

# Company Restructuring Pursuant to German Insolvency Law

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## Abstract

Coming into force on 1 March 2012, the German Act on the Further Facilitation of the Restructuring of Companies (Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen), in particular in conjunction with the insolvency plan and through what is known as self-administration, serves to align German insolvency law more closely with the restructuring proceedings of Chapter 11 of the US Bankruptcy Code. Insolvency law is no longer primarily about the liquidation of the debtor or insolvent company; instead, the legislature has, through the reform's main agenda, the insolvency plan procedure (Articles 217 ff. InsO) and self-administration (Articles 270 ff. InsO), placed the main emphasis on the debtor company in the restructuring process, and has made it possible to effectively organise insolvencies on the basis of creditor autonomy. In addition to the restructuring of the company, it also allows for what is known as the transferred reorganisation of the debtor's assets, and also liquidation. A subsequent step will involve defining regulations to deal with the issues associated with group insolvency, and considering whether a projected income procedure comparable with the "scheme of arrangement" should be developed. Below, we will examine the changes made to insolvency law to date, and show how boosting creditor autonomy, similar to Chapter 11, makes it possible for the debtor company to be released from its obligations and enable it to make a fresh start.

**Keywords:** Insolvency Plan; Protective Measures; Self-Administration; Creditor Autonomy

## Introduction

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In addition to the restructuring of the company, it also allows for what is known as the transferred reorganisation of the debtor's assets, and also liquidation. A subsequent step will involve defining regulations to deal with the issues associated with group insolvency, and considering whether a projected income procedure comparable with the "scheme of arrangement" should be developed.

Below, we will examine the changes made to insolvency law to date, and show how boosting creditor autonomy, similar to Chapter 11, makes it possible for the debtor company to be released from its obligations and enable it to make a fresh start.

## The Insolvency Proceedings and the Establishment of a Preliminary Creditors' Committee

### General

In the case of personal insolvency on the part of the debtor, Art [1-13] InsO stipulates that a list of creditors must be submitted and the amount of their claims specified. In the event that the business is not closed down, the list.

Should indicate the largest claims, the largest secured claims,

debts owed to the tax authorities, social insurance institutions and the company pension plan [14]. If the debtor fails to submit a list of creditors, the file for insolvency may be rejected as inadmissible. The file for insolvency is not rejected as inadmissible if the list is incomplete. However, the insolvency judge will order protective measures to be taken, for example the appointment of a temporary insolvency administrator. Often, the insolvency court obtains further information directly from creditors.

Following a written application by the debtor or a creditor, the insolvency court, without abusing its powers of discretion, may appoint a preliminary creditors' committee to secure the insolvency estate [15]. The insolvency court obtains the required information for the appointment from the debtor or the creditors.

### The preliminary creditors' committee

At the opening of insolvency proceedings, the preliminary creditors' committee serves to strengthen creditor rights by expanding the existing options for their participation in the insolvency proceedings. At the same time, it must be ensured that only creditors or their representatives are actually appointed as members of the preliminary creditors' committee. Especially during this early stage of the insolvency proceedings, important and far-reaching decisions need to be made, sometimes under considerable time pressure, for example the appointment of a provisional insolvency administrator. In this context, it is useful to have a direct connection to the debtor and practical knowledge of its business operations, something that a

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non-creditor would first need to acquire. The legislature distinguishes between three types of creditors' committees.

**The creditors' committee in the insolvency proceedings:** Firstly, there is the preliminary creditors' committee in the insolvency proceedings, for which the provisions in Art. 67 par. 1, Art. 67 par. 3 and Art. 68 InsO do not apply. This means that non-creditors are not eligible to become members of the creditors' committee unless they become creditors when the insolvency proceedings are opened [16]. As a rule, trade union representatives are excluded as members of the creditors' committee, as they themselves are creditors in only very rare instances [17].

**The creditors' committee after the insolvency proceedings are opened:** The preliminary creditors' committee, which operates in the period after insolvency proceedings are opened, up until the date of the creditors' meeting, or what is termed the reporting date, is a separate body responsible for a special regulatory area. As a result, the office of the preliminary creditors' committee from the period before the insolvency proceedings are opened comes to an end, and a new decision on the appointment of creditors to the committee needs to be taken. The preliminary creditors' committee is established for the period up to the reporting date if the need arises. The judge is not bound to accept proposed appointments, and may change the composition of the creditors' meeting for the period after insolvency proceedings are opened, since various responsibilities arise during the different periods.

**The appointment of the creditors' committee at the creditors' meeting:** The creditors' meeting, which must be held no later than three months after insolvency proceedings are opened, decides whether the preliminary creditors' committee appointed by the insolvency judge should be retained, a new creditors' committee selected or the committee dispensed with entirely. Since the intention of the legislature was to achieve a representative sample of the group of creditors [18], it is expedient to form a creditors' committee with five members. A creditors' committee with an even number of members is also permissible, with the consequence that no decision might be reached in cases in which the votes are evenly split, and the rules of procedure for the creditors' meeting make no provision in such cases for a casting vote by a member of the creditors' meeting.

### The duty to appoint a creditors' committee

The appointment of a preliminary creditors' committee at the opening stages of the insolvency proceedings, and the participation of this committee in the court decision on the appointment of a provisional insolvency administrator, are intended to ensure that creditors have an early say in the selection and appointment of the provisional insolvency administrator, the order for self administration and the appointment of the preliminary custodian. The committee's primary role is in situations where restructuring of an insolvent entity is being considered and the survival of plants and jobs is in question [19].

Art. 22a par. 1 InsO stipulates that a preliminary creditors' committee of this kind must be appointed for companies above a certain size. Thresholds such as balance sheet total, revenues and the number of employees are specified in Art. 22a par. 1 No. 1-3 InsO to distinguish between the different categories. The obligation to appoint a preliminary creditors' committee applies only if the company:

- Has a minimum balance sheet total of €4,840,000 after deduction of any deficit shown on the assets side within the meaning of Art. 268 par. 3 HGB [20]

- Revenues of at least €9,680,000 in the 12 months before the balance sheet date [21]

- Had an annual average workforce of at least 50 employees [22].

### The voluntary creditors' committee

If there is no obligation to appoint a creditors' committee, for example because business operations have ceased or the thresholds were not reached, the court may appoint a creditors' committee as required, because, for instance, the debtor, the preliminary insolvency administrator or a creditor has requested the appointment. However, persons must be nominated who are suitable for appointment to the creditors' committee, and who are prepared to accept such a post. This voluntary creditors' committee is not involved in the appointment of the provisional insolvency administrator.

### Involvement of the Creditors in the Appointment of a Provisional Insolvency Administrator

#### General

For the appointment to the position of provisional insolvency administrator in the insolvency proceedings, the right of the creditors to be involved in the appointment does not extend to the individual members of the creditors' committee.

#### Consultation with the creditors' meeting

The full preliminary creditors' committee should be given an opportunity to comment on the requirements for the receiver's job description and on the person of the provisional insolvency administrator. The job description for the provisional insolvency administrator must set out objective criteria indicating that the proposed person is unbiased and possesses the business expertise to implement the envisaged restructuring. However, the preliminary creditors' committee is not obliged to express an opinion. If it does not express an opinion, it is the court's responsibility to decide on the job description for the provisional insolvency administrator for the final insolvency proceedings. The insolvency court is not bound to consider any proposed candidates where no information or insufficient details have been provided on the job description for the provisional insolvency administrator.

The opinion of the preliminary creditors' committee must be based on a resolution adopted at a creditors' committee meeting that was actually held, in accordance with the rules of procedure, and which was signed by all the members of the creditors' committee. It is essential to document the resolution of the preliminary creditors' committee submitted in writing, because the insolvency court has the power to deviate from the proposals submitted by the preliminary creditors' committee.

The consultation provision applies only to the preliminary creditors' committee in the insolvency proceedings. In the event that the insolvency court appoints a different provisional insolvency administrator once the insolvency proceedings are opened, further consultation with the previous preliminary creditors' committee is not required.

If, when insolvency proceedings are opened, a creditors' committee is appointed with the same members as the preliminary creditors' committee, this constitutes a new creditors' committee that holds office until the first creditors' meeting. The insolvency proceedings may refrain from consulting the preliminary creditors' committee if a

permanent change in the debtor's assets situation clearly results in a deterioration in the company's assets situation.

### The agreed proposal of the preliminary creditors' committee

If the proposed provisional insolvency administrator meets the job description suited for the company, and if the envisaged provisional insolvency administrator is unanimously proposed to the court by the preliminary creditors' committee, the court is bound to accept the proposal [23]. However, the court is not bound to accept the proposal from the preliminary creditors' committee if the person proposed is not suitable to assume the post, or does not have enough work capacity. On the question of unsuitability, it must be noted that the provisional insolvency administrator cannot be rejected as unsuitable because the person was proposed by a creditor or the debtor, and the later provisional insolvency administrator provided general advice to the debtor.

### The majority proposal of the preliminary creditors' committee

If the preliminary creditors' committee is unable to reach a unanimous agreement on the appointment to the position of the provisional insolvency administrator, the court is not bound to accept the proposal. Based on the arguments of the preliminary creditors' committee, the insolvency court can, without abusing its powers of discretion, appoint a different provisional insolvency administrator that it considers suitable for the position.

## The Insolvency Plan

### Introduction

The legislature based the insolvency plan proceeding that entered into force in 1999 on the US Chapter 11 bankruptcy code.

### Purpose of the insolvency plan

The insolvency plan proceeding can aim at financial and performance-related restructuring, regardless of whether the debtor appears worthy of restructuring. As regards the objectives of the proceeding that deviate from the liquidation (standard realisation), e.g. the restructuring of the company, the insolvency plan pursuant to Art. 1 InsO provides the necessary legal framework for creditor autonomy, which is intended to facilitate consensual management of the insolvency by way of negotiation and private autonomous exchange processes. In derogation from the realisation proceeding regulated by law, the parties involved in the insolvency proceedings are given opportunities to restructure the debtor or to exploit it economically to find more favourable realisation options[24].

### Legal status of the insolvency plan

The insolvency plan is based on the free agreement between the creditors, so that it constitutes a realisation agreement on the debtor's assets [25].

### The plan initiative

The debtor [26], the insolvency administrator [27] and the insolvency guardian [28] can be considered as possible initiators of the insolvency plan. Pursuant to the wording of Art. 218 InsO, the insolvency administrator has an independent right to initiate the plan regardless of the body of creditors. In addition, the creditors' meeting [29] can collectively instruct the insolvency administrator to draw up an insolvency plan, whose objective can be set by the creditors' meeting. Individual creditors can also obtain a resolution at the

creditors' meeting, instructing the insolvency administrator to prepare an insolvency plan, whose objective is specified by the creditors.

In accordance with the basic structure, four different insolvency plans can therefore be considered:

- A plan drawn up and submitted by the debtor.
- A plan drawn up by the provisional insolvency administrator, but submitted only after the opening of insolvency proceedings.
- Insolvency plans drawn up by the insolvency administrator at the behest of the creditors' meeting, with possibly contrary objectives, according to the objectives that the creditors' meeting or individual creditors wish to pursue.

The arrangement sought by the creator of the plan, which focuses on the latter's interests, is independent of the creditors and can result in a plurality of insolvency plans that is not adequately regulated by the voting procedure [30].

### Types of insolvency plan

A distinction is made between the following basic types of insolvency plan, depending on the objective that is being followed, and a range of mixed forms can result from combinations of them.

#### Insolvency Plan Objective

Liquidation plan Realisation and distribution of the insolvency estate

Transfer plan Transfer of the debtor company to a third party, e.g. a receiving company

Reorganisation plan Re-establishing the earnings capacity of the debtor company

Other plans E.g. "Zero plan", moratorium plan

**The liquidation plan:** The sense and purpose of an insolvency plan in the form of the liquidation plan is to organise the liquidation envisaged by the legislature, i.e. the management and realisation of the insolvency estate (Articles 148 ff. InsO) in derogation from statutory requirements. The regulations of the insolvency plan may therefore deviate from the insolvency administrator's realisation authority as provided for under the law, and may restrict the scope of realisation.

**The transfer plan:** In the case of the transferred restructuring plan, the debtor's (partial) business is wound up for the purpose of continuing operations, either with or without accepting the liabilities from the company in difficulty, and is transferred to another company, e.g. a newly established takeover company or shell company through contributions in kind or by way of sale, transfer of ownership, or also to the highest bidder in a foreclosure sale.

**The restructuring plan:** The aim of the restructuring plan may be to invest additional liability equity capital into the company in difficulty by changing its legal form and/or by accepting new shareholders. A performance-related restructuring can also be considered, e.g. by restructuring, laying off staff, realignment of the product range or by adopting other cost-cutting measures.

**Other plans:** Within the framework of private autonomy, every conceivable insolvency plan is permissible, such as the remission of liabilities in return for payment of a quota, proposed deferral, or what is known as a "zero plan", in which the debtor as a natural person seeks discharge of residual debt without any return service.

## Structuring of the insolvency plan

It is a mandatory legal provision (cf. Articles 219, 231 par. 1 No. 1 InsO), despite the wide degree of latitude in terms of design, that the insolvency plan be divided into:

- A declaratory section (Art. 220 InsO)
- A constructive section (Art. 221 InsO)
- The plan attachments (Articles 229, 230 InsO) [31]

**Declaratory section:** The declaratory section describes the measures already taken or still to be taken to set out the rights of the parties concerned, and the legal, financial and performance-related features of the company in difficulties (Articles 220 InsO) and, if necessary, the rehabilitation concept [32].

One prerequisite for a restructuring concept and the basis for the insolvency plan is an in-depth analysis of the company [33], which helps to uncover the reasons for the crisis and provides starting points for deciding on objectives and restructuring measures. The sense and purpose of the analysis of the company is to identify the causes and interrelationships and build on this information to indicate restructuring options [34]. The key data for the company, such as the development of the company to date, the legal and financial relationships, performance-related circumstances and the organisational basis, are used to perform the analysis.

If the analysis of the company shows that the company in difficulties can be restructured, short- and long-term objectives can be developed based on this weak-point analysis that focus on the causes, rather than the consequences, of the company crisis. The company is capable of being reorganised if it is in a position, following the implementation of restructuring measures, to achieve a sustained surplus of income over expenditure. If it cannot be reorganised, the company must be liquidated. In cases in which restructuring is feasible, a list of measures, the restructuring plan, detailing specific restructuring measures, must be prepared based on the objectives set out in the declaratory section. There is a wide range of possible restructuring measures [35].

**Comparative calculation:** Using a comparative calculation, the declaratory section of the insolvency plan compares the extent to which creditors would be satisfied by following the insolvency plan or under statutory liquidation without the insolvency plan. It suffices to distinguish between the different groups of creditors for the comparative calculation; it is not necessary to make a comparison for every individual creditor. On the one hand, this is intended to give creditors a basis for deciding how to vote, while additionally, the comparative calculation is important for issues such as opposition on the part of a group of creditors [36] (prohibition to obstruct), objections from the debtor [37], or objections from a creditor [38] (Art. 251 par. 1 No. 2 InsO), whereby the insolvency court can overrule by a decision any opposition on the part of a group of creditors, objections from the debtor or from a creditor, if the insolvency plan would leave the parties concerned better off than under liquidation without an insolvency plan. The basis for the comparative calculation is firstly a list of the assets [39], from which the estimated probable liquidation proceeds can be deduced in the event of statutory realisation, as well as the plan income statement.

**Constructive section:** The constructive section of the insolvency plan defines in Art. 221 InsO the ways in which the legal status of the parties concerned is changed by the insolvency plan [40]. The following are considered the parties concerned pursuant to Art. 222 InsO:

- The creditors, including the subordinate creditors, and
- Creditors entitled to separate satisfaction.

None of the parties concerned are creditors entitled to segregation [41]. None of the parties concerned is the debtor pursuant to Art. 225a InsO, since the participation and membership rights of the persons holding shares in the debtor basically remain unaffected by the insolvency plan, unless the insolvency plan stipulates otherwise.

**Plan attachments:** The following specific documents must be attached to the insolvency plan as plan attachments pursuant to Art. 229 InsO, provided the intention is to satisfy the creditors with the proceeds:

- An asset and liability statement [42]
- A plan income statement [43]
- A liquidity plan [44] and also
- Additional attachments e.g. the declaration by the debtor that it is prepared
- to continue the business [45]

## Formation of Groups

The formation of voting groups of creditors as prescribed in Art. 222 InsO must be set out in the constructive section of the insolvency plan. The sense and purpose of forming groups is to make allowance for the different economic interests of the various creditor groups. The significance of the formation of groups relates to the planning strategy. Voting results and majorities can be influenced by the way in which the creditors are divided, in other words “the formation of groups is the strategic key to the majority issue”. The insolvency plan must at least distinguish between the groups of creditors specified in Art. 222 par. 1 InsO, that is to say:

- Creditors entitled to separate satisfaction if the insolvency plan infringes their rights
- The non-subordinate creditors
- The individual priorities of subordinate creditors, provided the claims are not deemed waived pursuant to Art. 225 par. 1 InsO [46].

Pursuant to Art. 222 par. 2 InsO, groups may be formed within those parties with identical legal status, grouping together creditors with the same type of economic interests. Clear distinctions need to be made between these groups, and the differentiating criteria must be specified in the insolvency plan [47]. Pursuant to Art. 222 par. 3 InsO, a separate group should be formed for

- employees and
- small sum creditors,

and the question may be asked whether the employees, for their part, should form subgroups (e.g. salaried employees, waged workers, or according to the types of claim, e.g. wages and salaries, holiday pay, gratuities, severance pay, profit sharing, etc.). The fair value of the claims can be used as a demarcation criterion for the formation of the groups, along with the legal status of the creditors (Art. 222 par. 1 InsO) and the same type of economic interests.

Depending on the particular circumstances in an individual case, a series of possible voting groups can be formed based on the criteria mentioned. The material delimitation of the groups is intended to be



governed by the content monitoring on the part of the insolvency court pursuant to Art. 231 par. 1 No. 1 InsO [48].

Under Art. 231 par. 1 No. 1 InsO, the insolvency court has only to check whether the plan has been submitted by the debtor or by the insolvency administrator, and if it is organised into a declaratory section and a constructive section, the reason being that the right of examination is restricted to the questions of whether the right to present and the content of the plan have been complied with. The fear of a manipulative division of the body of creditors does not warrant transferring monitoring control for the groups to the insolvency court over and above the wording of the law, even if the insolvency plan and the groups were proposed by the debtor [49].

## The Debt Equity Swap

### General

Art. 225a par. 1 InsO clearly states that the equity interests and membership rights of persons holding shares in the debtor basically remain unaffected by the insolvency proceedings. However, encroachment on these rights is permitted by law if this is expressly provided for in the insolvency plan [50]. Otherwise, the legal position of the persons holding shares in the debtor remains unaffected by the insolvency proceedings and there is no reason for them to participate in the voting.

**Art. 225a par. 2 InsO:** Art. 225a par. 2 InsO contains provisions on converting debt into equity. The change is intended to meet practical requirements. To ensure that converting debt into equity operates as a well-functioning restructuring tool, and that the rights of the former owners are also safeguarded, it should be possible to transfer the debt-equity conversion to the constructive section of the insolvency plan. The owners of equity interests and membership rights in the debtor are thus involved as interested parties in the insolvency plan and can vote as a separate group on the plan, and therefore on the conversion of claims. Just like the creditors, they enjoy protection of minorities and have the right to object to the plan by seeking legal remedies. Pursuant to Art. 225a par. 2 sentence 2 InsO, no creditor may be forced into a shareholder position against its will. Each and every creditor has the individual right not to agree to a claim being converted. Their consent cannot be replaced by the majority vote within the group.

The plan should regulate in detail how the conversion of a claim to equity is to be carried out in practice. It is usually done in the form of a capital decrease with a subsequent increase, with the claim introduced as a contribution in kind [51]. It is generally recognised that claims against the company itself can be contributed. This can either be by way of a claim conversion, where the debt becomes invalid through merger, or by way of a remission agreement.

At the same time, regulations must be established for any securities provided. A creditor whose claim is secured will have to consider at regular intervals whether to consent to the claim being converted to an equity share, with the possibility of thereby losing the security, or whether to retain it and assert a claim for the loss from the guarantor.

The plan should expressly state what capital measures are to be carried out, what value a claim should be estimated at, and who shall be entitled to the subscription right. Where necessary, expert opinions should be obtained on the question of the fair value of the claim. The fair value of the claim will be regularly reduced because of the debtor's insolvency, and the value will not correspond to the nominal book value, but will instead be significantly lower. The quota expectation can

also be considered in this context. The insolvency plan must provide for a suitable valuation allowance. In the case in which claims are converted into shares in a stock corporation (AG), underwriting of the new shares must comply with the general provisions of the German Stock Corporation Act (Aktienrecht). At the same time, an exclusion of subscription rights at the expense of the shareholder must be stipulated for the capital increase that is assumed by the shareholder who made the payment [52]. The exclusion of subscription rights always requires objective justification because of the gravity of the interference in the membership. This is the case if the exclusion of subscription rights is made in the interests of the company, in other words where it serves to promote the object of the company, and is otherwise appropriate, necessary and commensurate.

The exclusion of subscription rights for restructuring purposes can basically constitute such a justification. With the capital increase through contributions in kind, the subscription rights for those shareholders who cannot make the non-cash contribution must necessarily be excluded, since they have no claims against the company that are admitted as contributions. At the same time, this does not automatically justify the exclusion of subscription rights. It must be shown in the context of the debt-equity swap that there are no options for debt repayment without exclusion of subscription rights, in particular that a capital increase for cash by the former shareholders, or a combination of a capital increase for cash and a capital increase through contributions in kind, with cross-exclusion of subscription rights are not precluded. However, the corporate bodies enjoy only a limited verifiable margin of discretion from the courts in this context.

If a capital decrease is intended, the underlying decreases in value and other losses must be determined in accordance with the provisions in the German Commercial Code, and it must be explained which ones will apply to the annual financial statements. To become effective, the resolutions adopted in the insolvency plan must be entered in the relevant commercial register, register of cooperatives, register of partnerships or register of associations. This is generally the responsibility of the debtor's corporate bodies. However, to simplify the procedure, the insolvency administrator is empowered to arrange the registrations personally in place of the corporate bodies [53]. In the interest of calculation safety, the valuation of the contribution in kind can be attacked only within the planning procedure. Any overvaluation of the contribution in kind does not lead to compensation liability on the part of the contributor towards the debtor.

**Art. 225a par. 3 InsO:** Art. 225a par. 3 InsO permits a radical overhaul of the debtor's corporate law structures, including outside the context of the debt-equity swap, and allows these to be modified to meet the requirements of the insolvency plan proceeding. In the process, the rights of persons holding shares in the debtor are adequately guaranteed, since pursuant to Art. 222 par. 1 sentence 2 No. 4 InsO, they are involved in voting on the plan as a separate group [54].

Since the opening of insolvency proceedings dissolves a company, the plan can include provisions to continue the debtor company. This means that no formal continuation resolution by the shareholders is required if the company is to continue. Additionally, the transfer of the debtor's shareholdings in third companies can be included in the plan.

Creditors who become shareholders as a result of the conversion of their claims benefit from the restructuring privilege [55] in Art. 39 par. 4 sentence 2 InsO, and under certain circumstances from the minority shareholder privilege [56] in Art. 39 par. 5 InsO. If the creditor acquires the shares because of a debt-equity swap in an insolvency plan, it may

be assumed that they were acquired for the purpose of restructuring within the meaning of Art. 39 par. 4 InsO.

### Compensation for cancellation of equity interest

If equity interests are incorporated into an insolvency plan, provision must be made for financial compensation if they are cancelled, provided the shares are still of value. In this instance, pursuant to Art. 251 par. 3 InsO, the plan must provide the required funds if necessary [57]. However, in insolvency proceedings, the shares can generally be assumed to be worthless. In this case, compensation is not required. The constitutional title protection of the shareholders affected is guaranteed by the regulations on protection of minorities and on right of appeal against the confirmation of the plan in Articles 245, 251 and 253 InsO. This ensures that a shareholder receives appropriate compensation for the loss of its ownership interest. Pursuant to Art. 251 par. 3 sentence 2 InsO, compensation must be claimed outside the insolvency proceedings to ensure there are no delays.

### Change-of-control clauses

Art. 225a par. 4 InsO guards against the risk that the implementation of measures pursuant to Art. 225a par. 2 or 3 InsO is used as an excuse by contracting parties to terminate existing contractual relationships. A widespread termination of contractual relationships, or even the termination of key individual contracts, can jeopardise the existing restructuring prospects. In light of this, a legal provision is required to specifically ensure that the standard change-of-control clauses used in practice are not applied when a debt-equity swap or other capital measures are performed. For this reason, Art. 225a par. 4 InsO decrees these to be invalid [58]. Contract clauses that address not only the performance of measures pursuant to Art. 225a par. 2 and 3 InsO, but also other breaches of obligations, remain unaffected by this.

### Art. 225a par. 5 InsO

Art. 225a par. 5 InsO makes allowance for the fact that, the performance of measures pursuant to paragraphs 2 or 3 can lead to a change in the group of shareholders or members. The creditors participating in a debt-equity swap therefore join the group of shareholders or members. In the case of personally organised companies, this can lead to the situation in which, from the perspective of the former shareholders or members, there is a good reason for resigning.

If a shareholder or member exercises his/her right to resign, it must be ensured that any justified claims to compensation do not result in a burden on the debtor that jeopardises the prospects of restructuring. When determining the amount of the compensation claim, it should firstly be taken into account that non-implementation of the plan might mean that the company would have to be wound up. In addition, the plan should make suitable provision so that any compensation claim is payable over a period of up to three years, or can be cancelled.

### Insolvency plan and debt-equity swap provision

**General:** Up to now, the insolvency law has had no effect on company law, with the result that shareholders' ownership interests could not be interfered with [59]. In the past, it was possible for shareholders to block financial restructuring measures. The legitimisation of the debt-equity swap in the German Insolvency Code is intended to strengthen competition. In the USA and United Kingdom, the debt equity swap has become a popular and successful restructuring tool. The crucial benefit, however, is that the issues have been removed that made the

debt-equity swap either impossible in practice, or unjustifiably placed the former shareholders of the insolvent company in a better position. In particular, this became a problem where a restructuring by transfer, in other words the retail sale of the assets of the insolvent company, was not possible, because rights required for the business attached to the legal entity of the insolvent company, e.g. freight traffic licences, bank licensing, airport slots.

### Encroachment on ownership interests and membership rights:

In order to achieve the best possible restructuring results, the legislature included the provision in Art. 217 sentence 2 InsO that the ownership interests and membership rights of persons holding shares in the debtor can be incorporated into the insolvency plan if the debtor is not a natural person [60].

**Formation of groups:** As a consequence of this provision on ownership interests, pursuant to Art. 222 InsO, persons holding shares in the debtor may form a separate group if their ownership interests and membership rights are being included in the insolvency plan. Pursuant to Art. 222 par. 1. sentence 2 No. 4 InsO, special groups can be formed by small sum creditors, and therefore also shareholders with a participation of less than 1% of the liable equity capital or €1,000 [61].

**Discussion and voting meeting:** Pursuant to Art. 235 par. 3 InsO, the persons involved [62], in other words including the shareholders, must be invited to the discussion and voting meeting.

**Voting right of the shareholders:** Art. 238a InsO stipulates that the voting rights of the shareholders shall be based only on their participation in the capital or in the assets of the debtor. The number of shareholders is immaterial. Likewise, restrictions on voting rights in accordance with the Articles of Association, special rights or multi voting rights shall not be considered [63].

**The prohibition to obstruct:** The prohibition to obstruct, whereby the disagreeing voting group is deemed to have consented, applies if a creditor group refuses to consent to the insolvency

plan, although the following requirements of Art. 245 par. 1 InsO must also be met:

- No. 1: The creditors should not be in a worse position as a result of the insolvency plan than they would have been without it.
- No. 2: The creditors must participate to a reasonable extent in the economic value devolving on the creditor parties under the plan.
- No. 3: The majority of the voting groups must have backed the plan with the necessary majorities.

The legal effects of the prohibition to obstruct do not apply by act of law, but must be established by the insolvency court. The insolvency court must officially check the conditions of the prohibition to obstruct if not all of the voting groups have accepted the plan (Articles 248, 245 InsO). Regarding the sequence of checks, it is recommended that the insolvency court first examines the formal requirement of No. 3, which is the easiest to determine, and then looks at the material requirements. Art. 245 InsO applies to the different participating groups, whereby, with regard to subordinate creditors, the prohibition to obstruct is supplemented by the provision in Art. 246 InsO, which considerably simplifies the replacement consent in respect of the lower need for protection of the subordinate creditors. In contrast, the prohibition to obstruct does not apply to those creditors entitled to segregation, since they are not parties concerned (see above) and would need to give their consent individually if they were included in an insolvency plan.

As a result of Art. 245 par. 3 InsO, the prohibition to obstruct is extended to the former shareholders [64]. This extension will not entail any great effect, since the consent of the former shareholders is fictitious, if the insolvency plan provides for a decision in favour of the former shareholders in the event they have a claim. In effect, this means that the insolvency plan can be implemented against the will of the former shareholders. Art. 245 par. 3 InsO formally regulates the requirements for replacing the consent of the former shareholders. The blanket provision pursuant to Art. 245 par. 3 No. 2 InsO, according to which any betterment of individual shareholders or groups of shareholders is not permitted, reflects the valuation regarding reasonable economic participation of creditors pursuant to Art. 245 par. 2 No. 3 InsO, according to which any disadvantage suffered by a creditor group in comparison with creditors of equal rank negates the criterion of reasonable participation in the economic value.

**Protection of minorities:** Since the shareholders are participants in the insolvency plan proceeding, they are also entitled to minority protection, which is guaranteed pursuant to Art. 251 InsO. With this provision, the legislature wished to ensure that the shareholders receive the liquidation value of the shares and are not placed in a less favourable position as a result of the insolvency plan than they would be under liquidation. The request to refuse confirmation for the insolvency plan will be declined even if the requesting parties demonstrate that they would be in a less favourable position under the plan that without it, if funds are provided in the constructive section of the insolvency plan for the event that a party can prove that it would be in a less favourable position [65]. In this instance, evidence must be provided that either reserves have been established, or that the shareholder was provided with a banker's bond or bank guarantee. The proof that the shareholders would be in a less favourable position and the financial security does not impede the implementation of the insolvency plan. Instead, any dispute about whether the shareholder receives compensation from the funds must be decided by the trial court outside the insolvency proceedings (Art. 251 par. 1 No. 2 InsO).

**Admissibility of encroachment on shareholders' rights:** The central question of whether or not the encroachment on shareholders' rights is admissible depends on whether the protection afforded by Art. 14 GG (Basic Law for the Federal Republic of Germany) applies. As well as the rights to claim, Art 14 GG also safeguards ownership relating to persons and corporations [66]. Even if the scope of protection for the property is affected, expropriation does not apply, since it does not involve encroachment on the shareholders' rights by the state [67]. The resolution by the various creditor groups does not constitute expropriation because the creditors are only protecting their co-management rights as afforded by the InsO [68]. With the authority to encroach on the rights of the shareholders, the legislature permissibly and appropriately restricts the content and limitations of property. The legislature has given priority to protecting the company, jobs and the interests of the creditors if the shareholders no longer meet their financing responsibilities, with the result that the insolvency proceedings are opened. The legislature has thus chosen a solution that satisfies the interests of the parties concerned. Encroachment on the shareholders' rights is not only justified if the value of the ownership interests after insolvency proceedings are opened is more or less nothing [69], but also if a value attaches to the ownership interests. In such case, the shareholder must receive fair compensation [70].

## Drawing up an Insolvency Plan

### Introduction

In cases of imminent insolvency or over-indebtedness, Art. 270b

InsO facilitates self administration on the part of an insolvent debtor whose business enterprise has not closed down, with the help of an insolvency plan. Provided that the debtor has filed for insolvency and the envisaged restructuring does not evidently lack all prospects of success, on application the court sets a time limit of maximally three months for submission of the insolvency plan.

### Certification to be submitted

**General:** Pursuant to Art. 270b par. 1 sentence 3 InsO, the debtor must present a certificate from a tax consultant, auditor or lawyer with experience in insolvency matters, or from a person with comparable qualifications. The following are deemed persons with comparable qualifications: tax agents or certified accountants, who are authorised in the same way as a tax consultant, pursuant to Art. 3 No. German Tax Consultancy Act (StBerG), to provide business assistance in tax matters, but also citizens of another EU or EEA member state, and persons with a business office in one of these states and possessing a similar qualification.

**Experience in insolvency matters:** When accepting the mandate, the certifying professional must check his/her professional experience, and present and provide evidence of it to the court [71]. Art. 270b par. 1 sentence 3 InsO does not stipulate which requirements apply in relation to the professional experience of the certifying party. However, it is clear that knowledge acquired from vocational training alone is not sufficient. In order to assume adequate professional experience, it is necessary in many respects to demand at least five years' experience in the area of Germany insolvency law.

**Content of the certificate:** The certifying party must demonstrate imminent illiquidity in respect of the debtor's assets (cf. Art. 18 InsO) or overindebtedness (Art. 19 InsO), but not illiquidity itself (Art. 17 InsO), and show that the envisaged restructuring does not evidently lack all prospects of succeeding.

**Analysis of the envisaged restructuring "not evidently lacking all prospects of succeeding":** Following an analysis of the envisaged restructuring not evidently lacking all prospects of succeeding, which must be performed based on the types of crisis to be investigated, their stages and causes, and make statements on the continuation of the business, or the restructuring capability, the certificate must show that it is not hopeless. It must show that:

- There is no insolvency
- There is no imminent illiquidity and/or overindebtedness
- That the company crises investigated can be managed
- That the measures identified to surmount the difficulties for investigating profitability, financing and equity gaps are suitable
- That there are no obstacles to restructuring, such as
- A lack of willingness to cooperate on the part of the main creditors
- A lack of willingness to implement restructuring measures on the part of management and/or shareholders
- A lack of willingness to cooperate on the part of the employees, the works council, or the trade unions
- The loss of important customers.

### Appointment of a custodian

At the same time as the ruling on the deadline for submitting an insolvency plan, the court appoints a provisional insolvency guardian,

who may not be the same person who issued the certificate (Art. 270b par. 1 InsO). The provision serves to clarify that the independence always required from the guardian pursuant to Art. 270a par. 1 sentence 2 in conjunction with Articles 274, 56 InsO would not then be possible if the person in questions has previously issued the certificate to the debtor pursuant to Art. 270b par. 1 InsO [72]. The court may reject a guardian proposed by the debtor only if the proposed person is obviously unqualified to assume the office. The lack of suitability, e.g. a lack of business knowledge, must be justified by the court (Art. 270b par. 2 sentence 2 subsentence 2 InsO). Pursuant to Art. 270b par. 2 sentence 3 InsO, the insolvency court may order provisional measures. It may:

- Appoint a preliminary creditors' committee pursuant to Art. 21 par. 2 sentence 1 No. 1a InsO
- Order a total restriction or temporary restriction on measures of execution against the debtor (Art. 21 par. 2 sentence 1 No. 3 InsO)
- Order a temporary interception of the debtor's mail (Art. 21 par. 2 sentence 1 No. 4 InsO)
- Order that items for which segregation is demanded be used to continue the debtor's business

### Justification of preferential debt

On the application of the debtor, the court shall order that the debtor may justify preferential debt (Art. 55 par. 2 InsO). This provision was created to enable the business to continue during the opening of insolvency proceedings, and thus establish the basic prerequisites for restructuring. The provision was originally intended to protect persons who conclude business transactions with a provisional insolvency administrator, or meet a long-term debt obligation with the latter that they had originally agreed with the debtor. Particularly in the critical phase of the opening of insolvency proceedings, it is important to gain the trust of business partners, whose cooperation is essential if the business is to continue. If such trust in a "standard" opening of insolvency proceedings is linked to the person of the provisional insolvency administrator, it is especially important 31/36 for a self-administering debtor in a proceeding pursuant to Art. 270b InsO, to win confidence for its business transactions. It therefore seems necessary to assist the debtor in this critical phase of the company restructuring by allowing the latter the possibility, through an order of the court, to move into the legal status of a strong provisional insolvency administrator. The debtor is thus given the authority to justify preferential debt through all its legal acts. Provided the general requirements for ordering a proceeding pursuant to Art. 270b InsO are met, the court must vest this authority in the debtor on the latter's application [73]. When the self-administered debtor files the request, they must weigh up whether it would be more expedient in the specific situation of preparing for restructuring to propose to the court individual authorisations to justify preferential debt, or to make use of the option of being vested with a global authorisation. The priority for the provisional solvency guardian is to investigate the debtor's economic situation and monitor the management of the business and expenditure for the debtor's lifestyle. If the debtor wishes to justify liabilities that are not part of standard business operations, it should do so only with the consent of the provisional solvency guardian, including during the opening of insolvency proceedings. Under Art. 270b par. 3 InsO, the court is allowed to vest the power of disposal solely in the debtor if a debtor petition has been submitted, while giving the provisional solvency guardian a purely monitoring function. Since the debtor is not

yet illiquid, allowing the parties concerned a broad legal framework to structure the power of disposal in the most practical way in the interests of achieving the best possible restructuring is justified.

## Supplementary Provisions for the Insolvency Plan

### Debtor's liability

Pursuant to Art. 227 InsO, unless the insolvency plan provides otherwise, the debtor shall be discharged of its residual obligations towards its creditors once such creditors have been satisfied under the constructive section. Pursuant to Articles 247, 248 InsO, the debtor must not be placed at a disadvantage by the insolvency plan compared to its situation without the plan, so that no additional liability is imposed on it [74].

### Changes to conditions under property law

Pursuant to Art. 228 sentence 1 InsO, declarations of intent to justify, change, transfer or cancel rights to items can be included in the insolvency plan without the requirement for an additional notarial record. If the insolvency plan is confirmed, these declarations of intent are deemed to have been issued in the prescribed form [75].

### Plan accounting attachments

If it is envisaged that the creditors will be satisfied from the earnings derived from the debtor's enterprise continued by the debtor or by a third party, Art. 229 InsO requires the inclusion of an asset and liability statement, contrasting assets with liabilities. The asset and liability statement, in application *mutatis mutandis* of Articles 153 par. 1, 151 par. 2, 152 par. 2 InsO, must be based on going-concern values and on liquidation values, where these vary from the going-concern value [76].

### Acceptance and confirmation of the insolvency plan

**Discussion and voting meeting (Articles 235 ff. InsO):** Following the preliminary examination, the insolvency court must schedule a meeting (oral proceedings) to discuss and vote on the insolvency plan; it should take place within a month, and may not be held before (or in conjunction with) the verification meeting. The target period stated in Art. 235 InsO of no more than a month begins from the entry of the insolvency plan in the registry, since by this point the insolvency court will already have completed the preliminary examination and allowed the parties specified in Art. 232 InsO an opportunity to comment. The date of the discussion and voting meeting must be published.

In addition, the insolvency court must individually summon the following

persons to the discussion and voting meeting, enclosing a copy of the plan, or a

summary of its essential points (Art. 235 par. 2 InsO):

- Creditors who have filed claims
- Secured creditors
- The insolvency administrator
- The debtor
- The works council and the representative body for executive staff.

While not explicitly stipulated, it is expedient to also summon any third parties who will be involved in the provisions of the insolvency plan. The first stage of the standard discussion and voting meeting is to discuss and decide on the voting rights of the creditors of the insolvency



proceedings and secured creditors, and the outcome of this negotiation must be recorded in a voting list drawn up by the registrar of the court (Art. 239 InsO).

**Voting rights of creditors of the insolvency proceedings:** Pursuant to Art. 237 InsO, decisions on the voting rights of the creditors of the insolvency proceedings are generally based on the general provision set out in Art. 77 InsO. However, only creditors are entitled to vote whose claims are affected by the insolvency plan (Art. 237 InsO), with the special feature that the full amount of the (estimated) loss is taken into account for secured creditors if they waive their right to separate satisfaction, and provided the debtor is personally liable towards them. Art. 237 InsO applies *mutatis mutandis* for the loss claims of the secured creditors, which must also qualify as insolvency claims.

**Voting rights of secured creditors:** As a supplement to Articles 237, 77 InsO, Art. 238 InsO regulates the voting rights based on the secured portion of a claim. According to this provision, secured creditors are entitled to vote only if their legal status has been encroached on and they have been disadvantaged as a result. Their rights must be discussed individually at the meeting. In cases in which a right is not disputed by any of the parties involved in the proceedings, the voting right is acknowledged. Otherwise, the insolvency court must decide on the voting right with an incontestable ruling. The same provision applies to rights subject to conditions precedent and immature rights.

**Modification of the insolvency plan (Art. 240 InsO):** Following the determination of the voting rights, the details of the provisions in the insolvency plan are discussed. If slight modifications to the plan are required, these can be made by the initiator at the meeting, and the modified insolvency plan then voted on. However, major changes to the essentials elements of the insolvency plan cannot be introduced in this way. Changes against the will of the person submitting the plan are also not permitted.

**Scheduling a separate voting meeting:** If no vote is taken on the insolvency plan in the standard discussion and voting meeting, the insolvency court can schedule a separate voting meeting, which however, must take place within one month. Only the creditors whose voting rights were established and the debtor are summoned to attend the separate voting meeting. Pursuant to Art. 241 par. 2 InsO, it is no longer necessary to summon the insolvency administrator or the other parties specified in Art. 235 par. 3 InsO. The reason for this is that no further discussion is planned for the separate voting meeting, so to that extent there is no further requirement to give the parties in question a fair hearing.

**Acceptance of the insolvency plan by the creditors:** Voting on the insolvency plan is carried out within the separate groups set out in Art. 222 InsO (Art. 243 InsO). Pursuant to Art. 244 InsO, for the plan to be accepted, there must be an overall majority in each group in favour, both in terms of numbers and in terms of the aggregate value of the claims, whereby creditors who hold a right jointly are counted as one creditor for the purposes of the vote.

**Effect of the insolvency plan:** The legal effects of the provisions set out in the constructive section ensue immediately when the order confirming the insolvency plan becomes final (Art. 254 InsO). Any declarations of intent included in the plan to constitute, amend, transfer or cancel in rem rights are therefore deemed to have been issued in accordance with formal requirements, without requiring any further implementation of the plan. The same applies *mutatis mutandis* for undertakings. On the other hand, legal acts that are purely factual

cannot be replaced by the insolvency plan. If the insolvency plan provides for a debt waiver on the part of the creditors, the claims in question are deducted directly, while deferrals have the effect of postponing the due date. The effects of the insolvency plan apply to all parties concerned, irrespective of whether they have participated in the planning procedure or not. The personal rights of the creditors of the insolvency proceedings with regard to jointly liable third parties (co-debtors, guarantors) and the assertion of security interests by third parties are not affected by the insolvency plan. To prevent the debtor being held liable in full by means of a recourse claim, Art. 255 par. 2 sentence 2 InsO restricts the entitlement to recourse to the provision for the principal claim included in the plan. Art. 254 par. 3 InsO clearly states that creditors have no claim for a return over and beyond the amount provided for in the insolvency plan. To ensure planning security for creditors who bring a claim against the debtor as part of the planning procedure by means of a contribution in kind, thus becoming shareholders, a later obligation to effect an additional payment in accordance with the principles of compensation liability is excluded under Art. 254 par. 4 InsO.

## Summary

The restructuring of the debtor by private autonomous regulations between the creditors and the debtor as part of an insolvency plan is appropriate for avoiding insolvency-related losses, and allows insolvent companies to continue in business.

## Reference

1. Cf. Hess/Weiss, WM 1998, 2349; fn. 1, Hess *Insolvenzrecht* Grosskommentar in zwei Bänden, Vol. I 2nd ed. 2013 before Art. 1 marginal note 1ff. with additional notes
2. In addition to liability in company insolvency, the provisions cover debt relief for natural persons by way of discharge from residual debt (Articles 286 ff. InsO)
3. Articles 217 ff. InsO
4. Art. 27 par. 1 InsO
5. Articles 156 ff. InsO
6. Articles 270 ff. InsO
7. The Act for the Further Facilitation of the Reorganisation of Companies (BGBl I 2011,2582), which entered into force on 1 March 2012
8. Articles 21, 22a InsO
9. Articles 56, 56a InsO
10. Articles 217, 221, 222, 225a, 229-235, 238a, 241, 244-246a, 248a, 251, 254b, 254a, 259b InsO
11. Art. 270 InsO
12. Art. 270a InsO
13. Art. 270b InsO
14. Hess (Footnote 1) Art. 13, marginal note 38 ff.
15. On the court's discretionary leeway see BGH 19.12.2007 – V AR (VZ) 6/07 – ZInsO, 2008,207; OLG Dresden 26.7.2007 – 13 VA 1/07 – ZIP 2007, 2182; OLG Cologne 27.9.2006 – 7VA 9/05 – ZInsO 2007, 272; OLG Hamburg 19.10.2005 – 2 VA 2/05 – ZInsO 2005, 1170
16. Hess (Footnote 1) Art. 21 marginal note 66
17. Hess (Footnote 1) Art. 21 marginal note 67
18. Frind ZInsO 2011, 2249
19. Hess (Footnote 1) Art. 22a marginal note 1 ff.
20. Hess (Footnote 1) Art. 22a marginal note 15
21. Hess (Footnote 1) Art. 22a marginal note 16

22. Hess (Footnote 1) Art. 22a marginal note 17
23. Siemon ZInsO 2011, 381; Preuss ZIP 2011, 933; Frind NZI 2010, 705
24. Hess/Weis, WM 1998, 2349
25. Hess (Footnote 1) Art. 217 marginal note 10 ff.; Gross in Hess Sanierungshandbuch, 6th ed. 2013, Chapter 32 marginal note 33; cf. also BGH 6.10.2005 – IX Z 36/22 – ZIP 2006, 39; diverging opinion in Smid/Rattunde/Martini insolvency plan marginal note 368 ff., which asserts the judgement nature of the insolvency plan
26. Gross (Footnote 25) marginal note 59 et al.
27. Gross (Footnote 25) marginal note 47 ff.
28. Gross (Footnote 25) marginal note 68 ff.
29. Gross (Footnote 25) marginal note 77
30. Hess/Weis, WM 1998, 2349, 2351 ff.; Gross (Footnote 25) marginal note 78
31. For details, see Gross (Footnote 25) marginal note 84 ff.
32. Gross (Footnote 25) marginal note 86 ff.
33. On the analysis data to be collected, see Gross (Footnote 25) marginal note 104 ff.
34. Hess/Weis WM 1998, 2349, 2353 with advice on the quantitative and qualitative data that can be used
35. On the planning of the restructuring measures, see Gross (Footnote 25) marginal note 111 and Hess/Weis WM 1998, 2349 ff. on possible financial and performance related measures
36. Art. 245 par. 1 InsO; on this subject see Gross (Footnote 25) marginal note 496 ff.
37. Art. 247 par. 1 No. 2 InsO
38. Art. 251 par. 1 No. 2 InsO
39. Art. 151 InsO
40. Gross (Footnote 25) marginal note 112 ff.
41. Art. 47 InsO
42. Gross (Footnote 25) marginal note 433 ff.
43. Gross (Footnote 25) marginal note 438 ff.
44. Gross (Footnote 25) marginal note 440 ff.
45. Gross (Footnote 25) marginal note 444 ff.
46. Gross (Footnote 26) marginal note 286
47. Gross (Footnote 26) marginal note 287
48. Gross (Footnote 26) marginal note 296 f.
49. On the preliminary examination of the insolvency plan pursuant to Art. 231 InsO, see Gross (Footnote 25) marginal note 453 ff.
50. Gross (Footnote 25) marginal note 178
51. Gross (Footnote 25) marginal note 187
52. Hess (Footnote 1) Vol. II Art. 225<sup>a</sup> marginal note 76 ff.
53. Art. 254a par. 2 InsO
54. Hess (Footnote 1) Vol. II Art. 222 marginal note 37 ff.
55. Hess (Footnote 1) Vol. I Art. 39 marginal note 150 ff.
56. Hess (Footnote 1) Vol. I Art. 39 marginal note 155
57. Hess (Footnote 1) Vol. II Art. 251 marginal note 22
58. Hess (Footnote 1) Vol. II Art. 225a marginal note 80 f.
59. See the references in Hess (Footnote 1) Vol. II Art. 217 marginal note 30
60. Hess (Footnote 1) Vol. II Art. 217 marginal note 27 f.
61. Hess (Footnote 1) Vol. II Art. 222 par. 38 ff.
62. On this matter, see Hess (Footnote 1) Vol. II Art. 235 marginal note 14
63. Hess (Footnote 1) Vol. II Art. 238a marginal note 2
64. Hess (Footnote 1) Vol. II Art. 245 marginal note 39
65. Hess (Footnote 1) Vol. II Art. 251 marginal note 2
66. (BVerfG 7.8.1962 – 1 BvL 16/60 – BVerfGE 14, 263, 276; 19.7.2000 – 1 BvR – 539/96 – BVerfGE 102, 197, 222) and thus also property and administrative rights (BVerfG 27.4.1999 – 1 BvR 1613/94 – BVerfGE 100, 289; 23.8.2000 – 1 BvR 68/95, 1 BvR 147/97 – ZIP 2000,1670).
67. BVerfG 7.8.1962 – 1 BvL 16/60, BVerfGE 14, 263, 272
68. Sassenrath ZIP 2003, 1517, 1523 with additional notes
69. Hölzle NZI 2011, 124, 127
70. Sassenrath ZIP 2003, 1517, 1524, Smid DZWIR 2010, 397, 403
71. On this matter, see Hess (Footnote 1) Vol. II Art. 270b marginal note 8 ff.
72. Hess (Footnote 1) Vol. II Art. 270b marginal note 15
73. Hess (Footnote 1) Vol. II Art. 270b marginal note 23 ff.
74. On the insolvency plan's effect of limiting liability, see Hess (Footnote 1) Vol. II Art. 227 marginal note 9 ff.
75. For more details, see Hess (Footnote 1) Vol. II Art. 228 marginal note 10. ff
76. For details of the plan calculations, see Hess (Footnote 1) Vol. II Art. 229 marginal note 3 ff.

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