guidelines for restructurings in austria

Schönherr Rechtsanwälte | Raiffeisen Bank International
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restructuring guide

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The extra-judicial restructurings of the past years have shown that a reliable cooperation of Austrian Banks when working with financially troubled companies is crucial in minimizing damages for all participants.

A successful reorganization protects not only the Banks and other Creditors but also avoids considerable negative social and economic consequences.

The dynamic of extra-judicial restructurings can sometimes lead to individual interests being placed above joint interests. Therefore, Gabriele Schiemer (Raiffeisen Bank International AG), Ralf Zeitlberger (Erste Group Bank AG), Harald Brückl (UniCredit Bank Austria AG) and Wolfgang Höller (Schoenherr Rechtsanwaelte GmbH) have started an initiative to elaborate – together with the other Austrian Banks and including all those involved in extra-judicial restructurings – guidelines for cooperation that can serve as objective recommendations for action, independent of the interests of individual cases.

The result of this project is the following "Guidelines for Restructurings in Austria".

preface

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In the course of this project, we have received numerous valuable comments that were carefully considered in preparing these Guidelines. In parallel, we have cooperated with trade credit insurers and leasing companies to agree on trade credit insurer and leasing company annexes to the Guidelines, which deal with the particularities of trade credit insurers and leasing companies.

The Guidelines and their annexes received broad approval at the closing session on 19 June 2013.

We are therefore pleased to present to you the "Guidelines for Restructurings in Austria" and hope that they greatly contribute to making extra-judicial restructurings still more efficient in the future.

Raiffeisen Bank International AG
Erste Group Bank AG
UniCredit Bank Austria AG
Schönherr Rechtsanwälte GmbH

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introduction

guidelines for restructurings in austria

The following "Guidelines for Restructurings in Austria" (the "Guidelines") are not binding regulations from which legal claims may be derived. The Guidelines do not reduce the right or obligation of each Creditor to independently determine whether it supports an extra-judicial restructuring, which decision ultimately rests with the relevant corporate body of the Creditor.

The Guidelines also do not assert that every company can be rescued through an extra-judicial reorganization. They are, however, a documented common understanding that an extra-judicial reorganization can be useful for all participants. To this end, working together constructively and in good faith is an indispensable requirement.

The Guidelines aim solely to generally improve the restructuring processes and to increase the efficiency of these processes to the benefit of all participants (especially for the debtor itself). To achieve this, the interests of the participants were, with the help of experts, thoroughly weighed and considered.

The Guidelines subsume practical experiences and look to international standards, such as the "London Rules"

of the Bank of England and INSOL International's "Statement of Principles". In the latter case, eight "guidelines for a global approach for multi-Creditor restructurings" are established that, taking local features into account, can also be applied to restructurings in Austria. The reference to internationally recognized guidelines ensures that foreign Creditors can be incorporated into the joint understanding for regulating restructurings in Austria. INSOL International's eight guidelines thus also establish the starting point for "Guidelines for Restructurings in Austria".

The Guidelines deal primarily with the first phase of an extra-judicial restructuring. That is the period, to be kept as short as possible, in which it should be determined whether there is a possibility for reorganization of the debtor.

To this phase is joined the actual restructuring phase, which is initiated after the conclusion of a restructuring agreement. Although the necessity of constructive cooperation naturally also applies to this second phase, in view of the differences of each case, the Guidelines are limited to defining key points for this second restructuring phase.

The Guidelines apply to all Creditors of a debtor ("**Creditors**"), but individual issues concern only the financing Banks ("**Banks**") or these together with factoring companies, leasing companies, trade credit insurers, deposit insurers, guarantors, and bond holders ("**Finance Creditors**"). The term „Creditor" is used in the Guidelines when the intended meaning is all those Creditors involved in the extra-judicial restructuring case.

The particular features of individual Finance Creditors are dealt with in the annexes.

The Guidelines focus on restructurings in which at least three Banks take part and a total volume of around EUR 30 million is involved.

guidelines

1. Guideline

Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to cooperate with each other to give sufficient (though limited) time (a "Standstill Period") to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor's financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case. (First Principle of INSOL International's "Statement of Principles")

1.1 **The material starting point** for restructurings is a more-than-temporary deterioration of the economic situation of the debtor that endangers its viability (e.g., credit unworthiness, pressing inability to pay, negative equity).

1.2 If a restructuring case is present, the Banks should ensure that the case is handled by **personnel** who have specific knowledge in the restructuring area.

Already in the early phase of the restructuring it should be arranged that Banks are released from **Bank secrecy** so that a direct exchange of information is possible for purpo-

ses of the restructuring. Conversely, for debtors financed on the capital markets, it should be ensured that Creditors and their advisors observe all applicable provisions on **prohibited market manipulation and insider trading**.

1.3 If a Bank has identified a restructuring case, it should ask the debtor to duly arrange a meeting with the financing Banks (**Banking Meeting**).

In the Banking Meeting, the debtor should inform the Banks of its current economic situation, providing especially an overview of liabilities to banks and a current liquidity forecast.

The Banks agree on the process and reach the fundamental decision of whether to grant a standstill period for reviewing the possibility of restructuring.

The Banks decide together with the debtor which additional Creditor groups should be included and whether, for the further restructuring, a big Creditor meeting should be called together with additional Creditor groups. The timely inclusion of additional Creditor groups (especially trade credit insurers and leasing companies) and the invitation to them to make a serious, responsible contribution to the debtor's restructuring can be decisive for the success of the restructuring.

1.4 Whether an **All Lenders' Meeting** should be called depends on the individual case and should be based on whether it is necessary and useful in accomplishing the reorganization of the debtor. Possible participants in the All Lenders' Meeting include Banks, factoring companies, trade credit insurers, deposit insurers, guarantors (e.g., AWS, öKB), leasing companies, and bond holders (together "**Finance Creditors**") as well as, in individual cases, major suppliers.

In principle all Finance Creditors should be invited to the All Lenders' Meeting. In single cases it may be useful to (temporarily) exclude individual Creditors (groups), such as when inclusion for the restructuring is not required, or when in light of the specific situation of individual Finance Creditors no restructuring input by them can be expected, or if inclusion would further complicate the restructuring.

In the All Lenders' Meeting the debtor makes all such information available that has already been made available to the Banks. The participating Creditors agree on how to proceed and agree on the fundamental decision of whether to grant a standstill period while reviewing the possibility of restructuring.

1.5 If a standstill period is agreed, then the following **fundamental decisions** are to be taken in the Banking Meeting or All Lenders' Meeting:

- date of the start of the standstill period (see point 1.7);
- duration of the standstill period (see point 1.8); and
- milestones within the standstill period (see point 1.9).

1.6 The **definitive time for beginning the standstill period** (the "**Deadline**") is to be decided in the Banking Meeting or All Lenders' Meeting. The Deadline is also relevant in order to determine the outstanding liabilities and the status of existing securities (see point 2.2).

Regarding the Banks, the Deadline is to be set at the time of their invitation to the Bank Meeting, and regarding the other Creditors, at the time of their invitation to an All Lenders' Meeting. In order to accommodate a possible advancement of information for individual Creditors due to disparate information from the debtor, in single cases it may be required to determine an earlier prominent event. A prominent event can be the occurrence of an event of default under a facility, the declaration that any amount under a facility has become due and payable, media coverage of economic difficulties, or early information of a

Creditor from the debtor.

1.7 The **duration of the first standstill period** is to be set as short as possible given the individual case. It should be as long as necessary, but as short as possible in order to review the possibility of restructuring. As a benchmark, the first standstill period should be from 1 to 3 months.

1.8 The Creditors and the debtor are to set **milestones** by when:

- the debtor shall mandate external advisors (especially financial advisors) to support the restructuring;
- to provide the information to the Creditors and their advisors that is necessary to evaluate the economic situation of the debtor, as defined on a case-by-case basis;
- the debtor is to provide a written restructuring concept;
- to present the restructuring concept to the Creditors; and
- the commercial owners shall present their suggestion for an appropriate reorganization contribution by them.

1.9 The selection of **external economic advisors** should be discussed with the debtor.

If a debtor does not have an external economic advisor, or if the Creditors have reservations about the existing external economic advisor, the Creditors may submit a recommendation consisting of three recognized advisors from which the debtor should replace or add to the existing advisor. If the debtor does not agree to engage one of the recommended advisors, the Creditors may bring in an additional economic advisor to check the plausibility of the work of the economic advisor (related to the Creditors' advisors, see point 4.5).

Also the economic advisor engaged by the debtor should be authorized and obliged to provide the Creditors with all necessary information to assess the possibility of reorganization.

1.10 The **economic and legal requirements** of the restructuring concept to be established during the standstill period are to be discussed between the debtor, the Creditors and the advisors in a kick-off meeting. The restructuring concept must be economically and legally sufficient to allow the Creditors to reach a careful decision whether to support the restructuring. To avoid the possibility that the restructuring concept does not meet these requirements, it is especially important to decide whether to prepare a prognosis for the

company‘s continued existence in the meaning of the insolvency law, for which individual companies such a prognosis should be prepared and what relevance group considerations have for the situation of individual companies.
For cases in which the restructuring concept must be issued in the form of a prognosis for the company‘s continued existence, and the prognosis depends on the implementation of certain internal and external reorganization measures, it should be established that these measures be presented to the Creditors separately.

2. Guideline

During the standstill period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or (otherwise than by disposal of their debt to a third party [together with the related obligations]) to reduce their exposure to the debtor but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced. (Second Principle of INSOL International's "Statement of Principles")

2.1 Depending on what is appropriate for the individual case, the Creditors agree whether a **factual standstill** is sufficient during the duration of the first standstill period, or whether already for this period a short**, written standstill agreement** should be concluded. The decision depends especially upon whether payments are due in the first standstill period and must be deferred.

2.2 The **following basic rules** should apply during the standstill period – independent of whether a factual standstill is granted or a written standstill agreement is concluded:

- Claims for repayment of principal amounts from the Creditors are to be deferred if

necessary to maintain solvency.

- Interest is to be paid by the debtor as possible.
- Increases of interest are to be avoided as much as possible after the Deadline.
- During the standstill period, the Banks should maintain the credit lines that existed at the Deadline and permit further repeated drawings thereunder. The amount available under these credit lines should correspond to the total amount outstanding at the time of the Deadline less off-settable cash assets at the Deadline (net balance).
- During the standstill period, there are no repayments to individual Banks. To ensure this in light of the ongoing payments of the debtor, there is a settlement of accounts between the Banks. That means that any reduction of outstanding amounts as compared to the utilization as at the Deadline is to be divided internally between the Creditors pro rata in relation to their relevant exposure at the Deadline (see point 1.7).
- From the Deadline (point 1.7) individual collateralization is strictly prohibited, except the security (i) can be perfected without any assistance whatsoever from the debtor (e.g., a signed collateral deed that can be registered) and (ii) does not comprise

a substantial asset value of the debtor in relation to total assets. Other securities that were not yet perfected at the Deadline are available to a common security pool for the Creditors (taking into account the waterfall as per point 8) and are to be made available to the pool even when at first a bilateral security arrangement is advantageous due to time considerations.

2.3 In individual cases, the standstill period can hold considerable **risks under voidance law**, especially maintaining revolving financing can be challenged under sec. 31 IO (adverse legal transactions). Legal and economic advice is necessary to assess the risks of voidance. The following aspects should be kept in focus:

- Under sec. 31 IO, a requirement for a claim under voidance law is the existence of material insolvency (insolvency or over-indebtedness under insolvency law). The fact that the debtor is in a restructuring does not necessarily mean that such material insolvency exists.

- Another requirement for a claim under voidance law is the existence of Creditor discrimination. It must be tested whe-

ther, due to the concession of a standstill, the potential insolvency estate is diminished (quota impairment). This must be determined on a case-by-case basis.

- As sec. 31, 1 Z 3 IO requires that the detriment cause was objectively foreseeable, the full details that speak against such an objective foreseeability should be documented. In single cases already the first restructuring concept presented by the debtor and its advisors can be drawn-up in the form of a "reorganization concept" that is not „clearly unfit" within the meaning of sec. 31, 1 Z 3 IO.

3. Guideline

During the standstill period, the debtor should not take any action that might adversely affect the prospective return to the relevant creditors (either collectively or individually) as compared with the position at the beginning of the standstill period. (Third Principle of INSOL International's "Statement of Principles")

3.1 Under consideration of the corresponding obligations of the Creditors under point 2.2, during the standstill period it is especially forbidden that the debtor undertakes the following activities without the consent of the Creditors:

- activities outside the normal course of business, especially the sale of significant assets;

- entering into new obligations in the broadest sense (including the issuing of letters of credit, leasing), except when it involves investing in replacements that are necessary for the operation of the business in the normal course of business; and

- granting new securities.

3.2 If the debtor is already insolvent or over-indebted within the meaning of insolvency law and therefore obligated to file for insolvency (Sec. 69 IO), then the debtor may take only those actions that are necessary to preserve its business operations and that do not diminish the future insolvency estate. In light of this obligation, the debtor alone has the responsibility to timely file for insolvency. The Creditors must refrain in this and any other respect from influencing the debtor‘s management.

4. Guideline

FOURTH GUIDELINE: The interests of relevant creditors are best served by coordinating their response to a debtor in financial difficulty. Such co-ordination will be facilitated by the selection of one or more representative coordination committees and by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole. (Fourth Principle of INSOL International's "Statement of Principles")

4.1 Due to the complexity of extra-judicial restructurings, it is necessary to set up organizational structures for the restructuring process as soon as possible. This aims at the organization and coordination of the Banks' efforts and the coordination of these efforts with the other Creditors. To this purpose, the Banks should appoint a consortium leader for the Banks who, depending on size and complexity, can set up a **steering committee** with other Banks.

4.2 The role of **consortium leader** should be assumed by the Bank with whom the debtor has the largest liability as of the Deadline (point 1.7).

The consortium leader of the Banks assumes a coordination and process-steering function. He should facilitate negotiations with the debtor and coordinate the provision of information to the Banks. He cannot, however, represent the other Banks such that he obligates them to pursue a certain course of action. Nor is it his role to take economic decisions for other Banks.

In particular, the following functions fall within the competence of the consortium leader:

- obtaining such information from the debtor that, in the view of the Banks, is necessary for a careful decision about supporting the restructuring;
- prompt provision of information provided by the debtor via conference calls and other appropriate means (e.g., electronic data room);
- issuance of information related to questions by Banks or the forwarding of these questions to be answered by the debtor or its advisors;
- coordination of process timing with the debtor, where possible taking into account the decision-making and approval processes of the Banks;
- coordination between individual Creditor

groups;
- coordination and supervision of the restructuring milestones with the debtor and its advisors;
- choice of the advisors who act for the Banks (see point 4.5);
- general coordination of the drafts of legal documents; and
- negotiations with commercial owners on an appropriate reorganization contribution.

Since the role of the consortium leader is limited to a coordination and process-steering function, his liability is reduced to the legal minimum (liability only for intent or grossly negligent behavior). The consortium leader is entitled to adequate compensation for his work.

4.3 If the size and complexity of the individual case so requires, additional Banks may be called in with which the consortium leader may form a **steering committee**.

Under leadership of the consortium leader, the steering committee takes over the functions described in point 4.2. The steering committee reaches its decision unanimously or according to the type of majority unanimously agreed in the by-laws.

4.4 If the size and complexity of the individual case so requires, additional coordination committees may be set up for other Creditor groups, acting as steering committee for the respective Creditor group. It is up to the respective Creditor group to form such a coordination committee. The debtor, the consortium leader, the steering committee or individual Banks may request at any time the formation of additional coordination committees.

4.5 To support the consortium leader / steering committee / coordination committee, **advisors** may be appointed by them who act on behalf of all members of the relevant Creditor group and who represent their joint interests. Depending on needs, this may include lawyers, auditors or other experts.

Depending on the complexity of the restructuring, the consortium leader / steering committee may decide

- to call in a "debt advisor" to efficiently guide the restructuring process; and
- to call in an own economic advisor to assess the debtor's ability to reorganize independent from the debtor's economic advisor (supervisor).

In selecting the advisors, attention is to be paid that they possess the relevant experience and competence and are in a position to provide impartial counsel to the benefit of all members of the relevant Creditor group.

The relevant Creditor group is to be immediately informed if the consortium leader / steering committee / coordination committee intends to appoint such advisors. If individual Creditors have valid reservations about appointing advisors or the choice of advisor, these are to be considered.

4.6 Each Creditor is at liberty to appoint its **own additional advisors**. However, Creditors should ensure that the appointment of their own advisors does not impair the efficiency of the restructuring process and that their advisors work constructively together with the group's advisors.
Remuneration of advisors who are appointed by individual Creditors is the sole responsibility of the appointing Creditor.

5. Guideline

During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to, all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors. (Fifth Principle of INSOL International's "Statement of Principles")

5.1 In coordination with the other Creditors, the consortium leader calls for all **documents** required by the Creditors in order to make a careful decision about supporting the restructuring.

This includes in particular the following documents:

- table of liabilities towards banks (exposure, credit lines);
- table of securities (including securities from shareholders) including date of title and perfection;
- changes of liabilities since the Deadline (point 1.7);
- table of all liabilities;
- list of all assets;
- assets available as additional collateral;

and

- short-term liquidity plan.

5.2 The information provided by the debtor should be made available to all Creditors at the same terms. To simplify communication, an **electronic data room** should be set up whenever possible.

5.3 The debtor's **restructuring concept** (point 1.11) to be issued together with its advisors should be made available to the Creditors in such a timely manner that they have enough time to assess it both legally and economically. Questions about the restructuring concept are to be presented to the debtor and its advisors in an orderly process and are to be answered by them in writing. The Q&A during the presentation of the restructuring concept should, however, be limited to key points of the concept.

The Creditors can request additional reorganization measures that are to be considered by the debtor and its advisors as they formulate and amend the restructuring concept.

Legal or economic questions that are not satisfactorily answered by the debtor or its advisors are to be clarified with external advisors.
For the case where the restructuring concept is

the foundation for a prognosis for the debtor's the continued existence, it is to be determined whether the legal requirements for such a prognosis are satisfied.

5.4 Next to the restructuring concept, the Creditors must also be allowed to simulate alternative scenarios. In this respect, external experts may be called in if needed.

6. Guideline

SIXTH GUIDELINE: Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the beginning of the standstill period. (Sixth Principle of INSOL International's "Statement of Principles")

6.1 The restructuring concept presented by the debtor is the foundation for the conclusion of a **restructuring agreement**, which follows the first standstill period and establishes the legal framework and key points of the implementation of the restructuring concept and the restructuring phase.

6.2 The concrete content of the restructuring agreement depends on the individual case; therefore, these Guidelines cannot stipulate any details about such content. The basic concept of the restructuring agreement should, however, be that it leads to harmonization of key contractual provisions in the sense of a **framework agreement**, so as to provide both the Creditors and the debtor with legal security for the duration of the restructuring.

Typically the restructuring agreement regulates, for example, grounds for termination, covenants, reporting obligations and the obligation to implement the reorganization measures.

If the restructuring concept foresees restructuring contributions from the commercial owners of the debtor, then such contributions are to be set out in the restructuring agreement and the economic owners should accede to the restructuring agreement with respect to the relevant provisions.

6.3 The decision of whether a Creditor supports the presented restructuring concept is exclusively up to its corporate bodies, which are to decide in accordance with **internal and external legal provisions**. Notwithstanding these legally binding general conditions, the Creditors will keep in mind that an extra-judicial restructuring requires the constructive cooperation of all participants, and the lack of participation of individual Creditors can also contribute to a negative decision by the other Creditors when a restructuring concept may have otherwise been positively received. It cannot be expected from other Creditors that they assume additional burdens from a re-

structuring when individual Creditors take advantage of the risk positions of others and refuse to cooperate in the restructuring.

6.4 The goal of the restructuring process is, therefore, that **each Finance Creditor becomes a contracting party** to the restructuring agreement and a contributor to the restructuring of the debtor.

In individual cases, legal and tax reasons may make it necessary that certain Finance Creditors (e.g., foreign Finance Creditors) conclude bilateral agreements with the debtor or its relevant local subsidiary. Such bilateral agreements should reflect the key points of the restructuring agreement and implemented contemporaneously therewith.

6.5 Depending on what is most convenient, drafting of the restructuring agreement should begin in parallel with the restructuring process, or only after a positive decision by the Banks as to their support of the restructuring. This decision is for the consortium leader / steering committee to make.

7. Guideline

Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should, unless already publicly available, be treated as confidential. (Seventh Principle of INSOL International's "Statement of Principles")

7.1 A requirement for a careful decision by the Creditors is **timely and transparent information** about all circumstances material to such decision (see also point 5).

In order for the Creditors to trust the restructuring process and its successful conclusion, it is crucial that all Creditors taking part in the restructuring receive the same information about the debtor's business, and that all suggestions the debtor submits to its Creditors are shared with all of them. This also includes different suggestions to different Creditor groups, so as to allow each Creditor to assess the balance of the restructuring.

An electronic data room can be used to meet

these information requirements.
Also, if foreign-language-speaking Creditors participate, an appropriate procedure is to be chosen that integrates these Creditors into the restructuring process.

7.2 The information requirements of the Creditors are opposed to the **confidentiality requirements** of the debtor. Respecting the confidentiality of the information that the debtor has made available and the confidentiality of the ongoing negotiations is essential to the success of the restructuring process. In the restructuring process, the Banks are to release each other from banking secrecy so as to permit a direct exchange of information in the interest of the restructuring (see point 1.3). For third parties, however, banking secrecy remains in place if not otherwise expressly waived by the debtor.

Other Creditors that are not under a legal duty of secrecy should, in connection with the restructuring process, be contractually committed to confidentiality. This might be done in connection with the granting of access to the data room.

For debtors who are financed on the capital markets, provisions on insider trading and prohibited market manipulation are to be observed.

8. Guideline

If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors. (Eighth Principle of INSOL International's "Statement of Principles")

8.1 The provision of fresh liquidity during the **first standstill period** becomes an issue only when the standstill measures (point 2) and additional liquidity measures to be taken by the economic owners are insufficient to maintain the debtor's ability to pay.

If fresh liquidity is required until the decision about the restructuring concept, then this **bridge financing** should be provided by all Banks pro rata to their exposure as at the Deadline (see point 2.2 in relation to point 1.7), taking into account the risks of legal challenge. Non-participation in the bridge financing should therefore be the exception, which should be applied only in exceptional, merited circumstances.

8.2 Should it result from the restructuring concept

that a **reorganization financing** for the restructuring phase is required, the Banks are to be promptly notified of this circumstance and of the respective financing requirements. The respective financing requirements for each Bank are assessed in relation to their exposure at the Deadline (see point 2.2 in relation to point 1.7).
In the interest of constructive cooperation between the Banks it is commonly understood that **each Bank**, after the individual assessment of the prospects of the debtor's reorganization and taking into account

- its risk position in the concrete case,
- its legal and economic options, and
- the impact of its decision on the actual restructuring and future restructurings

should make a proportional contribution to the reorganization financing. Non-participation in the reorganization financing should therefore be the exception, which should be used applied in exceptional, merited circumstances.

8.3 Additional liquidity in the form of bridge financing or reorganization financing has priority over all financial obligations of the debtor that exist at the Deadline (point 1.7; *super senior*). This applies in respect of repayment as well as collateralization.

8.4 The granting of additional liquidity through the Banks in the form of bridge financing or reorganization financing depends fundamentally on the readiness of the **economic owners** to make an appropriate contribution to the debtor's restructuring.

The suitability of the owners' contribution is to be assessed on a case-by-case basis taking into account the contributions already made and the owner's economic abilities.

If the owner makes no suitable contribution to the restructuring, this is to be considered in the configuration of the restructuring agreement and security package.

8.5 The **remaining Finance Creditors** (especially factoring companies, trade credit insurers, deposit insurers, guarantors, [e.g., AWS, ÖKB], leasing companies and bond holders) should – in connection with the granting of additional liquidity by the Banks, and taking into consideration point 8.2 of the Guidelines – make an appropriate contribution to ensure the debtor's liquidity, and should especially take no measures that work against the restructuring. In this respect, please refer to the Guideline annexes.

annex 1
trade credit insurers

Introduction

Constructive participation of trade credit insurers is very important for the success of extra-judicial restructurings. The Guidelines for Restructuring in Austria (the "**Guidelines**") thus refer to trade credit insurers in various places, especially with regard to their timely inclusion in the Creditors' meeting.

Since the business model for trade credit insurers is different than that for Banks, the Guidelines cannot be bluntly applied to trade credit insurers. It therefore made sense to cover the participation of trade credit insurers in extra-judicial restructurings in a separate annex attached to the Guidelines.

As with the Guidelines, the only goal of this annex is to improve the restructuring processes with the aim of increasing efficiency for all affected parties. It does not contain any binding regulations upon which legal claims may be brought. It does, though, document the common understanding that the trade credit insurers – while considering the special features that arise from their business model – are prepared to bring a valuable contribution to extra-judicial restructurings that are oriented to the Guidelines.

1. Business model for trade credit insurers

1.1 Unlike Banks, trade credit insurers have no direct legal relationship with the debtor. Only in the case of the debtor's insolvency do they become its Creditor.

The only business partner of trade credit insurers is the insured party (i.e., the debtor's supplier), for whom the trade credit insurers (i) check and monitor the solvency of the Creditor and (ii) assume the *del credere* risk in the case of the debtor's insolvency.

1.2 With regard to the assumption of the *del credere* risk, the trade credit insurers set credit lines that are – for future deliveries – always revocable with respect to the insured party. The credit decisions are usually taken without security. Retention of title is the only requirement for effective insurance protection.

Utilization of the credit line varies and is not known to the trade credit insurer. Determination of the utilization of the credit line is possible for the trade credit insurer only in cooperation with the insured party and so has a public effect.

1.3 Still, the decision whether the insured party will supply the debtor is taken solely by the insured

party. The insured parties are free not to supply even if there is a credit line available. Conversely, they are also free to disregard the credit decision of the trade credit insurer and "to supply at their own risk".

Insured parties also carry a considerable deductible in compensation cases.

2. Specific guidelines for trade credit insurers

2.1 While considering the circumstances of the individual case, trade credit insurers should be promptly included in the process of the extra-judicial restructuring.

2.2 The expectation of the debtor and the other Finance Creditors that the trade credit insurers will make a meaningful contribution to the extra-judicial restructuring depends on the trade credit insurers' promptly receiving the information related to the debtor to which the other Finance Creditors in the restructuring have had access.

2.3 The trade credit insurers are aware that, in the first phase of the restructuring in which the possibility of reorganization is assessed, it is important to avoid an additional liquidity burden for the debtor by restricting credit limits from the trade credit insurers.

For restructurings in which the trade credit insurers are promptly included and for which it is agreed that the possibility of reorganization of the debtor should be assessed, the trade credit insurers are prepared – for the duration of the first standstill period (see point 1.8 of the Guidelines) – to implement a so-called "coverage freeze". That means that, with respect to each supplier, they will not unilaterally decrease the available credit limit below the amount of the relevant supplier's utilization as at the Deadline. It will be observed that trade credit insurers may not undertake to extend credit limits between suppliers, nor may they influence whether suppliers are prepared to use existing credit limits.

2.4 The trade credit insurers are aware that knowledge of the available credit limits is vital for the debtor's short-term liquidity planning. Such liquidity planning is also the basis for the decisions of other Creditors.

Due to legal data protection grounds, trade credit insurers' publicizing details about individual credit limits for individual suppliers would be possible only with the agreement of the insured party. However, the trade credit insurers are prepared when possible to determine the total volume

of use of credit limits and to provide this to the debtor.

2.5 Since retention of title by the suppliers is a requirement for effective insurance protection, the possibility to improve such agreements is a requirement for the trade credit insurers to maintain credit limits in the amount of the utilization as at the Deadline.

2.6 Despite their cooperation in the first standstill phase, the trade credit insurers reserve the right to decide – based on the restructuring concept to be presented by the debtor (at the end of the first standstill phase) and all other information available to the trade credit insurers – whether, and if so, to what extent they are prepared to allow credit limits for future deliveries to the debtor. Since without this information the debtor is not in the position to present a liquidity plan and a possible prognosis for the company‘s continued existence, the trade credit insurers are prepared to share their decision with the debtor. A positive decision by the trade credit insurers is also non-binding. The debtor cannot infer from it any type of right whatsoever that deliveries to it in the intimated scope are insured. If the trade credit insurers are prepared to accompany the debtor’s

restructuring with credit limits, they should issue a declaration corresponding to the form below so that this commitment can be taken into consideration when drafting the prognosis for the company's continued existence.

2.7 It is to be observed that the trade credit insurers will continuously monitor the solvency of the debtor and that the credit limits for the debtor can always be cancelled. Since the cancellation of credit limits would immediately affect the liquidity plan and the possible prognosis for the company's continued existence, the trade credit insurers are prepared to promptly communicate to the debtor changes to their credit decision during the restructuring.

[Debtor]
[Management]
[Address]

Trade credit insurance [Debtor]

Dear Ladies and Gentlemen,

We refer to the negotiations between [the debtor] and the financing Banks on the conclusion [of a restructuring agreement]. We are also aware of the restructuring concept dated [date] (the "**Restructuring Concept**"). As already mentioned, we as trade credit insurer [of the debtor] do not wish to formally join the restructuring agreement.

We can, however, inform you that we – so far and as long as our trade credit insurer conditions so allow – are prepared to back [the debtor] until further notices with a maximum volume of [to add] with trade credit insurance limits for suppliers who are currently insured with us.
This commitment is subject to the following conditions:

- [the restructuring agreement] is entered into with the Banks; and
- [the debtor], at the request of our customers, agrees in writing to a simple retention of title.

We are aware that the [restructuring agreement] provides for a standstill until [date] and that the Banks have agreed to this standstill on the condition that [the debtor] implement the restructuring measures set out in the [restructuring concept]. Our agreement to back [the debtor] with trade credit insurance limits, too, is conditional on this stipulation. We therefore expect that, just as with the Banks, we will be informed as to the implementation of and adherence to the restructuring concepts.

Kind Regards

[trade credit insurers]

annex 2
leasing companies

Introduction

Constructive participation of leasing companies is very important for the success of extra-judicial restructurings. The Guidelines for Restructuring in Austria (the "**Guidelines**") thus refer to leasing companies in various places, especially with regard to their timely inclusion in the Creditors' meetings.

Since the risk position of leasing companies is different than that of Banks, the Guidelines cannot be bluntly applied to leasing companies. It therefore made sense to cover the participation of leasing companies in extra-judicial restructurings in a separate annex attached to the Guidelines.

As with the Guidelines, the only purpose of this annex is to improve the restructuring processes with the aim of increasing efficiency for all affected parties. It does not contain any binding regulations upon which legal claims may be brought. It does, though, document the common understanding that the leasing companies – while considering the special features that arise from their risk position – are prepared to bring a valuable contribution to extra-judicial restructurings that are oriented to the Guidelines.

1. Risk position of leasing companies

1.1 Leasing companies, as owners of the financed

leasing objects, have a similar position to pledgees. However, through their ownership position and asset experts, leasing companies are in a better position to ensure that the financed asset retains its value and have easier sales opportunities should the debtor fail in its payment obligations. As a rule, these two aspects mean that leasing companies ultimately find themselves in a better risk position than pledgees.

1.2 The risk position of leasing companies is to be differentiated depending on the concrete leasing arrangements.

Leasing financing for simple equipment of a debtor (e.g., copier, printer) is not normally part of a restructuring and is also not considered in the evaluation of the risk position. In the evaluation of the risk position of leasing companies, leasing financing for real property, machines and facilities is especially considered.

Leasing financing where the outstanding amount is less than the value of the leasing object in case of sale means that the leasing company is fully collateralized. From this differ leasing financings that are economically underfunded because of location, quality or obstacles to a sale of the lea-

sing object at the Deadline. In this case, the risk position of the leasing company is similar to that of a Creditor who is not fully collateralized.

The risk position of the leasing company also depends on the loss of value in the leasing object resulting from the use envisaged in the contract during the period of the leasing contract. With leasing objects that retain their value (e.g., real estate), the risk position differs from the risk position in connection with leasing objects that are subject to scheduled depreciation due to their use (e.g., certain machines, vehicles).

1.3 The risk position of the leasing company to be evaluated individually ultimately determines the expectation towards and readiness of the leasing company to contribute to extra-judicial restructurings.

2. Specific guidelines for leasing companies

2.1 In the first Creditor meeting (point 1.4 of the Guidelines), the debtor informs the financing Banks about current leasing financings and which objects are leased thereunder. Building on that, the debtor discusses with the Banks whether it is expected that the leasing companies will contribute to the extra-judicial restructuring in light of their

different risk position, described in point 2.2.

2.2 If it is determined that, for the success of an extra-judicial restructuring, it is necessary that the leasing companies also contribute to the restructuring, the debtor will **promptly communicate this expectation to the leasing companies** and invite them to the All Lenders Meeting (point 1.5 of the Guidelines).

The expectation of the debtor and the other Finance Creditors that the leasing companies will make a meaningful contribution to the extra-judicial restructuring depends on the leasing companies' promptly receiving the information related to the debtor to which the other Finance Creditors in the restructuring have had access.

2.3 Depending on the complexity of the restructuring, it may be appropriate to set up a **coordinating committee for the leasing companies** (point 4.2 of the Guidelines), which takes over the following tasks in particular:

- information of leasing companies through conference calls and suitable media (e.g., electronic data room);
- coordination with the consortium leader/ Steering Committee;

- selection of possible advisors who act for the leasing companies in case the interests of the leasing companies are not adequately looked after by the advisors chosen by the other Creditor groups; and
- coordination of the drafts of the legal documents.

2.4 In the **first standstill period** (point 1.8 of the Guidelines), the leasing companies will (provided that they have been promptly included in the extra-judicial restructuring) take no measures that could lead to additional liquidity burdens for the debtor (e.g., cancellations, increased margins). Further, in the first standstill period, the leasing companies will take part in a standstill agreement (point 2.1 of the Guidelines) if this is necessary to maintain the debtor‘s ability to pay.

2.5 Taking into account the different risk positions described in point 2.2 of this annex, the leasing companies should promptly work out with the debtor the **key legal and economic points** for possible **contributions to the restructuring** by the leasing companies. In this way it should be ensured that the leasing companies are promptly brought into the debtor’s restructuring concept and that the expectations directed toward them can be discussed with the debtor and the other

Finance Creditors.

The reason for involving the leasing companies is so that the restructuring contributions negotiated with them can become a part of the debtor's restructuring concept, even if it is necessary that their contractual implementation occur at a later point in time.

2.6 In essence, the leasing companies' **restructuring contributions** can consist of a deferment of leasing rates, an extension of the leasing period, an improvement of the conditions for the debtor, or a combination of these instruments.

The content and form of these restructuring contributions depend on the type of the leasing financing, the recoverability of the leasing object and the stability of its value. The concrete implementation and allocation of a restructuring contribution for individual leasing financings is ultimately up to the leasing companies, while giving equal weight to the economic requirements of the debtor.

For legal reasons, the leasing companies are, in fact, not in the position to directly contribute in the provision of fresh liquidity (point 8 of the Guideli-

nes). But they can, through the above described restructuring contributions, substantially support in the restructuring phase the maintenance of the company's ability to pay.

2.7 The **amount** of the leasing companies' restructuring contributions depends on

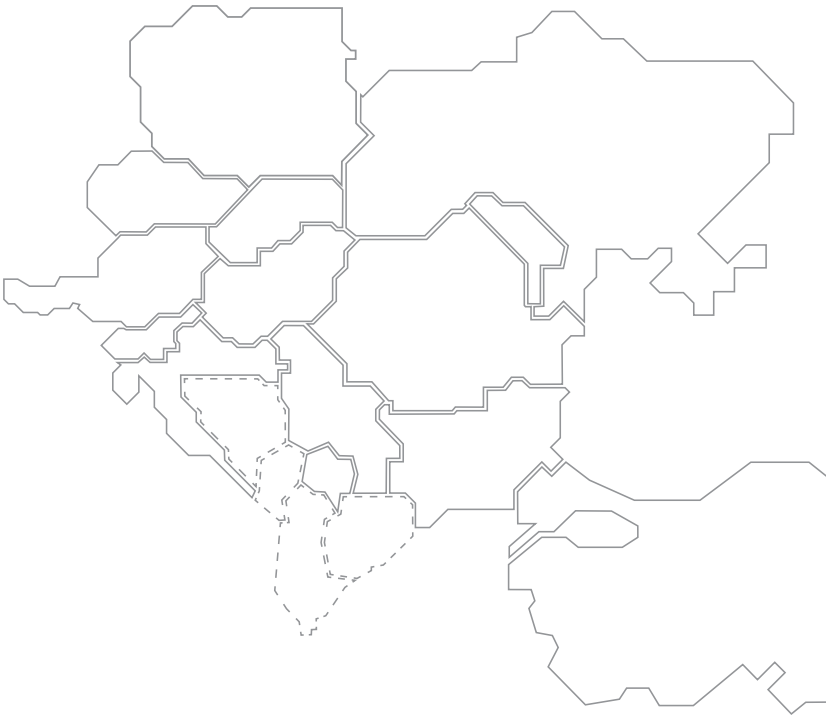
- the debtor's economic requirements;
- the leasing companies' risk position; and
- the restructuring contributions of other Finance Creditors.

The leasing companies are aware that a successful extra-judicial restructuring requires that a balanced relationship between the financial Creditors be created.

2.8 Despite their cooperation in the first standstill period, the leasing companies reserve the right to decide whether they are prepared to support the debtor's restructuring concept, based on the **restructuring concept** to be presented (at the end of the first standstill period) by the debtor and on additional information to be provided to the leasing companies by the debtor.

If this is the case, the leasing companies will contractually establish their restructuring contribu-

tions with the debtor. Depending on the circumstances of the individual case, this should either be implemented in the general restructuring agreement concluded with all Finance Creditors or in a separate agreement, to be concluded simultaneously or promptly after the general restructuring agreements and oriented to the key points of the general restructuring agreement.



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