ABEL

RECHTSANWÄLTE

Insolvency Law in Austria

Insolvency Act
(amended version of 2017)

Austria

edited by Norbert Abel (Abel Rechtsanwälte GmbH & Co KG, Vienna)

1. Literature

Mohr, Insolvenzordnung [*Insolvency Act*], 11. Auflage, 2012; Konecny/Schubert (Hrsg.) Kommentar zu den Insolvenzgesetzen [*Commentary on the Insolvency Laws*], 2009; Walter Buchegger, Österreichisches Insolvenzrecht [*Austrian Insolvency Law*], 2010; Axel Reckenzaun, IRÄG 2010 – Insolvenzordnung [*IRÄG 2010* - Insolvency Act*], 2010; Kodek, das IRÄG 2010 im Überblick [*The IRÄG 2010*in an overview*], ZAK 2010/499; Konecny, IRÄG 2010 [*IRÄG 2010**] – ZIK Spezial, 2010; Mohr, Das Insolvenzrechtsänderungsgesetz 2010 – Reform des Unternehmensinsolvenzrechts [*The Law Ammending the Insolvency Law – Reforming the Enterprise Insolvency Law*], ecolex 2010, 563; Konecny, Das Insolvenzrechtsänderungsgesetz 2010 [*The Law Ammending the Insolvency Law 2010*], Zik 2010/119, 82; Kodek, Von der KO zur IO – Das IRÄG 2010 im Überblick [*From the KO to the IO – The IRÄG 2010*in an overwiew*], ÖBA 2010, 498; Jelinek, Insolvenzrechtsreform 2010 [*The insolvency law reform 2010*], wbl 2010, 377; Mohr/Riel, Das IRÄG 2010 aus Bankensicht [*The IRÄG 2010* as seen by the banks*], RdW 2010/639, 615; Mohr, Neuerungen im Unternehmensinsolvenzrecht – IRÄG 2010 [*Changes in insolvency law for enterprises – IRÄG 2010**], ÖJZ 2010/94, 887; Pariasek, IRÄG 2010: Neuerungen im Zusammenhang mit Bestandrechten [*IRÄG 2010*: Changes in the context of tenancy law*], wobl 2010, 237; Spiegel/Benes, Insolvenzordnung: Kreditvergabe und Insolvenzrisiken [*Insolvency Act: Lending policies and the risk of insolvencies*], RdW 2010/758, 751; Weissel, Die neue Rechtsstellung des Absonderungsgläubigers nach dem IRÄG 2010 [*The new legal position of the secured creditor with regard to the IRÄG 2010**], ÖBA 2011, 391; Hans-Georg Kantner, Sanierung aus Sicht der Gläubigerschutzverbände [*Reorganisation from the point of view of the associations for the protection of creditors' rights*] in Lichtkoppler/Reisch (Hrsg.), Handbuch Unternehmenssanierung, 2010; Buchegger, Insolvenzrecht 2010 [*Insolvency Law 2010*]; Konecny, Probleme grenzüberschreitender Insolvenzen [*Problems of Cross-border Insolvencies*], in Smid (Hrsg.), Neue Fragen des deutschen und internationalen Insolvenzrechts [*New Questions on German and International Insolvency Law*] (2006); Kodek, Das anwendbare Recht in grenzüberschreitenden Insolvenzen – Grundzüge und ausgewählte Probleme [*Applicable Law in Cross-border Insolvencies- Outlines and Selected Problems*], in Kodek/Konecny (Hrsg.), Insolvenz-Forum 2007 (2008); Mohr, Auslandsvermögen im österreichischen

Konkurs – Anerkennung ausländischer Insolvenzverfahren [*Foreign Property in Austrian Bankruptcy – Recognising Foreign Insolvency Proceedings*], ZIK 2003/104, 74; Oberhammer, Das internationale Insolvenzrecht und Österreich: Grundstrukturen und ausgewählte Probleme [*International Insolvency Law and Austria: Framework and Selected Problems*], ÖBA 2002, 698; Schneider, IRÄG 2017 – die „kleineren" Änderungen [IRÄG* 2017 – small changes], ZIK 2017/103; Mohr, Neuerungen im Privatinsolvenzrecht [new developments in Personal Insolvency Law] – IRÄG* 2017 , ZIK 2017, 97; Riel, das Konzerninsolvenzrecht des IRÄG 2017 [Insolvency Proceedings for group of companies under the IRÄG* 2017], ZIK 2017, 109, Konecny, die EU-InsVo 2015 im Überblick [overview of EU Regulation on insolvency proccedings 2015 (recast)], ZIK 2017, 82 J.

* IRÄG (*Insolvenzrechtsänderungsgesetz = Law Amending the Insolvency Law*)

2. Introduction

2.1 Legal framework

With the IRÄG 2010 (*Insolvenzrechtsänderungsgesetz = Law Amending the Insolvency Law*) a new insolvency law was introduced effective on the 1st of July 2010 in Austria. It settled the duality between the Bankruptcy Act (KO) and the Composition Act (AO). The central aim of the amendment was to make it easier for enterprises to reorganise. The main part of Austrian insolvency law is now regulated by the Insolvency Act (IO)[1]. A major amount of provisions of the Bankruptcy Act (KO) have been taken over unmodified into the Insolvency Act (IO). In 2017 the Insolvency Act was reformed, especially the debt settlement proceedings for private individuals.

In addition the Enterprise Reorganisation Law[2] still exists but it has no relevance in practice.

[1] Insolvenzordnung „IO", BGBl I 2010/29
[2] Unternehmensreorganisationsgesetz „URG", BGBl I 2005/120

2.2 Types of proceedings

There is only one insolvency law namely the Insolvency Act (IO). Within the IO there is a choice of characteristic insolvency proceedings:

- reorganisation proceedings with the debtor in possession pursuant to ss 169 ff. IO
- reorganisation proceedings without the debtor in possession pursuant to ss 166 ff. IO
- bankruptcy proceedings pursuant to ss 180 f. IO
- debt settlement proceedings pursuant to ss 181 ff. IO

The insolvency proceedings are therefore either governed by the rules for reorganisation proceedings or bankruptcy proceedings. To be able to petition for reorganisation proceedings with the debtor in possession under the supervision of a reorganisation administrator certain requirements have to be met. Equally the debt settlement proceedings make it possible for a private debtor to seek discharge with a settlement plan and failing that though the proceedings for income levy.
Important information or data concerning the insolvency proceedings, e.g. type of proceedings, contact information, dates and time-limits etc. are publicly notified in the Insolvency Internet Gazette (*Ediktsdatei*) with the internet address www.edikte.justiz.gv.at.

Though the purpose of bankruptcy proceedings[3] is to realise the available assets and to distribute of the estate to the creditors it also allows the debtor to seek a discharge from his debts. The debtor may together with the petition for opening insolvency proceedings or at any time later up to the termination of the insolvency proceedings petition for the conclusion of a reorganisation plan.[4] In the petition for a reorganisation plan the debtor must offer the creditors amongst other requirements a dividend of at least 20 % of the claims payable within 2 years after approval of the reorganisation

[3] s 180 IO
[4] s 140 IO

plan. The debtor may also petition for a reorganisation plan even if the bankruptcy proceedings were opened after a creditor's petition. If the debtor files for insolvency himself and intends to discharge his debts he may directly petition for the opening of reorganisation proceedings.[5] Amongst other requirements, the debtor has to offer a dividend of at least 20 % of the claims payable within 2 years after approval of the reorganisation plan. If the debtor petitions for a reorganisation plan with the debtor in possession,[6] he has to demonstrate how the offered dividend and the carrying on with the business shall be financed. Also in this case the minimum dividend is 30 %. In all three cases the simple majority of claims and capita suffices of those insolvency creditors with voting rights present at the hearing for the reorganisation plan.[7]

A natural person not operating an enterprise may in the course of insolvency proceedings petition for the conclusion of a settlement plan.[8] In it the debtor must offer his insolvency creditors a dividend which at least reflects his income situation in the coming 5 years. The time-period for payment may not exceed 7 years. The simple majority of claims and capital of the creditors present with voting rights suffices. In the course of the insolvency proceedings the debtor may petition to undertake proceedings for income levy with subsequent debt discharge, but not later than the hearing for the settlement plan.[9] In this petition the debtor must attach a statement that he shall assign to a trustee to be appointed by the court the distrainable part of his claim on income from employment or other recurring payments with a surrogate function for income for a time-period of seven years after finality of the decision ordering the proceedings for income levy. At the end of the seven year period the court then decides on the debt discharge.[10] During the time-period of income levy the debtor has incumbency duties especially the duty to inform on a change in his financial situation.

The proceedings are governed by the principle par conditio creditorum. Whereas the concept for the proceedings concerning enterprises is towards saving the enterprise

[5] ss 166 ff. IO
[6] ss 169 ff. IO
[7] s 147 para 1 IO
[8] s 193 para 1 IO
[9] s 199 para 1 IO
[10] s 213 IO

and reorganisation, when introducing the debt settlement proceedings an instrument was created to help private households to discharge their debts. The Enterprise Reorganisation Law (URG) introduced in 1997 is intended to restructure not yet insolvent enterprises through reorganisation.

The new implementation of the EU Regulations should lay down rules on the coordination of insolvency proceedings which relate to the same debtor or to several members of the same group of companies.[11]

3. Opening proceedings

The high court of first instance in whose district the debtor carries on his enterprise at the time of lodging the application or in absence of such has his habitual abode is competent for the insolvency proceedings.[12]

3.1 Reasons for opening

A requirement for opening insolvency proceedings is the creditor's inability to pay debts.[13] To open reorganisation proceedings with or without the debtor in possession impending inability to pay debts suffices.[14] Legal entities need only to be over-indebted.[15] Bankruptcy proceedings are opened either after a petition by the debtor[16] or a creditor[17] as long as the assets present are cost-covering or the petitioner advanced a sum to cover the costs of the proceedings. Reorganisation proceedings with or without the debtor in possession may only be opened on petition of the debtor.[18] The opening shall be publicly notified in an edict.[19] The public notification is carried out in

[11] ss 180bf. IO
[12] ss 63f. IO
[13] s 66 IO
[14] s 167 para 2 IO
[15] s 67 IO
[16] s 69 IO
[17] s 70 IO
[18] ss 167, 169 IO
[19] s 74 IO

the Internet Insolvency Gazette (Ediktsdatei). The Internet Insolvency Gazette is found in the internet at the address http://www.edikte.justiz.gv.at. Every creditor with a known address receives a copy of the edict and in case of a petition for a reorganisation plan a copy of the plan.[20] The essential content of the reorganisation plan is also made public in the Internet Insolvency Gazette.

3.2 Debtor

All natural persons and legal entities have access to bankruptcy proceedings. A natural person operating an enterprise, a legal entity, a partnership or the estate of a deceased person may petition for reorganisation proceedings. Debt settlement proceedings are reserved for natural persons who are not entrepreneurs. The reorganisation proceeding pursuant to the URG (Enterprise Reorganisation Law) is reserved for enterprises irrespective of whether the entrepreneurial entity is a natural person or a legal entity.

3.3 Admissible securing measures prior to opening the proceedings

Should it not be possible to open bankruptcy proceedings immediately and the petition seems reasonable then the court may order interim measures to secure the assets especially to prevent voidable transactions and to secure the carrying on with the business.[21]

3.4 Effects of the opening of proceedings

The legal effects of the opening of insolvency proceeding begin on the day following the day of public notification of the contents of the edict.[22] The public notification is effected by an entry in the Insolvency Internet Gazette. With the opening of insolvency

[20] s 145 para 2 IO
[21] s 73 IO
[22] s 2 IO

proceedings all assets which are subjected to execution and belonging to the debtor are withdrawn from his free disposal.[23] In reorganisation proceedings with the debtor in possession the debtor needs the consent of the reorganisation administrator or the court to undertake certain transactions.[24] Insolvency claims are barred from trial. Pending proceedings by operation of law are interrupted by the order opening the proceedings and may only be continued or initiated after either the bankruptcy or reorganisation administrator refuses the proof of debt.

4. Course of the proceedings

4.1 Lodgment of a claim by a creditor

Creditors shall lodge their claims within the time-limit set at court either in writing in duplicate or by recording a verbal statement.[25] It is not mandatory to be represented by a lawyer. Representation by one of the privileged associations for the protection of creditors' rights[26] is possible. The lodgement of a claim must state the sum of the claim and the facts supporting the claim as well as the evidence. Should proceedings concerning the claim be pending then the relevant court and file number should also be included. In the hearing for proving debts[27] the insolvency administrator announces whether the claim is admitted or disputed either in full or partially. Neither the creditor nor his representative need attend this hearing. The creditor receives a communication on the insolvency administrator's announcement only when the claim is disputed.[28] Creditors whose claims were disputed may have them proven in a declaratory action. The insolvency court must set a time-limit within which the declaratory action must be filed.[29]

[23] s 2 para 2 IO
[24] ss 171 ff. IO
[25] ss 102 ff. IO
[26] s 266 IO
[27] s 105 IO
[28] s 110 para 5 IO
[29] (usually 4-8 weeks after receiving the communication about the claim being disputed)

If the time-limit for lodging a claim was missed then the claim may still be lodged later.[30] The creditor is liable for the cost of the hearing for belated proof of debt, at present set at a flat rate of € 60,--. When the reorganisation plan is confirmed with finality then the creditor is entitled to his dividend irrespective of whether the claim was lodged or not. The dividend on a disputed claim is to be secured with the insolvency administrator, should the time-limit set for the declaratory action not yet have lapsed or the declaratory action have been filed timely.

4.2 Creditors' meeting

The Insolvency Act (IO) knows many types of creditors' meetings some of which are summoned on request:

- The first creditors' meeting (s 74 para 2 sub-para 4, s 179 IO)

In reorganisation proceedings the first creditors' meeting shall take place within the first three weeks after the opening of insolvency proceedings otherwise as a rule within the first 14 days after the opening. In reorganisation proceedings at the first creditors' meeting the reorganisation administrator reports on the economic situation as well as whether the financial plan is being met, the reorganisation plan will be fulfilled and if needs be whether there are reasons for revoking being debtor in possession. The first creditors' meeting is also the forum to raise objections to the insolvency administrator und discuss them.

- Hearing for presenting reports (s 91a IO)

The hearing for presenting reports has to take place at the very latest 90 days after opening the insolvency proceedings but it can also function as the first creditors' meeting. At this meeting the decision is taken on the future course of the proceedings (carrying on or closing down the business, reorganisation plan).

[30] s 107 IO

Further in this hearing the question shall be discussed whether a reorganisation plan is in the common interest of the insolvency creditors and its fulfilment likely.[31]

- Hearing for proving debts (s 105 IO)

In the hearing for proving debts the insolvency administrator shall make a statement on every claim lodged concerning admissibility and priority. The debtor may follow the statements of the insolvency administrator or dissent. A dissenting statement from the debtor only has an affect when the insolvency proceedings are terminated by a reorganisation plan. In the hearing for proving debts a creditor may contest a claim lodged by another creditor.

- Hearing for the reorganisation plan (s 145 IO)

The voting on the reorganisation plan presented takes place in the hearing for the reorganisation plan.

- Hearing for rendering of accounts (s 121 IO

The insolvency administrator has to render account in this hearing and also clarify. The debtor, creditors as well as members of the creditors' committee are allowed to inspect the accounts and deposit possible objections either during the hearing or in writing beforehand. If the objections are deemed valid then the insolvency court decides with no further recourse to the law.[32]

- Hearing for the debt settlement plan (s 193 IO)

In the proceedings for debt settlement for private persons the voting on a settlement plan submitted by the debtor takes place.

[31] ss 114a ff. IO
[32] s 122 para 2 IO

- Hearing for income levy (s 200 para 2 IO)

Should the settlement plan be unsuccessful then the proceedings may carry over into an income levy proceeding if the petition for them was filed timely. The decision on the petition also takes place in a hearing.

4.3 Administrating and realizing the insolvent estate

Without any delay the insolvency administrator shall review the economic situation, the previous management, the cause for the loss of assets, the degree of endangered work-places, the presence of declarations of liability by third parties, and all significant circumstances for resolutions by the creditors. Further he shall determine the status of the estate, ensure the recovery and securing of assets. To this end he shall determine the debts and prove the lodged claims as well as taking legal action in matters concerning the estate either fully or only partially. At the same time he shall examine whether the business operation may be continued or reopened.[33] This decision must be taken at the very latest in the hearing for presenting reports. The notification of this specific hearing also has to be included in the edict.[34] If the requirements for continuing with the business are given then the insolvency court has to order this in a decision.

In reorganisation proceedings with the debtor in possession under the supervision of a reorganisation administrator[35] his administrational activities are limited to voiding legal transactions pursuant to ss 27 through 43 IO, proving debts pursuant to ss 122 ff IO, notifying the court of transaction pursuant to s 116 IO, authorising transactions pursuant to s 117 IO, sale through the courts pursuant to s 119 IO, sale of property charged with a right for preferential treatment pursuant to s 120 IO as well the stay of execution proceedings pursuant to s 120a IO. Furthermore, the reorganisation administrator has to authorise transactions not considered usual for the enterprise concerned as well as withdrawing, giving notice or dissolving transactions pursuant to ss

[33] s 81a IO
[34] s 91a IO
[35] s 172 IO

21, 23 and 25 IO. Any activity involving realisation by the reorganisation administrator is only possible with the consent of the debtor.[36] In reorganisation proceedings without the debtor in possession the administering and realising of the insolvent estate rests with the insolvency administrator. This authority is only limited inasmuch as the debtor, the court or the creditors' committee have rights to be involved and heard. With regard to the realisation after hearing the insolvency administrator and the creditors' committee the insolvency court may rule that the realisation of the insolvent estate shall be held off until the decision of the creditors' meeting.[37]

In debt settlement proceedings the entire debtor's estate is always realised und distributed irrespective of whether the debtor petitions for a settlement plan with or without proceedings for income levy.

4.4 Distribution to the creditors

It depends on the course of the proceedings as to when and to what amount a dividend shall be paid out to a creditor.

Should the insolvency proceedings be terminated with a reorganisation plan or settlement plan then the time for payments and the amount of the dividend depend on the terms of the reorganisation plan or settlement plan after confirmation with finality. Without either a reorganisation plan or settlement plan a final dividend in accordance with the report of the insolvency administrator is distributed at the end of the proceedings.[38] In income levy proceedings a dividend is distributed to the creditors after the expiration of the declarations of assignment.[39] Should the insolvent estate be insufficient and therefore there be no dividend for the insolvency creditors then the creditors with claims against the estate are satisfied pro rata.[40] Interim distributions are permissible.

[36] s 172 para 3 IO
[37] s 140 para 2 IO
[38] s 136 IO
[39] s 203 IO
[40] s 46 IO

5. Creditors

5.1 Creditors with a right to segregation of property

Should property be found in the insolvent estate not belonging to the debtor either in full or in part then the owner has a right to segregation. This right is based on general provisions of either law or contract. Should the object have been sold after the opening of insolvency proceedings then the owner may demand the segregation of monies received into the insolvent estate. If payment has not yet been made the owner may demand to have the right to payment assigned to him. But this does not affect more far-reaching claims to compensation.[41]

Claims for segregation of property are not lodged in court but shall be asserted directly with the insolvency administrator. Should the claims not be fulfilled then the owner may file for restoration in court against the insolvency administrator. Creditors with a right to segregation of property are not affected by a bar of trial or execution.

5.2 Secured creditors

Claims for preferential treatment are claims for separate settlement out of certain items belonging to the debtor. Secured creditors may demand that settling their claims out of these certain items take precedence up the amount of their claims.[42]

In principle the opening of proceedings does not affect the existence and the sum of the claim for preferential treatment. But there are exceptions:

A claim for preferential treatment established either through execution or by giving security in the last 60 days prior to opening the proceedings expires with the opening of the proceedings.[43] Preferential claims for secured creditors acquired prior to the

[41] s 44 IO
[42] s 48 IO
[43] s 12 IO

opening of insolvency proceedings either by having a claim on income from employment or other recurring payments with a surrogate function for income assigned or pledged, expire two years following the calendar month in which the insolvency proceedings were opened.

Such claims for segregation of property acquired before the opening of insolvency proceedings through execution expire at the end of the current month at the time of the opening of insolvency proceedings. Should the insolvency proceedings be opened after the 15th day of the month, the claim for segregation of property then expires at the end of the following calendar month.[44]

Claims for preferential treatment are not affected by a bar of trial or execution. The realisation of the special estate rests with the insolvency administrator.[45] The secured creditors are satisfied out of the proceeds of the realisation in accordance with the priority of their rights in rem. The secured creditors exclude the other creditors from satisfaction out of these items up to the sum of their claims. Secured creditor also with a personal claim against the debtor may also lodge this claim as well as demanding preferential treatment. The right of secured creditors to preferential treatment need not be lodged in court but are to be put to the insolvency administrator.

5.4 Simple insolvency creditors

Austrian law does not know insolvency proceedings with classes of creditors. All insolvency creditors are treated equally.

5.5 Subordinate insolvency creditors

A subordinate insolvency creditor is a creditor who has either stated that his claim has a lower priority than the other claims and therefore settlement shall be subordinate or has a claim for which the law orders subordination. This is the case for performances

[44] s 12a IO
[45] ss 120 f IO

in substitution of equity. Subordinate insolvency creditors only receive payment for their claim after all the other creditors have received the total amount of the lodged claim.[46]

5.6 Creditors with claims against the estate

Claims against the estate are claims that occur after the opening of insolvency proceedings. Basically they should be paid in full irrespective of the stage of proceedings or the balance of the estate as soon as they are certain and due. But should it not be possible to redeem the claims against the estate in full then they are to be paid according to a specified ranking.[47] Unpaid claims prevent the confirmation of a possible reorganisation plan and possibly may lead to liability of the insolvency administrator.[48]

6. Handling not fully fulfilled contracts

If at the time of opening insolvency proceedings a bilateral contract has not been fulfilled or only partially fulfilled by the debtor or the other party then the insolvency administrator may either fulfil the contract instead of the debtor and demand fulfilment from the other party or withdraw from the contract.[49] The insolvency administrator must declare this decision at the latest within a time-limit set by the insolvency court after a petition by the other party otherwise it shall be assumed the insolvency administrator has withdrawn from the transaction. The time-limit to be set by the insolvency court may not end before three days after the hearing for presenting reports. In the case of withdrawal, the other party may claim compensation for damages as an insolvency creditor.

Should the debtor be bound to a non-pecuniary performance und be in arrears with the performance then the insolvency administrator shall make a statement as soon as

[46] s 57a IO
[47] s 47 IO
[48] s 81 IO
[49] s 21 IO

he receives the request from the contract partner but no later than within five working days. If he does not declare himself within this time limit it is assumed, he has withdrawn from this transaction.

If the performances are separable and at the time of opening insolvency proceedings the creditor has performed in part, then the claim for this partial performance is deemed to be an insolvency claim.

Should the debtor have leased or rented property then the insolvency administrator may give notice observing the legal or stipulated shorter time-limits for notice.[50] A possible claim for compensation for damages as an insolvency claim remains unaffected. When the debtor is the landlord then the insolvency administrator takes over his position.

Should the debtor be an employer then the insolvency administrator has a privileged right when giving notice and under certain circumstances employees have an extraordinary right to resign.[51] The insolvency administrator may give notice to an employment contract observing the time-limits for giving notice. These may be the statutory ones, ones fixed by collective agreements or ones of a shorter period of notice agreed upon permissibly taking the statutory termination restrictions into consideration. Deadlines for giving notice need not be considered. An employee may resign prematurely when the business is closed down, whereas the opening of insolvency proceedings is deemed a grave and weighty reason. Claims arising from termination pursuant to s 25 IO are insolvency claims. In debt settlement proceedings termination should take place within one month of opening proceedings otherwise within one month after public notification of the decision ordering, authorising or confirming the closing down the enterprise or within one month of the hearing for presenting reports unless the court authorised the carrying on with the business. Should only one operative section of the enterprise be closed down then the right to resign is limited to those employees in the section concerned.

[50] s 23 IO
[51] s 25 IO

Ongoing contracts may be terminated by the contracting partner of the debtor within the first 6 months after the opening of insolvency proceeding only for grave and weighty reasons should the dissolution jeopardise the carrying on with the business.[52] The deterioration of the debtor's economic situation or the debtor's defaulting in fulfilling claims due before opening the insolvency proceedings are not deemed such reasons. These limitations do not apply should the dissolution of the contract be essential to avert severe personal or economic disadvantages to the contracting party, to claims for payment from a loan and contracts of employment.

7. Set-off

Creditors' claims that could be set-off at the time of opening the insolvency proceedings need not be lodged in the insolvency proceedings.[53] As to the admissibility of the set-off the IO has provisions that go partly farther and party less far compared to the general requirements or possibilities of set-off in civil law.

Set-off is not ruled out because the claim of the creditor or the debtor is either conditional or payable at a future date or the creditor's claim is not for legal tender. Should the creditor's claim be conditional the court may make the admissibility of a set-off dependent on providing a security. Inasmuch as the set-off is admissible in the proceedings the creditor may claim it during the entire course of the proceedings.

Set-off is not admissible should a creditor have become a debtor after the opening of insolvency proceedings or acquired the claim against the debtor after the opening of proceedings. Further set-off is not admissible should the debtor have acquired his claim in the last 6 months prior to the opening of proceedings and at that time knew or should have known that the insolvency debtor was unable to pay debts.[54]

[52] s 25a para 1 IO
[53] s 19 IO
[54] s 20 IO

8. Avoidance in insolvency

The rules governing avoidance are set out in ss 27 ff IO. Transactions with the intention to discriminate are voidable within the last 10 years before opening the insolvency proceedings if the avoidance opponent knew of the intention of the debtor to discriminate against his creditors. Should the opponent have known of this intention then the time-limit is reduced to 2 years.

Any transaction (purchase, barter and delivery) at undervalue entered into in the last year before the opening of insolvency proceedings by the debtor are voidable if the avoidance opponent noticed or should have noticed the undervalue of the transaction and the intention to discriminate against the insolvency creditors.

Also voidable are transactions without consideration undertaken in the last two years before opening the insolvency proceedings unless they concerned the fulfilling of a legal obligation, customary occasional gifts or transactions for a reasonable and proportionate amount towards a charitable cause or the fulfilling of a moral duty or considerations of decency.

In practice only avoidance due to discrimination or knowledge or imputed knowledge of the inability to pay debts is relevant. In these cases, security or payment given to a creditor after the occurrence of inability to pay debts or after filing for the opening of insolvency proceedings or in the preceding last sixty days is voidable if the creditor obtained a security or payment, he was not entitled to or not in that way or not at that time, unless he did not benefit from this transaction ahead of the other creditors. Security or payment given is also voidable if the avoidance opponent knew or should have known that the debtor intended to favour him over the other creditors. The time-limit for avoidance for discrimination is one year back from the day of opening the insolvency proceedings, with regard to knowledge or imputed knowledge of the inability to pay debts the time-limit is six months back. The right to avoidance rests with the insolvency administrator. Avoidance asserted with a lawsuit should be filed within one year of opening the insolvency proceedings otherwise the claim is forfeited. The defence plea of avoidance may be lodge over and above this time-limit against a claim of action. A claim of avoidance may not be set-off against a claim against the debtor.

The court competent for avoidance proceedings is the court of the pending insolvency proceedings. If the avoidance opponent has to pay into the insolvent estate due to avoidance the this amount becomes an insolvency claim and has to subsequently be lodged in the insolvency proceedings.

9. Costs for the proceedings

The costs of the proceedings include the remuneration of the insolvency administrator, the privileged associations for the protection of creditors' rights and the judicial fee. The remuneration of the insolvency administrator is depending on the performance.[55]The remuneration of the privileged associations for the protection of creditors' rights is based on the fee for the insolvency administrator.[56] The court costs are also calculated based on an percentage of the fee for the insolvency administrator.[57]

10. The termination

The insolvency proceedings is terminated by court order.[58] The termination is based on the consent from all creditors, due to insufficient assets, after the confirmed reorganization plan or on the final distribution of the insolvency administrator.[59]

11. Reorganisation proceedings pursuant to the URG

(*Unternehmensreorganisationsgesetz = Enterprise Reorganisation Law)*

With the Insolvency Amendment Law 1997 the Enterprise Reorganisation Law (URG) introduced enterprise reorganisation in Austria. Should an enterprise need reorganising the entrepreneur as long as he is solvent may petition for reorganisation proceedings

[55] ss 82ff. IO
[56] s 87a IO
[57] TP 6 GGG (Gerichtsgebührengesetz [Courts Fees Act])
[58] s 123 IO.
[59] ss 123a, 123b, 139 IO.

pursuant to the URG. The enterprise reorganisation proceedings pursuant to the URG are not insolvency proceedings.

Reorganisation is a measure based on business management principles to improve the situation of assets, finance and profit whereby the sustainable continuation of a distressed enterprise is made possible. The court competent is the High Court in the court district from where the enterprise is run, in Vienna it is the High Court for Commercial Law.

The proceedings are open on petition of the entrepreneur. The court appoints a reorganisation examiner. He presents the court with an expertise assessing the practicality of the proposed reorganisation measures and their prospect of success based on the reorganisation plan pursuant to the URG present by the petitioner.

The entrepreneur is obliged to full disclosure with respect to the reorganisation examiner. During the period of reorganisation the entrepreneur has to report to all persons involved in the reorganisation plan pursuant to the URG on the situation of the enterprise and the progress on reorganisation as well as immediately when significant circumstances change concerning the realisation of the reorganisation plan pursuant to the URG.

The reorganisation proceedings do not offer creditor protection particularly not a stay of execution. The reorganisation proceedings also do not provide for preferential conditions for dissolving contracts. In fact agreements on rights of withdrawal, dissolution of contracts or to call due a paid out loan are inadmissible in the case of opening reorganisation proceedings pursuant to the URG. Further avoidance actions with regard to bridging and reorganisation measures are extensively limited should insolvency proceedings be opened at a later date. The object is to enable the enterprise to receive further financial help fairly easily without risk. Therefore the reorganisation measures are not subjected to the rules of substitution of equity.

10. International insolvency law

Austria is a member state of the EC Regulation on Insolvency Proceedings so that in principal the recognition of foreign proceedings opened in a member state of the EU

Insolvency Regulation follow the EU Insolvency Regulation.[60] However for the recognition of proceedings from third countries the autonomous international insolvency law continues to be applicable. The EU Insolvency Regulation caused Austria to regulate this international insolvency law comprehensively within the framework of the IO. The provisions of the Seventh Group of Parts of the IO are only applicable should there be no conflict with international law or legal acts of the European communities. For insolvency proceeding, the requirements for opening them and their effects are basically ruled by the law of the state opening the proceedings.[61] Ss 222 to 235 IO regulate the exceptions from the general rule in s 221 IO whereby foreign proceedings and the relevant provisions are recognised. The exceptions follow the EU Insolvency Regulation. S 237 IO now decrees that the effects of insolvency proceedings opened in Austria extend to property situated in foreign countries unless the centre of main interest of the debtor is in another country or insolvency proceedings have already been opened and the property in this other country has been included in the proceedings. Vice versa Austria recognises the effects of insolvency proceedings opened in another country and the decision in such proceedings when the debtor's centre of main interest is in the other country and the main features of the insolvency proceedings are comparable to those in Austria.[62] Recognition is denied should insolvency proceedings have been opened in Austria or be contrary to public policy. At all events neither substantive nor formal reciprocity is a requirement for recognition of the insolvency proceedings.

[60] s 217 IO
[61] s 221 IO
[62] s 240 IO