

# IFLR

INTERNATIONAL FINANCIAL LAW REVIEW

# INSOLVENCY AND CORPORATE REORGANISATION SURVEY 2014



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**LATHAM & WATKINS**

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# IFLR

INTERNATIONAL FINANCIAL LAW REVIEW

Gottfried Gassner and Emanuel Welten, Binder Grösswang

**Section 1: CREDITORS' RIGHTS****1.1 When may a company seek relief from creditors? Must a company be insolvent?**

The Austrian Insolvency Code provides for bankruptcy proceedings, which lead to the winding-up and liquidation of a debtor company and restructuring proceedings, which seek to rescue a debtor company. Restructuring proceedings may be initiated with self-administration or without self-administration. Only restructuring proceedings under the Insolvency Code may lead to the relief from creditors.

Bankruptcy proceedings must be opened by the court whenever it has been established that a company is illiquid (unable to pay due debt) or is over-indebted in terms of the insolvency law (its liabilities exceed its assets and the company has a negative prospect). Restructuring proceedings, however, may also be initiated by the debtor in case of imminent illiquidity.

Out-of-court restructurings that claim to reduce or modify the terms of the company's debts are quite common in practice, but require the consent of all creditors affected.

**1.2 Does an automatic stay against creditor action arise upon filing of a bankruptcy case?**

The opening of insolvency proceedings by the court leads to an automatic stay against all actions of unsecured creditors.

On the other hand, the rights of secured creditors, such as pledgees, remain – with certain limitations – unaffected by the opening of insolvency proceedings.

**1.3 Who administers the estate following commencement of a voluntary bankruptcy case?**

If a debtor applies for insolvency proceedings with self-administration, the existing management remains in control and can dispose of the debtor's estate independently. However, they are monitored by a court-appointed restructuring administrator, to whom certain transactions are reserved.

In case of bankruptcy and restructuring proceedings without self-administration, the estate is administered by an administrator appointed by the court.

**Section 2: DEBTORS' RIGHTS****2.1 Does the debtor have an exclusive right to propose a reorganisation plan?**

Yes, only the debtor is entitled to propose a restructuring plan. If the restructuring plan is presented together with the petition to open insolvency proceedings, the proceedings are called restructuring proceedings. However, a debtor may also present a restructuring plan in the course of bankruptcy proceedings which results in the proceedings being continued as restructuring proceedings.

**2.2 What are the voting requirements for approval of a plan?**

The restructuring plan must be approved by a qualified simple majority of the unsecured creditors. This means that the simple majority of unsecured creditors in number present at the restructuring plan hearing must vote in favour of the restructuring plan, and that the total sum of these unsecured creditors' claims must exceed 50% of the unsecured claims present at the hearing. In addition, the approval of the court is required. Generally, there are no different classes of unsecured creditors.

**2.3 May a plan be approved over the objection of a creditor or a class of creditors (ie does the concept of a cram-down exist)?**

In a restructuring plan, the debtor has to offer a quota of at least 20% to the unsecured creditors, payable within two years. In case of restructuring proceedings with self-administration, the minimum quota is 30%. If the restructuring plan is accepted by the creditors and the court and fulfilled by the debtor, the latter is released from the rest of the debts. An approved restructuring plan also affects creditors who voted against the plan. Therefore, in that sense a cram-down does exist.

**2.4 Is post-petition financing able to receive super-priority status?**

New financing attracted by the debtor after the opening of insolvency proceedings would normally be treated as costs and expenses of the bankrupt's estate. Such costs and expenses comprise in principle all claims which lawfully arose against the bankrupt's estate after the opening of the proceedings (such as costs of the proceedings, administrator's fees, expenses of the realisation of assets, and expenses arising from the continuation of the debtor's business). In this way, the new financing would be senior to insolvency claims, but not senior to certain other privileged claims.

**2.5 Can the debtor sell all or a portion of its assets through a going concern reorganisation plan or otherwise?**

In principle, a restructuring plan proposed by the debtor may provide as a restructuring measure the sale of assets. Secured creditors are entitled to preferential satisfaction with respect to proceeds gained by the realisation

of the relevant assets provided as collateral. They exclude unsecured creditors from satisfaction with respect to these assets. The selling procedure, typically auction sales, must be transparent and fair. Credit bidding and stalking-horse-bids are not an option.

### 2.6 What are the duties of directors of an insolvent company?

If a company is insolvent (see section 1.1), each director is (severally) obliged to file for insolvency proceedings without culpable delay, but within 60 days at the latest. If a director violates his duty to (timely) file for insolvency proceedings, he may be subject to damage claims and criminal offences. Once insolvency proceedings are opened, the directors are generally obliged to cooperate with the administrator. In case of proceedings with self-administration, they remain in charge of managing the company.

## Section 3: CONTRACTS AND SUBORDINATION

### 3.1 How are executory contracts treated?



Generally, for contracts that have not been fully performed by both parties upon institution of insolvency proceedings, the administrator may either

decide to perform the contract and request the other party to perform its part, or rescind from the contract. Specific rules apply to rental agreements, employment agreements and similar types of contracts.

### 3.2 Is contractual subordination enforceable?



Only certain types of subordination are enforceable in relation to the debtor company, for instance in connection with shareholder loans.

## Section 4: OTHER MATERIAL CONSIDERATIONS

### 4.1 What other major stakeholders (e.g. governmental or regulatory institutions) could have a material impact on the outcome of the reorganisation?

The main players are usually the debtor, the administrator, the creditors (often represented by creditor protection associations) and the court. Other than with regulated businesses (such as financial institutions and insurance companies) there are in principle no further stakeholders that could have a material impact on the outcome of the restructuring.



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#### About the author

Gottfried Gassner has been a partner at Binder Grösswang since 2010. His main practice areas are M&A and corporate, including distressed M&A, and corporate reorganisations and restructurings, with a focus on national and cross-border reorganisation transactions and corporate recovery matters. Gassner is the author of a number of publications in his field of practice and frequently serves as lecturer on topics concerning his practice area. He studied law and international business administration at the University of Innsbruck, Austria, and at Marquette University, Milwaukee, USA. In 2006, Gassner gained further international experience working with the Dutch law firm DeBrauw Blackstone Westbroek in Amsterdam. Gassner is a member of the IBA, INSOL, AIJA and ReTurn – Forum für Restrukturierung und Turnaround Management.



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Finance expert Emanuel Welten has been a partner at Binder Grösswang since 2009. As a member of Binder Grösswang's banking and finance team, he regularly advises on banking law, finance, financial restructurings and aviation law. His expertise in banking law and structured finance is a cornerstone for the firm's restructuring practice. Welten is the author of various publications with regard to his practice areas, and studied at universities in Paris, Vienna, Brussels and New York. He has been with Binder Grösswang since 2001, and is a member of the IBA and ReTurn – Forum für Restrukturierung und Turnaround Management.

Key	CREDITORS' RIGHTS		DEBTORS' RIGHTS					CONTRACTS & SUBORDINATION	
	Automatic stays	Administrator	Reorganisation plan	Voting requirements	Cram-downs	Post-petition financing	Asset sales	Executory contracts	Contractual subordination
<p><b>Key</b></p> <ul style="list-style-type: none"> <li> Generally favourable to creditors</li> <li> Neutral or neither favourable to creditors or debtors</li> <li> Generally favourable to debtors</li> <li> Creditors' rights</li> <li> Debtors' rights</li> <li> Contracts and subordination</li> </ul>									
<b>Austria</b> Binder Grösswang									
<b>Brazil</b> Felsberg Advogados									
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