THE LENDING AND SECURED FINANCE REVIEW

SEVENTH EDITION

Editor
Azadeh Nassiri

THE LAWREVIEWS

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PREFACE

This seventh edition of *The Lending and Secured Finance Review* contains contributions from leading practitioners in 21 different countries, and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions, and on the challenges and opportunities facing market participants. I would also like to thank our publishers without whom this review would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

Azadeh Nassiri
Slaughter and May
London
June 2021

Chapter 1

AUSTRIA

Leopold Höher[1]

I OVERVIEW

Since the onset of the covid-19 pandemic in the first quarter of 2020, many companies are trying to best position themselves to cope with evolving economic circumstances and new challenges. Against this background, both lenders and borrowers are taking a proactive approach to overcome covid-19 implications with rapid responses, either by means of ramping-up operations and restructuring the business or otherwise aiming at thriving through the pandemic. Driven by that, need for liquidity increased and lending activity in Austria remains strong.

Austrian lenders are very active in both the Austrian lending market and the central and eastern Europe (CEE) lending market, given that several Austrian credit institutions have a strong market presence in the CEE region. As far as financings in the CEE region are concerned, Austrian lenders provide financing to Austrian borrowers active in the CEE region and to non-Austrian borrowers located in the CEE region.

Moreover, Austrian lenders' participation in Anglo-Saxon and German syndicated financing transactions comprises a fair amount of their overall lending activity (either with or without the involvement of an Austrian borrower or security provider).

When focusing on the Austrian law financing market, infrastructure deals and public–private partnership transaction structures aiming at further modernising public and social infrastructures (e.g., glass fibre networks) are growing particularly rapidly. Also, because of the current borrower-friendly interest rate environment, borrowers are seeking to refinance their existing debt on more favourable and commercially attractive terms.

What can also be recognised is a constantly growing interest of US- and UK-based alternative lenders and investment funds in the Austrian lending market since they were active in several significant transactions in 2020. Further, owing to the ongoing digitalisation in the financial industry, a rapidly growing demand can be seen for start-up and technology-driven financing transactions (e.g., bond issuances on blockchain technology).

A fair bulk of Austrian law-syndicated loan transactions are documented on the basis of the Loan Market Association (LMA) recommended template forms (leveraged or investment grade, as applicable) adapted to meet Austrian law requirements. However, depending on the specific circumstances of the transaction, including the size of the loans made available, the documentation standard used may be fairly shortened compared with the LMA (leveraged) template.

1 Leopold Höher is a partner at Wolf Theiss Rechtsanwälte/Attorneys-at-Law.

Moreover, the number of non-performing loan transactions in Austria (and also the CEE region) continued to increase in past years, and this field is expected to become even more active (also considering the covid-19 pandemic). Those transactions included sales of Austrian banks in the region, and of non-performing loans and leasing portfolios.

II LEGAL AND REGULATORY DEVELOPMENTS

i Certain regulatory aspects with respect to (cross-border) lending business

Lending in Austria generally forms part of a comprehensive list of banking activities enumerated in the Austrian Banking Act. Lending may thus only be conducted on a commercial basis in Austria if the relevant loan provider has been granted an Austrian banking licence or to the extent it is validly passported into Austria under Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (CRR) if no exemption is available. Furthermore, any credit institution authorised in a Member State of the European Economic Area may perform the activities referred to in Nos. 1–15 of Annex I to the European Directive 2013/36/EU in Austria by either the establishment of a branch or by way of the freedom to provide services. While not explicitly stated in the Austrian Banking Act, certain structural alternatives or exemptions when a lender does not hold the aforementioned banking licence or passport may be available and worth further exploring on a strict case-by-case basis.

The Austrian Banking Act may also be applicable if the lending activities are conducted from a place outside Austria (i.e., if cross-border activities are carried out).

However, even if not explicitly stated in the Austrian Banking Act, the existence of a lending activity presumes, at least to a certain extent, engagement in the domestic market. Whether a lending business will be considered to be carried out in Austria for the purposes of the Austrian Banking Act may be difficult to determine, as there is no law or regulation to establish the requirements that would have to be fulfilled.

Following discussions in academic literature and decisions rendered by the Austrian Supreme Court and the Austrian Supreme Administrative Court, respectively, there is a non-exhaustive set of factors to be taken into consideration when assessing whether a lending activity is carried out in Austria. The risk that the result of a proposed transaction might be considered to constitute 'lending business' could be mitigated by avoiding any geographical connection to Austria, such as by (1) performing any negotiations in the context of the envisaged lending outside Austria; (2) executing and keeping all arrangements concerning the loans outside Austria; and (3) having all accounts relevant in the context of the lending arrangement outside Austria (ensuring, in particular, that any disbursements and repayments are made from, and to, accounts located outside Austria).

Conducting licensable activities (such as lending activities) with respect to Austrian banking law in Austria without a licence (or without benefiting from an exemption) could trigger at least administrative fines and civil law sanctions; criminal sanctions may, under certain circumstances, also be imposed. Furthermore, the law provides that whoever carries out the lending activities unlicensed shall not be entitled to any compensation connected with such activities (e.g., interest, commissions, fees); sureties and guarantees granted in connection therewith may be ineffective.

Given the increased appetite and presence of funds in the Austrian lending market, regulatory exemptions for the respective regulated activities become more and more important and are a key structuring element of a lending transaction.

ii Basel III and IV implementation

As far as the Basel III and IV framework is concerned, this has been and, as regards Basel IV, will be implemented in Austria by the CRR and the transposition of the Capital Requirements Directive IV into the Austrian Banking Act, both applicable since 1 January 2014. Basel IV will be implemented by Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019, amending the CRR as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements (CRR II).

Furthermore, several directly applicable Commission-delegated regulations, based on regulatory technical standards drafted by the European Banking Authority, complement this legislative package.

The aim of this extensive reform is to strengthen the EU banking sector by introducing higher capital requirements in terms of quality and quantity, new liquidity requirements, improved risk management and governance, and strengthened banks' transparency and disclosure.

iii Intensification of know your customer checks

The core part of the Financial Market Anti-Money Laundering Act (implementing Directive 2015/849 (EU) of the European Parliament and the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD IV)) has been applicable since 1 January 2017 and has been amended meanwhile in course of the introduction of Directive 2018/843 (EU) (i.e., the fifth Anti-Money-Laundering Directive (AMLD V)). The Financial Market Anti-Money Laundering Act applies, among others, to credit institutions and financial institutions pursuant to the Austrian Banking Act as well as CRR institutions pursuant to Section 9 of the Austrian Banking Act, and has a significant impact on, inter alia, the know-your-customer checks to be conducted by the respective institutions in relation to their customers. Each such institution is obliged to take appropriate steps to identify, assess and mitigate the risks of money laundering and terrorist financing, taking into account risk factors, including those relating to their customers, geographic areas, products, services, transactions or delivery channels, and thereby preventing the use of the EU financial system for the purposes of money laundering and terrorist financing.

iv Introduction of an Austrian Beneficial Ownership Register

The AMLD IV requires Member States to establish a central register on the beneficial ownership of corporate and other legal entities incorporated within each Member State's territory. The Austrian Beneficial Owner Register Act (implementing Articles 30 and 31 of the AMLD IV and its most recent update, the AMLD V) provides that as of 1 June 2018 Austrian entities (with some exceptions) shall register their ultimate beneficial owners (UBOs) in the Austrian Beneficial Owner Register. Austrian entities thereby have to disclose, inter alia, name, residence, birthday and citizenship of their UBO. A UBO by definition is a natural person. There are several routes to establish one or more UBO (e.g., based on direct or indirect ownership, or control over the Austrian entity), such as a natural person holding more than 25 per cent of the capital in the Austrian entity. If no UBO can be identified, the senior managing official (e.g., the management board) of the Austrian entity

must be registered. Currently, this register is not publicly accessible. However, third parties can inspect the register when proving a legitimate interest. Furthermore, various authorities and legal representatives are entitled to inspect.

v Legal and administrative developments in the context of the covid-19 pandemic

Regulation (EU) 2020/873 of the European Parliament and of the Council of 24 June 2020 (amending CRR and CRR II as regards certain adjustments in response to the covid-19 pandemic) contains amendments to the EU prudential framework for banks, primarily the CRR, to encourage lending by banks to mitigate the economic impact of the covid-19 pandemic. The purpose of that is to encourage banks to continue lending to businesses and households during the covid-19 pandemic, thereby absorbing adverse implications of the pandemic. The Commission's view is that, although the existing prudential and accounting frameworks allow banks a degree of flexibility in their response to covid-19, limited changes to specific aspects of the CRR are also necessary. The Regulation makes targeted 'quick fix' amendments to the CRR for this purpose. It also reflects policy decisions taken by the Basel Committee on Banking Supervision in response to the pandemic.

III TAX CONSIDERATIONS

i Austrian withholding tax

Domestic income from the granting of capital (capital investment) is generally subject to a withholding tax of 25 per cent or 27.5 per cent under specific circumstances, unless an exemption applies. In a typical loan or credit transaction involving a (domestic or foreign) corporate entity as a lender and an Austrian borrower or an Austrian branch of a foreign borrower, no such withholding tax applies. This is because interest from private loans and other non-securitised receivables, which are not based on a bank deposit (or similar banking transaction), is not subject to withholding tax. Furthermore, interest received by a corporate entity that has neither its seat nor its place of management in Austria is not subject to tax in Austria.

In a typical loan or credit transaction involving a (domestic or foreign) corporate entity as a lender and an Austrian borrower or an Austrian branch of a foreign borrower, interest is generally tax deductible at the level of the borrower. However, there are two important exceptions.

No deduction is possible for interest in connection with debt that served the acquisition of shares if the borrower purchased the shares, directly or indirectly, from a group company or from a controlling shareholder. This applies also where the loan is provided by an unrelated lender.

Further, in line with the Anti-Tax Avoidance Directive (ATAD), the Austrian legislator introduced an interest limitation rule. Pursuant thereto, an interest surplus in a fiscal year is only deductible to the extent of 30 per cent of the EBITDA for tax purposes for that fiscal year. An interest surplus shall be deemed to exist to the extent that deductible interest expenses exceed taxable interest income in the fiscal year. Several exceptions apply. Particularly, an interest surplus shall be deductible up to an amount of €3 million per tax assessment period, meaning that excess interest up to this amount – irrespective of the amount of the EBITDA – shall be immediately deductible as an expense.

If the lender is a related party of the borrower and the lender is resident in a low-tax jurisdiction, the borrower may not be allowed to fully deduct the interest under Austrian domestic law.

ii Austrian stamp duty

The Austrian Stamp Duty Act contains an exhaustive catalogue of legal transactions that are in principle subject to Austrian stamp duty, provided that a written document is executed and a specific nexus to Austria exists.

Though no Austrian stamp duty is triggered on loan and credit agreements per se they may still be stamp duty-sensitive if they contain or refer to other stamp-dutiable transactions. In the context of loan and credit agreements, such stamp-dutiable transactions typically encompass assignment and transfer agreements (e.g., assignments or transfers by lenders), security assignment agreements, suretyships, assumptions of debt as a joint debtor and mortgages.

The computation of the assessment base is regulated for each type of transaction in the Austrian Stamp Duty Act and varies according to the specific conditions of the transaction involved. In general, the stamp duty is calculated as a percentage of the contract value (e.g., the consideration agreed upon or, in the case of security transactions, the secured amount). However, the exact amount of stamp duty due must be assessed in each individual case.

The Austrian Stamp Duty Act provides for certain exemptions from Austrian stamp duty; for example, an important exemption in the context of debt trading is the exemption from stamp duty for assignments between credit institutions, if the institutions satisfy certain requirements.

Furthermore, all types of transactions that serve to secure a loan or credit agreement (with the exception of bills of exchange, which may, under certain circumstances trigger Austrian stamp duty) may be exempt from Austrian stamp duty.

In the case of stamp duty-sensitive transactions, in relation to which no exemption applies, various other schemes to mitigate the risk of triggering Austrian stamp duty are available. An option to mitigate the stamp duty risk that is commonly used in financing transactions is to execute all stamp duty-sensitive documents outside Austria and also to keep these documents outside of Austria (it is recommended that stamp duty-sensitive documents also contain a stamp duty-related warning note to strengthen parties' awareness). After execution, the original stamp duty-sensitive document and all certified copies thereof must stay outside Austria. Further, documents that refer to stamp duty-sensitive documents and the dutiable transactions (e.g., substitute documentation, notices with respect to the stamp-dutiable transaction or documents signed by either of the parties that refer to the stamp-dutiable transaction) must not be sent to or from Austria.

With respect to standard indemnities by the borrower in respect of, inter alia, stamp duty, as foreseen in the LMA-recommended template forms, the Austrian Stamp Duty Act contains specific provisions on which party is liable for stamp duty. In the case of security transactions, this will usually only be the secured party; in most other stamp-dutiable legal transactions, both parties of the legal transaction are jointly and severally liable for stamp duty triggered. Thus, Austrian tax authorities are not legally bound by agreements between the parties that deviate from the statutory provisions. However, the tax authority shall, at its discretion (and as far as this does not contradict the statutory rules), at first approach the party that shall bear any stamp duty that is triggered as agreed between the contractual parties.

iii FATCA

As far as the Foreign Account Tax Compliance Act (FATCA) is concerned and how it has affected lending transactions in Austria, LMA-based loan agreements typically include boilerplate FATCA-related provisions as part of the section on tax gross-up and indemnities. In loan agreements between domestic parties, however, FATCA provisions are rather uncommon. From a purely Austrian tax perspective, FATCA provisions do not affect the general tax clauses.

IV CREDIT SUPPORT AND SUBORDINATION

i Security

Austrian law recognises various types of securities, and lending transactions typically involve pledges over various asset classes, such as receivables (trade receivables, intra-group receivables, insurance receivables, etc.), bank accounts, real estate and (to the extent applicable in the context of the security package) intellectual property rights.

In the context of structuring an Austrian security package, Austrian law does not recognise the establishment of security interests over a fluctuating pool of assets (i.e., no floating charge). A security may only be valid if the collateral assets as well as the secured obligations are specified, or at least specifiable.

A pledge or mortgage under Austrian law is an accessory right and will, therefore, be subject to the same legal consequences as the secured obligations, meaning that, for example, if the secured obligation is terminated or not valid, the same would apply to the pledge.

Furthermore, a pledge cannot be separated from the secured obligation, which means that it can only be held and enforced by the creditor of the secured obligation. In the context of Anglo-Saxon and German syndicated financing transactions, this is typically achieved by the use of (English or German law-governed) parallel debt concepts. As far as Austrian secured lending transactions are concerned, usually a joint-and-several-creditor structure allowing a security agent to hold the security is implemented, pursuant to which the security agent has its own entitlement to the secured claims in its own name and on its own behalf.

Because of its accessory nature, the pledge will cease by operation of Austrian law upon payment (or other discharge) of the underlying secured obligation in full.

For a security (*in rem*) to be validly established, a public act (perfection step), in addition to an agreement, is required. The steps to be undertaken to perfect the relevant security interest depend on the asset class. The necessary act of publicity for a mortgage is registration with the land register. As far as, for example, pledges over receivables are concerned, either the pledgor must make a corresponding annotation in its books and accounts or the relevant third-party debtor needs to be notified. In this context, as long as a third-party debtor has not been notified accordingly, the debtor may settle its obligations towards the pledgor with debt-discharging effect by paying to the pledgor.

Because, as outlined above, the concept of a floating charge is not recognised under Austrian law, the creation and perfection of security interests over movable assets would require the delivery of the collateral assets into the custody of the security agent or a delegate of the security agent acting as custodian. As a result of this requirement and related asset disposition control mechanics that need to be complied with to stand the tests of the Austrian courts, the taking of security over inventory depends on its importance (cost–benefit analysis) in the context of the security package.

In connection with costs associated with the establishment of securities, mortgages, for example, are subject to court fees for registration of the mortgages in the relevant land registers (in principle, 1.2 per cent of the secured amount) as well as stamp duties (in principle, 1 per cent of the secured amount), unless an exemption pursuant to the Austrian Stamp Duty Act applies (see Section III).

ii Guarantees and other forms of credit support

Guarantees are a very commonly used instrument in terms of credit support. Abstract guarantees under Austrian law are characterised by their non-accessory nature, meaning that any obligations under the guarantee remain unaffected by any changes to the underlying (secured) obligations.

However, in that context, despite the abstract nature of a guarantee, the validity, binding effect and enforceability may be limited or otherwise affected by, among other things: (1) equitable principles of general applicability of Austrian civil law (e.g., the prohibition to abuse legal rights or similar concepts); and (2) applicable insolvency, reorganisation, fraudulent conveyance, avoidance, moratorium or similar laws of general application relating to or affecting the enforcement of creditors' rights and remedies.

Thus, although in principle no defences or objections arising out of the arrangements underlying the (abstract) guarantee can be raised by a guarantor, a guarantor may, despite the abstract nature of the guarantee, raise defences and objections arising out of the guarantee agreement itself (if any). Such defences or objections may in particular concern (1) the invalidity of the guarantee agreement, (2) the issuance of an inadequate (payment) demand under the guarantee agreement or (3) the non-occurrence of the guaranteed event.

In terms of Austrian stamp duty considerations, though suretyships in principle would be within the catalogue of transactions that are subject to Austrian stamp duty, abstract guarantees, if structured carefully, should not trigger Austrian stamp duty as guarantee agreements are not within the scope of legal transactions enumerated in the Austrian Stamp Duty Act. In this respect, the Austrian tax authorities will only treat an agreement as a guarantee for stamp duty purposes if certain prerequisites are met. Moreover, according to a recent decision by the Austrian Supreme Court, a 'guarantee' securing the due performance of a debtor's payment obligations was qualified as a surety upon first demand for civil law purposes since, pursuant to that decision, the court held that the accessory nature is not entirely eliminated given the guarantor may be entitled to raise defences arising out of the underlying (guaranteed) obligations.

Other instruments of credit support used occasionally in the context of Austrian secured lending transactions are bills of exchange and letters of comfort (which may, depending on the letter's nature, qualify as either a strong or soft letter of comfort).

iii Priorities and subordination

As far as the ranking of (*in rem*) security interests is concerned, generally under Austrian law, the first come, first served principle applies, meaning that the timing of performance of the relevant perfection step is decisive for the ranking between competing security interests, with the earlier security interest being senior in rank to the later security interest.

Because Austrian law security (other than, for example, real estate) is not registered with any public registers but perfection of certain collateral assets is achieved via, for example, notices to third-party debtors, lenders have to rely on there being no encumbrance or negative pledge representations and undertakings provided for by the security provider.

For limitations that may affect the validity, binding effect and enforceability of a security interest, see Section V.

Subordination is typically achieved by either structural or contractual subordination. For purposes of contractual subordination, usually either intercreditor arrangements or subordination agreements are entered into.

V LEGAL RESERVATIONS AND OPINIONS PRACTICE

Legal opinions issued in Austria in the context of lending and secured lending arrangements contain a set of various legal limitations and qualifications that are typically also seen in other jurisdictions, as well as limitations reflecting various Austrian law specifics.

The key topics addressed in the limitations section usually comprise the following.

i General effects of insolvency proceedings

Any opinion statements rendered are subject to all limitations arising from the laws relating to insolvency, bankruptcy, liquidation, receivership, moratorium and reorganisation, including certain periods before the institution of the proceedings for which a transaction may be contested, and other laws affecting the rights of creditors (including secured creditors) generally, including the principle of equitable subordination. In particular:

a during the six months after the opening of an insolvency proceeding against an Austrian entity, agreements may not be terminated except for good cause if the exercise of such rights would endanger the carrying on of the insolvent's business by the receiver and provided the restriction does not constitute severe personal or economic disadvantages to a particular creditor;

b contractual stipulations providing for the right to withdraw from or cancel an agreement, or for an automatic termination in the event of opening of an insolvency proceeding against an Austrian entity, are not enforceable, if this was the only reason for withdrawing, cancellation or termination of an agreement; and

c security instruments may not be enforceable for six months from the opening of insolvency proceedings if enforcement would jeopardise the continuation of the Austrian entity's business unless, among other things, enforcement is inevitable to prevent the creditor from incurring severe personal or economic damage.

As far as clawback regimes are concerned, pursuant to Austrian law, transactions may be subject to an avoidance claim. General requirements for avoidance are that the challenged legal act took place within a certain 'suspect period' prior to the commencement of insolvency proceedings, the challenged legal action caused a discrimination of the other creditors and the effect of a successful avoidance claim would be to increase the bankrupt's estate. Grounds for avoidance include, among others, intentional discrimination of other creditors, avoidance because of squandering of assets, avoidance because of preferential treatment and avoidance because of knowledge of insolvency.

Further, any power of attorney – even if granted irrevocably – will automatically terminate upon the opening of insolvency proceedings over the relevant entity's assets.

ii Austrian capital maintenance rules

A rather strict system of protection of capital of companies against undue distribution to its shareholders applies to Austrian corporations and partnerships whose general partners consists merely of corporations. The concept is based on the principle that the entire set of assets of a company should be protected on behalf of the company and the company's creditors. This goal is reached by a set of capital maintenance rules, restricting the possibility of any direct or indirect distribution to shareholders or their affiliates. The most important exception is the right of the shareholders to receive dividend payments that are restricted to the amount of net profits as shown in the approved annual financial statement and not excluded from distribution by law or the articles of association.

Following these aims, a business transaction that provides for any value transfer to a shareholder or a shareholder's affiliates must be concluded on arm's-length terms supported by adequate consideration. In the absence of arm's-length terms, the transaction constitutes an unlawful repayment of capital and thus violates Austrian capital maintenance rules. Unlawful repayment of capital may be justified by specific corporate reasons that are in the best interest of the company. When assessing whether a transaction is entered into on arm's-length terms, not only must the specific conditions of the transaction be considered, but also whether a third party would ever enter into this specific transaction. In addition, all advantages to the company must be taken into account.

Austrian courts are interpreting this mandatory principle of Austrian law prohibiting repayment of capital from a company to its shareholders broadly. This prohibition also encompasses the granting of security interests by a company to secure a loan granted to its shareholders (upstream security) or to its shareholders' affiliates (side-stream security) without adequate consideration.

The legal consequence of a violation of the Austrian capital maintenance rules is that the received benefit may be null and void. In that respect, limitation clauses, which are usually included in the relevant lending or security agreement, attempt to partly preserve the security interest (or guarantee) if the court concludes that the security interest (or guarantee) violates Austrian capital maintenance rules, so that the amount secured or guaranteed would be reduced to what is permissible under Austrian law. Although this approach is market standard in financing transactions, no case law is available to confirm that a limitation clause achieves its desired purpose.

Generally, Austrian capital maintenance rules are applicable in relations between the company and its shareholders. However, a loan agreement or security agreement may be null and void, and a recipient of security or a third-party lender may not be able to claim the full amount of its loan and be liable for repayment of monies received, if it either knew or by gross negligence did not know that the transaction violates Austrian capital maintenance rules. Although there is no general obligation on a lender to verify or investigate this matter, such an obligation exits if there is a strong suspicion that a transaction violates capital maintenance rules.

iii Legal opinion practice

Legal opinions in (secured) lending transactions in Austria are usually provided by lenders' as well as by obligors' legal counsel. Pursuant to good market practice, legal advisers to the lenders are asked to render an enforceability opinion on the relevant financing documentation, and legal advisers to the obligors are asked to render the capacity opinion with respect to the (Austrian) obligors involved.

Legal opinions are typically addressed to the agent as well as to the finance parties that are an original party to the finance documentation as at the date on which the opinion is issued. In the context of syndicated financing transactions, opinion counsels are frequently asked to broaden the addressees to cover also persons becoming lenders during primary syndication within a predefined short period as at the execution of the relevant financing agreement. Typically, legal opinions may be disclosed to (but not relied upon by) persons if so required by applicable law, rule or regulation; any competent judicial, governmental or supervisory body; or with the prior written consent of the opinion-issuing counsel.

iv Choice of law – submission to jurisdiction

In principle, the courts of Austria will uphold and give effect to a choice of law. A submission to courts of a jurisdiction other than Austria is legal, valid and binding, subject to the qualifications referred to in Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations. It is subject to the rules regarding Austrian public policy and mandatory provisions of Austrian procedural law, insolvency law and corresponding applicable European legislation (in particular, Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Ia Regulation)) restricting the free choice of courts. Recognition and enforcement of foreign judgments must be in line with the terms of applicable EU legislation (in particular, the Brussels Ia Regulation) and are subject to the rules of procedure set out in the Austrian Enforcement Act and other statutory regulations.

VI LOAN TRADING

In Austria, loan participations are regularly traded. Transfers of loan participations are most commonly achieved by either an assignment of rights or a transfer of rights and obligations by way of assumption of contract, in which case the whole contractual position of the transferring lender would pass to the new lender (Austrian stamp duty issues need to be considered accordingly (see Section III)).

In terms of security interests granted in favour of the initial lender, the accessory nature of Austrian law security interests (other than, for example, abstract guarantees) requires that the beneficiary of the security and the creditor of the secured claims be the same person. If security is provided in the context of syndicated facilities, the use of security agent structures allows lenders to trade their debt without the security being adversely affected. However, any replacement of the security agent may result in the legal requirement to repeat certain acts of publicity in relation to the security to ensure that the security interests remain properly perfected in accordance with Austrian law.

Additionally, (funded and unfunded) sub-participations can be found frequently.

Any debt trading requires careful structuring because of regulatory requirements. In the context of debt trading, in particular, provisions encompassing banking secrecy rules need to be taken into account. Because Austrian banking secrecy and data protection rules are rather strict, these need to have already been considered at the stage of granting the loan, so that trading is not hindered by banking secrecy obligations.

VII OTHER ISSUES

Other issues that may be of particular interest for lenders in the context of (secured) Austrian financing transactions relate to Austrian companies being in financial crisis in accordance with the terms of the Austrian Act on Equity Replacements. In a financial crisis of a company, a loan granted by a qualified shareholder (i.e., a shareholder with controlling participation or with a participation of at least 25 per cent, and any person not holding a participation in the company but having a controlling influence with regard to the company pursuant to the Act on Equity Replacements) is considered to be equity-replacing, as a consequence of which the shareholder who has granted the equity-replacing loan could not demand repayment until the borrowing company has been reorganised or restructured. Any security granted in connection with such loans may not be enforced and in an insolvency proceeding the relevant claims of the lender are subordinated. As an incentive for shareholders to provide liquidity to their companies in the face of the covid-19 pandemic, these rules have been temporarily amended so that short-term cash loans granted during certain periods and for a term of not more than 120 days and provided that such loans do not benefit from collateral granted by the company over its assets, are not considered to be equity-replacing.

Moreover, in the context of clawback regimes, creditors can – also outside insolvency proceedings – use rights of avoidance granted to them by the Austrian Act on Avoidance of Legal Transactions (which limits the rights of avoidance to transactions similar to the ones mentioned in the Austrian Insolvency Act (see Section V)). The claim can be filed by any creditor whose claim against the debtor has not been satisfied by the proceedings under the Austrian Enforcement Act or is not likely to be satisfied by such proceedings.

Financing in times of covid-19

The unfolding economic implications of the covid-19 pandemic entail a variety of practical questions and issues in connection with existing financing agreements.

With respect to loans that have not yet been disbursed, the lender might be entitled to refuse to disburse the loan amount pursuant to the Austrian civil code if the economic situation of the borrower (e.g., because of financial distress in the wake of the covid-19 pandemic) has deteriorated to such extent that the repayment of principal loan or interest is objectively at risk. In addition, in many cases the loan agreement itself stipulates compliance with certain financial criteria and non-existence of an event of default as prerequisites for the utilisation of funds.

Further, the question arises whether lenders are entitled to terminate loan agreements because of the outbreak of the covid-19 pandemic. While the Austrian civil code provides for an extraordinary termination right of a loan party in case maintaining the credit agreement becomes unbearable for good cause for the respective party, it is questionable whether this provision could be used to terminate loan agreements solely on the basis of the covid-19 pandemic. Given the lack of relevant judicature, it is difficult to assess how courts would rule in this respect. That being said, however, loan parties should be aware that the adverse economic effects induced by the pandemic may give rise to contractual termination or acceleration rights (e.g., because of a breach of financial covenants or the occurrence of a material adverse change, provided that respective provisions are set forth in the agreement).

Moreover, the Austrian Parliament has passed a number of legislative measures aiming at stabilising the country's economic situation, including various financial support measures such as public guarantees, loans and subsidies, aiming to cover short-term liquidity needs of companies during the covid-19 pandemic.

VIII OUTLOOK AND CONCLUSIONS

Future legal developments related to financings are crucially dependent on how quickly and comprehensively the economy recovers from the covid-19 pandemic. While many of the measures adopted to mitigate the economic impact of the pandemic are, in principle, only intended to be effective temporarily, at this point it cannot be predicted to what extent the legal and regulatory framework will need to be amended to adequately respond to the challenging circumstances.

Apart from that, we see an ongoing digitalisation in the financial industry (further intensified by covid-19-related curfews) and, following that trend, some traditional banks increasingly embracing new technologies. Furthermore, the continuing restructuring needs of several debtors (in particular, in emerging markets where Austrian credit institutions play a very active role) have sharpened lenders' sensibility in general. This sensibility, however, does not necessarily lead to Austrian lenders being more conservative in terms of providing new financing, but to decisions on whether the new financing provided is carefully considered and well founded in response to the financial crisis. In general, Austrian lenders are very active and, by conducting significant lending business in Austria and the CEE region, are contributing to further stabilisation and growth in eastern Europe.

Appendix 1

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