DISTRESSED M&A

Austria

LEXOLOGY
Getting The Deal Through

Consulting editor
Walder Wyss Ltd

Distressed M&A

Consulting editors

Thiemo Sturny, Dominik Hohler

Walder Wyss Ltd

Quick reference guide enabling side-by-side comparison of local insights, including market climate and legal framework; transaction structures and sale process; due diligence and mitigation of related risks; valuation and financing; documentation; regulatory and judicial approvals; dispute resolution; and recent trends.

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Contributors

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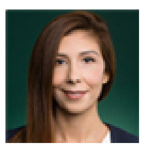
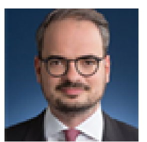
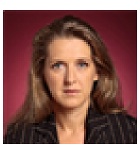


Sarah Wared
sarah.wared@wolftheiss.com
Wolf Theiss



Matthias Schimka
matthias.schimka@wolftheiss.com
Wolf Theiss



Eva Spiegel
eva.spiegel@wolftheiss.com
Wolf Theiss

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MARKET CLIMATE AND LEGAL FRAMEWORK

Market climate

How would you describe the general market climate for distressed M&A transactions in your jurisdiction?

While deal volumes have pushed global M&A to all-time highs in 2021 and it can be expected that the M&A market will remain robust in Austria in terms of the volume and number of deals in the last quarter of 2021 and beyond, we have not observed an increase in distressed M&A transactions in Austria. However, we may see an increase in distressed M&A in specific industries within the next 12 to 18 months. Such distressed M&A transactions may, inter alia, be seen in retail as well as in the transportation industry. In particular, experienced investors and crisis-proof strategic buyers with cash reserves or an intact stock price may use distressed opportunities and are eager to purchase distressed targets at favourable valuations. Furthermore, the sale of non-core business reduces costs and simultaneously increases much-needed liquidity in times of crisis.

Law stated - 25 October 2021

Legal framework

What legal and regulatory regimes are applicable to distressed M&A transactions in your jurisdiction?

In Austria, insolvency proceedings are either restructuring proceedings or bankruptcy proceedings. Bankruptcy proceedings aim at liquidating all assets and distributing the funds to the creditors, whereas restructuring proceedings continue the operation of the debtor's business without liquidating the debtor.

Due to the transposition of Directive (EU) 2019/1023 through the Restructuring Code, which entered into force on 17 July 2021, a new preventive restructuring framework under Austrian law is applicable. The Restructuring Code, in particular, allows the restructuring of a company even against the will of individual creditors (cram down), which in the past could have resulted in the failure of a consensual out-of-court restructuring.

In Austria, there is no specific legal and regulatory regime that is applicable only to distressed M&A transactions, but there are various customary market standards to be considered in the course of distressed M&A transactions. Further, there are various legislative and regulatory frameworks that apply to insolvency proceedings and may apply to distressed M&A transactions, depending on their structure. The principal sources of law in this regard are found in the Insolvency Act, the Restructuring Code, the Contestation Code, the Equity Capital Replacement Act and the Company Reorganisation Act.

Law stated - 25 October 2021

Main risk in distressed M&A transactions

Summarise the main risks to all parties involved.

Distressed M&A transactions encompass transactions involving a company in crisis before insolvency, as well as during insolvency proceedings. Depending on the structure and phase of a distressed M&A transaction, different risks should be considered (the risks must be analysed on a case-by-case basis). For example, the insolvency administrator has the right to:

- decide whether to fulfil bilateral contracts that have not been fully fulfilled by both parties prior to the opening of

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the insolvency proceedings (and to request the fulfilment of outstanding obligations); or

- refuse the fulfilment of any outstanding obligations and withdraw from the agreement pursuant to section 21 of the Insolvency Act.

Typically, the insolvency administrator refuses the fulfilment of any outstanding obligations to the extent that the other party has already fulfilled its obligations (in part) (eg, in the case of advance payments). In such a case, the claims of the other party are limited to the insolvency quota as a creditor in insolvency. To the extent that both parties have fulfilled their obligations under the relevant agreement equally, the insolvency administrator will, on a case-by-case basis, assess to what extent the further fulfilment of the obligations is in favour of the insolvency estate.

Law stated - 25 October 2021

Director and officer liability and duties

What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of distressed M&A transactions in your jurisdiction?

In addition to the general duties of the managing directors (ie, to act with the care of a prudent and diligent business manager in the best interest of the company), the following duties apply in a distressed scenario:

- to the extent that the company is illiquid or over-indebted pursuant to the Insolvency Act, the managing directors must file for insolvency without undue delay and in any case within 60 days following the material insolvency;
- the violation of the duty to file triggers the liability of the managing directors for all damages caused by such violation;
- managing directors may be held personally liable pursuant to the Criminal Code; and
- additionally, the managing directors have the possibility (but are generally not obliged) to initiate restructuring proceedings pursuant to the Restructuring Code, already in a situation of the company's likelihood of insolvency.

Law stated - 25 October 2021

Differences from non-distressed M&A

In general terms, what are the key legal and practical differences between distressed and non-distressed M&A transactions in your jurisdiction?

Distressed M&A transactions encompass all transactions before or during the insolvency of a company. Depending on the structure of such transactions, one of the key differences compared with other M&A transactions is that the insolvency administrator takes control of the target once a target becomes insolvent and, to a certain extent, the agreements between the parties are subject to mandatory regulations. Further, the number of relevant stakeholders in distressed M&A transactions may be higher than in other M&A transactions. Distressed mergers and acquisitions are characterised by the need to find a resolution among the different interests represented by shareholders, creditors (banks), suppliers, customers and employees.

Further, the terms of the transaction documents and related market standards in a distressed M&A transaction differ fundamentally from a non-distressed M&A transaction. For example, material adverse change clauses are unusual and operational warranties are not, or rarely, accepted by the insolvency administrator or the seller in a distressed transaction.

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Timing of transactions

What key considerations should be borne in mind when deciding when to acquire distressed companies or their assets?

An acquisition prior to the initiation of formal insolvency proceedings has the advantage that the purchaser and seller can decide the terms of the transaction (eg, the seller can decide to exclusively negotiate the transaction with one bidder), whereas in an acquisition following the initiation of formal insolvency proceedings, the insolvency administrator will commonly control the M&A process.

One of the key considerations with respect to acquisitions from insolvency is that the buyer can purchase certain assets (cherry picking) and leave behind the liabilities.

If insolvency proceedings are opened over the assets of the seller after signing but before closing, the insolvency administrator has the right to:

- decide whether to fulfil bilateral contracts that have not been fully fulfilled by both parties prior to the opening of the insolvency proceedings (and to request the fulfilment of outstanding obligations); or
- refuse the fulfilment of any outstanding obligations and withdraw from the agreement pursuant to section 21 of the Insolvency Act.

It is common for the insolvency administrator to refuse the fulfilment of any outstanding obligations to the extent that the other party has already fulfilled its obligations (in part) (eg, in the case of advance payments).

Law stated - 25 October 2021

TRANSACTION STRUCTURES AND SALE PROCESS

Common structures

What sale structures are commonly used for distressed M&A transactions in your jurisdiction? What are the pros and cons of each, and what procedures and legal requirements apply?

The sale structure of a private acquisition before the initiation of formal insolvency proceedings depends on a number of considerations, in particular:

- tax considerations;
- the scope and complexity of the relevant business;
- the results of the due diligence; and
- liability risks connected with the acquisition.

The main advantage of a share deal is that the identification of the object of the acquisition is simple and all the assets of the target are simultaneously acquired (unless the parties decide to exclude certain assets). The main advantage of an asset deal is that the buyer can choose whether to acquire all or only certain assets. This can be advantageous in distressed cases and where a company would like to avoid certain liability risks (which would ordinarily be encompassed in a share deal). Generally, third-party rights at the company level (eg, pre-emption rights) are not triggered in the course of an asset deal. Following the initiation of formal insolvency proceedings, asset sales are commonly used.

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Law stated - 25 October 2021

Packaging and transferring assets

How are assets commonly packaged and transferred in a distressed M&A transaction in your jurisdiction? What procedural, documentary and other requirements apply?

In general, all or a part of a company's business or assets in distressed M&A transactions can be transferred through a carve-out and transfer into a (new) company.

In a pre-insolvency scenario, pre-packaged deals are common in Austria. Before the initiation of formal insolvency proceedings, the sale of all or a part of a company's business or assets is negotiated with the potential buyer. Following the initiation of formal insolvency proceedings, the insolvency administrator effects the sale of all or a part of a company's business or assets following his or her appointment. Under Austrian law, pre-packaged deals are not subject to regulations. However, creditors or third parties may raise a voidance claim to the extent that they do not agree with the pre-packaged deal.

Law stated - 25 October 2021

Transfer of liabilities

What legal requirements and practical considerations should be borne in mind regarding the acceptance and transfer of any liabilities attached to the distressed company or assets?

The extent to which an asset deal or share deal makes sense must be evaluated on a case-by-case basis. In general, a buyer of assets in a distressed M&A transaction will be interested in avoiding taking over any liabilities associated with the company that it purchases, and this could be one of the main advantages of an asset deal over a share deal.

In asset deal transactions – as long as the target is sold outside of insolvency proceedings – the buyer is, in particular, liable for:

- debts related to assets that are not transferred in the course of the asset deal, whereby such liability can be excluded by agreement between the parties, which, in addition, needs to be duly announced (meaning that it needs to be registered with the commercial register, by way of publication in a newspaper or similar, or by way of notifying the third parties concerned);
- all social security contributions that accrued in the 12-month period before the transfer of the business, according to article 67(4) of the Employment and Social Security Act; and
- any other liability that he or she knew of or should have known of up to an amount corresponding to the value of the acquired company.

These are mandatory law provisions.

However, if the target is sold within insolvency proceedings, a restructuring privilege applies. Particularly in the case of an already materially insolvent target, it may therefore be advisable to wait with the acquisition until insolvency proceedings have been formally opened.

Should the transaction be carried out as a share deal, the buyer – in any case – automatically presumes the position of the seller. Any liability remains with the company.

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Consent and involvement of third parties

What third-party consents are required before completion of a distressed M&A transaction? What are the potential consequences of failure to obtain these consents? In what other ways are third parties commonly involved in the transaction?

Prior to the initiation of formal insolvency proceedings, no special approval is required. However, change-of-control consents of financing banks or counterparties to material agreements are often required (as in the case of non-distressed transactions).

Following the initiation of formal insolvency proceedings, the sale of all or a part of a company's business or assets is subject to the consent of the insolvency administrator, the company's creditors committee and the insolvency court. Failure to comply with such requirement may invalidate the underlying agreement.

Law stated - 25 October 2021

Time frame

How do the time frames and timelines for the various transaction structures differ? Can these be expedited in any way?

In general, companies in crisis must be sold under extremely tight time constraints. Transaction documents are sometimes negotiated overnight, and due diligence is limited to weeks or even days, in what would otherwise have been months. Following the initiation of formal insolvency proceedings, specific time frames set by the insolvency administrator and the insolvency court, in particular with respect to the submission of offers, must be considered.

Law stated - 25 October 2021

Tax treatment

What tax liabilities and related considerations arise in relation to the various structures for distressed M&A transactions in your jurisdiction?

In general, an asset deal may trigger:

- (corporate) income tax on the capital gains realised at the level of the seller;
- value added tax on the individual assets transferred;
- 3.5 per cent real estate transfer tax if Austrian real estate forms part of the assets transferred; and
- 0.8 per cent stamp duty if receivables are sold or contracts are transferred.

If a business is transferred entirely, the buyer will be liable for certain taxes of the seller connected with such business, provided that the buyer was aware or should have been aware of such taxes at the time of the transfer and to the extent that the buyer has not already paid an amount of tax debts equal to the value of the transferred assets (without deducting debts taken over).

By contrast, a share deal may trigger:

- (corporate) income tax on the capital gains realised at the level of the seller; and
- 0.5 per cent real estate transfer tax if a corporation holds Austrian real estate and if at least 95 per cent of the

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shares are unified in the hand of one single shareholder or in the hands of shareholders forming a tax group.

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Auction versus single-buyer sale process

What are the respective pros and cons of auction sales and single-buyer sales? What rules and common practices apply to each?

In general, disposals carried out by auction sale are more stringent and seller-friendly and allow the seller to maximise the sale proceeds. Typically, no specific provisions apply with respect to an auction process (ie, the seller determines the rules and procedure of the auction to the extent that such sale is conducted prior to an insolvency). Where the company is already subject to insolvency proceedings, the potential buyer is required to negotiate the transaction preliminary with the insolvency administrator, whereby the insolvency administrator is required to sell to the best bidder. Further, the committee of creditors and the insolvency court are involved, and disposals are subject to their approval.

Law stated - 25 October 2021

DUE DILIGENCE

Key areas

What are the most critical areas of due diligence in a distressed M&A transaction?

As most distressed M&A transactions are subject to tight deadlines, it is important to prioritise the due diligence on areas that are most critical, whereby such areas do not usually differ essentially from non-distressed M&A transactions. The scope of the due diligence is also dependent on whether the respective transaction is structured as a share deal or an asset deal.

In the case of a distressed M&A transaction following the initiation of insolvency proceedings, the assessment of the relevant business or assets is relevant.

Law stated - 25 October 2021

Searches

What searches of public records should be conducted as part of a due diligence exercise in distressed M&A transactions in your jurisdiction?

As distressed companies are often threatened by impending insolvency, a search of the Austrian edict database should be conducted as a first step of the due diligence to determine whether the target is subject to any insolvency proceedings.

General information regarding the target and its property can be gathered from the Austrian companies register and the Austrian land register.

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Contractual protections and risk mitigation

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What contractual protections and other strategies are commonly used to mitigate diligence gaps in a distressed M&A transaction?

Seller warranties and indemnities must be considered carefully in transaction documents of a distressed M&A transaction prior to the initiation of insolvency proceedings and depend to a large extent on the specific financial situation of the target and the field of operation of such target. However, insolvency administrators usually do not agree to guarantees, with the exception of the guarantee of ownership of the assets sold in the course of distressed M&A transactions following the initiation of formal insolvency proceedings.

In recent years, insurance covering damages resulting from breaches of warranties and indemnities has become part of transactions, including transactions in the Austrian M&A market. Such warranty and indemnity insurance may be considered to a certain extent, also with respect to distressed M&A transactions.

Law stated - 25 October 2021

VALUATION AND FINANCING

Pricing mechanisms and adjustments

What pricing methods, adjustments and protections are commonly used in the valuation of distressed M&A transactions in your jurisdiction and what are the pros and cons of each? How are they used to balance the interests of the parties?

In general, in a share sale the parties agree on either a locked-box consideration structure or a closing-accounts consideration structure. In recent years, there has been an increase in the application of locked-box structures compared to previous years. The pricing mechanism of a distressed M&A transaction prior to the initiation of insolvency proceedings often corresponds to non-distressed M&A transactions. In the case of distressed M&A transactions following insolvency proceedings, no such pricing mechanism applies and the purchase price for the assets or the business of the insolvent company is usually a fixed purchase price.

Law stated - 25 October 2021

Fraudulent conveyance

What rules govern fraudulent conveyance of distressed assets sold undervalue in your jurisdiction? How can clawback risks be mitigated when negotiating the deal price?

In the case of a fraudulent transfer of distressed assets sold undervalue prior to the opening of insolvency proceedings, the insolvency administrator may raise a voidance claim to the extent that the transfer is disadvantageous for the creditors. In case no insolvency proceedings are opened such transaction may under certain circumstances be challenged by creditors.

Based on the doctrine of laesio enormis , a transaction can be challenged if the true value of the purchase object is less than half of the consideration paid. However, parties can explicitly exclude the applicability of laesio enormis in the agreement. Such exclusion is particularly relevant from a seller's perspective in the course of distressed M&A transactions, as valuations are favourable and buyers usually buy the company or the assets at a low purchase price.

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Financing

What forms of financing are available and commonly used in distressed M&A transactions? How can financing be secured?

Bridge financing is often used in distressed M&A transactions. In general, creditors who provided bridge financing in the case of a distressed target may be at risk that such bridge financing (including any securities provided in connection therewith) would be subsequently challenged by the insolvency administrator if the turnaround is unsuccessful. The amendments to the Insolvency Act, accompanying the entry into force of the new Restructuring Code on 17 July 2021, now provide for certain limited safe harbour provisions. New financing that is part of a court-approved restructuring plan, as well as court-approved bridge or interim financing, may be protected to a certain extent.

Shareholders may grant a bridge loan to a subsidiary (that is in distress) without triggering the stay of redemption as set out under the provisions of the Equity Capital Replacement Act. This holds true for cash loans with a maturity of up to 60 days, commercial credits not exceeding a six-month period or credit extensions and deferrals (if credit has been provided before the crisis). To allow corporate reorganisations, the Equity Capital Replacement Act allows the acquisition of a stake in the distressed company for the purpose of overcoming that company's financial crisis coupled with the grant of a loan in the context of feasible reorganisation.

Law stated - 25 October 2021

Pre-closing funding

What provisions are typically agreed to secure pre-closing funding of distressed businesses and assets?

Typically, to secure pre-closing funding, the purchaser requests that the acquisition agreement includes, as a condition precedent to closing, certain mechanics for the termination of existing securities and the granting of new securities in favour of the purchaser's financing banks. Purchasers are not typically willing to provide any funding unless they have reached closing. Debt term sheets or equity commitment letters are negotiated for closing or post-closing funding. We have, however, seen cases where pre-closing funding was also provided to ensure operational costs until closing.

Law stated - 25 October 2021

DOCUMENTATION

Closing conditions

What closing conditions are commonly agreed in distressed M&A transactions? How do these differ from non-distressed transactions?

In distressed M&A transactions, there are usually either no or only very few closing conditions. Therefore, the closing conditions are mostly limited to any regulatory approval, required third-party consent or corporate approval.

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Representations, warranties and indemnities

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What representations, warranties and indemnities are commonly given in distressed M&A transactions?

Seller warranties and indemnities must be considered carefully in the transaction documents of a distressed M&A transaction prior to the initiation of insolvency proceedings and depend to a large extent on the specific financial situation of the target and the field of operation of such target. However, insolvency administrators usually do not agree to guarantees, with the exception of the guarantee of ownership of the assets sold in the course of distressed M&A transactions following the initiation of formal insolvency proceedings.

Law stated - 25 October 2021

Remedies for breach

What remedies are available and commonly sought for breaches of closing conditions, representations, warranties and indemnities in distressed M&A transactions?

Usually, the seller is entitled to remedy a breach of a warranty within a certain time frame (eg, two weeks from the buyer's request). If the seller fails, or is unable to remedy the breach, the buyer is entitled to monetary damages. Statutory legal consequences are usually excluded to the extent legally permitted. The breach of a closing condition may result in a claim against the breaching party for damages.

Law stated - 25 October 2021

Insurance

Is warranty and indemnity (W&I) insurance available for distressed M&A transactions in your jurisdiction? If so, what provisions and exclusions are commonly included in W&I policies?

In recent years, warranty and indemnity insurance covering damages resulting from breaches of warranties and indemnities has become a key part of transactions, whereby such insurance is less common in distressed M&A transactions and depend on the structure of the transaction. Commonly known risks or statements where the due diligence exercise has been weak are excluded from the insurance package.

Law stated - 25 October 2021

REGULATORY AND JUDICIAL APPROVALS

Merger control

What merger control rules and filing requirements govern the acquisition of distressed businesses and assets in your jurisdiction? Is the 'failing firm' defence recognised in your jurisdiction?

In general, the Austrian competition rules also apply to mergers and acquisitions of companies in distress. In particular, the general jurisdictional thresholds and the standstill obligation are applicable until clearance by the Austrian competition authorities. Austrian merger control, however, also allows for taking account of the specific feature of distressed M&A with regard to the substantial assessment and procedure.

M&A deals that would create or strengthen a dominant position, and as such would risk being blocked on competition

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grounds, may benefit from a 'failing firm defence' under certain conditions. These conditions are strict and mirror the conditions developed under EU merger control.

On the procedural side, it is possible to shorten the normal four-week review period if both competent authorities waive their right to instigate an in-depth review. This 'early clearance' is usually granted only if the parties present compelling reasons for the urgency.

Law stated - 25 October 2021

Foreign investment review

Are distressed M&A transactions subject to foreign investment review in your jurisdiction? What rules, procedures and common practices apply?

The Investment Control Act has recently been adopted to further tighten the regulatory framework for foreign direct investments.

Pursuant to the Investment Control Act, a mandatory filing requirement is necessary if at least one of the investors is a foreign person (ie, non-EU/EEA/Swiss individual/entity) and directly or indirectly intends to carry out an investment in an Austrian undertaking (ie, has its seat or central administration in Austria) that is active in a sector listed in an annex to the act. Such investment encompasses the acquisition of the following:

- shares in an Austrian company reaching or exceeding 10 per cent, 25 per cent or 50 per cent (voting rights);
- control in such company; or
- material assets of an undertaking (asset deal).

The above-mentioned annex to the Investment Control Act distinguishes between particularly sensitive sectors, for which an additional materiality threshold of 10 per cent applies, and other sectors, for which only the materiality thresholds of 25 per cent and 50 per cent apply, respectively.

The highly sensitive sectors subject to the 10 per cent, 25 per cent and 50 per cent thresholds (exhaustively) are as follows:

- defence goods and technologies;
- the operation of critical energy infrastructure;
- the operation of critical digital infrastructure, especially 5G infrastructure;
- water;
- the operation of systems securing the data sovereignty of the Republic of Austria; and
- research and development in the fields of medicinal products, vaccines, medicinal devices and personal protective equipment.

Other sectors subject to the 25 per cent and 50 per cent thresholds, in which a threat to security or public order might arise, are as follows:

- critical infrastructure (ie, facilities, systems, plants, processes, networks or parts of them) in certain fields, such as energy, information technology, traffic and transport, health, finance and the chemical industry, among others;
- critical technologies and dual-use goods, such as AI, robotics, semiconductors and nanotechnologies, among others;
- security of supply with critical resources, such as energy supply, supply of raw materials, food, vaccines and other

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medicinal products, among others;
- access to sensitive information or personal data, including the possibility to control such; and
- freedom and plurality of the media.

An approval of the responsible member of the federal government (currently the Ministry of Digital and Economic Affairs (MDEA) is not required with respect to investments in an undertaking that has fewer than 10 employees and an annual turnover or balance sheet total of less than €2 million.

MDEA approval must be obtained before signing an applicable transaction. Generally, the MDEA has a one-month review period from the date of the delivery of the relevant notification that only begins following a 35-day period within which the European Commission and member states can comment on the transaction. A case is deemed cleared if the MDEA does not issue a decision within these periods.

Law stated - 25 October 2021

Bankruptcy court

What rules and procedures govern the bankruptcy court's approval of distressed M&A transactions in your jurisdiction?

The following transactions require the approval of the creditors' committee and the insolvency court irrespective of the value of such transaction:

- the sale or lease of the debtor's business or his or her interest in a business;
- the sale or lease of the entire movable fixed and current assets or any part thereof required for the business; and
- the voluntary sale or lease of immovable property.

The insolvency administrator is required to publish the envisaged sale or lease, in particular, by including it in the official database of court publications for 14 days, whereby the debtor will have the possibility to provide his or her comments with respect to the initiated sale or lease process. The relevant approval will presuppose that at least 14 days have passed since the beginning of the publication of the envisaged sale or lease.

Law stated - 25 October 2021

DISPUTE RESOLUTION

Common disputes and settlement

What issues commonly give rise to disputes in the course of distressed M&A transactions and what practical considerations should be borne in mind when seeking to settle such disputes out of court?

A breach of a warranty or indemnity may give rise to disputes. Voidance claims may be initiated by insolvency administrators to increase the insolvency estate. However, the frequency of litigation is volatile, and practical considerations generally depend to a significant extent on the structure of the transaction.

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Litigation and alternative dispute resolution

What litigation forums are used to resolve disputes arising from distressed M&A transactions in your jurisdiction and what procedures apply? Is alternative dispute resolution (ADR) commonly used?

In the case of insolvency proceedings that have been initiated, disputes are mostly held in front of state courts with common civil procedure rules applying. This is (partly) due to certain actions being exclusively subject to court proceedings (eg, voidance claims). Further, insolvency administrators generally insist on the jurisdiction of Austrian (state) courts and typically are unwilling to agree to arbitration or ADR. No special rules apply with respect to distressed M&A transactions prior to the initiation of insolvency proceedings.

Law stated - 25 October 2021

UPDATE AND TRENDS

Recent developments and outlook

What have been the most significant recent developments and trends affecting distressed M&A in your jurisdiction, including any notable court decisions, regulatory actions and deals? What is the general outlook for future transactions?

Due to covid-19, the duty to file in Austria for insolvency resulting from over-indebtedness was suspended until June 2021. Based on our experience the number of distressed M&A transactions has not further increased since June 2021.

There may be an increase in distressed M&A within the next 12 to 18 months as the covid-related governmental support has been essentially reduced. In particular, experienced investors and crisis-proof strategic buyers with cash reserves or an intact stock price may use distressed opportunities and are eager to purchase distressed targets at favourable valuations. Furthermore, the sale of non-core business reduces costs and simultaneously increases much-needed liquidity in times of crisis (ie, we expect an increase in carve-out transactions in the last quarter of 2021 and beyond).

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Jurisdictions

Jurisdiction	Firm
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