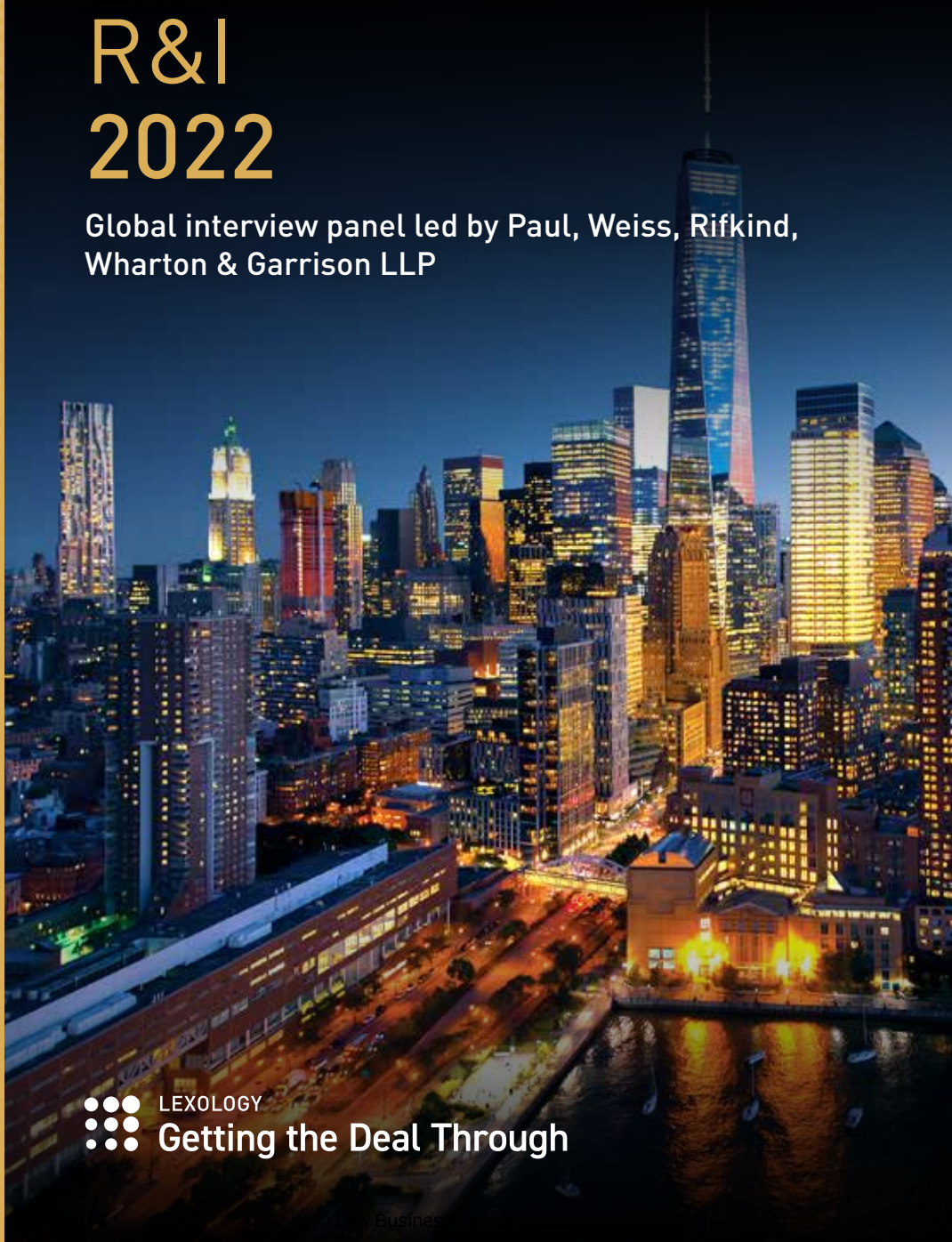
Market Intelligence

R&I 2022

Global interview panel led by Paul, Weiss, Rifkind, Wharton & Garrison LLP



LEXOLOGY
Getting the Deal Through

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Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager
Dan Brennan
dan.brennan@gettingthedealthrough.com

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R&I 2022

Austria

Markus Fellner is managing partner and head of the insolvency law and restructuring practice group. He is ranked in the top tier in this practice area, also by peers, and his impressive track record includes the representation of some of Austria's largest banks in restructuring mandates. Markus recently advised the core banks of the traditional Vorarlberg lingerie manufacturer Huber, also in connection with reorganisation proceedings initiated at the end of May 2020 with regard to individual companies of the Huber Group, and other cases such as Kremsmüller Industrieanlagen GmbH & Co KG and the Steinhoff Group. His other key areas of practice include banking and finance, corporate/M&A as well as dispute resolution.

Elisabeth Fischer-Schwarz was admitted to the Austrian Bar in 2017, and has been an attorney at law with Fellner Wratzfeld and Partners since that year. She has particular experience and knowledge in the areas of banking and finance, insolvency law and restructuring and dispute resolution. Elisabeth speaks German, English and French.

Florian Henöckl is an attorney in the insolvency and restructuring practice group at Fellner Wratzfeld and Partners. He also specialises in banking and finance, as well as corporate/M&A. He obtained a law degree from University of Graz and was admitted to the Austrian Bar in 2021.

1 | In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

The first half of 2021 provided the lowest number of company bankruptcies in over 40 years. Compared with the first half of 2020, the number of company insolvencies decreased by around 45 per cent to 1,059. This decrease of company insolvencies despite the massive economic slump due to the covid-19 pandemic was caused by the measures that the Austrian government passed to combat the covid-19 crisis. Such measures included the granting of short-time work support and fixed-cost subsidies, the assumption of liabilities as well as the temporary suspension of the obligation to file for insolvency and the suspension of tax liabilities. Most of these measures have no longer been available since the third quarter of 2021.

Unlike the beginning of 2021, the fourth quarter of 2021 showed a different trend. Compared to the same time period in 2020 company insolvencies increased to a similar level as in the fourth quarter of 2019; 40 per cent of all company insolvencies in 2021 were opened in the fourth quarter. This rise in the insolvency rate – as experts since the beginning of the corona crisis have tended to predict – may lead to a new 'wave of insolvencies'.

2 | Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

Out-of-court restructurings, especially in the field of aviation and electromobility, have been on the rise. In 2021, there were – compared to 2019 – fewer major insolvencies such as the insolvency of EYEMAXX Real Estate AG with total liabilities of €200 million and Autobank AG with total liabilities of €120 million. Due to financial measures taken by Austrian government to prevent a 'wave of insolvencies', companies were often able to restructure their debt with creditors on an out-of-court basis.

3 | Have there been any recent legislative reforms? Is there a perceived need for reform?

With the Directive on Restructuring and Insolvency (Directive (EU) 2019/1023), the European legislator enacted a framework providing an early restructuring mechanism for companies facing a likelihood of insolvency. The Austrian legislator transposed this directive into national law with the Austrian Restructuring Act, which came into force at the end of July 2021. This 'new' Austrian Restructuring Act is similar to the Austrian Business Reorganisation Act, which entered into effect in 1997, but ended up as 'dead' law.

Markus Fellner

Elisabeth Fischer-Schwarz

Florian Henöckl

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Proceedings under the Austrian Restructuring Act are a hybrid of out of court and court monitored proceedings. The restructuring mechanism can be initiated at the request of the debtor in the case of a 'likelihood of insolvency', which is defined as (a) insolvency being imminent or (b) the equity ratio falling below 8 per cent and the notional debt repayment period exceeding 15 years. The purpose is to allow a debtor to avert insolvency and ensure the viability of its company.

The right to apply for the initiation of restructuring proceedings is only available to the debtor and not to third parties. The debtor retains, generally, but subject to certain restrictions, control over its assets. The key element is that the debtor – based on a restructuring plan – can gain a discharge of debt without the consent of all creditors involved.

The restructuring plan (section 27 of the Austrian Restructuring Act) must contain the proposed restructuring measures and their duration, the reduction and deferral of claims as well as any new financial support. In addition, the restructuring plan must describe the debtor's economic situation, in particular its assets, liabilities and the company. The affected creditors (including classification into creditor classes) as well as the unaffected creditors must be listed in the restructuring plan together with a factual justification for their inclusion or non-inclusion in the restructuring plan. A conditional forecast of the company's continued existence and a description of the necessary preconditions for the success of the plan must also be included.

The restructuring plan also should describe that – compared to insolvency proceedings – restructuring proceedings under the Restructuring Act are in the best interest of the creditors. To be binding on the parties the restructuring plan needs to be confirmed by the court; the discharge of debt also needs the approval of the court. The restructuring proceedings are also monitored by the court.

Around a half year after the Austrian Restructuring Act's entry into force, there are – perhaps due to the lack of publicity – no known restructuring proceedings under the Austrian Restructuring Act. According to the *Alpenländischer Kreditorenverband* (an Austrian association for the protection of creditors) no public restructuring proceedings have yet to be initiated. It cannot be precluded that the 'new' Austrian Restructuring Act will in the end share the same fate as the Austrian Business Reorganisation Act.

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4 In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

With the Directive on Restructuring and Insolvency the European legislator – regarding the coordination of cross-border cases – also aims at providing proceedings fully compatible with the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on cross-border insolvency proceedings, at least as far as to grant certain minimum principles of effectiveness. The Austrian legislator therefore aligned the restructuring mechanism with the Regulation (EU) 2015/848 in section 44 of the new Restructuring Act. Provided that the debtor makes the opening of restructuring proceedings public the proceedings are 'public collective proceedings' within the meaning of article 1 of the Regulation (EU) 2015/848.

Any judgment opening restructuring proceedings handed down by an Austrian court, as a court of a member state of the European Union, is recognised in all other member states of the European Union (article 19 of Regulation (EU) 2015/848). The judgment opening restructuring proceedings produces, with no further formalities,

the same effects in any other member state as under the law of the state of the opening of proceedings (article 20 of Regulation (EU) 2015/848).

5 | In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

In principle, there is no possibility for forum shopping under Austrian law. Insolvency proceedings must be filed with the competent court at the registered office of the respective debtor. According to article 1 of the Regulation (EU) 2015/848 the courts of the member state within the territory of which the centre of the debtor's main interests (COMI) is situated have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). COMI is defined as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'.

The debtor's COMI is determined at the time of filing for insolvency. Therefore, debtors can change the international jurisdiction and thus the applicable insolvency law by shifting the COMI to another EU member state in time in order to achieve easier debt relief. Insolvency proceedings – and public restructuring proceedings – opened in a member state are recognised in other member states of the European Union without further formalities as set out in article 19 and article 20 of the Regulation (EU) 2015/848.

For insolvency proceedings opened in a non-EU member state (irrespective of an international treaty or the reciprocity principle), the Austrian Insolvency Act provides for recognition of the effects of, as well as decisions rendered in such proceedings, where the centre of the main interests of the debtor is located in the respective foreign country and the insolvency proceedings are comparable to such proceedings in Austria, in particular if Austrian creditors are treated in the same manner as creditors from the state of the opening of proceedings. Recognition is denied if insolvency or composition proceedings have already been opened in Austria, or interim measures have been ordered, or recognition leads to a result that clearly conflicts with public policy.

6 | Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

Internationally, Austria is generally considered a creditor-friendly jurisdiction, as it does not provide for UK or US-style restructuring proceedings. However, the implementation of the Directive (EU) 2019/1023 on Restructuring and therefore

the possibility to have effective preventive restructuring measures is a step in the direction of achieving a balance between debtor and creditor-friendliness.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

There are two possible ways of purchasing assets out of an insolvency, either by way of a share deal or by way of an asset deal.

In general, the insolvency administrator issues bidding conditions specifying what kind of transaction can be carried out and in what form. In practice, a share deal is particularly relevant in the case of holding companies that hold shares in subsidiaries and sell them during the insolvency of the holding company. On the other hand, if the operating company itself becomes insolvent, this normally results in an asset deal, which is subject to special conditions and can result in opportunities for the purchaser. Unlike in an asset deal with a solvent company, the employees (with the exception of the works council) must not be taken over

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and, in principle, there are also no liabilities transferred (an asset deal under the new Restructuring Act leads – unlike under the Insolvency Act – to a transfer of the liabilities). In practice, it is even common to partially close parts of the company so that only the 'healthy' parts of the company are sold.

The whole transaction must be already specified as accurately as possible in the bidding conditions in the interests of a fair and transparent process. If a best bidder is finally determined, if all assets or immovable assets are sold, the creditors' committee must decide on the sale and the debtor must be heard before the sale is approved by the court. Only once the court's approval decision becomes final does the purchase of assets become legally binding.

Markus Fellner
markus.fellner@fwp.at

Elisabeth Fischer-Schwarz
elisabeth.fischer-schwarz@fwp.at

Florian Henöckl
florian.henoeckl@fwp.at

Fellner Wratzfeld & Partners
Vienna
www.fwp.at

The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

When selecting the right counsel for a complex restructuring or insolvency case, the following two key factors should be considered:

- Extensive legal expertise and experience, especially in the field of insolvency and restructuring law, but also in insolvency and restructuring-related fields (banking and finance, corporate/M&A, labour law), accompanied by business competence and understanding; and
- a proper law firm structure and access to an experienced partner network of national and international attorneys, auditors and tax advisers.

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

A successful implementation of a complex insolvency filing requires substantial preparation. The first step is to decide which kind of restructuring or insolvency proceeding fits the needs of the company: a restructuring on the basis of an out-of-court restructuring agreement, restructuring proceedings, reorganisation proceedings with/without debtor in possession or liquidation proceedings.

It is recommended to draft the key points of a reorganisation plan before the filing of the insolvency application and to present it together with the filing at the opening of the insolvency proceedings. A financing plan for the period after the opening of the insolvency proceedings helps to ensure the continuation of the business and should take into account the immediately necessary reorganisation measures, for example, closing the non-viable parts of the company. It is also necessary to convince the creditors to approve a reorganisation plan and provide financing.

What was the most noteworthy filing that you have worked on recently?

fwp advised, on an out-of-court basis, the financing banks of an aviation company and an electromobility company on the restructuring of its financings and implementation of the reorganisation measures and the takeover of parts of the business by a strategic investor. These two mandates are further examples of fwp contributing to successful restructurings by providing extensive multidisciplinary legal and business expertise and experience in an international context.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Paul, Weiss, Rifkind, Wharton & Garrison LLP, this *R&I* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

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