

## Insolvency & Restructuring - Austria

### Granting legal aid to insolvency estates

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#### [Introduction](#)

#### [Beneficiaries](#)

#### [Creditors as beneficiaries](#)

#### [Comment](#)

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### Introduction

The grant of legal aid plays a significant role in lawsuits (including, but not limited to, avoidance and liability issues) initiated by an insolvency administrator. In such cases, it is not so much a question of providing free legal services (the insolvency administrator will regularly provide those), but rather of preliminarily waiving considerable litigation fees (eg, flat rate fees payable to the court, which are 1.2% to 2.4% of the amount in dispute depending on the instance) and expert fees. The cost factor is often critical in low-asset insolvencies of legal entities.

### Beneficiaries

The Budget Accompanying Act 2009<sup>(1)</sup> abolished legal aid for legal entities. However, on October 5 2011 a Constitutional Court decision reintroduced the original Section 63 (2) of the Code of Civil Procedure. Legal entities are now again entitled to legal aid pursuant to Section 63 if neither the entity nor the beneficiaries can raise the funds necessary to conduct the proceedings, and if the proposed enforcement or defence of the rights is not made in bad faith.

For the purpose of Section 63 of the Code of Civil Procedure, 'beneficiaries' means persons whose assets will be affected by the legal entity prevailing in or losing the proposed lawsuit, provided that their beneficial interest is also based on a legal relationship.<sup>(2)</sup> Since privileged creditors will always have to be paid in full (unless there is an insolvency in the course of insolvency), and will, as a rule, not benefit from a dispute that raises their recovery rates, they are not beneficiaries.<sup>(3)</sup> Similarly, those creditors who are not materially affected by the insolvency and would thus not gain a significant advantage do not qualify.<sup>(4)</sup> Consequently, all creditors which would gain a significant advantage from a higher recovery rate if they were to prevail in a lawsuit are beneficiaries. Those creditors must regularly pre-finance the costs of the lawsuit. Thus, trial courts will not grant undifferentiated legal aid to the insolvency administrator if there are beneficiaries which refuse to pay the lawsuit costs.<sup>(5)</sup>

### Creditors as beneficiaries

Most recently, Martin Trenker<sup>(6)</sup> opposed the undifferentiated qualification of creditors as beneficiaries in an insolvency estate. He also opposed a too broad or undifferentiated interpretation of the concept of beneficiaries, claiming that it would lead to a breach of both Article 6 of the European Human Rights Convention – the right to a fair trial – and Article 47 of the European Charter of Fundamental Rights – the right to an effective remedy. Article 52 of the charter specifically provides that the right to legal aid, and thus to court access, may be limited only if there is legitimate reason and if the means used are reasonably proportionate.<sup>(7)</sup> A comparison of legal entities and physical persons makes these problems apparent. With regard to the principle of equality, reliance on beneficiaries seems problematic: a physical person will receive legal aid after insolvency proceedings have been rejected for lack of assets, despite the existence of creditors with enough assets; whereas a physical person will be denied legal aid when the insolvency is opened and concerns his or her own assets, as this would create an insolvency estate. Pursuant to Austrian law, the creation of an insolvency estate constitutes a legal entity.

Further, a reference to beneficiaries will also infringe the creditors' fundamental rights because insolvency creditors (unlike shareholders of a profit-oriented company) participate compulsorily in the proceedings. While single creditors may pre-finance

lawsuits outside of the insolvency proceedings at any time, and at their own risk (thereby securing success on their own by way of a pledge or transfer), pre-financing a lawsuit in insolvency proceedings is supposed to raise the recovery rate on an 'egalitarian' basis. The pre-financing creditor may be able to recover only a small (possibly unnoticeable) benefit.

This imbalance is also evident in the fact that a claim which cannot be enforced due to a lack of pre-financing will be eliminated from the estate and 'transferred back' to the debtor. That debtor – whether a legal entity or individual – could then assert the claim by relying on legal aid (to the benefit of his or her insolvency-free assets), arguing that there were no beneficiaries in the insolvency-free assets (these would be left behind in the insolvency proceedings).

Trenker concludes that beneficiaries should be liable to finance a lawsuit only if that lawsuit is linked directly to the system and purpose of the insolvency proceedings (eg, avoidance claims pursuant to Sections 30 and 31 of the Enforcement Code, but not pursuant to circumstances unrelated to insolvency), and thus could not be conducted by a single creditor outside of the insolvency proceedings.

## Comment

Trenker's opinion – that insolvency creditors should not unrestrictedly qualify as beneficiaries for the purpose of assessing the productivity of insolvency estates – can be supported. Creditors should qualify as beneficiaries only if insolvency-specific claims are asserted.

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## Endnotes

- (1) *Budgetbegleitgesetz* 2009, *Federal Law Gazette* I 2009/52.
- (2) *Bydlinski* in *Fasching*, Section 63(12) of the Code of Civil Procedure; Schumacher, *Verfahrenshilfe an den Masseverwalter*, JBI 1986, at 498 *et seq.*
- (3) Riel, *Befugnisse des Masseverwalters* [1995] 154; Vienna Regional Court of Appeals, July 14 2000, 14 R 63/00p; 20.12.1999, 15 R 126/99f.
- (4) Vienna Regional Court of Appeals, December 20 1999, 15 R 126/99f; 25.2.1998, 3 R 135/97z.
- (5) Graz Regional Court of Appeals, June 11 2002, 2 R 89/02d with further reference in Schumacher, JBI 1986, at 498 *et seq.*
- (6) *Verfahrenshilfe für die Insolvenzmasse* unter besonderer Berücksichtigung von Art 6 MRK, Art 47 Abs 3 GRC, ZIK 2014, at 13 *et seq.*
- (7) See also Slonina, "Schützenhilfe", where the European Court of Justice discussed the insolvency administrator's entitlement to legal aid, ZIK 2011, 51; EGMR 22.3.2012, 19508/07 paragraph 45; December 14 1999.

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