


TU TECHNISCHE
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WIEN WIEN
Vienna University of Technology



**VO 330.226
Wirtschaftsrecht**

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**Company Crisis
& Insolvency law,
Creditors Rights**

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**Krise: Verlust halbes
Stammkapital**

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Crisis – Not yet Insolvency

Sec 36 para 2 GmbHG:

- Loss of 50% of equity
- or "8%/15yrs" under URG (below)

- Call for shareholders' meeting
- Shareholder can resolve; filing of resolutions (if any) with Register

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Krise: URG und EKEG

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Crisis – Not yet Insolvency

"Substitution of Equity" Act (EKEG):

- § 2 EKEG, § 23 URG: spec. definition of "crisis"
 - Illiquidity (§ 66 Insolvency Act)
 - Over-indebtedness (§ 67 Insolvency Act)
 - Equity ratio below 8% and notional debt repayment period of more than 15 years (Business Reorganization Act)

$$\frac{\text{equity} + \text{untaxed reserves}}{\text{total capital}}$$

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Crisis – § 23 URG: "8 %"

Assets	820		Equity	500
			Reserves	100
Inventories	500		Profits	700
Bank	400		Provisions	500
Prepaid expenses	100		Liabilities	20
	1.820			1.820
Equity + untaxed reserves	=		1.300	
Total capital	=		1.820	
Equity ratio = $E/TC \cdot 100$	=		71,4 %	

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Crisis – § 23 URG: "8 %"

Assets	820		Equity	500
Inventories	400		Loss	-400
Bank	100		Provis.	500
Prepaid expenses	100		Liabil.	820
	1.420			1.420
Equity+ untaxed reserves	=		100	
Total capital	=		1.420	
Equity ratio = $E/TC \cdot 100$	=		7,04 %	

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- URG - Consequences**
- Reorganisation procedure (not: insolvency proceedings)
 - Reorganisation plan and inspector
 - Liability of board members (sec 23 URG)
 - Up to EUR 100.000 each
 - Failure to take necessary restructuring measures
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Restrukturierungsordnung (ReO)

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ReO

- Noch nicht Insolvenz (dazu später: IO)
- Aber: **wahrscheinliche Insolvenz**
 - Drohende Zahlungsunfähigkeit ohne Restrukturierung
 - URG-Kriterien (8%; 15 Jahre)
- Keine ReO-Antragspflicht, bei Verfahrenseinleitung aber Entfall der URG-Haftung und mögliche Forderungskürzung

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Insolvenzordnung (IO)

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Insolvency

- **Insolvency Act** (not "URG")
- Insolvency procedures opened by court after filing by debtor or a creditor
- Illiquidity **or** over-indebtedness

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Illiquidity

§ 66 Insolvency Act (IO)

- Unable to pay debts in due time and
- unable to acquire the necessary funds within reasonable time
- Due and payable liabilities only

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Over-indebtedness

§ 67 Insolvency Act

- Liabilities exceed assets and
- negative prospects
- Liquidation value of assets compared to liabilities

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Crisis Time Line

"History"

- Operating losses over extended period of time
- Negative / weakly positive Cash-Flows
- Short-term external financing

1: "history"
 2: loss of half of the share capital (§ 36/2 GmbHG), convene a shareholders' meeting
 3: business reorganisation ("URG"), convene a shareholders' meeting + court proc. Acc. URG or ReO
 4: objective occurrence of insolvency: illiquidity or over-indebtedness
 5: manifestation/ subjective knowledge of the organs
 6: max. 60-days rehabilitation period
 7: last day for mandatory insolvency petition to be filed with the court

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Insolvency

- Directors are obliged to file for insolvency proceedings if the company meets the prerequisites
 - Illiquidity **or** over-indebtedness

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Shareholder's liability towards creditors

- REMEMBER: Both the Limited Liability Company Act and the Stock Corporations Act state that shareholders are not liable for the liabilities of the company, thus clearly establishing the corporate veil concept.
- The Insolvency Act introduced a statutory basis for piercing the corporate veil. The shareholder must file for insolvency within 60 days of the date on which the company became illiquid or over-indebted, if the following conditions are met:
 - The shareholder holds more than 50% of the company's registered share capital; and
 - The company no longer has at least one managing director, including cases where the appointed managing director is not acting as such (because the managing director is either unable or unwilling to act).
- In case of non-compliance, a majority shareholder will become liable to the company's creditors for any losses caused by such non-compliance.
 - Vis-a-vis "old" creditors – impairment of quota
 - Vis-a-vis "new" creditors – full interest

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Directors' liabilities

Liability towards creditors for (too late) insolvency filings after due date under civil law (tort law):

- To "old" creditors – impairment of quota
- To "new" creditors – full interest

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Insolvency Proceedings

- Restructuring procedures or bankruptcy proceedings
- Self-administration or judicial administration

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Restructuring in insolvency

- Restructuring plan filed with court
- Minimum quota: 20%
- Payable within 2 years
- Self-administration possible
 - > minimum quota for unsecured debtors: 30%

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Restructuring in insolvency

- Creditor vote on restructuring plan
- Double majority
 - Simple majority of creditors present
 - Total sum of their claims: 50% of all claims

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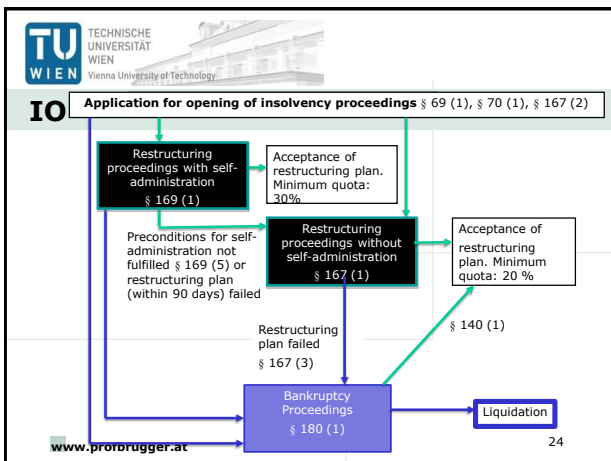
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Bankruptcy proceedings

- Debtor
 - no right to dispose of assets
- Insolvency administrator

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Ranking of claims

- Creditors file claims with the court
- Certain time frame set by Court
- Unsecured claims rank pari passu
- Privileged claims
 - arose after opening of proceedings
- Preferential claims
 - secured by collateral

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Netting of claims

- No need to file with court (§ 19 IO)
- Also claims that are not due yet or are subject to conditions
- Limitations:
 - Compensable at the time of the opening of bankruptcy proceedings
 - No claims that arose within 6 months prior to the opening of proceedings in case of knowledge or negligent ignorance of insolvency

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Contracts

- Bilateral contracts § 21 IO
 - Creditor has fulfilled his obligation, debtor not → insolvency claim
 - Debtor has fulfilled his obligation → creditor has to fulfil his obligation
 - Neither has fulfilled → Bankruptcy administrator's choice to fulfil or terminate

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Contracts

- Leases §§ 23, 24 IO
 - Debtor as lessee
 - Statutory period of notice has to be observed, not, however, the statutory termination dates
 - Debtor as lessor
 - Contract is automatically continued, no extraordinary right of termination

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Contracts


- Labor contracts § 25 IO
 - Debtor as employer
 - Termination within 1 month after publication of court order to close the business or after court hearing for the administrator's report
 - Statutory termination dates irrelevant, statutory period of notice (or shorter contractually agreed on period) has to be observed

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Assignments/Orders

- § 26 IO
- Orders by debtor lapse automatically
 - Offers made by the debtor are not binding
 - Orders to the debtor remain intact

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Claw-back actions I

- Avoidance claims
- Challenge transactions
 - that took place within a certain period before beginning of proceedings
 - that disadvantaged other creditors
 - Successful claim would increase insolvent's estate

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Claw-back actions II

- Intentional discrimination
- Squandering of assets
- Dispositions free of charge
- Preferential treatment
- Knowledge of insolvency

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End of formal procedure

- Repealed by court order if
 - all assets are distributed
 - no sufficient assets to finance proceedings
 - restructuring plan becomes final

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Penal Law

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Directors' liabilities – StGB

- **Austrian Penal Code (StGB)**
- § 156 Fraudulent interference with creditor's claims
 - getting rid of, hiding, damaging or selling parts of the assets or diminishing the estate (actually or in pretence) and
 - thereby obstructing creditor's satisfaction.
 - Imprisonment: 6 months to 5 years (one to 10 years in case of damage over 300.000€)

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Directors' liabilities – StGB

- § 158 StGB Preferential treatment of creditors
 - giving preferential treatment to one creditor over another/others and
 - thereby placing other creditors at a disadvantage.
 - Imprisonment: up to 2 years

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Directors' liabilities – StGB

- § 159 Grossly negligent impairment of creditors' interests
 - Grossly negligently causing insolvency in a manner contrary to business standards
 - With knowledge or in negligent ignorance of the insolvency grossly negligently obstructing creditors' satisfaction

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– by:

- destroying, damaging, rendering unusable, selling under value or giving away a substantial part of the estate
- spending excessive sums in an extraordinarily risky business, which is not part of the usual business, or by gambling or wagering
- having excessive expenditures contradictory to the financial circumstances

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- keeping no accounting records or keeping them in way that doesn't easily allow an overview over the true financial situation
- not preparing an annual financial statement, that is required by law, or preparing it so late or in a way that doesn't easily allow an overview over the true financial situation

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Liabilities – StGB

- § 160 StGB Activities during bankruptcy oversight or insolvency procedures
 - Asserting claims that do not exist legitimately or not to that extent
 - A creditor allowing material benefits to be promised or granted to him for exercising his voting rights in a certain way. Equally the person promising or granting the benefits.

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- A creditor allowing material benefits to be promised or granted to him for the approval of the restructuring plan. Equally the person promising or granting the benefits.
- Imprisonment of up to 1 year

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Liabilities – StGB

- § 162 Obstruction of enforcement
 - Hiding, selling or damaging assets, feigning a non-existent claim or otherwise diminishing the estate (actually or in pretence)
 - and thereby obstructing creditors' satisfaction in the enforcement
 - Imprisonment of up to 6 months or fine of up to 360 daily rates. Imprisonment up to 3 years if damage exceeds 5000 €

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Liabilities – StGB

- § 163 StGB Obstruction of enforcement to the benefit of another
 - Hiding, selling or damaging assets or feigning a non-existent claim without the consent of the debtor
 - and thereby obstructing creditors' satisfaction in the enforcement.
 - Imprisonment of up to 6 months or fine of up to 360 daily rates. Imprisonment up to 3 years if damage exceeds 5000 €
