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Lending & Secured Finance 2021

A practical cross-border insight into lending and secured finance

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

The COVID-19 pandemic has had a dramatic impact on all global economic sectors, putting enormous pressure on the lending markets as well. In Austria, lockdowns of almost the entire economy have ultimately led to an economic crisis, which resulted in a desperate need for capital by companies facing insolvency.

The European Central Bank (ECB) and national governments have been trying to provide liquidity and attractive lending conditions to credit institutions. While the ECB has provided long-term refinancing conditions and bond purchase programmes, the Austrian governmental authorities introduced other mechanisms, such as unconditional guarantees, to improve credit institutions' liquidity situation and enable them to apply less restrictive credit assessments. Nevertheless, banks had to adapt their lending policies in light of this rapidly changing and volatile economic situation, inevitably forcing them to tighten their financing conditions. In fact, banks also had to suffer a loss in profits due to securities purchase programmes and negative interest rates imposed by the ECB.

Apart from the impact of the COVID-19 pandemic, Austrian credit institutes, like all European banks, have continued to focus on their strategies concerning lending business in connection with an increasing regulatory framework, such as regulations relating to the determination of risk-weighted assets and own funds, though the effectiveness of these regulations has been partly diluted by legislative exceptions with respect to the COVID-19 pandemic. European Banking Authority (EBA) stress tests are growing in importance in this context.

Austrian credit institutions have also continued to deal with their fair share of non-performing loans, which kept the market trading with such non-performing loans active, with the CESEE region being mainly responsible for non-performing loans in the portfolios of Austrian banks' subsidiaries.

The Act on the Recovery and Resolution of Banks (*Sanierungs- und Abwicklungsgesetz* (BaSAG), implementing the Bank Recovery and Resolution Directive 2014/59/EU (BRRD)), covers EU Capital Requirements Regulation (CRR) credit institutions and CRR investment firms, including certain CRR financial institutions, financial holding companies and branches of third-country institutions to the extent they are part of a group of credit institutions. BaSAG, which came into effect on 1 January 2015, requires "recovery plans" to be drawn up by institutions to identify impediments and outline measures which could guarantee effective resolutions. The impact of this Act on the lending market might be described as having a confidence-building effect, in particular with respect to the syndicated loan market. In November 2018, the Austrian federal government decided to restructure the banking supervisory framework by bundling supervision over the financial market with the Austrian Financial Market Authority (FMA). This took effect on 1 January 2020.

Additionally, particularly in syndicated loan scenarios, the Austrian Act on Financial Collateral (*Finanzsicherheiten-Gesetz* (FinSG)), which regulates the granting and enforcement of financial collateral arrangements between participants in the financial markets, is becoming increasingly important. The FinSG provides for wider and less regulated means of enforcement of the collateral and in particular provides for the option to agree on an immediate realisation of the collateral if an insolvency, liquidation, or reorganisation proceeding is opened against the collateral provider.

Even though the issue is broadly overshadowed by the discussion about COVID-19 financing, criteria for green and sustainable financing products are becoming increasingly concrete throughout Europe and also in Austria. With the adoption of Agenda 2030 by all members of the United Nations and the ratification of the Paris Agreement, Austria has also committed itself to the goal of a more sustainable economy and society. The Paris Agreement assigns the financial sector a key role in this process. The "Green Supporting Factor" mentioned in the current Austrian Government Program, with its programmatic declaration to work at European level to ensure that banks have to deposit less equity capital for loans that effectively contribute to accelerating the transition to a sustainable, climate-neutral economy, also pursues this approach. Green loans and sustainable financing are likely to play an increasingly important role in Austria in the years to come.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

One major loan transaction was the European Investment Bank's EUR 400 million financing of the Vienna Airport passenger terminal, with the involvement of Austrian credit institutions as guarantors. It is worth mentioning that there is also a general trend in the Austrian lending market to scrutinise long-term loans in terms of agreed interest *versus* market interest. As sustainability is an issue with ever-increasing importance, the Österreichische Kontrollbank AG (Austria's central finance and information services provider for export and the capital market) issued its first Sustainability Bond with a volume of EUR 500 million in 2019. The net issue proceeds are being used in order to (re-)finance social as well as environmental projects. A further example of the financing of green projects that support the production of CO_2-neutral energy is the expansion of one

of the largest wind farms in Austria, which started in 2019 and is debt financed mainly by the European Investment Bank and UniCredit in the amount of EUR 107.4 million. In addition to these sustainable loans, in the shadow of the state aid financing of Lufthansa Group in Germany, its Austrian subsidiary Austrian Airlines was also financed with a state-guaranteed syndicated loan in 2020. Refinancing of Austrian state aid measures is also a topic of increasing importance, Fellner Wratzfeld & Partner having advised in a long-term refinancing of EUR 600 million in Lower Austria.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Downstream guarantees (or other securities) are not restricted by Austrian law. Stringent limitations apply, however, to upstream and side-stream guarantees provided by corporations (and equivalent entities).

As a basic principle, distributions to (direct or indirect) shareholders of a corporation (AG, GmbH, GmbH & Co KG, i.e. a limited partnership in which the only unlimited partner is a GmbH) may only be effected under specific circumstances, namely (a) in the form of formal dividend distributions based on a shareholders' resolution, (b) in the case of a capital decrease (which also requires a shareholders' resolution), or (c) in the form of a distribution of liquidation surplus. Besides that, it is recognised that a company and its shareholders may enter into transactions with each other on arm's-length terms and conditions. This requirement entails that the management of the company makes – prior to entering into such a transaction – a comprehensive assessment of a proposed transaction, in particular of the risks involved, and shall only enter into such transactions with its (direct or indirect shareholder or a sister company) if and to the extent that it would enter into the transaction on identical terms and conditions with any unrelated third party. However, the management must not enter into a transaction, if by any such transaction the existence of the company would be threatened.

To some extent, Austrian law jurisprudence also accepts specific corporate benefits as an adequate means of justification for granting upstream and side-stream guarantees. Requirements for such corporate benefit are that the corporate benefit must not be disproportionate to the risk and that it must be specific and not only general, such as a general "group benefit".

Austrian case law on these restrictions is based on a case-by-case evaluation and has become increasingly stringent over the last 20 years. In practice, it is advisable to have the management of the company assess the proposed transaction in accordance with the above criteria. Potential consequences of a breach of these Austrian capital maintenance rules include personal liability of the management as well as nullity of the respective transaction.

The above principles do not only apply in respect to funds or loans paid by a company but to all benefits granted by such, including guarantees for borrowings.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

As discussed in question 2.1, a violation of the stringent capital maintenance rules will have the result of the transaction being deemed void (*ex lege*). The company would then have a claim for repayment against the person or entity that has received the funds. Only if transactions are *per se* (economically and as per the assumed intention of the parties, if they reasonably would also have entered into the remaining part of the transaction) dividable into separate parts, then Austrian jurisprudence holds that the violation of capital maintenance rules shall render the transaction only partially void. Whether any such transaction (e.g. a guarantee) would be found by any competent court to be only partially or entirely void is decided on a case-by-case basis, which therefore causes tremendous risks to the predictability of such type of transaction.

Shareholders and managing directors of corporations may be held personally liable for damages, if capital maintenance rules are violated. The provision of a guarantee/security for only a disproportionately small (or no) benefit would presumably constitute such a violation. In case of a violation, managing directors are liable for their own culpable behaviour; i.e. if they did not act in accordance with the standard of care of a prudent businessman, provided that the directors' liability is in principle only towards the company, but not towards individual shareholders or creditors (although exceptions apply).

In order to mitigate the risks of nullity of a guarantee or personal liability of the management of the company providing the guarantee, it has become common practice in Austria to include limitation language, restricting the (potential) enforcement of upstream or cross-stream security arrangements to the maximum permissible extent under Austrian capital maintenance law. Since the validity of upstream or cross-stream guarantees needs to be subject to a case-by-case evaluation, any reliance on upstream or cross-stream guarantees and the according use of limitation language causes ambiguities and is likely to decrease the commercial value of such guarantees.

2.3 Is lack of corporate power an issue?

Austrian companies are generally not subject to the *ultra vires* doctrine. Internal restrictions, which may be based on organisational regulations or on internal approval procedures (e.g. if the supervisory board has to consent to a measure), are allowed and very common, but they generally have no effect on the validity of agreements with third parties. However, such internal restrictions may have to be observed if the third party was aware of the excess of corporate power by the corporations' representative and if the damage to the company resulting therefrom must have been obvious to such third party or if the management and the third party had acted collusively with the management to the company's detriment.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

The Austrian Banking Act (*Bankwesengesetz*) requires a banking licence to be issued by the Austrian regulator (FMA) for the lending business, i.e. the commercial providing of financing to borrowers. Notified licences of a credit institution domiciled in another European Economic Area (EEA) jurisdiction (based on the home Member State concept) will be held equivalent for that purpose. The same applies for the acquisition of (loan) receivables on a commercial basis (i.e. factoring) which, in principle, prevents work-around structures, such as the disbursement of a loan by an Austrian "fronting bank" and immediate acquisition of the loan by a foreign, non-licensed lender. Insurance

companies granting loans in order to create a reserved asset base for the purpose of their insured persons/customers are, *inter alia*, subject to some exceptions.

Limited exceptions also apply in the context of small-category financings such as crowd-funding which, in Austria, was regulated in statutory law in 2015 (and was then amended in 2018) and provides for exceptions from both the bank licence and capital markets' prospectus requirements, if and to the extent that a financing does not exceed certain thresholds.

Resolutions, such as shareholders' resolutions, are – as set out in question 2.3 – not a general requirement for the validity and enforceability for an act of the legal representative of an Austrian corporation (limitations may apply as set out in question 2.3). However, it is, especially with respect to larger/syndicated financings, standard market practice to obtain shareholder approvals for entering into a loan agreement, security agreement or other associated finance documents or to obtain capacity opinions, which will be based on the respective review of corporate resolutions.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Apart from general limitations in connection with capital maintenance rules (as discussed above) and customary contractual enforcement limitations, it shall be noted that guarantees, and the maximum amount owed under a guarantee, will be interpreted on a very strict basis and ambiguities in the wording of the guarantee may be interpreted by a court to the detriment of the beneficiary of the guarantee.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Under Austrian law, there are no such exchange controls which would pose obstacles to the enforcement of guarantees.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In Austria, there are two general groups of collateral that may be used to secure lending obligations: personal collateral on the one hand; and *in rem* collateral on the other hand.

The following types of personal collateral for securing lending obligations are the most common: (a) assumption of debt (*Schuldbeitritt*); (b) sureties (*Bürgschaften*); (c) guarantees; and (d) letters of comfort (*Patronatserklärungen*).

The most common types of *in rem* collateral used are the following: (a) pledge of assets (such as a pledge on movables or a mortgage); (b) transfer of title for security purposes (*Sicherungsübereignung*); (c) assignment for security purposes (*Sicherungszession*); and (d) retention of title (*Eigentumsvorbehalt*).

In general, the most common types of collateral are share pledges, mortgages, account pledges, assignment of current and future receivables, trademark and IP-right pledges, and sometimes the pledge on stock in warehouses (which, based on the very stringent law on perfection of pledge, basically requiring that the pledgee takes control over the stock, is extremely difficult to establish and maintain under Austrian law).

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

The concept of a general security interest in all (current and future) assets of the pledgee to the assignee does not exist under Austrian law. As a result of the various different perfection requirements for different types of collateral under Austrian law (e.g. entry into the land register for mortgages, book entry for the assignment of claims as an alternative to the notification to the third-party debtors, the notification of the company when pledging shares in an Austrian Limited Liability Company), but also for reasons of enhancing the enforceability of collateral even in case one category of collateral was not perfected or is not enforceable, it is standard market practice to have one security agreement for each class.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

A mortgage is the only form of security over real property (land). A mortgage grants a right of preferential satisfaction to the pledgee when the pledgor does not meet its payment obligations. It is necessary that a mortgage deed be agreed upon between the pledgor and the pledgee. For perfection, the mortgage needs to be registered in schedule C of the land register. When intending to effect the entry into the land register, the pledgor of the property must provide a specific consent declaration in authenticated form regarding the registration (*Aufsandungserklärung*). Multiple pledges over one individual property are possible and will be ranked among each other in terms of priority (the point in time when the application for registration of the pledge in the land register reaches the competent land register). A mortgage can be registered for a fixed amount as a regular mortgage, including a certain percentage of the interest, interest on default, and a fixed amount of ancillary costs. Additionally, it is also possible for a mortgage to be registered with a maximum amount for loans granted. The secured obligations under such a mortgage can vary over the lifetime of the mortgage, with the amount actually secured being the outstanding amount owed by the pledgee from time to time. There is also a possibility to establish a mortgage over more than one property by creating a simultaneous mortgage (*Simultanhypothek*).

Registration fees play a significant role in the registration of a pledge over real property in the land since they amount to 1.2% of the secured amount of the real property. In order to avoid such fees in some lending scenarios, the lender agrees to receive a registrable (i.e. authenticated) pledge agreement in combination with a ranking order resolution (*Rangordnungsbeschluss*), which ensures for one year that no third party may enter another mortgage into the specific rank.

A pledge of real estate generally also extends to any fixtures and accessories. Any equipment that is not connected to a real property in the sense of the preceding sentence is considered to be movable property. With regard to security agreements in respect to movables, no specific formal requirements must be observed. However, Austrian law imposes strict standards of perfection that either require a physical transfer of the pledged goods or any equivalent measure, such as handing over via declaration, in case the physical transfer would be too burdensome to be performed. The same strict perfection requirements are required in case of full title transfer of such goods for security purposes (in order to avoid circumvention).

Warehouse pledges are generally admissible under Austrian law as well, provided the stringent rules in respect to the perfection of the assets contained in the warehouse are observed, which basically requires signage of the goods and the appointment of a warehouse custodian, who shall be strictly bound by the instructions of the pledgee only and shall ensure that goods are only removed from the warehouse if such is accepted by the pledgee.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security rights may be taken over receivables either by way of pledge or by way of full transfer of rights (for security purposes) via assignment. In the case of a pledge, the pledgee will be granted preferential satisfaction out of the proceeds. On the other hand, however, in the case of an assignment, the assignee becomes the owner of the claim, holding it in trust for the assignor for security with the purpose of obtaining preferential satisfaction.

In accordance with the principle of speciality, the pledge can only be perfected in relation to a specific object (chattel). This means that it is impossible to grant a pledge over all of the assets of the debtor. Furthermore, the pledgee is obligated to keep the pledged chattel and prevent the pledgor from further utilising it.

Under Austrian law, in general, no more requirements other than an agreement between the assignor and the assignee have to be fulfilled in order to take receivables as security. While not each and every claim has to be specifically identified, any receivable that is to be assigned must be sufficiently realisable (capable of satisfaction). If the respective receivables are recorded in the creditor's/assignor's books, it is mandatory that the pledge is annotated in both the list of obligors of the assignor and in the list of open accounts. Notifying third-party debtors, however, provides an alternative perfection procedure. Future receivables, which are determined or at least determinable (i.e. if the parties and the legal reason of the agreement are certain), can also be subject to assignments (or pledges). Receivables pledges and security transfers may also extend to future receivables or certain categories of receivables, if and to the extent that such receivables are duly described in the security agreement.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Under Austrian law, collateral security may be taken over cash deposited in bank accounts. Such cash collateral is commonly established in the form of account pledges, which are not subject to any special form requirements and therefore in practice principally drawn up in simple written form. In order to become perfected, the bank that holds the respective account must be notified or adequate markings must be made in the pledgor's records and accounts (in its capacity as the third-party debtor).

The commonly used general terms and conditions of Austrian banks provide for a general pledge over all funds of a bank's customer for any funds transferred by customers into custody of the bank (i.e. the funds of customers on bank accounts). This standard pledge agreement contained in the general terms and conditions is typically waived or subordinated if the funds on bank accounts are pledged for security purposes for a pledgee other than the bank holding the account. As of the date the pledge has been created, the owner has no access to the funds in the bank account and the respective garnishee must not pay out money from the pledged account to the owner.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

Security rights over shares in a Limited Liability Company (*Gesellschaft mit beschränkter Haftung – GmbH*) are generally created by way of pledge. While the actual transfer of GmbH shares requires a notarial deed, a share pledge may be done in (simple) writing form. Such shares are not evidenced by a share certificate. Therefore, for the perfection of the GmbH share pledge, notification to the managing directors of the company is required. In practice, share pledges are commonly made together with a power of attorney for the sale of the shares in case of an event of default by the pledgee, whereby such power of attorney needs to be executed by the pledgor in authenticated form to comply with the requirement that a power of attorney for the sale of shares in a GmbH has to be authenticated.

The pledge of shares of a Stock Corporation (*Aktiengesellschaft*) differs from the pledge of GmbH shares, as shares of an AG are typically certificated as securities, which is especially reflected in the different perfection requirements. In contrast to the GmbH, the sale of shares in AGs requires no specific form and thus, powers of attorney for the sale, if any, are not required to be authenticated.

Generally, the perfection of *in rem* securities over movables (such as certificated securities) requires that the pledgee obtains direct or indirect (e.g. via the account bank) possession in the shares. Only shares in stock-exchange listed companies may be certificated as bearer shares (*Inhaberaktien*). This is effected through a global share certificate with the shares then being introduced into an electronic clearing system. In such case, a pledge may be created by transferring the shares to the pledgee's securities deposit account or by blocking the pledgor's account in the pledgee's favour.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

As set out in question 3.3, Austrian law imposes strict standards of perfection for all kinds of movables, including inventories, and either requires a physical transfer of the pledged goods to the pledgee (or its custodian) or any equivalent measure, such as handing over via declaration, in case the physical transfer would be too burdensome to be performed. In respect to inventory – as is the case with respect to general warehouse pledges – for perfection of the security, it will be necessary that the inventory is stored separately from all other goods of third parties and access to the inventory (and any release of inventory) is strictly observed – and subject to agreement by the pledgee – by a custodian of the pledgee.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Subject to the limitations arising from the stringent capital maintenance rules under Austrian law, there are no general obstacles under Austrian law that a company may at the same time under one credit facility grant security for its own obligations as borrower under such credit facility and grant security (or guarantee) for the obligations of other obligors under such guarantee facility (which is, e.g., regularly the case if a holding company

takes up the loan and guarantees as the borrower the obligations of all or certain of its direct and indirect subsidiaries).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Stamp duty is governed by the Stamp Duty Act (*Gebührengesetz*) and follows a strict civil approach, which is that stamp duty is levied on various legal transactions concluded in physical written form (but also electronically, such as via e-mail). Also, legal documents executed abroad can trigger stamp duty. Stamp duty is levied either when both parties to an agreement are Austrian residents or when the written document evidencing the transaction is brought to Austria in its original form or in the form of a notarised copy, provided that the legal transaction has legal effect in Austria; or a legal obligation is assumed under the legal document or will be performed in Austria. Furthermore, stamp duty may be also triggered if based on a written document another legal binding action occurs in Austria or if such document is used as evidence before authorities or courts.

The Stamp Duty Act provides for a wide variety of documents, which trigger stamp duty. Documents often used in connection with loan agreements include: sureties, which trigger a 1% stamp duty; assignment agreements, which trigger a 0.8% stamp duty; or mortgages, which trigger a 1% stamp duty, in each case calculated from the fair value of the security.

A significant potential tax burden/risk has been removed from granting loans to Austrian borrowers, in the form of the abolition of Austrian stamp duty (*Rechtsgeschäftsgebühr*) on loans (*Darlehen*) and credits (*Kredite*), effective for loans and credits granted on or after 1 January 2011.

When creating mortgages, the underlying pledge agreement must be authenticated to obtain registration in the land register. Notarisation fees usually depend on the value of the transaction. In addition, registration of mortgages in the land register triggers a registration fee of 1.2% of the fair value of the mortgage.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Registers for perfection of security over assets exist in Austria for mortgages and – even though in principle an entry in the books of the owner of IP rights is also considered a permissible method of perfection of, e.g., trademark pledges – the trademark and patent register. Thus, only in respect of mortgages and IP rights will public authorities be involved in the perfection (registration) process of pledges. Registration of pledges in those registers shall usually be completed in a timeframe of up to two weeks. If timing is of the essence, informal pre-notification to the register is a practical means to ensure a swift process.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No regulatory or similar consents are required with respect to the creation of security. It shall be noted, however, that if, e.g., a mortgage is created or shares are pledged in a corporation owning real estate, the realisation of such collateral might be hampered by the fact that the acquisition of real estate by non-Austrian parties might be subject to restrictions as to real estate transfer in relation to foreign parties. Further, the realisation of pledges in shares or in a business may be subject to merger control.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No special priorities or other concerns exist in relation to the securing of revolving borrowings, provided that, if future claims are to be secured, such future claims must be clearly identifiable.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

With regard to notarisations, see questions 3.3 and 3.6 above. Where a security agreement is executed on the basis of a power of attorney (*Vollmacht*), parties require authorisation pursuant to the power of attorney to be evidenced on the basis of a complete chain of corresponding powers certified by notaries or corresponding entries in commercial registers (*Firmenbuch*). In case a power of attorney is executed by a foreign company, a foreign notary may confirm the identity of the signatories and the content of the respective foreign commercial register. In some cases of foreign certification, an apostille is required. With regard to changes due to the COVID-19 pandemic, see question 11.1 below.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

As set out in more detail in question 2.1 above, Austrian companies are subject to strict capital maintenance rules, which generally (subject to exemptions which are described in question 2.1 above) do not permit upstream guarantees or other upstream securities. Thus, in case of acquisition of shares in a company, such acquisition must not be collateralised by shares of the target company. The same restrictions apply to "sister subsidiaries", if they are directly or indirectly subsidiaries of the target's direct and indirect shareholders.

On the other hand, downstream collateral, such as shares in a direct or indirect shareholder company (holding company) of the target company, can serve as collateral for the acquisition financing without violating the downstream collateral capital maintenance rules.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Collateral that is accessory, such as sureties or pledges, must not be separated from the underlying secured obligation, otherwise the collateral will cease. The concept of "security trustees" or agents, as well as a generic type of "parallel debt", is not recognised under Austrian law to validly establish collateral for one

"security agent" which is not at the same time a lender or not a lender in respect of all obligations that shall be secured by the (accessory) collateral. It is, therefore, market practice to include a parallel debt structure for the security trustee concerning security governed by Austrian law. In order to ensure that the requirements of the accessory collateral are met, the Austrian market practice either provides that all secured parties are at the same time pledgees (or direct beneficiaries) under the security agreements or that a "security agent" is appointed, whereby it is agreed among all lenders with the consent of the borrower (or other obligors) that such security agent is the joint and several creditor (*Gesamthandgläubiger*) of all claims, it being further agreed among all creditors that only the security agent shall (following a decision process among all lenders) have the right to enforce the collateral and will then distribute the proceeds from such enforcement among all lenders in proportion to their exposure under the secured obligations.

In respect of non-accessory collateral (e.g. guarantees), it is not required for their validity that they are directly connected with the secured obligation. However, since loan documentation typically includes accessory and non-accessory collateral, it is market practice to provide for joint and several creditorships if the lenders desire to execute their rights arising from the collateral via one security agent.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

As discussed in question 5.1, the most common lending practice provides that the (Austrian type of) security agent is a joint and several creditor (*Gesamthandgläubiger*) of all claims of any of the lenders.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

In this context, it is necessary to observe that Austrian law differentiates between fully abstract guarantees (*Garantien*) and sureties (*Bürgschaften*).

Guarantees are considered to be separate non-accessory claims against the guarantor according to Austrian law. Therefore, generally, a guarantee would need to be assigned to Lender B, provided, however, that the guarantor retains all objections *vis-à-vis* Lender B that result from the guarantee agreement with Lender A upon a transfer of the loan and assignment of the guarantee.

In contrast, sureties are considered to be accessory claims according to Austrian law, which are consequently automatically transferred upon assignment of the secured loan. Another difference to guarantees is that the grantor of a surety is not only entitled to raise objections resulting from the surety upon transfer of the loan, but also to raise objections which stem from the relationship between the obligor and creditor under the loan agreement.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Generally, repayments of principal under loan transactions are not subject to withholding tax. In addition, interest payments are not subject to withholding tax as a general rule. Rather, such payments will have to be taken into account for purposes of the (corporate) income tax of the lender. If payment of interest is effected, however, to a non-Austrian lender then withholding tax in the amount of 35% may apply.

There are numerous double taxation treaties concluded between Austria and other jurisdictions, which typically provide for such withholding tax to be considered as deductible and/or refundable; even though there is a new OECD model convention in force as from 2017 and such model convention is also applicable to existing tax treaties due to acceptance through the Multilateral Instrument (MLI), there are no changes in this respect.

Due to the introduction of comprehensive cross-border information undertakings among authorities, the withholding tax legislation is not applicable from the end of 2016 onwards.

As regards proceeds of a claim under a guarantee or the proceeds of enforcing security, there is generally also no requirement imposed by Austrian law to deduct or withhold tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

No Austrian taxes of any kind, e.g. stamp duty, issue, registration or similar taxes apply with regard to loans, mortgages or other security document for their effectiveness or registration and, similarly, no incentives whatsoever are provided in a preferential way to foreign lenders.

In case the foreign lender acts as an investor, the Austrian government in general would welcome such foreign direct investment. This is especially the case if those investments have the prospect to create new jobs in high-tech fields or promote capital-intense industries (cash grants may possibly be awarded). A particular focus is also given to investments that enhance research and development where specific tax incentives are available. A similar priority for the government is the environment; thus, investments should not have any negative impact in this regard. Financial incentives may also be provided according to EU guidelines to promote investment in Austria, which are equally available to domestic and foreign investors, and range from tax incentives to preferential loans, guarantees and grants. Most of these incentives are available only if the planned investment meets specified criteria (e.g. implementation of new technology or reduction of unemployment).

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

Generally, no income of a foreign lender will become taxable in Austria, solely because of a loan, a guarantee or generally the grant of a company in Austria.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

In Austria, no taxes or stamp duty will apply for the granting of loans (such loan fees were abolished in Austria in 2011) or (abstract) guarantees.

With regard to surety agreements and mortgages, stamp duty at the rate of 1% of the secured interest will apply. Similarly, for assignments, stamp duty at the rate of 0.8% of the secured interest will apply. In connection with bill transactions, stamp duty at the rate of 0.125% of the secured interest will apply.

Also, notary fees may be payable; e.g. with respect to the creation of mortgages, which must be notarised for registration and will depend on the transaction value. In addition, the registration of a mortgage in the land register will incur a registration fee of 1.2% of the mortgage.

6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

In general, Austrian law does not provide for any such consequences.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

Austrian law and conflicts of law rules generally permit the choice of a foreign law as the governing law of a contract, which is also the case if the respective contract is to be enforced in Austria. Regulation (EC) 593/2008 of 17 June 2008 on the Law applicable to Contractual Obligations (*Rom I Verordnung*) is applicable in Austria and must be observed in this context. Following such Regulation, Austrian courts will principally recognise the contractual choice of foreign law, subject to certain requirements (e.g. actual conflict of laws, or the contract relates to a civil and/or commercial matter), and to this extent, Austrian courts have jurisdiction for claims under such a contract. However, some restrictions apply regarding the granting and perfection of security rights, which, depending on the type of security, is in many cases governed by local Austrian law (e.g. for pledges over shares in Austrian companies, pledges over security assignments of Austrian law-governed receivables or for the creation of mortgages over real estate properties located in Austria). Hence it is common market practice that security rights over assets that are located in Austria, including those which are provided by Austrian domiciled transferors or pledgors, have Austrian law-governed security documentation.

In addition, in cases where there is no actual conflict of law or where the contract is solely connected to EU Member States, the parties are not allowed to choose the law of a non-Member State. Additionally, no choice of law will be recognised by Austrian courts which would violate Austrian *ordre public*.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

As regards the enforcement of judgments or awards that were not rendered in Austria, there are generally the following options:

- **Court judgments of EU Member States**: The enforcement of judgments rendered in another EU Member State is governed by Regulation (EC) No 1215/2012 on the Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Ia Regulation). As in Austria the Brussels Ia Regulation is applicable, judgments from other EU Member States are recognised without any special procedure being required or any re-examination of the merits of the case (exceptions may apply, mainly with respect to Austrian *ordre public*).
- **Court judgments of non-EU Member States**: Beyond the applicability of the Brussels Ia Regulation, enforceability of foreign judgments is conditional and depends on whether there is a bilateral treaty between Austria and the domicile of the other party. According to Austrian law, reciprocity is ensured under bilateral treaties/regulations and is assumed as a fundamental criterion for the enforcement of court judgments. Additionally, it is required that Austrian law would not have denied the foreign court, having rendered the relevant decision, if the defendant in the enforcement proceedings has been duly convoked in the original proceedings before the foreign court and if the relevant judgment is final in the sense that it may no longer be challenged before the courts and authorities of the foreign state. In case the counterparty had not had the opportunity to participate in the foreign court proceedings, the enforcement of such court judgment may be denied. The same applies in case the enforcement is aimed at an action which may not be enforced or that is not allowed under Austrian law, or if the Austrian *ordre public* would be violated.
- **Arbitral awards**: Austria is a contract state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitral proceedings and the enforcement of arbitral awards are common in Austria (see in this respect question 7.7 below).

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

As a general rule, the duration of court proceedings depends on several factors such as the complexity of the case and the overall workload of the specific court. Usually (considering the above-mentioned factors) a judgment might be expected within one year with regard to question 7.3 (a). With regard to question 7.3 (b), the best case scenario for an enforcement of a judgment from an EU Member State may be expected within a few days and a couple of months in case of judgments from a non-EU Member State. Although those estimations are generally applicable, they vary from case to case and proceedings could require significantly more time. The timeframe may be stretched by remedies especially, and in particular by appeal against first instance judgments (as is the case most of the time).

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

For the different types of securities and any other contractual arrangements, the enforcement of contractual security rights varies significantly. Security rights are usually enforced through statutory law applied by courts as a general principle, but deviations are possible in case of contractual arrangements between parties, which are permissible. Regarding the most relevant types of security, the following statutory rules and market practices apply:

- **Share pledges**: Common market practice for shares in Limited Liability Companies and shares in Stock Corporations is to agree on out-of-court enforcements. This requires notification of the pledgor as well as a valuation of the shares and subsequent disposal to the best bidder (usually the pledgor is also granted the right to participate in the bidding process).
- **Mortgages**: A public auction is required for mortgages; the involvement of the court could lead to delays in the enforcement procedure.
- **Receivables**: There is no specific enforcement procedure in place for receivables. The assignee (or the pledgee if granted a power to collect) is entitled to directly claim the payment from the debtor in case of default.
- **Guarantees/suretyships**: There is no specific type of enforcement procedure for personal security such as guarantees or surety. Following the terms and conditions agreed in the security arrangement (e.g. priorities), the payment can be requested directly from the obligor (and enforced in court proceedings).
- **Movable property**: The standard practice for movable property is to modify the enforcement procedure under statutory law to permit out-of-court enforcements. Adhering to a cooling-off period of one month and following public auctions, movable goods may be sold after notification of the pledgor.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

Foreign lenders may be required to deposit court fees before proceedings commence. Lenders seated in EU Member States or states that are party to the Hague Convention on Civil Procedure of 1 March 1954 are usually not required to post collaterals for court costs.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

As of the opening of the insolvency proceedings, the litigation and execution of claims by individual creditors is no longer permitted. As of such date, the enforcement of a claim requires its filing as an insolvency claim (*Insolvenzforderung*) with the insolvency court. The application period (*Anmeldungsfrist*) is published in the decree; however, the claim can also be filed after expiration of such period, although additional court fees may apply. Afterwards, the insolvency administrator collects all claims in the claim table (*Anmeldeverzeichnis*), which is presented to the court. During the examination hearing (*Prüfungstagsatzung*) all duly filed claims are examined. At such hearing, the insolvency administrator must declare which of the individual claims shall be acknowledged or declined. For a claim to be considered acknowledged, however, it is also required that no other creditor contests such claim. When acknowledged, the creditor will take part *pro rata* in the distribution of the applicable insolvency quota. With regard to the enforcement of collateral security, please see questions 8.1 and 8.2 below.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

An arbitral award rendered by an arbitral tribunal having its seat in Austria generally constitutes an executory title under the Austrian Enforcement Act (*Exekutionsordnung*) and does not require a declaration of enforceability by a domestic court. Under these circumstances, it is considered sufficient to attach to the enforcement request a copy of such arbitral award with a confirmation of its final and binding nature and enforceability issued primarily by the chairman of the arbitral tribunal.

In respect to foreign arbitral awards, the New York Convention of 1958 is the prime basis for the recognition and enforcement. Sec. 611 Austrian Code on Civil Procedure (*Zivilprozessordnung*) provides possible legal grounds for re-examining/setting aside an arbitral award. However, in general, an Austrian Court will not re-examine the merits of an arbitral case, but review the award with regard to procedural errors (e.g. if the decided dispute is not covered by the arbitral agreement or if an arbitral agreement does not exist at all or if the matter in dispute must not be arbitrated). Certain exceptions apply; especially where an arbitral award conflicts with the fundamental values of the Austrian legal system (*ordre public*).

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

A secured creditor is barred from exercising enforcement rights regarding its security for a maximum period of six months after the opening of insolvency proceedings if the exercise of such enforcement rights would endanger the operation of the debtor's business. However, this does not apply where the performance of such enforcement rights is necessary to prevent the secured creditor from being exposed to severe personal or economic danger, provided that it is not possible (and will not be possible) to provide full satisfaction to the creditor by execution into other assets of the debtor.

In insolvency proceedings, secured creditors are divided into categories. The claims of secured creditors are settled in a determined order. First, rights to separation of property (*Aussonderungsrechte*) are handled. Property of third parties caught in the insolvency proceedings must be returned to such third parties. After that, rights to separate satisfaction (*Absonderungsrechte*) are handled. Separate satisfaction is granted to creditors, whose claims are secured by a pledge or otherwise either by law or by agreement. The insolvency administrator may initiate auctions or forced administration of the insolvency estate's immovable assets, even if the asset is subject to a right of separate satisfaction.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The Austrian Insolvency Act provides rules which enable creditors to contest certain transactions which possibly decrease the assets of the debtor prior to the opening of insolvency proceedings. In this respect, transactions that were entered into by the debtor and a third party, which discriminate against other creditors, might be contested. The respective transaction must be contested by the appointed insolvency administrator.

Generally, for the contestation of transactions, the following is required: (i) it concerns an existing transaction; (ii) that such transaction is entered into prior to the opening of the insolvency proceedings; (iii) the transaction somehow decreases the assets of the debtor; (iv) the transaction discriminates against other creditors; and (v) the claim fulfils one of the specific contesting provisions of the Austrian Insolvency Act.

The Austrian Insolvency Act provides basically for the following specific contesting provisions:

1. Discriminatory intent (*Benachteiligungsabsicht*):
   This provision applies if the debtor acted with the intent to discriminate against creditors and the other party either knew of this intent (in this case all transactions within the last 10 years prior to the initiation of insolvency proceedings are impeachable) or should have been aware of it (then all transactions up to two years preceding the initiation of insolvency proceedings are covered).
2. Squandering of assets (*Vermögensverschleuderung*):
   A transaction is contestable if it is seen as squandering the company's assets. The other party must have known or should have been aware of this (transactions up to one year preceding the initiation of insolvency proceedings).
3. Dispositions free of charge (*Unentgeltliche Verfügungen*):
   Transactions that were made free of charge and which were entered into within the two years prior to the opening of the insolvency proceedings are contestable.
4. Preferential treatment of creditors (*Begünstigung*):
   This provision applies where a transaction discriminates against one creditor *vis-à-vis* the others or is intended to prefer one creditor *vis-à-vis* the others after the debtor is materially insolvent or after the application for the opening of insolvency proceedings has been submitted or 60 days prior to either such event.
5. Knowledge of illiquidity (*Kenntnis der Zahlungsunfähigkeit*):
   A legal act based on the knowledge of illiquidity of the debtor might be contested after illiquidity has occurred, where the contracting third party knew or negligently was not aware of the debtor's illiquidity.

All provisions outlined above secure the debtor's assets prior to the opening of the proceedings. After the opening of insolvency proceedings and appointment of an insolvency administrator, the debtor is solely represented by the insolvency administrator. This does not apply where insolvency proceedings were opened as restructuring proceedings by self-administration of the debtor (*Sanierungsverfahren mit Eigenverwaltung*), which under certain circumstances is subject to the consent of the insolvency administrator, the court or the creditor's committee. Otherwise, any transaction or disposition of a debtor's property can only be undertaken by the insolvency administrator (and under certain circumstances requires the consent of the court or the creditor's committee) after the opening of insolvency proceedings.

Estate claims (*Masseforderungen*) are generally preferred claims when the general estate (not the preferred estate) is distributed. Such estate claims comprise, e.g., claims for the general continuing of the business, including claims of employees, after opening of the insolvency proceedings.

Due to the COVID-19 pandemic, the Austrian legislator amended the law regarding contestation. Pursuant to such amendment, bridge loans that are granted in order to fund short-term working capital up to 120 days cannot be contested if they were granted between 1 March 2020 and 31 January 2021 (the latter date may be postponed by further legislation in the future). In addition, in order to protect the economy from multiple insolvency proceedings, an application for opening an insolvency proceeding can no longer be filed because of over-indebtedness and insolvency proceedings will not be opened in cases where a creditor has filed for proceedings for this reason. This amendment, which currently applies from 1 March 2020 until 31 March 2021, began discussions on whether over-indebtedness could still be a reason to contest payments or other transactions. There is some dissent in the community on this issue and the question may not be answered until a corresponding decision by the Supreme Court is available. The inability to pay debts when they fall due remains a trigger for the obligation to file for insolvency.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Austrian insolvency law is generally not limited to any type of entity. The insolvency ability is rather defined as part of the private law legal capacity. Therefore, generally, any natural person, as well as legal entities (private or public) and inheritances can be a debtor and can become insolvent.

With regard to banks, investment firms, investment services companies and insurance companies, it should be noted that such entities may be subject to winding-up but not to bankruptcy procedures.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

If no out-of-court seizure of assets is agreed upon (or even in case such agreement is made but not observed by the debtor), the process for seizure of assets of companies has to be made via court enforcement.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

The contractual choice of forum is generally permissible and legally binding as defined per Art. 25 of the Brussels Ia Regulation, which is applicable for cross-border scenarios in case a party submits to a foreign jurisdiction, although specific form requirements may apply. It is also permissible if expressed and agreed that the forum shall be chosen by one party. It needs to be considered that, for instances where the courts have exclusive jurisdiction pursuant to Art. 24 Brussels Ia Regulation, no choice of forum is permissible. This applies especially to proceedings in respect to rights *in rem*.

The Brussel Ia Regulation may not be applicable in case only one party has its domicile in an EU Member State and the other party also has its domicile in the same country or in a non-EU Member State. The choice of jurisdiction clause would then be governed by domestic law or other applicable conventions on the choice of law. In any case, domestic rules also correspond to the Brussel Ia Regulation to a large extent.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Provided it does not conflict with public international law or special immunities, such as diplomatic immunity, a waiver of sovereign immunity is usually legally binding.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

In order to provide loan financing on a commercial level to companies in Austria, there are three possible options:

- Application for a banking licence. A valid licence is a prerequisite for conducting banking transactions. The licence for conducting banking transactions may have certain conditions and obligations attached to it, whilst parts of individual types of banking transactions may be excluded from the scope of the licence. Obtaining a banking licence is a rather complicated procedure and requires in-depth preparation over a longer period of time. The legal requirements that have to be fulfilled are especially extensive, as is the creation of an appropriate business plan that has to be reviewed by the regulator.
- Credit institutions authorised in an EEA Member State are in principle already authorised on the basis of their authorisation/licence in their home state to provide banking services in other Member States. Hence, a credit institute of another EU Member State may establish a branch based on the "EEA freedom of establishment" (which would need to be notified to the Austrian regulator).
- Utilising the EU freedom of service to render services in Austria, which is the most common approach for non-Austrian banks holding a licence in an EEA Member State that want to become active in the lending business and wish to avoid establishing a permanent presence.

Non-banks may only engage in the lending business to the extent that such activity is exempted from the requirement to hold a banking licence (e.g. acquisition of loan portfolios by special securitisation purpose entities).

11 Other Matters

11.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2020 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2020 due to COVID-19 to continue into 2021 and beyond?

In Austria, formal statutory requirements on signatures did not change during 2020. When the law imposes agreements or declarations in writing, a genuine signature by the parties as well as the submission of the original document to the recipient is necessary. However, such provisions have to be interpreted in the light of the legislator's intention. In some instances, Austrian courts have ruled that written agreements may be concluded by submitting a scan of the signed agreement by telefax or e-mail. Where the law requires documents to be in writing, only qualified electronic signatures can substitute wet ink signatures and the submission of the original document.

In the course of the COVID-19 pandemic and in order to support social distancing, the Austrian legislator has adapted legislation concerning documents that have to be signed before a notary. Pursuant to the 4th COVID-19 Act, the possibility for digital notarial certification, which was already possible in some corporate law cases, was extended to all other application areas that require a notarial certification by law. The signing parties and the notary are connected in a videoconference (permanent visual and audible connection required). After the identification process, the parties have to sign the document by a qualified electronic signature and the notary creates a digital notarial certified document that serves legal requirements. According to such legislation, notarial certification before an Austrian notary is now possible even if the parties are located outside of Austria.

From a practical perspective, especially in the financing sector, the use of digital signatures that are qualified electronic signatures in the meaning of Regulation (EU) No 910/2014 are much more frequently used and are, with very limited exceptions and according to law, considered equal to the written form requirement of the Austrian Civil Code.

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