

# Insolvency Code (Insolvenzordnung, InsO)

Insolvency Code of 5 October 1994  
(*BGBl.* [Federal Law Gazette] I 1994, page 2866),  
most recently amended by Article 34 Subsection 13  
of the Act of 22 December 2023 (*BGBl.* I 2023, no. 411)

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**Part One – General Provisions**

**Section 1 – Objectives of Insolvency Proceedings**

The purpose of insolvency proceedings is the collective satisfaction of the debtor’s creditors through realisation of the debtor’s assets and distribution of the proceeds or through agreement on an alternative arrangement in an insolvency plan, particularly in order to maintain the enterprise. Debtors who have acted in good faith will be given the opportunity to have their remaining debts discharged.

**Section 2 – Local Court as Insolvency Court**

- (1) The local court within whose district a regional court is located has exclusive jurisdiction for insolvency proceedings as the insolvency court for the district of this regional court.
- (2) In order for the proceedings to be appropriately facilitated or processed more rapidly, the governments of the Federal States are authorised to designate other or additional local courts as insolvency courts and stipulate different districts for the insolvency courts by statutory order. The governments of the Federal States may delegate this power to the administration of justice departments of the Federal States.
- (3) Statutory orders under subsection (2) shall, for each district of a higher regional court, specify an insolvency court at which a place of group jurisdiction pursuant to section 3a may be established. The jurisdiction of the insolvency court specified may extend within a Federal State beyond the district of a higher regional court.

**Section 3 – Local Jurisdiction**

- (1) The insolvency court within whose district a debtor has its<sup>1</sup> place of general jurisdiction has exclusive local jurisdiction. If the centre of a self-employed economic activity carried on by the debtor is located in a different place, the insolvency court within whose district this place is located has exclusive jurisdiction.
- (2) If during the last six months before the application is lodged the debtor has used tools pursuant to section 29 of the Business Stabilisation and Restructuring Act [*Unternehmensstabilisierungs- und -restrukturierungsgesetz*], the court which was responsible for the measures as restructuring court also has local jurisdiction.
- (3) If more than one court has jurisdiction, the court to which application is first made for commencement of insolvency proceedings shall exclude the other courts.

**Section 3a – Place of Group Jurisdiction**

- (1) Upon application by a debtor that is a member of a corporate group within the meaning of section 3e (group-affiliated debtor), the insolvency court seised of the insolvency proceedings shall declare its jurisdiction over the other group-affiliated debtors (other group proceedings) if an admissible application for commencement of insolvency proceedings has been lodged with respect to the debtor and if the debtor is manifestly not merely of secondary importance for the corporate group as a whole. Secondary importance may generally not be assumed if in the last full financial year, the debtor’s annual average number of employees represented more than 15% of the annual average number of employees in the corporate group, and
  1. the debtor’s total assets amounted to more than 15% of the consolidated total assets of the corporate group or
  2. the debtor’s sales revenue amounted to more than 15% of the consolidated sales revenue of the corporate group.

If several group-affiliated debtors simultaneously lodged an application in accordance with sentence 1, or if in the case of several applications, it is unclear which application was lodged first, the decisive application shall be the one lodged by the debtor that had the most employees in the last full financial year; the other

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<sup>1</sup> Unless a reference is specifically to a natural person or to a legal entity, all references to ‘the debtor’ and pronouns relating thereto should be construed as referring to male and female natural persons and legal entities.

applications shall be inadmissible. If none of the group-affiliated debtors meets the requirements of sentence 2, the place of group jurisdiction may in any event be established at the court that has jurisdiction for the commencement of the proceedings for the group-affiliated debtor that had the most employees in the last full financial year.

- (2) If there are doubts that concentration of the proceedings at the insolvency court seised of the matter is in the common interest of the creditors, the court may refuse the application under subsection (1) sentence 1.
- (3) The debtor's right of application vests in the insolvency administrator upon commencement of the insolvency proceedings or in a preliminary insolvency administrator vested with the right to manage and dispose of the debtor's assets upon his/her appointment.
- (4) On application by the debtor, the court with jurisdiction over other group proceedings, provided that it has jurisdiction for decisions in restructuring cases pursuant to section 34 of the Business Stabilisation and Restructuring Act [*Unternehmensstabilisierungs- und -restrukturierungsgesetz*], shall also declare its jurisdiction, in accordance with the requirements in subsection (1), over other group proceedings in insolvency matters pursuant to subsection (1).

### **Section 3b – Continuation of Place of Group Jurisdiction**

A place of group jurisdiction established pursuant to section 3a remains unaffected by the non-commencement, termination, or discontinuation of insolvency proceedings in respect of the debtor that lodged the application as long as proceedings are pending at that place of jurisdiction in respect of another group-affiliated debtor.

### **Section 3c – Responsibility for Other Group Proceedings**

- (1) At the court at the place of group jurisdiction, the division responsible for the other group proceedings is the one who is responsible for the proceedings in which the place of group jurisdiction was established.
- (2) The application for commencement of other group proceedings may also be lodged at the court having jurisdiction pursuant to section 3 (1).

### **Section 3d – Referral to the Place of Group Jurisdiction**

- (1) If an application for commencement of insolvency proceedings in respect of the assets of a group-affiliated debtor is lodged with an insolvency court that is not the court at the place of group jurisdiction, the court seised of the matter may refer the proceedings to the court at the place of group jurisdiction. Upon application, a referral shall be made if the debtor lodges an admissible application for commencement of insolvency proceedings with the court at the place of group jurisdiction immediately after it became aware that a creditor had lodged an application for commencement of insolvency proceedings.
- (2) The debtor is entitled to make the application. Section 3a (3) applies with the necessary modifications.
- (3) The court at the place of group jurisdiction may dismiss the preliminary insolvency administrator appointed by the referring court if this is necessary in order to appoint one individual as the insolvency administrator for several or all proceedings in respect of the group-affiliated debtors in accordance with section 56b.

### **Section 3e – Corporate Group**

- (1) A corporate group within the meaning of this Code consists of legally independent enterprises that have the centre of their main interests on domestic territory and are directly or indirectly affiliated with one another due to
  1. the ability to exercise a controlling influence or
  2. consolidation under common management.
- (2) Also considered a corporate group within the meaning of subsection (1) are a partnership and its general partners, if none of the latter is a natural person or a partnership with a natural person as general partner, or the connection of partnerships continues in this manner.

### **Section 4 – Applicability of the Code of Civil Procedure [*Zivilprozessordnung*]**

Unless otherwise specified in the present Code, the provisions of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications to insolvency proceedings. Section 128a of the Code of Civil Procedure [*Zivilprozessordnung*] applies with the proviso that notices of creditors' meetings and other meetings are to make the participants aware of the obligation to refrain from deliberately recording sound and images and to ensure through appropriate measures that third parties cannot hear or view the transmission of sound and images.

#### **Section 4a – Deferment of the Costs of Insolvency Proceedings**

- (1) If the debtor is a natural person and has lodged an application for discharge of residual debt, on application he/she shall be permitted to defer the costs of the insolvency proceedings until the discharge of residual debt is granted if it is likely that the debtor's assets will be insufficient to cover these costs. Deferment pursuant to sentence 1 also includes the costs of the debt settlement plan proceedings and the residual debt discharge proceedings. The debtor shall attach a declaration to the application stating whether a ground for refusal pursuant to section 290 (1) No 1 applies. If such a ground applies, deferment is excluded.
- (2) If the debtor is permitted to defer the costs of the proceedings, on application he/she shall be assigned a lawyer of his/her choice who is willing to represent him/her, if representation by a lawyer appears necessary despite the duty of care incumbent on the court. Section 121 (3) to (5) of the Code of Civil Procedure [*Zivilprozessordnung*] applies with the necessary modifications.
- (3) The effect of deferment is that
  1. the Federal treasury or Federal State treasury may claim against the debtor for
    - a) the court costs in arrears and the court costs arising,
    - b) the claims of the lawyer assigned to the debtor which pass to the treasury, only in accordance with the stipulations laid down by the court;
  2. the lawyer assigned to the debtor cannot assert claims for remuneration against the debtor.Deferment is granted separately for each stage of the proceedings. The effects specified in sentence 1 apply on an interim basis pending the decision on deferment. Section 4b (2) applies with the necessary modifications.

#### **Section 4b – Repayment and Adjustment of Deferred Amounts**

- (1) If, after discharge of residual debt has been granted, the debtor is not in a position to pay the deferred amount out of his/her income and assets, the court may extend the deferment and fix the monthly instalments to be paid. Section 115 (1) and (2) and section 120 (2) of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications.
- (2) The court may vary the decision on deferment and the monthly instalments at any time if personal or financial circumstances relevant to the decision have significantly changed. The debtor is obliged to notify the court without delay of any significant change in these circumstances. Section 120 (4) sentences 1 and 2 of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications. A change to the detriment of the debtor is excluded if four years have elapsed since termination of the proceedings.

#### **Section 4c – Revocation of Deferment**

The court may revoke the deferment if

1. the debtor intentionally or through gross negligence provides incorrect information regarding circumstances relevant for the commencement of insolvency proceedings or for deferment, or if the debtor does not provide a declaration requested by the court regarding his/her circumstances;
2. the personal or financial requirements for deferment were not met; in this case revocation is excluded if four years have elapsed since termination of the proceedings;
3. the debtor is intentionally or negligently more than three months in arrears with the payment of a monthly instalment or with the payment of another amount;
4. the debtor is not in reasonable gainful employment and if unemployed does not try to find such employment or refuses a suitable activity and thereby prejudices the satisfaction of the insolvency creditors; this shall not apply if the debtor is not at fault; section 296 (2) sentences 2 and 3 apply with the necessary modifications;
5. discharge of residual debt is refused or revoked.

#### **Section 4d – Appeal**

- (1) The debtor has the right of immediate appeal against the refusal of deferment or its revocation and against the refusal of the application for assignment of counsel.
- (2) If deferment is granted, the public treasury has the right of immediate appeal. The appeal can only be based on the fact that deferment should have been refused in view of the debtor's personal or financial circumstances.

#### **Section 5 – Procedural Principles**

- (1) The insolvency court shall ascertain ex officio all circumstances relevant to the insolvency proceedings. To this end it may, in particular, hear witnesses and experts.
- (2) If the debtor's financial circumstances are straightforward and the number of creditors or the amount of the debts is small, the proceedings will be conducted in writing. The insolvency court may order that the proceedings or individual parts of the proceedings are conducted orally if this is appropriate to facilitate the

course of the proceedings. The court may rescind or vary this order at any time. The order and its rescission or variation shall be published.

- (3) The court may issue its decisions without a hearing. If a hearing is held, section 227 (3) sentence 1 of the Code of Civil Procedure [*Zivilprozessordnung*] is not applicable.
- (4) Schedules and lists may be produced and processed electronically. The governments of the Federal States are authorised to lay down detailed provisions by statutory order regulating the maintenance of the schedules and lists, their electronic submission, as well as the electronic submission of accompanying documents and their storage. They may also stipulate the data format requirements for electronic submission. The governments of the Federal States may delegate this power to the administration of justice departments of the Federal States.
- (5) Insolvency administrators should maintain an electronic creditor information system via which every insolvency creditor who has filed a claim can be given access in a commonly used file format to all decisions of the insolvency court, all reports sent to the insolvency court which do not concern only the claims of other creditors, and all documents concerning the creditor's own claims. If in the preceding business year the debtor has fulfilled at least two of the three criteria specified in section 22a (1), the insolvency administrator must maintain an electronic creditor information system and make the documents specified in sentence 1 available for electronic access without delay. The administrator shall provide the parties entitled to view the documents with the information necessary for access without delay.

### **Section 6 – Immediate Appeal**

- (1) The decisions of the insolvency court are subject to appeal only in those cases in which this Code provides the right of immediate appeal. The immediate appeal shall be lodged with the insolvency court.
- (2) The period for lodging an appeal starts to run on the date on which the decision is pronounced, or if it not pronounced, on the date on which it is served.
- (3) The decision on the appeal shall be effective only when it becomes final and binding. The appeal court may, however, order that the decision is effective immediately.

### **Section 7 (repealed)**

### **Section 8 – Service**

- (1) Service of documents is effected ex officio without the document to be served requiring certification. Service may be effected by posting the document to the address of the addressee for service; section 184 (2) sentences 1, 2 and 4 of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications. If service is to be effected on domestic territory, the document shall be deemed to have been served three days after posting.
- (2) Service shall not be effected on persons whose place of residence is unknown. If such persons have a representative with authority to accept service, service shall be effected on that representative.
- (3) The insolvency court may instruct the insolvency administrator to carry out the service of documents pursuant to subsection (1). He/she may use third parties, in particular his/her own staff, for effecting and recording the service of documents. The insolvency administrator shall add the notes made by him/her in accordance with section 184 (2) sentence 4 of the Code of Civil Procedure [*Zivilprozessordnung*] to the court files without delay.

### **Section 9 – Public Announcements**

- (1) Public announcements are made by means of centralised, national publication on the internet<sup>2</sup>; publication may be made in extract form. The announcement shall accurately identify the debtor, stating in particular its address and line of business; it shall be deemed to have been made when a further two days have elapsed since the day of publication.
- (2) The insolvency court may decide on additional publications if Federal State legislation makes provision for this. The Federal Ministry of Justice and Consumer Protection is authorised to regulate the details of the centralised, national publication on the internet by statutory order issued with the approval of the Bundesrat. This shall, in particular, stipulate time limits for deletion and provisions ensuring that publications
  1. are not tampered with and are complete and up-to-date;
  2. can be traced to their source at any time.
- (3) Public announcement shall suffice as proof of service on all parties to the proceedings even if this Code prescribes separate service in addition.

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<sup>2</sup> [www.insolvenzbekanntmachungen.de](http://www.insolvenzbekanntmachungen.de)

### **Section 10 – Hearing of the Debtor**

- (1) If this Code provides for the debtor to be granted a hearing, this may be omitted if the debtor resides abroad and the hearing would unduly delay the proceedings or if the debtor's place of residence is unknown. In this case a representative or relative of the debtor shall be heard.
- (2) If the debtor is not a natural person, subsection (1) applies with the necessary modifications in relation to the hearing of persons authorised to represent the debtor or who hold a participating interest in the debtor. If the debtor is a legal entity and the legal entity does not have a representative body (no management), the persons who hold a participating interest in the debtor may be heard; subsection (1) sentence 1 applies with the necessary modifications.

### **Section 10a – Preliminary Discussion**

- (1) A debtor who fulfils at least two of the three criteria specified in section 22a (1) is entitled to a preliminary discussion at the insolvency court responsible for it concerning matters relevant for the proceedings, in particular the requirements for self-administration, the self-administration strategy, the composition of the preliminary creditors' committee, the person to be appointed as preliminary insolvency administrator or supervisor, any further protective orders and authorisation to create preferential liabilities. If the debtor is not entitled to a preliminary discussion pursuant to sentence 1, the court may offer a preliminary meeting at its own discretion.
- (2) With the approval of the debtor, the court can hear creditors, in particular in order to discuss their willingness to serve as members of a preliminary creditors' committee.
- (3) The division on behalf of which the judge conducts the preliminary discussion pursuant to subsection (1) sentence 1 has jurisdiction for insolvency proceedings in respect of the assets of the debtor during the six months after the preliminary meeting.

## **Part Two – Commencement of Insolvency Proceedings. Assets Involved and Parties to the Proceedings**

### **Chapter One – Requirements for Commencement and Preliminary Insolvency Proceedings**

#### **Section 11 – Admissibility of Insolvency Proceedings**

- (1) Insolvency proceedings may be commenced in respect of the assets of any natural person or legal entity. An association without legal personality is equivalent to a legal entity in this respect.
- (2) Insolvency proceedings may further be commenced:
  1. in respect of the assets of a partnership with legal personality (general partnership, limited partnership, registered partnership, partnership under the Civil Code [*Bürgerliches Gesetzbuch*], shipping partnership, European Economic Interest Grouping);
  2. in accordance with sections 315 to 334, in respect of a deceased's estate, the joint marital property of a continued community of property or the joint marital property of a community of property jointly managed by the spouses or life partners.
- (3) After the dissolution of a legal entity or a partnership with legal personality the commencement of insolvency proceedings is permitted as long as the assets have not been distributed.

#### **Section 12 – Legal Entities under Public Law**

- (1) Insolvency proceedings may not be commenced in respect of the assets
  1. of the Federal Republic or a Federal State;
  2. of a legal entity under public law which is subject to the supervision of a Federal State, if the law of the Federal State so provides.
- (2) If a Federal State has declared insolvency proceedings to be inadmissible in respect of the assets of a legal entity in accordance with subsection (1) No. 2, in the event of its illiquidity or overindebtedness its employees may apply to the Federal State for the benefits which they would be able to claim from the Employment Agency pursuant to the provisions on insolvency pay contained in the Third Book of the Code of Social Security Law [*Drittes Buch Sozialgesetzbuch*] and from the statutory insolvency insurance institution pursuant to the provisions of the Act to Improve Occupational Pensions [*Gesetz zur Verbesserung der betrieblichen Altersversorgung*] if insolvency proceedings had been commenced.

#### **Section 13 – Application for Commencement of Insolvency Proceedings**

- (1) Insolvency proceedings shall only be commenced on written application. The creditors and the debtor are entitled to lodge the application. An application by the debtor shall be accompanied by a list of creditors and their claims. If the debtor has a business operation that has not been discontinued, the list shall indicate in particular
  1. the largest claims;

2. the largest secured claims;
3. the tax authorities' claims;
4. the social security authorities' claims and
5. claims arising under occupational pension schemes.

In this case the debtor shall also give particulars of the total assets, the sales revenue and the average number of employees in the preceding business year. The particulars pursuant to sentence 4 are obligatory if

1. the debtor applies for self-administration;
2. the debtor fulfils the criteria specified in section 22a (1) or
3. an application has been made for the appointment of a preliminary creditors' committee.

A declaration shall be attached to the list pursuant to sentence 3 and the particulars pursuant to sentences 4 and 5 stating that the information provided is accurate and complete.

- (2) The application may be withdrawn up until the court orders commencement of insolvency proceedings or the application is refused with final effect.
- (3) If the application for commencement of insolvency proceedings is inadmissible, the insolvency court shall invite the applicant to remedy the deficiency without delay and shall grant him/her a reasonable period of time in which to do so.
- (4) The Federal Ministry of Justice and Consumer Protection is authorised to introduce a form to be used by the debtor for lodging an application by means of statutory order issued with the approval of the Bundesrat. Insofar as a form is introduced pursuant to sentence 1, the debtor must use this form. Different forms may be introduced by the courts for proceedings that are processed electronically and for proceedings that are not processed electronically.

#### **Section 13a – Application for the Establishment of a Place of Group Jurisdiction**

- (1) The following information must be specified in an application under section 3a (1):
  1. name, registered office and objects and also the total assets, sales revenue and average number of employees in the last financial year of the other group-affiliated undertakings which are not merely of secondary importance to the corporate group; corresponding information should be provided for the remaining group-affiliated undertakings;
  2. the reasons why concentration of proceedings at the insolvency court seized of the matter is in the common interest of the creditors;
  3. whether continuation or reorganisation of the corporate group or part thereof is being pursued;
  4. which group-affiliated undertakings are institutions within the meaning of section 1 (1b) of the Banking Act [*Kreditwesengesetz*], financial holding companies within the meaning of section 1 (3a) KWG, capital investment companies within the meaning of section 17 (1) of the Investment Code [*Kapitalanlagegesetzbuch*], payment service providers within the meaning of section 1 (1) of the Payment Services Supervision Act [*Zahlungsdiensteaufsichtsgesetz*] or insurance undertakings within the meaning of section 7 No. 33 of the Act on the Supervision of Insurance Undertakings [*Versicherungsaufsichtsgesetz*] and
  5. the group-affiliated debtors in relation to which the commencement of insolvency proceedings has been applied for or proceedings have been commenced, including the insolvency court having jurisdiction and the case number.
- (2) The most recent consolidated accounts for the corporate group must be annexed to the application under section 3a (1). If these are not available, the most recent annual accounts of the undertakings in the group which are not merely of secondary importance to the corporate group must be annexed. The annual accounts of the remaining undertakings in the corporate group should be annexed.

#### **Section 14 – Application by a Creditor**

- (1) An application by a creditor is admissible if the creditor has a legal interest in the commencement of insolvency proceedings and substantiates its claim and the grounds for commencement of insolvency proceedings by prima facie evidence. The application shall not become inadmissible solely on account of the claim being satisfied.
- (2) If the application is admissible, the insolvency court shall hear the debtor.
- (3) If the creditor's claim is satisfied after the application has been lodged, the debtor must bear the costs of the proceedings if the application is rejected as unfounded. The debtor must also bear the costs if the application of a creditor is rejected by reason of a non-public stabilisation order pursuant to the Business Stabilisation and Restructuring Act [*Unternehmensstabilisierungs- und -restrukturierungsgesetz*] which is effective at the time the application is lodged and the creditor could not have known of the stabilisation order.

### **Section 15 – Right of Legal Entities and Partnerships with Legal Personality to Apply for Commencement of Insolvency Proceedings**

- (1) In addition to the creditors, any member of the representative body or, in the case of a partnership with legal personality or of a partnership limited by shares, any general partner, and also any liquidator is entitled to apply for commencement of insolvency proceedings relating to the assets of a legal entity or of a company without legal personality. In the case of a legal entity with no management, each shareholder, and in the case of a stock corporation or a cooperative, in addition each member of the supervisory board, is also entitled to apply for commencement of insolvency proceedings.
- (2) If the application is not lodged by all members of the representative body, all general partners, all shareholders of the legal entity, all members of the supervisory board or all liquidators, it shall be admissible if grounds for commencement of insolvency proceedings are demonstrated to the satisfaction of the court. In addition, if an application is lodged by shareholders of a legal entity or members of the supervisory board, the lack of management shall also be demonstrated to the satisfaction of the court. The insolvency court shall hear the remaining members of the representative body, general partners, shareholders of the legal entity, members of the supervisory board or liquidators.
- (3) If none of the general partners of a partnership with legal personality is a natural person, subsections (1) and (2) shall apply with the necessary modifications to the members of the representative body and the liquidators of the partners authorised to represent the company. The same shall apply if the connection between the companies continues in this form.

### **Section 15a – Obligation of Legal Entities and Partnerships with Legal Personality to Apply for Commencement of Insolvency Proceedings**

- (1) If a legal entity becomes illiquid or overindebted, the members of the representative body or the liquidators must apply for commencement of insolvency proceedings without undue delay. The application must be lodged no later than three weeks after the occurrence of illiquidity and six weeks after the occurrence of overindebtedness. The same shall apply to the members of the representative body of the partners authorised to represent the company or the liquidators in the case of a partnership with legal personality where none of the general partners is a natural person; this shall not apply if the general partners include another company which has a natural person as general partner.
- (2) In the case of a company within the meaning of subsection (1) sentence 3, subsection (1) shall apply with the necessary modifications if the members of the representative body of the partners authorised to represent the company are, in turn, companies in which none of the general partners is a natural person, or if the connection between the companies continues in this form.
- (3) In the event that a company with limited liability has no management, each shareholder, and in the event that a stock corporation or a co-operative has no management, each member of the supervisory board, is obliged to lodge an application for commencement of insolvency proceedings unless such person was unaware of the company's illiquidity and overindebtedness or lack of management.
- (4) Anyone who, contrary to subsection (1) sentence 1 and sentence 2, also in conjunction with sentence 3 or subsection (2) or subsection (3),
  1. does not apply for commencement of insolvency proceedings or does not apply within the specified time limit or
  2. does not apply correctlyshall be punished by imprisonment for up to three years or by a fine.
- (5) If the offender in the cases specified in subsection (4) acts negligently, the punishment shall be imprisonment for up to one year or a fine.
- (6) In the case of subsection (4), number 2, also in conjunction with subsection (5), the offence shall be punishable only if the application for commencement of insolvency proceedings was refused as inadmissible with final effect.
- (7) Subsections (1) to (6) are not applicable to associations and foundations to which section 42 (2) of the Civil Code [*Bürgerliches Gesetzbuch*] applies.

### **Section 15b – Payments in the case of Illiquidity and Overindebtedness; Limitation Period**

- (1) After a legal entity has become illiquid or overindebted, the members of the representative body and liquidators of the legal entity obligated to apply for commencement of insolvency proceedings under section 15a (1) sentence 1 are no longer permitted to make payments on its behalf. This does not apply to payments which are consistent with the due care of a prudent and conscientious manager.
- (2) Subject to subsection (3), payments made in the ordinary course of business, particularly those that serve to maintain business operations, are deemed consistent with the due care of a prudent and conscientious manager. During the period for timely lodging of an application pursuant to section 15a (1) sentences 1 and



2, this applies for only as long as the parties obligated to apply for commencement of insolvency proceedings pursue measures to permanently eliminate the material insolvency or to prepare an application for commencement of insolvency proceedings with the due care of a prudent and conscientious manager. Payments that are made in the period between the lodging of the application and the commencement of insolvency proceedings are deemed consistent with the due care of a prudent and conscientious manager if they are made with the consent of a preliminary insolvency administrator.

- (3) If the time limit for timely lodging of an application pursuant to section 15a (1) sentences 1 and 2 has passed and the party obligated to apply for commencement of insolvency proceedings has not done so, payments are not generally compatible with the due care of a prudent and conscientious manager.
- (4) If payments are made contrary to subsection (1), the parties obligated to apply for commencement of insolvency proceedings must reimburse the legal entity. If the creditors of the legal entity have incurred a lesser loss, the obligation to pay compensation is limited to compensation for that loss. Insofar as the reimbursement or compensation is required to satisfy the creditors of the legal entity, the obligation shall not be excluded by reason of the fact that these parties acted in compliance with a resolution of a body of the legal entity. If the legal entity waives reimbursement or compensation claims or enters into a settlement in respect of these claims, the waiver or settlement is ineffective. This does not apply if the party owing the reimbursement or compensation is illiquid and enters into a settlement with its creditors in order to avoid insolvency proceedings, if the obligation to reimburse or pay compensation is dealt with in an insolvency plan or if an insolvency administrator is acting for the legal entity.
- (5) Subsection (1) sentence 1 and subsection (4) also apply for payments to persons who hold a participating interest in the legal entity insofar as such payments necessarily led to the illiquidity of the legal entity, unless this was not apparent even with exercise of the due care referred to in subsection (1) sentence 2. Sentence 1 is not applicable to cooperatives.
- (6) Subsections (1) to (5) also apply to the members of the representative body of the partners authorised to represent the company who are obligated to lodge an application for commencement of insolvency proceedings pursuant to section 15a (1) sentence 3 and subsection (2).
- (7) Claims based on the foregoing provisions become time-barred after five years. If the legal entity is quoted at the time of the breach of obligation, the claims become time-barred after 10 years.
- (8) There is no breach of tax payment obligations if between the occurrence of illiquidity pursuant to section 17 or overindebtedness pursuant to section 19 and the decision of the insolvency court on the application for commencement of insolvency proceedings tax claims are not satisfied or are not satisfied in good time, provided that the parties obligated to apply for commencement of insolvency proceedings comply with their obligations under section 15a. If contrary to the obligation under section 15a an application for commencement of insolvency proceedings is lodged late, the foregoing applies only to tax claims falling due following the appointment of a preliminary insolvency administrator or the ordering of interim self-administration. If insolvency proceedings are not commenced and this is attributable to a breach of duty by the parties obligated to apply for commencement of insolvency proceedings, sentences 1 and 2 do not apply.

#### **Section 16 – Ground for Commencement**

It is a prerequisite for commencement of insolvency proceedings that a ground for commencement exists.

#### **Section 17 – Illiquidity**

- (1) The general ground for commencement of proceedings is illiquidity.
- (2) The debtor is deemed illiquid if it is unable to meet its due payment obligations. Illiquidity shall generally be presumed if the debtor has stopped making payments.

#### **Section 18 – Imminent Illiquidity**

- (1) If the debtor applies for commencement of insolvency proceedings, imminent illiquidity is also a ground for commencement of proceedings.
- (2) The debtor faces imminent illiquidity if it is likely to be unable to meet existing payment obligations when they fall due. In general, a forecast period of 24 months is to be taken as a basis.
- (3) In the case of a legal entity or a partnership with legal personality, if the application is not lodged by all members of the representative body, all general partners or all liquidators, subsection (1) shall only be applicable if the applicant or applicants is or are entitled to represent the legal entity or company.

#### **Section 19 – Overindebtedness**

- (1) In the case of a legal entity, overindebtedness is also a ground for commencement of proceedings.
- (2) Overindebtedness exists if the debtor's assets no longer cover its existing liabilities, unless the continued operation of the enterprise during the next twelve months is substantially likely in the circumstances.

Claims to repayment of shareholder loans or claims arising out of legal acts corresponding in economic terms to such loans which the creditor and debtor have agreed pursuant to section 39 (2) will be subordinated in insolvency proceedings to the claims specified in section 39 (1) Nos 1 to 5 are not to be taken into consideration in relation to the liabilities in terms of sentence 1.

- (3) If a partnership with legal personality does not have a natural person as general partner, subsections (1) and (2) shall apply with the necessary modifications. This shall not apply if the general partners include another company which has a natural person as general partner.

#### **Section 20 – Obligation of Disclosure and Co-operation during Preliminary Insolvency Proceedings. Reference to Discharge of Residual Debt**

- (1) If the application is admissible, the debtor must provide the insolvency court with the information it requires to decide on the application and otherwise support the court in the performance of its duties. Sections 97, 98 and 101 (1) sentences 1 and 2 and (2) apply with the necessary modifications.
- (2) If the debtor is a natural person, he/she shall be informed that he/she may obtain discharge of residual debt pursuant to sections 286 to 303a.

#### **Section 21 – Interim Measures Order**

- (1) Until the application has been decided the insolvency court shall take all measures which appear necessary to prevent any changes in the debtor's financial position to the prejudice of the creditors. The debtor has the right of immediate appeal against the ordering of the measure.
- (2) The court may in particular
  1. appoint a preliminary insolvency administrator to whom section 8 (3) and sections 56 to 56b and 58 to 66 and 296a apply with the necessary modifications;
  - 1a. establish a preliminary creditors' committee to which section 67 (2, 3) and sections 69 to 73 apply with the necessary modifications; persons who only became creditors upon commencement of proceedings may also be appointed as members of the creditors' committee;
  2. issue a general restraint order against the debtor prohibiting disposals of assets or order that disposals by the debtor require the approval of the preliminary insolvency administrator to be effective;
  3. order a prohibition or temporary suspension of compulsory enforcement measures against the debtor unless immovable assets are involved;
  4. issue an interim postal redirection order to which sections 99 and 101 (1) sentence 1 apply with the necessary modifications;
  5. order that assets which would be covered by section 166 or in respect of which segregation could be claimed in the event of commencement of proceedings may not be realised or collected by the creditor and that such assets may be used for the continued operation of the debtor's enterprise insofar as they are of substantial importance for this purpose; section 169 sentences 2 and 3 apply with the necessary modifications; the creditor shall be compensated for any loss in value resulting from such use by regular payments. The obligation to make compensation payments exists only insofar as the loss in value resulting from the use impairs the security of the creditor entitled to separate satisfaction. If the preliminary insolvency administrator collects a debt assigned to secure a claim in place of the creditor, sections 170 and 171 shall apply with the necessary modifications.

The ordering of protective measures does not affect the validity of disposals of financial collateral pursuant to section 1 (17) of the Banking Act [*Kreditwesengesetz*] and the validity of the settlement of claims and performance under payment orders, orders between payment service providers or intermediaries or orders for the transfer of securities brought into systems pursuant to section 1 (16) of the Banking Act [*Kreditwesengesetz*]. This shall apply even if a transaction of this type by the debtor is carried out and settled or financial collateral is provided on the day the order is made and the other party proves that it neither knew nor ought to have known of the court order; if the other party is a system operator or a participant in the system, the day on which the order is made shall be determined in accordance with the meaning of business day in section 1 (16b) of the Banking Act [*Kreditwesengesetz*].

- (3) If other measures are insufficient, the debtor may be compelled to appear before the court and be taken into custody after being heard. If the debtor is not a natural person the same shall apply with the necessary modifications to the members of its representative body. Section 98 (3) applies with the necessary modifications to the ordering of detention.

#### **Section 22 – Legal Status of the Preliminary Insolvency Administrator**

- (1) If a preliminary insolvency administrator is appointed and a general prohibition of disposal is imposed on the debtor, the right to manage and dispose of the debtor's assets vests in the preliminary insolvency administrator. In this event the preliminary insolvency administrator shall:
  1. secure and preserve the debtor's assets;

2. continue an enterprise operated by the debtor until the decision on commencement of insolvency proceedings, unless the insolvency court consents to the closure of the enterprise in order to avoid a substantial reduction in the assets;
  3. investigate whether the debtor's assets will cover the costs of the proceedings; the court may in addition instruct the preliminary insolvency administrator as an expert to investigate whether there is a ground for commencement of proceedings and what prospects exist for the debtor's enterprise to continue.
- (2) If a preliminary insolvency administrator is appointed without a general prohibition of disposal being imposed on the debtor, the court shall determine the duties of the preliminary insolvency administrator. Such duties are not permitted to exceed the duties pursuant to subsection (1) sentence 2.
  - (3) The preliminary insolvency administrator is entitled to enter the debtor's business premises and conduct investigations there. The debtor shall permit the preliminary insolvency administrator to inspect its books and business records. The debtor shall provide the preliminary insolvency administrator with all necessary information and support him/her in the performance of his/her duties; sections 97, 98 and 101 (1) sentences 1 and 2 and 101 (2) apply with the necessary modifications.

#### **Section 22a – Appointment of a Preliminary Creditors' Committee**

- (1) The insolvency court shall establish a preliminary creditors' committee pursuant to section 21 (2) number 1a if the debtor has fulfilled at least two of the following three criteria in the previous business year:
  1. a balance sheet total of at least EUR 6,000,000 after deduction of any losses exceeding equity within the meaning of section 268 (3) of the Commercial Code [*Handelsgesetzbuch*];
  2. sales revenues of at least EUR 12,000,000 in the last 12 months prior to the balance sheet date;
  3. an annual average of at least fifty employees.
- (2) On application by the debtor, the preliminary insolvency administrator or a creditor, the court shall appoint a preliminary creditors' committee pursuant to section 21 (2) number 1a if the potential members of the preliminary creditors' committee are named and a declaration of consent by those persons is attached to the application.
- (3) A preliminary creditors' committee shall not be appointed if the debtor's business operations have ceased, if the establishment of a preliminary creditors' committee is disproportionate in view of the anticipated value of the insolvency estate or if the establishment of the committee would cause a delay leading to a prejudicial change in the debtor's financial position.
- (4) At the court's request, the debtor or the preliminary insolvency administrator shall name potential members of the preliminary creditors' committee.

#### **Section 23 – Publication of Restrictions on Disposals**

- (1) The decision ordering any of the restrictions on disposals specified in section 21 (2) No. 2 and the appointment of a preliminary insolvency administrator shall be published. It shall be served separately on the debtor, on persons who have liabilities towards the debtor and on the preliminary insolvency administrator. The debtor's debtors shall be requested at the same time to pay their liabilities only in compliance with the decision.
- (2) If the debtor is registered in the Commercial Register, Register of Cooperatives, Register of Companies, Register of Partnerships or Register of Associations, the insolvency court registry shall send an official copy of the decision to the registration court.
- (3) Sections 32 and 33 apply with the necessary modifications in respect of the registration of restrictions on disposals in the Land Register, the Register of Ships, the Register of Ships under Construction and the Register of Liens on Aircraft.

#### **Section 24 – Effects of the Restrictions on Disposals**

- (1) Sections 81 and 82 apply with the necessary modifications in relation to any breach of the restrictions on disposals specified in section 21 (2) No. 2.
- (2) If the right to dispose of an asset of the debtor has vested in a preliminary insolvency administrator, section 85 (1) sentence 1 and section 86 shall apply with the necessary modifications in relation to the resumption of pending court proceedings.

#### **Section 25 – Revocation of the Protective Measures**

- (1) If the protective measures are revoked, section 23 shall apply with the necessary modifications to the public announcement of the revocation of a restriction on disposals.
- (2) If the right to dispose of the assets of the debtor has vested in a preliminary insolvency administrator, the preliminary insolvency administrator shall discharge the costs incurred and fulfil the obligations entered into by him/her out of the assets administered by him/her prior to the revocation of his/her appointment. The same shall apply in respect of liabilities arising out of contracts for continuing obligations insofar as the

preliminary insolvency administrator has claimed counter-performance in respect of the assets administered by him/her.

### **Section 26 – Refusal of Application due to Insufficient Assets**

- (1) The insolvency court shall refuse the application for commencement of insolvency proceedings if the debtor's assets are likely to be insufficient to cover the costs of the proceedings. The application shall not be refused if sufficient funds are advanced or if the costs are deferred pursuant to section 4a. The order shall be published without delay.
- (2) The court shall order that any debtor in respect of whom an application to commence insolvency proceedings has been refused for deficiency of assets be entered in the list of debtors pursuant to section 882b of the Code of Civil Procedure [*Zivilprozessordnung*] and shall immediately transmit the order electronically to the central enforcement court pursuant to section 882h (1) of the Code of Civil Procedure [*Zivilprozessordnung*]. Section 882c (3) of the Code of Civil Procedure [*Zivilprozessordnung*] applies with the necessary modifications.
- (3) Anyone who has made an advance payment pursuant to subsection (1) sentence 2 may claim reimbursement of the advanced amount from any person who, contrary to the provisions of insolvency or company law, has intentionally or negligently and in breach of duty failed to lodge an application for commencement of insolvency proceedings. If a dispute arises as to whether the person acted intentionally or negligently and in breach of duty, such person shall bear the burden of proof.
- (4) Any person who, contrary to the provisions of insolvency or company law, has intentionally or negligently and in breach of duty failed to lodge an application for commencement of insolvency proceedings is obliged to make the advance payment pursuant to subsection (1) sentence 2. If a dispute arises as to whether the person acted intentionally or negligently and in breach of duty, such person shall bear the burden of proof. Payment of the advance payment may be requested by the preliminary insolvency administrator and by any person who has a justified financial claim against the debtor.

### **Section 26a – Remuneration of the Preliminary Insolvency Administrator**

- (1) If insolvency proceedings are not commenced, the insolvency court shall make an order determining the preliminary insolvency administrator's remuneration and reimbursable expenses.
- (2) The determination shall be made against the debtor unless the application for commencement of insolvency proceedings is inadmissible or not well-founded and the applicant creditor is guilty of gross negligence. In this case the preliminary insolvency administrator's remuneration and reimbursable expenses shall be imposed on and awarded against the creditor in whole or in part. Gross negligence shall be assumed in particular if the application had no prospect of success from the outset and the creditor should have recognised this. The order shall be served on the preliminary insolvency administrator and on the party responsible for the preliminary insolvency administrator's costs. The provisions of the Code of Civil Procedure [*Zivilprozessordnung*] concerning compulsory enforcement based on cost assessment orders apply with the necessary modifications.
- (3) The preliminary insolvency administrator and the party responsible for the preliminary insolvency administrator's costs have the right of immediate appeal against the order. Section 567 (2) of the Code of Civil Procedure [*Zivilprozessordnung*] applies with the necessary modifications.

### **Section 27 – Order Commencing Proceedings**

- (1) If insolvency proceedings are commenced, the insolvency court shall appoint an insolvency administrator. Section 270 remains unaffected.
- (2) The order commencing proceedings shall contain:
  1. the debtor's company name or surname and first names, date of birth, registration court, registration number under which the debtor is entered, branch of business or occupation and place of business or place of residence;
  2. name and address of the insolvency administrator;
  3. the time when the order was made;
  4. the grounds on which the court did not follow a unanimous proposal from the preliminary creditors' committee as to the person to be appointed as administrator; the name of the proposed person shall not be mentioned.
  5. an abstract representation of the time limits for deletion applicable to personal data pursuant to section 3 of the Ordinance regarding Public Announcements on the Internet in Insolvency Proceedings of 12 February 2002 (as published in the Federal Law Gazette, see *BGBI.* I p. 677), last amended by Article 2 of the Act of 13 April 2007 (as published in the Federal Law Gazette, see *BGBI.* I p. 509).
- (3) If the time when the order commencing proceedings is made is not stated, it shall be deemed to have been made at midday on the day on which the order is issued.

### **Section 28 – Requests to Creditors and Debtors**

- (1) In the order commencing proceedings the creditors shall be requested to file their claims with the insolvency administrator within a specified period in compliance with section 174. The period shall amount to not less than two weeks and not more than three months.
- (2) In the order commencing proceedings the creditors shall be requested to inform the administrator without delay of the security interests they claim to have in movable assets or rights of the debtor. Details must be provided of the asset in which the security interest is claimed, the nature and reason for the creation of the security interest and also the secured claim. Anyone who intentionally or negligently fails to provide or delays in providing such information shall be liable for the resulting damage.
- (3) In the order commencing proceedings, a request shall be made to persons who have liabilities towards the debtor that they should no longer render performance to the debtor but instead to the administrator.

### **Section 29 – Scheduling of Dates**

- (1) In the order commencing proceedings the insolvency court shall schedule dates for:
  1. a meeting of creditors to decide on the future course of the insolvency proceedings on the basis of a report by the insolvency administrator (report meeting); the date for the meeting should not be fixed more than six weeks in advance and may not be fixed more than three months in advance;
  2. a meeting of creditors to verify the claims filed (verification meeting); the period between the expiry of the time limit for filing claims and the verification meeting shall amount to at least one week and not more than two months.
- (2) The meetings may be combined. The court shall dispense with the report meeting if the debtor's financial circumstances are straightforward and the number of creditors or the amount of the debts is small.

### **Section 30 – Publication of the Order Commencing Proceedings**

- (1) The insolvency court registry shall publish the order commencing proceedings immediately.
- (2) The order shall be served separately on the debtor's creditors and debtors and on the debtor itself.
- (3) (repealed)

### **Section 31 – Commercial Register, Register of Cooperatives, Register of Companies, Register of Partnerships or Register of Associations**

If the debtor is registered in the Commercial Register, Register of Cooperatives, Register of Companies, Register of Partnerships or Register of Associations, the insolvency court registry shall forward to the registration court:

1. an official copy of the order commencing proceedings in the event that insolvency proceedings are commenced;
2. an official copy of the order refusing the application in the event that the application for commencement of insolvency proceedings is refused due to insufficient assets and if the debtor is a legal entity or a partnership with legal personality which will be dissolved as a result of the refusal of the application due to insufficient assets.

### **Section 32 – Land Register**

- (1) Commencement of the insolvency proceedings shall be registered in the Land Register:
  1. in respect of plots of land for which the debtor is registered as owner;
  2. in respect of the debtor's registered rights in plots of land and in registered rights if there are concerns, based on the type of rights and in the circumstances, that the insolvency creditors would be disadvantaged in the absence of registration.
- (2) If the insolvency court is aware of such plots of land or rights it shall request the Land Registry ex officio to make the registration. The insolvency administrator may also request the Land Registry to make the registration.
- (3) If the administrator releases or sells a plot of land or a right in respect of which commencement of insolvency proceedings has been registered, on application the insolvency court shall request that the Land Registry delete the entry. The insolvency administrator may also request that the Land Registry delete the entry.

### **Section 33 – Ships and Aircraft Registers**

Section 32 applies with the necessary modifications to the registration of commencement of insolvency proceedings in the Register of Ships, Register of Ships under Construction and Register of Liens on Aircraft. In this case the ships, ships under construction and aircraft entered in these registers take the place of plots of land and the registration court takes the place of the Land Register.

### **Section 34 – Appeal**

- (1) If commencement of insolvency proceedings is refused, the applicant and, if the application is refused pursuant to section 26, the debtor, has the right of immediate appeal.
- (2) If insolvency proceedings are commenced, the debtor has the right of immediate appeal.
- (3) Once the decision revoking the order commencing proceedings becomes final, termination of the proceedings shall be published. Section 200 (2) sentence 2 applies with the necessary modifications. The effects of legal acts which have been carried out by or with the insolvency administrator shall be unaffected by termination of the proceedings.

## **Chapter Two – Insolvency Estate. Classification of Creditors**

### **Section 35 – Definition of Insolvency Estate**

- (1) Insolvency proceedings cover all of the assets which belong to the debtor at the time when the proceedings are commenced and which the debtor acquires during the proceedings (insolvency estate).
- (2) If the debtor pursues an activity as a self-employed person or intends to pursue such an activity in the near future, the insolvency administrator shall declare to him/her whether the assets from the self-employed activity belong to the insolvency estate and whether claims arising out of this activity can be asserted in the insolvency proceedings. Section 295a applies with the necessary modifications. On application by the creditors' committee, or, if one has not been appointed, the creditors' meeting, the insolvency court shall order the declaration to be invalid.
- (3) The debtor shall inform the administrator without delay of the assumption or resumption of an activity as a self-employed person. If the debtor asks the administrator for release of such activity, the administrator shall respond to the request without delay and within one month at the latest.
- (4) The insolvency administrator's declaration shall be notified to the court. The court shall publish the declaration and the order concerning its invalidity.

### **Section 36 – Objects Exempted from Attachment**

- (1) Objects not subject to compulsory enforcement do not form part of the insolvency estate. Sections 850, 850a, 850c, 850e, 850f (1), sections 850g to 850k, 851c and 851d of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications.
- (2) However, the insolvency estate includes
  1. the debtor's business records; statutory obligations governing the retention of documents remain unaffected;
  2. if the debtor is self-employed, the objects pursuant to section 811 (1) No. 1 (b) and animals pursuant to section 811 (1) No. 8 (b) of the Code of Civil Procedure [*Zivilprozessordnung*]; not included are objects required for continuation of a gainful occupation consisting in the provision of personal services.
- (3) Objects which constitute normal household goods and which are used in the debtor's household shall not form part of the insolvency estate if it is readily apparent that their disposal would only yield proceeds out of all proportion to their value.
- (4) The insolvency court has jurisdiction to decide whether an object is liable to compulsory enforcement under the provisions specified in subsection (1) sentence 2. The insolvency administrator may file the request in place of a creditor. Sentences 1 and 2 apply with the necessary modifications to preliminary insolvency proceedings.

### **Section 37 – Joint Marital Property in a Community of Property**

- (1) If, under the marital property regime of community of property, the joint marital property is managed by only one spouse and insolvency proceedings are commenced against this spouse, the joint marital property shall form part of the insolvency estate. No partitioning of the joint marital property shall take place. The joint marital property shall not be affected by insolvency proceedings commenced against the other spouse.
- (2) If the spouses both manage the joint marital property, insolvency proceedings commenced against one spouse shall not affect the joint marital property.
- (3) Subsection (1) applies to a continued community of property, provided that the surviving spouse takes the place of the spouse who managed the joint marital property alone and the late spouse's descendants take the place of the other spouse.
- (4) Subsections (1) to (3) apply with the necessary modifications to life partners.

### **Section 38 – Definition of Insolvency Creditor**

The insolvency estate serves to satisfy the personal creditors who have a justified financial claim against the debtor at the time of commencement of insolvency proceedings (insolvency creditors).

### **Section 39 – Subordinated Insolvency Creditors**

- (1) The following claims are subordinated to all other claims of the insolvency creditors; they shall be satisfied in the following order and in proportion to their respective amounts if they have equal ranking:
1. the interest and penalties for late payment accruing on the claims of the insolvency creditors since commencement of the insolvency proceedings;
  2. the costs incurred by the individual insolvency creditors through their participation in the proceedings;
  3. fines, administrative fines, administrative penalties and periodic penalty payments, and also the incidental legal consequences of a criminal or administrative offence resulting in liability for a monetary payment;
  4. claims to gratuitous performance by the debtor;
  5. pursuant to subsections (4) and (5) claims for repayment of a shareholder loan or claims arising out of legal acts corresponding in economic terms to such a loan.
- Sentence 1 No. 5 is not applicable if a state development bank or a subsidiary of such bank has granted a loan to an enterprise in which the state development bank or subsidiary holds a participating interest or has undertaken another legal act economically equivalent to the grant of a loan.
- (2) Claims which creditor and debtor have agreed will be subordinated in insolvency proceedings shall be satisfied, in case of doubt as to their ranking, after the claims specified in subsection (1).
- (3) The interest on the claims of subordinated insolvency creditors and the costs incurred by these creditors through their participation in the proceedings rank equally with the claims of these creditors.
- (4) Subsection (1) No. 5 applies to companies that have neither a natural person nor a company in which a general partner is a natural person as general partner. If a creditor acquires shares upon imminent or existing illiquidity of the company or its overindebtedness for the purpose of its reorganisation, until the viable recovery of the company has been achieved this shall not lead to the application of subsection (1) No. 5 to the creditor's claims arising out of existing or newly granted loans or claims arising out of legal acts corresponding in economic terms to such a loan.
- (5) Subsection (1) No. 5 shall not apply to the non-executive partner of a company within the meaning of subsection (4) sentence 1 who holds 10% or less of the company's liable equity capital.

### **Section 40 – Maintenance Claims**

Claims against the debtor for maintenance under family law may be lodged in the insolvency proceedings for the period after commencement of proceedings only insofar as the debtor is liable as heir of the obligor. Section 100 remains unaffected.

### **Section 41 – Unmatured Claims**

- (1) Unmatured claims are deemed to be due.
- (2) If they bear no interest, they shall be discounted at the statutory interest rate. The claims are thereby reduced to the amount which, by adding the statutory rate of interest accruing for the period from commencement of the insolvency proceedings until maturity, corresponds to the full amount of the claim.

### **Section 42 – Claims Subject to a Condition Subsequent**

Claims subject to a condition subsequent shall be taken into account in the insolvency proceedings as unconditional claims as long as the condition has not arisen.

### **Section 43 – Liability of Several Persons**

A creditor to whom several persons are liable in full for the same performance may claim the entire amount which it was entitled to claim at the time of commencement of proceedings in the insolvency proceedings against each debtor until full satisfaction.

### **Section 44 – Rights of Joint Debtors and Guarantors**

Joint debtors and guarantors may only assert the claim against the debtor in insolvency proceedings which they could acquire in the future through satisfaction of the creditor if the creditor does not assert its claim.

### **Section 44a – Secured Loans**

In insolvency proceedings relating to the assets of a company, pursuant to section 39 (1) No. 5 a creditor may demand pro rata satisfaction out of the insolvency estate in respect of a claim to repayment of a loan or an equivalent claim for which a shareholder provides security or is liable as guarantor only to the extent of any shortfall incurred when the security or the guarantee is exercised.

#### **Section 45 – Conversion of Claims**

Claims that are not based on money or for which an amount of money is not specified must be asserted at the value which can be estimated for them at the time of commencement of the insolvency proceedings. Claims expressed in foreign currency or in a unit of account must be converted into domestic currency on the basis of the exchange rate effective for the place of payment at the time of commencement of the insolvency proceedings.

#### **Section 46 – Recurring Performance**

Claims for recurring performance with a specified amount and duration shall be lodged for the amount resulting from the aggregation of all outstanding payments less the interim interest specified in section 41. If the duration of the performance is not specified, section 45 sentence 1 shall apply with the necessary modifications.

#### **Section 47 – Segregation**

Any creditor who can claim on the basis of a real right (in rem) or a personal right (in personam) that an asset does not form part of the insolvency estate is not an insolvency creditor. The creditor's right to segregation of the asset is determined in accordance with the laws applicable outside the insolvency proceedings.

#### **Section 48 – Substitute Segregation**

If an asset in relation to which a right to segregation could have been claimed is disposed of without authorisation by the debtor prior to commencement of the insolvency proceedings, or by the insolvency administrator after commencement of the insolvency proceedings, the creditor entitled to claim segregation of the asset may demand assignment of the right to the consideration insofar as this is still outstanding. The creditor may demand the consideration from the insolvency estate insofar as it is still present in distinct form within the insolvency estate.

#### **Section 49 – Separate Satisfaction from Immovable Assets**

Creditors with a right to satisfaction from assets which are subject to compulsory enforcement against the debtor's immovable property (immovable assets) are entitled to separate satisfaction in accordance with the provisions of the Act on Forced Sale and Sequestration [*Gesetz über die Zwangsversteigerung und die Zwangsverwaltung*].

#### **Section 50 – Separate Satisfaction of Pledgees**

- (1) In accordance with the provisions of sections 166 to 173, creditors who have a contractual lien, a lien acquired through levy of attachment or a statutory lien on an asset in the insolvency estate are entitled to separate satisfaction from the pledged asset in respect of their principal claim, interest and costs.
- (2) The statutory lien of a landlord or lessor cannot be claimed in insolvency proceedings in respect of rent covering a period earlier than the last twelve months prior to commencement of the insolvency proceedings, or in respect of damages payable as a consequence of the termination of the lease by the insolvency administrator. The lien of the lessor of an agricultural property is not subject to this restriction in respect of rent.

#### **Section 51 – Other Creditors Entitled to Separate Satisfaction**

The following creditors have equivalent status to the creditors specified in section 50:

1. Creditors to whom the debtor has transferred ownership of a movable object or assigned a right as security for a claim;
2. Creditors who have a right of retention over an object because they have made improvements to the object, insofar as their claim arising from such improvement does not exceed the remaining value of the improvement;
3. Creditors who have a right of retention under the Commercial Code [*Handelsgesetzbuch*];
4. The Federal Republic, Federal States, municipalities and associations of municipalities, insofar as objects subject to tax and customs duties serve as security for public charges and levies in accordance with statutory provisions.

#### **Section 52 – Shortfall of Creditors Entitled to Separate Satisfaction**

Creditors who are entitled to demand separate satisfaction are insolvency creditors if they also have a personal claim against the debtor. However, they are entitled to pro rata satisfaction out of the insolvency estate only to the extent that they waive the right to separate satisfaction or that separate satisfaction fails.



### **Section 53 – Preferential Creditors**

The costs of the insolvency proceedings and the other preferential liabilities of the insolvency estate rank ahead of all other claims for settlement out of the insolvency estate.

### **Section 54 – Costs of the Insolvency Proceedings**

The costs of the insolvency proceedings are:

1. The court costs for the insolvency proceedings;
2. The remuneration and the expenses of the preliminary insolvency administrator, the insolvency administrator and the members of the creditors' committee.

### **Section 55 – Other Preferential Liabilities**

(1) Preferential liabilities are further:

1. Liabilities that arise through the acts of the insolvency administrator or in any other way through the administration, realisation and distribution of the insolvency estate without forming part of the costs of the insolvency proceedings;
  2. Liabilities arising out of reciprocal contracts insofar as performance is demanded on behalf of the insolvency estate or if such a contract has to be performed after commencement of the insolvency proceedings;
  3. Liabilities resulting from unjust enrichment of the insolvency estate.
- (2) After commencement of the insolvency proceedings, liabilities created by a preliminary insolvency administrator in whom power of disposal over the debtor's assets has vested are deemed to be preferential liabilities. The same applies in respect of liabilities arising out of contracts for continuing obligations insofar as the preliminary insolvency administrator has claimed counter-performance in respect of the assets administered by him/her.
- (3) If justified wage claims pass to the Federal Employment Agency [*Bundesagentur für Arbeit*] under subsection (2), in accordance with section 169 of the Third Book of the Code of Social Security Law [*Drittes Sozialgesetzbuch*], the Federal Employment Agency may claim these only as an insolvency creditor. Sentence 1 applies with the necessary modifications in respect of the claims specified in section 175 (1) of the Third Book of the Code of Social Security Law [*Drittes Sozialgesetzbuch*] insofar as these continue to exist against the debtor.
- (4) After commencement of the insolvency proceedings, value added tax liabilities of the insolvency debtor created by a preliminary insolvency administrator or by the debtor with the consent of a preliminary insolvency administrator or by the debtor following appointment of a preliminary supervisor are deemed to be preferential liabilities. The following liabilities are equivalent to value added tax liabilities:
1. other import and export duties;
  2. excise duties regulated by Federal law;
  3. air passenger tax and motor vehicle tax; and
  4. wage tax.

## **Chapter Three – Insolvency Administrator. Creditors' Representative Bodies**

### **Section 56 – Appointment of the Insolvency Administrator**

- (1) The individual appointed as insolvency administrator shall be a natural person chosen from among all those persons willing to undertake insolvency administration work who is suitable in respect of the individual case, particularly experienced in business matters and independent of the creditors and of the debtor. A person who has served as restructuring practitioner or rehabilitation mediator in a restructuring case involving the debtor can, if the debtor satisfies at least two of the three criteria specified in section 22a (1), be appointed as insolvency administrator only if the preliminary creditors' committee consents. Willingness to undertake insolvency administration work may be restricted to particular proceedings. The person's requisite independence shall not be -excluded merely by reason of the fact that the person
1. has been proposed by the debtor or by a creditor;
  2. advised the debtor in general terms on the course of insolvency proceedings and their consequences prior to the application for commencement of insolvency proceedings.
- (2) The insolvency administrator shall receive a certificate of appointment. When his/her office terminates, he/she must return the certificate to the insolvency court.

### **Section 56a – Creditor Participation in Appointment of the Insolvency Administrator**

- (1) Prior to the appointment of the insolvency administrator the preliminary creditors' committee shall be given the opportunity to make representations concerning the criteria for the appointment and the person of the insolvency administrator unless this will clearly lead to a prejudicial change in the debtor's financial position within two business days.

- (2) The court may deviate from a unanimous recommendation of the preliminary creditors' committee on the person to be appointed as insolvency administrator only if the proposed person is not suitable for appointment. The court has to base its choice of insolvency administrator on the criteria for the person of the insolvency administrator decided by the preliminary creditors' -committee.
- (3) If, having regard to a prejudicial change in the debtor's financial position, the court refrains from holding a hearing pursuant to subsection (1), it shall give written reasons for its decision. At its first meeting the preliminary creditors' committee may unanimously choose a different person to the person appointed as insolvency administrator.

#### **Section 56b – Appointment of Administrator in the case of Debtors in the same Corporate Group**

- (1) If an application for commencement of insolvency proceedings is lodged in relation to the assets of group-affiliated debtors, the relevant insolvency courts must reach agreement on whether it is in the interests of the creditors to appoint only one person as administrator. In reaching agreement the courts must, in particular, discuss whether that person can attend to all the proceedings relating to the group-affiliated debtors with the requisite independence and whether potential conflicts of interest can be eliminated through the appointment of special insolvency administrators.
- (2) The court may deviate from the recommendation of or the specifications set by a preliminary creditors' committee pursuant to section 56a if the preliminary creditors' committee appointed for another group-affiliated debtor unanimously proposes another person who is suitable for a role pursuant to subsection (1) sentence 1. The preliminary creditors' committee must be heard before this person is appointed. If a special insolvency administrator has to be appointed to resolve conflicts of interest, section 56a applies with the necessary modifications.

#### **Section 57 – Election of a Different Insolvency Administrator**

At the first creditors' meeting following the appointment of the insolvency administrator the creditors may choose a different person in his/her place. The other person shall be elected if, in addition to the majority specified in section 76 (2), the majority of the creditors voting also vote for such person. The court may refuse the appointment of the person elected only if this person is not suitable for appointment. Each insolvency creditor has the right of immediate appeal against the refusal.

#### **Section 58 – Supervision by the Insolvency Court**

- (1) The insolvency administrator is subject to the supervision of the insolvency court. The court may request that the insolvency administrator provide specific information or a status and management report at any time.
- (2) If the insolvency administrator does not fulfil his/her duties, following prior warning the court may impose a penalty payment on him/her. An individual penalty payment may not exceed the sum of twenty-five thousand Euro. The insolvency administrator has the right of immediate appeal against the decision imposing the penalty.
- (3) Subsection (2) applies with the necessary modifications in relation to the enforcement of the obligation incumbent on a dismissed insolvency administrator to surrender possession of assets.

#### **Section 59 – Dismissal of the Insolvency Administrator**

- (1) The insolvency court may remove the insolvency administrator from office for good cause. Such dismissal may occur ex officio or on application by the insolvency administrator, the debtor, the creditors' committee, the creditors' meeting or an insolvency creditor. Dismissal is to occur on application by the debtor or an insolvency creditor only if an application for dismissal is lodged within six months of the appointment and the insolvency administrator is not independent; the applicant must substantiate this. The court shall hear the insolvency administrator prior to its decision.
- (2) The insolvency administrator has the right of immediate appeal against his/her dismissal. The applicant has the right of immediate appeal against the refusal of the application. If the application was lodged by the creditors' meeting, each insolvency creditor also has the right of immediate appeal.

#### **Section 60 – Liability of the Insolvency Administrator**

- (1) The insolvency administrator shall be liable for damages to all parties to the proceedings if he/she intentionally or negligently breaches the duties incumbent upon him/her under this Code. In carrying out his/her duties he/she shall exercise the due care of a prudent and conscientious insolvency administrator.
- (2) If the insolvency administrator has to utilise employees of the debtor within the scope of their previous activities in order to fulfil the duties incumbent upon him/her and these employees are not clearly unsuitable in this regard, the insolvency administrator shall not be responsible for any fault on the part of such

persons pursuant to section 278 of the Civil Code [*Bürgerliches Gesetzbuch*] but shall be responsible only for their supervision and for decisions of particular importance.

### **Section 61 – Failure to Settle Preferential Liabilities**

If a preferential liability created as a result of a legal act by the insolvency administrator cannot be settled in full out of the insolvency estate, the insolvency administrator shall be liable in damages to the preferential creditor. This shall not apply if the insolvency administrator could not have known at the time the liability was created that the insolvency estate would probably be insufficient to meet the liability in question.

### **Section 62 – Limitation Period**

The time-barring of the right to claim damages arising from a breach of duty on the part of the insolvency administrator is governed by the provisions on the standard limitation period under the Civil Code [*Bürgerliches Gesetzbuch*]. The claim shall become time-barred at the latest three years from the date of termination of the insolvency proceedings or from the date on which the order discontinuing the proceedings became final. Sentence 2 applies to breaches of duty committed in relation to subsequent distribution (section 203) or supervision of insolvency plan implementation (section 260) subject to the proviso that implementation of the subsequent distribution or termination of supervision takes the place of termination of the insolvency proceedings.

### **Section 63 – Remuneration of the Insolvency Administrator**

- (1) The insolvency administrator is entitled to remuneration for the execution of his/her office and to reimbursement of reasonable expenses. The standard rate of remuneration is calculated on the basis of the value of the insolvency estate at the date of termination of the insolvency proceedings. Account shall be taken of the scope and complexity of the administrator's execution of office by means of derogations from the standard rate.
- (2) If the costs of the proceedings are deferred in accordance with section 4a, the insolvency administrator has a claim against the public treasury for his/her remuneration and expenses insofar as the insolvency estate is insufficient to cover these.
- (3) The services of the preliminary insolvency administrator are remunerated separately. He/she generally receives 25 per cent of the insolvency administrator's remuneration calculated on the basis of the assets which are included within the scope of his/her services during the preliminary insolvency proceedings. The relevant date for determining the value is the date on which preliminary insolvency administration ends, or the date with effect from which the asset is no longer subject to preliminary insolvency administration. If the difference between the actual value of the calculation basis for the remuneration and the determined value of the remuneration exceeds 20 per cent, the court may amend the order concerning the preliminary insolvency administrator's remuneration up until the decision on the insolvency administrator's remuneration becomes final.

### **Section 64 – Insolvency Court's Power to Fix -Remuneration**

- (1) The insolvency court shall fix the insolvency administrator's remuneration and reimbursement of his/her expenses by order.
- (2) The order must be published and served separately on the insolvency administrator, the debtor and, if a creditors' committee has been appointed, on the members of the committee. The amounts fixed shall not be published; the public announcement shall make reference to the fact that the full order may be inspected at the court registry.
- (3) The insolvency administrator, the debtor and each insolvency creditor have the right of immediate appeal against the order. Section 567 (2) of the Code of Civil Procedure [*Zivilprozessordnung*] applies with the necessary modifications.

### **Section 65 – Power to Issue Statutory Orders**

The Federal Ministry of Justice and Consumer Protection is authorised to issue detailed regulations concerning the remuneration and reimbursement of expenses of preliminary insolvency administrators and insolvency administrators and the relevant procedure for this by statutory order.

### **Section 66 – Presentation of Accounts**

- (1) Upon termination of his/her office, the insolvency administrator shall present accounts to a creditors' meeting.
- (2) The insolvency court shall examine the administrator's final accounts prior to the creditors' meeting. It shall present the final accounts and supporting documents together with a statement concerning its review of the accounts and any comments by the creditors' committee, if one has been appointed, for inspection by

the parties; the court may set a time limit for the creditors' committee to make its representations. The period between the presentation of the documents and the date of the creditors' meeting shall amount to at least one week.

- (3) The creditors' meeting may request the administrator to present interim accounts on specified dates during the proceedings. Subsections (1) and (2) shall apply with the necessary modifications.
- (4) A different arrangement may be agreed in the insolvency plan.

#### **Section 67 – Establishment of the Creditors' Committee**

- (1) Prior to the first creditors' meeting the insolvency court may establish a creditors' committee.
- (2) The creditors entitled to separate satisfaction, the insolvency creditors with the largest claims and the minor creditors shall be represented on the creditors' committee. The committee should include a representative of the employees.
- (3) Persons who are not creditors may also be appointed as members of the creditors' committee.

#### **Section 68 – Election of Different Members**

- (1) The creditors' meeting decides whether a creditors' committee should be established. If the insolvency court has already established a creditors' committee, the creditors' meeting decides whether the committee should be retained.
- (2) The creditors' meeting may vote to dismiss the members appointed by the insolvency court and elect other or additional members of the creditors' committee.

#### **Section 69 – Duties of the Creditors' Committee**

The members of the creditors' committee shall support and supervise the insolvency administrator in the execution of his/her office. They shall keep themselves informed about the progress of business and have the books and business records inspected and the monetary transactions and cash assets examined.

#### **Section 70 – Dismissal**

The insolvency court may dismiss a member of the creditors' committee for good cause. Dismissal may take place ex officio, on application by the relevant member of the creditors' committee or on application by the creditors' meeting. The member of the creditors' committee must be heard by the court before it issues its decision; the member has the right of immediate appeal against the decision.

#### **Section 71 – Liability of Members of the Creditors' Committee**

The members of the creditors' committee shall be liable in damages to the creditors entitled to separate satisfaction and the insolvency creditors if they intentionally or negligently breach the duties incumbent upon them under this Code. Section 62 applies with the necessary modifications.

#### **Section 72 – Resolutions of the Creditors' Committee**

A resolution of the creditors' committee is valid if a majority of the members participated in the adoption of the resolution and the resolution was passed by a majority of the votes cast.

#### **Section 73 – Remuneration of Members of the Creditors' Committee**

- (1) The members of the creditors' committee are entitled to remuneration for their services and to reimbursement of reasonable expenses. Account shall be taken of the expenditure of time involved and the scope of activities performed.
- (2) Section 63 (2) and sections 64 and 65 apply with the necessary modifications.

#### **Section 74 – Convening the Creditors' Meeting**

- (1) The creditors' meeting is convened by the insolvency court. All creditors entitled to separate satisfaction, all insolvency creditors, the insolvency administrator, the members of the creditors' committee and the debtor are entitled to attend the meeting.
- (2) The time, place and agenda of the creditors' meeting shall be published. Publication is not required if a creditors' meeting adjourns negotiations.

#### **Section 75 – Application to Convene a Creditors' Meeting**

- (1) A creditors' meeting shall be convened if this is requested by:
  1. the insolvency administrator;
  2. the creditors' committee;
  3. at least five creditors entitled to separate satisfaction or non-subordinated insolvency creditors whose rights to separate satisfaction and claims are assessed by the insolvency court as together reaching

one fifth of the total resulting from the value of all rights to separate satisfaction and the amounts of the claims of all non-subordinated insolvency creditors;

4. one or more creditors entitled to separate satisfaction or non-subordinated insolvency creditors whose rights to separate satisfaction and claims are assessed by the court as reaching two fifths of the total specified in number 3 above.

- (2) The period between receipt of the application and the date of the creditors' meeting should amount to no more than three weeks.
- (3) If the court refuses to convene a creditors' meeting, the applicant has the right of immediate appeal against the refusal.

#### **Section 76 – Resolutions of the Creditors' Meeting**

- (1) The creditors' meeting is chaired by the insolvency court.
- (2) A resolution of the creditors' meeting is passed if the total of the amounts of the claims of the creditors voting in favour of the resolution amounts to more than half of the total of the amounts of the claims of the creditors voting; in the case of creditors entitled to separate satisfaction to whom the debtor is not personally liable, the value of the right to separate satisfaction takes the place of the amount of the claim.

#### **Section 77 – Determination of Voting Rights**

- (1) Claims which have been filed, and which are not disputed either by the insolvency administrator or by a creditor entitled to vote, confer entitlement to a voting right. Subordinated creditors are not entitled to vote.
- (2) Creditors whose claims are disputed are entitled to vote insofar as this is agreed at the creditors' meeting by the administrator and the creditors entitled to vote who are present at the creditors' meeting. If no agreement is reached, the insolvency court shall decide the matter. The court may vary its decision on application by the administrator or a creditor present at the creditors' meeting.
- (3) Subsection (2) applies with the necessary modifications to
  1. creditors with claims subject to a condition precedent;
  2. creditors entitled to separate satisfaction.

#### **Section 78 – Cancellation of a Resolution of the Creditors' Meeting**

- (1) If a resolution of the creditors' meeting is contrary to the common interest of the insolvency creditors, the insolvency court shall cancel the resolution if requested to do so at the creditors' meeting by a creditor entitled to separate satisfaction, a non-subordinated creditor or the insolvency administrator.
- (2) Cancellation of the resolution shall be published. Each creditor entitled to separate satisfaction and each non-subordinated creditor has the right of immediate appeal against the cancellation. The applicant has the right of immediate appeal against the refusal of an application for cancellation of a resolution.

#### **Section 79 – Provision of Information to the Creditors' Meeting**

The creditors' meeting is entitled to request specific information and a status and management report from the insolvency administrator. If a creditors' committee has not been appointed, the creditors' meeting may have the insolvency administrator's monetary transactions and cash assets examined.

### **Part Three – Effects of Commencement of Insolvency Proceedings**

#### **Chapter One – General Effects**

#### **Section 80 – Transfer of Right of Management and Right of Disposal**

- (1) As a result of commencement of insolvency proceedings the right of the debtor to manage and dispose of the assets of the insolvency estate vests in the insolvency administrator.
- (2) An existing prohibition of disposal imposed on the debtor that is only intended to protect particular persons (sections 135 and 136 of the Civil Code [*Bürgerliches Gesetzbuch*]) is of no effect in the proceedings. The provisions regulating the effects of an attachment or a seizure by way of compulsory enforcement remain unaffected.

#### **Section 81 – Disposals by the Debtor**

- (1) If the debtor has disposed of an asset in the insolvency estate after commencement of the insolvency proceedings, the disposal is ineffective. Sections 892 and 893 of the Civil Code [*Bürgerliches Gesetzbuch*], sections 16 and 17 of the Act Governing Rights in Registered Ships and Ships under Construction [*Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken*] and sections 16 and 17 of the Act Governing Rights in Aircraft [*Gesetz über Rechte an Luftfahrzeugen*] remain unaffected. The consideration shall be re-

funded to the other party out of the insolvency estate to the extent that the insolvency estate is thereby enriched.

- (2) Subsection (1) applies to a disposal of future claims to emoluments due to the debtor under a service contract, or to recurring emoluments replacing them, insofar as the disposal also affects emoluments for the period after termination of the insolvency proceedings. The right of the debtor to assign these emoluments to a trustee for the purpose of the collective satisfaction of the insolvency creditors remains unaffected.
- (3) If the debtor has made a disposal on the day on which proceedings are commenced, it shall be presumed that the disposal was made after the commencement of proceedings. A disposal by the debtor of financial collateral within the meaning of section 1 (17) of the Banking Act [*Kreditwesengesetz*] after commencement of proceedings is effective notwithstanding sections 129 to 147 if it takes place on the day of commencement of proceedings and the other party proves that it was neither aware nor should have been aware of the commencement of proceedings.

#### **Section 82 – Performance in Favour of the Debtor**

If the debtor receives performance in settlement of a liability after commencement of insolvency proceedings, although the liability was to be settled to the credit of the insolvency estate, the performing party shall be discharged of liability if it was unaware of the commencement of proceedings at the time of its performance. If performance was effected prior to publication of the order for commencement of proceedings, it shall be presumed that the said party was unaware of the commencement of proceedings.

#### **Section 83 – Inheritance. Continued Community of Property**

- (1) If an inheritance or legacy has accrued to the debtor prior to commencement of insolvency proceedings, or if this occurs during the proceedings, the debtor alone is entitled to accept or disclaim such inheritance or legacy. The same applies in relation to the rejection of continued community of property.
- (2) If the debtor is a prior heir, the insolvency administrator may not dispose of the assets of the inheritance if the disposal would be ineffective with respect to the subsequent heir pursuant to section 2115 of the Civil Code [*Bürgerliches Gesetzbuch*] in the event of subsequent succession occurring.

#### **Section 84 – Winding-up of a Company or Co-ownership**

- (1) If co-ownership by defined shares, other co-ownership or a partnership with legal personality exists between the debtor and third parties, the division or other winding-up shall take place outside the insolvency proceedings. The third parties may claim separate satisfaction from the debtor's share as so determined in respect of claims arising out of the legal relationship.
- (2) In the case of co-ownership by defined shares, an agreement which excludes the right to demand the cancellation of co-ownership in perpetuity or temporarily, or which designates a period of notice, is of no effect in the proceedings. The same shall apply to a clause with this content in a testator's will in respect of the co-ownership of his/her heirs and to a corresponding agreement by the co-heirs.

#### **Section 85 – Resumption of Court Proceedings as Claimant**

- (1) Court proceedings in which the debtor is claimant pending at the time of commencement of insolvency proceedings and affecting the assets of the insolvency estate may be resumed by the insolvency administrator with their existing status. If the insolvency administrator delays in resuming the proceedings, section 239 (2) to (4) of the Code of Civil Procedure [*Zivilprozessordnung*] shall apply with the necessary modifications.
- (2) If the administrator refuses to resume the proceedings, both the debtor and the defendant may resume the proceedings.

#### **Section 86 – Resumption of Particular Court Proceedings as Defendant**

- (1) Court proceedings pending against the debtor at the time of commencement of insolvency proceedings may be resumed both by the insolvency administrator and by the opposing party if they affect:
  1. the segregation of an asset from the insolvency estate;
  2. separate satisfaction or
  3. a preferential liability.
- (2) If the insolvency administrator acknowledges the claim immediately, the opposing party may only claim reimbursement of the costs of the court proceedings as an insolvency creditor.

#### **Section 87 – Claims of the Insolvency Creditors**

The insolvency creditors may only pursue their claims in accordance with the provisions governing insolvency proceedings.

### **Section 88 – Enforcement Prior to Commencement of Insolvency Proceedings**

- (1) If an insolvency creditor has obtained a security over the debtor's assets which constitute the insolvency estate during the month prior to the application for commencement of insolvency proceedings or after the application has been lodged by compulsory enforcement, this security becomes ineffective when insolvency proceedings are commenced.
- (2) The period specified in subsection (1) amounts to three months if consumer insolvency proceedings pursuant to section 304 are commenced.

### **Section 89 – Prohibition of Enforcement**

- (1) During insolvency proceedings compulsory enforcement on behalf of individual insolvency creditors is not permitted against the insolvency estate or the other assets of the debtor.
- (2) During insolvency proceedings compulsory enforcement against future claims to emoluments due to the debtor under a service contract, or to recurring emoluments replacing them, is not permitted, including on behalf of creditors who are not insolvency creditors. This does not apply to compulsory enforcement for a maintenance claim or for a claim based on an intentional tort against the part of the emoluments which is not subject to attachment on behalf of other creditors.
- (3) The insolvency court shall decide on any objections raised against the admissibility of compulsory enforcement on the basis of subsections (1) and (2). The court may issue an interim order prior to its decision; it may, in particular, order the temporary suspension of compulsory enforcement with or without the condition of provision of security or that compulsory enforcement may only be continued subject to the provision of security.

### **Section 90 – Prohibition of Enforcement in Relation to Preferential Liabilities**

- (1) Compulsory enforcement in respect of preferential liabilities not resulting from legal acts by the insolvency administrator is not permitted for a period of six months from the date of commencement of insolvency proceedings.
- (2) The following liabilities are not regarded as such preferential liabilities:
  1. liabilities arising out of a reciprocal contract which the administrator has opted to perform;
  2. liabilities arising out of a contract for continuing obligations for the period after the first date on which the administrator could have terminated the contract;
  3. liabilities arising out of a contract for continuing obligations insofar as the administrator claims counter-performance on behalf of the insolvency estate.

### **Section 91 – Exclusion of Other Acquisition of Rights**

- (1) After commencement of insolvency proceedings, rights in the assets of the insolvency estate cannot be validly acquired even if such acquisition is not based on a disposal by the debtor or compulsory enforcement on behalf of an insolvency creditor.
- (2) Sections 878, 892 and 893 of the Civil Code [*Bürgerliches Gesetzbuch*], section 3 (3) and sections 16 and 17 of the Act Governing Rights in Registered Ships and Ships under Construction [*Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken*], section 5 (3) and sections 16 and 17 of the Act Governing Rights in Aircraft [*Gesetz über Rechte an Luftfahrzeugen*] and section 20 (3) of the Maritime Distribution Regulations [*Schiffahrtsrechtliche Verteilungsordnung*] remain unaffected.

### **Section 92 – Collective Loss**

Claims of the insolvency creditors for compensation for loss suffered collectively by these insolvency creditors as a result of a reduction in the value of the assets of the insolvency estate before or after commencement of insolvency proceedings (collective loss) may be asserted during the insolvency proceedings only by the insolvency administrator. If such claims are directed against the administrator, they may be asserted only by a newly appointed insolvency administrator.

### **Section 93 – Personal Liability of Partners**

If insolvency proceedings are commenced in respect of the assets of a partnership with legal personality or a partnership limited by shares, the personal liability of a partner for the liabilities of the company or partnership may be claimed during insolvency proceedings only by the insolvency administrator.

### **Section 94 – Maintenance of a Set-off Position**

If, at the time when insolvency proceedings are commenced, an insolvency creditor has a right of set-off by operation of law or on the basis of an agreement, this right is unaffected by the proceedings.

### **Section 95 – Acquisition of a Set-off Position during the Proceedings**

- (1) If, at the time when insolvency proceedings are commenced, one or more of the claims to be set off are still subject to a condition precedent or are not due, or if the claims are not yet based on performance of an equivalent nature, set-off can only occur once the prerequisites for set-off are met. Sections 41 and 45 shall not apply. Set-off is excluded if the claim against which set-off is to be exercised becomes unconditional and due before set-off can occur.
- (2) Set-off shall not be excluded by reason of the fact that the claims are expressed in different currencies or units of account if these currencies or units of account are freely exchangeable at the place of payment of the claim against which set-off is to be exercised. The conversion shall be made on the basis of the exchange rate effective for this place at the time of receipt of the set-off declaration.

### **Section 96 – Inadmissibility of Set-off**

- (1) Set-off is inadmissible if
  1. an insolvency creditor has become indebted to the insolvency estate only after commencement of insolvency proceedings;
  2. an insolvency creditor has acquired its claim from another creditor only after commencement of insolvency proceedings;
  3. an insolvency creditor has acquired the opportunity to set off a claim through an avoidable legal act;
  4. a creditor whose claim is to be satisfied from the debtor's free assets is indebted to the insolvency estate.
- (2) Subsection (1) and also section 95 (1) sentence 3 shall not prevent the disposal of financial collateral within the meaning of section 1 (17) of the Banking Act [*Kreditwesengesetz*] or the settlement of claims and performance under payment orders, orders between payment service providers or intermediaries or orders for the transfer of securities brought into systems pursuant to section 1 (16) of the Banking Act [*Kreditwesengesetz*] which serves to implement such contracts, provided settlement occurs at the latest on the day of commencement of insolvency proceedings; if the other party is a system operator or a participant in the system the day of commencement of insolvency proceedings shall be determined in accordance with the meaning of business day in section 1 (16b) of the Banking Act [*Kreditwesengesetz*].

### **Section 97 – Debtor's Obligation to Disclose Information and to Co-operate**

- (1) The debtor must disclose information regarding all circumstances relevant to the insolvency proceedings to the insolvency court, the insolvency administrator, the creditors' committee and, if ordered to do so by the court, the creditors' meeting. The debtor shall also disclose any facts which may result in a prosecution for the commission of a criminal offence or an administrative offence. However, any information disclosed by the debtor in accordance with the obligation under subsection (1) shall be used against the debtor or any relative of the debtor specified in section 52 (1) of the Code of Criminal Procedure [*Strafprozessordnung*] in criminal proceedings or in proceedings under the Act on Breaches of Administrative Regulations [*Gesetz über Ordnungswidrigkeiten*] only with the debtor's consent.
- (2) The debtor must support the administrator in the performance of his/her duties.
- (3) On the order of the court the debtor has to be available at any time to fulfil his/her obligations of disclosure and co-operation. The debtor must refrain from all acts adversely affecting the performance of these obligations.

### **Section 98 – Enforcement of the Debtor's Obligations**

- (1) If considered necessary by the insolvency court for obtaining truthful testimony, the insolvency court shall order the debtor to affirm for the record in an affidavit that to the best of his/her knowledge and belief the information requested of him/her which he/she has provided is accurate and complete. Sections 478 to 480 and 483 of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications.
- (1a) The court can carry out the measures pursuant to section 802l (1) sentence 1 of the Code of Civil Procedure [*Zivilprozessordnung*] in place of the bailiff if
  1. a request to disclose information under section 97 (1) cannot be served on the debtor and
    - a) the address at which the service was to be effected is the same as the address provided by one of the authorities specified in section 755 (1) and (2) of the Code of Civil Procedure [*Zivilprozessordnung*] within a period of three months before or after service is attempted, or
    - b) after service is attempted the registration authority states that it holds no current address for the debtor, or
    - c) during the three months prior to the request to disclose information the registration authority stated that it holds no current address for the debtor;
  2. the debtor does not comply with his/her obligation to provide information pursuant to section 97 or



3. this is considered necessary for other reasons in order to achieve the purposes of the insolvency proceedings.

Section 802l (2) of the Code of Civil Procedure [*Zivilprozessordnung*] applies with the necessary modifications.

- (2) The court may order the debtor's compulsory attendance and order the debtor to be detained after the hearing
  1. if the debtor refuses to disclose information or to provide an affidavit or to co-operate in relation to the performance of the insolvency administrator's duties;
  2. if the debtor attempts to evade the fulfilment of his/her obligations of disclosure and cooperation, in particular by making preparations to abscond; or
  3. if this is necessary to prevent acts by the debtor adversely affecting the performance of his/her obligations of disclosure and co-operation, in particular to secure the insolvency estate.
- (3) Sections 904 to 906, 909, 910 and 913 of the Code of Civil Procedure [*Zivilprozessordnung*] apply to the detention order with the necessary modifications. The arrest warrant shall be cancelled by the court ex officio as soon as the prerequisites for the detention order are no longer present. There is a right of immediate appeal against the detention order and against the dismissal of an application for cancellation of the arrest warrant on the grounds that the prerequisites for detention have ceased to exist.

#### **Section 99 – Postal Redirection Order**

- (1) On application by the insolvency administrator or ex officio, the insolvency court shall order in a substantiated decision that the companies specified in the order redirect all or specific parts of the mail for the debtor to the insolvency administrator if such a measure appears to be necessary in order to investigate or prevent legal acts by the debtor which are prejudicial to the creditors. The order shall be issued after the debtor has been heard, provided this will not jeopardise the objective of the order due to the particular circumstances of the individual case. If the order is issued without the debtor being heard beforehand, this shall be substantiated separately in the decision and the hearing shall take place without delay thereafter.
- (2) The insolvency administrator is entitled to open the mail which is redirected to him/her. Communications which are unrelated to the insolvency estate must be forwarded to the debtor without delay. The remaining mail may be inspected by the debtor.
- (3) The debtor has the right of immediate appeal against the postal redirection order. The court shall revoke the order after hearing the insolvency administrator if the prerequisites for it cease to exist.

#### **Section 100 – Maintenance out of the Insolvency Estate**

- (1) The creditors' meeting decides whether and to what extent the debtor and his/her family should be granted maintenance out of the insolvency estate.
- (2) Until the creditors' meeting has reached its decision the insolvency administrator may, with the consent of the creditors' committee if one has been appointed, grant the debtor the necessary maintenance. Maintenance may be granted in the same manner to the debtor's minor unmarried children, spouse, former spouse, civil partner or former civil partner and to the other parent of his/her child in respect of the entitlement under sections 1615l and 1615n of the Civil Code [*Bürgerliches Gesetzbuch*].

#### **Section 101 – Members of the Representative Body. Employees**

- (1) If the debtor is not a natural person, sections 97 to 99 apply with the necessary modifications to the members of the debtor's representative or supervisory body and to the debtor's general partners with the power of representation. In addition, section 97 (1) and section 98 apply with the necessary modifications to persons who resigned from a position specified in sentence 1 not more than two years prior to the application for commencement of insolvency proceedings; if the debtor does not have any representatives, this shall also apply to the parties holding a participating interest in the debtor. Section 100 applies with the necessary modifications to the debtor's general partners with the power of representation.
- (2) Section 97(1) sentence 1 applies with the necessary modifications to employees and former employees of the debtor insofar as they left the debtor's employment not more than two years prior to the application for commencement of insolvency proceedings.
- (3) If the persons specified in subsections (1) and (2) do not comply with their obligations of disclosure and co-operation, they may be ordered to bear the costs of the proceedings if the application for commencement of insolvency proceedings is rejected.

#### **Section 102 – Restriction of a Basic Right**

The basic right to the privacy of correspondence, posts and telecommunications (Article 10 of the Basic Law [*Grundgesetz*]) is restricted by section 21 (2) No. 4 and sections 99 and 101 (1) sentence 1.

## Chapter Two – Performance of Transactions. Co-operation of the Works Council

### Section 103 – Insolvency Administrator’s Right of Choice

- (1) If a reciprocal contract has not been performed or has not been fully performed by the debtor and the other party at the time when insolvency proceedings are commenced, the insolvency administrator may perform the contract in place of the debtor and demand performance from the other party.
- (2) If the administrator refuses to perform the contract, the other party may assert a claim for non-performance only as an insolvency creditor. If the other party requests that the insolvency administrator exercise his/her right of choice, the administrator must declare without delay whether or not he/she wishes to demand performance of the contract. If he/she fails to do so, he/she cannot insist on performance.

### Section 104 Fixed Term Transactions, Financial Services, Contractual Netting

- (1) If a precise delivery date or period was agreed for goods with a market or exchange price and the date or expiry of the period occurs only after the commencement of insolvency proceedings, performance of the contract cannot be claimed; only a claim for non-performance can be asserted. This shall also apply to transactions for financial services with a market or exchange price for which a specific date or a specific period was agreed if such date occurs or such period expires after the commencement of insolvency proceedings. Financial services include, in particular, the following
  1. the delivery of precious metals;
  2. the delivery of financial instruments or similar rights, provided the acquisition of a participating interest in a company is not intended to create a durable link to this company;
  3. cash payments
    - a) to be made in foreign currency or in a unit of account or
    - b) the amount of which is determined directly or indirectly by means of the exchange rate of a foreign currency or unit of account, the interest rate on claims or the price of other goods or services;
  4. deliveries and cash payments from derivative financial instruments that are not excluded by number 2;
  5. options and other rights to deliveries in accordance with sentence 1 or to deliveries, cash payments, options and rights within the meaning of numbers 1 to 5;
  6. financial collateral arrangements within the meaning of section 1 (17) of the Banking Act (*Kreditwesengesetz*, KWG).

Financial instruments within the meaning of sentence 3 numbers 2 and 4 mean the instruments specified in Section C of Annex I to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349; OJ 2015 L 74, p. 38; OJ 2016 L 188, p. 28; OJ 2016 L 273, p. 35), most recently amended by Directive (EU) 2016/1034 (OJ 2016 L 175, p. 8).
- (2) The claim for non-performance is determined by the market or exchange value of the transaction. The market or exchange value shall be
  1. the market or exchange price for a substitute transaction that is concluded immediately following the commencement of insolvency proceedings, but not later than on the fifth business day following commencement or
  2. if a substitute transaction in accordance with number 1 is not concluded, the market or exchange price for a substitute transaction that could have been concluded on the second business day following the commencement of insolvency proceedings.

If market activity does not allow a substitute transaction to be concluded in accordance with sentence 2, numbers 1 or 2, the market or exchange price shall be determined in accordance with methods and procedures that ensure adequate valuation of the transaction.
- (3) If transactions under subsection (1) are combined by way of a master agreement or by way of the set of rules of a central counterparty within the meaning of section 1 (31) of the Banking Act (*Kreditwesengesetz*, KWG) into a uniform contract which provides that, if certain grounds exist, the included transactions can only be closed out in their entirety, all these included transactions shall be regarded as a single transaction within the meaning of subsection (1). This shall also apply where other transactions are included with them; the general provisions apply to the latter.
- (4) The contractual parties may make divergent arrangements, provided that they are compatible with the essential principles of the statutory provision being derogated from. In particular, they may agree
  1. that the effects under subsection (1) shall also occur prior to the commencement of insolvency proceedings, in particular where a contracting party lodges an application for the commencement of insolvency proceedings in respect of its own assets or where a ground for commencement exists (contractual close-out);

2. that those transactions under subsection (1) in respect of which claims to the delivery of goods or the provision of financial services become due prior to the commencement of insolvency proceedings but after the date specified for contractual close-out shall also be subject to contractual close-out;
  3. that for the purpose of determining the market or exchange value of the transaction
    - a) the date of contractual close-out shall take the place of the commencement of insolvency proceedings;
    - b) a substitute transaction under subsection (2) sentence 2, number 1 may be concluded until the end of the 20th business day following contractual close-out, where this is necessary to maximise the value at settlement;
    - c) in the place of the date specified in subsection (2) sentence 2, number 2, the relevant date shall be a date or period between contractual close-out and expiry of the fifth business day thereafter.
- (5) The other party may assert such a claim only as an insolvency creditor.

#### **Section 105 – Divisible Performance**

If the performance owed under a contract is divisible and the other party has already partially provided the performance due by it at the time of commencement of insolvency proceedings, this party is an insolvency creditor for the amount of its claim to counter-performance corresponding to the partial performance, even if the insolvency administrator demands performance in relation to the performance still outstanding. The other party is not entitled to claim the return of any partial performance that passed into the debtor's assets prior to commencement of proceedings from the insolvency estate on the grounds of non-performance of its claim to counter-performance.

#### **Section 106 – Priority Notice**

- (1) If a priority notice is registered in the Land Register to secure a claim for the grant or cancellation of a right in a plot of land belonging to the debtor or in a right registered for the debtor or to secure a claim for amendment of the content or the ranking of such a right, the creditor may demand satisfaction of its claim out of the insolvency estate. This shall also apply if the debtor assumed additional obligations towards the creditor and these have not been fulfilled or have not been fulfilled in their entirety.
- (2) Subsection (1) applies with the necessary modifications to a priority notice registered in the Register of Ships, Register of Ships under Construction or Register of Liens on Aircraft.

#### **Section 107 – Retention of Title**

- (1) If the debtor sold a movable item subject to retention of title and transferred possession to the purchaser prior to commencement of insolvency proceedings, the purchaser may demand performance of the purchase contract. This shall also apply if the debtor assumed additional obligations towards the purchaser and these have not been fulfilled or have not been fulfilled in their entirety.
- (2) If the debtor purchased a movable item subject to retention of title and acquired possession of the item from the seller prior to commencement of insolvency proceedings, the insolvency administrator who has been requested by the seller to exercise his/her right of choice does not have to make his/her declaration pursuant to section 103 (2) sentence 2 until immediately after the report meeting. This shall not apply if a significant reduction in the value of the item can be expected during the period up to the report meeting and if the creditor has informed the insolvency administrator of this circumstance.

#### **Section 108 – Continuation of Particular Contractual Obligations**

- (1) Tenancies and leases entered into by the debtor in relation to immovable property or premises and also service contracts entered into by the debtor shall continue to exist with effect for the insolvency estate. This shall also apply to tenancies and leases which the debtor entered into as landlord or lessor relating to other assets which have been assigned by way of security to a third party who financed their acquisition or production.
- (2) A loan agreement entered into by the debtor as lender shall continue to exist with effect for the insolvency estate insofar as the object owed has been made available to the borrower.
- (3) Claims for the period prior to commencement of insolvency proceedings may be asserted by the other party only as an insolvency creditor.

#### **Section 109 – Debtor as Tenant or Lessee**

- (1) A tenancy or lease entered into by the debtor in relation to immovable property or premises as tenant or lessee may be terminated by the insolvency administrator irrespective of the agreed contractual term or an agreed exclusion of the ordinary right of termination; the notice period shall amount to three months to the end of a month unless a shorter notice period is applicable. If the subject matter of the tenancy is the debtor's dwelling house, termination shall be replaced by the right of the insolvency administrator to declare that claims which become due after the expiry of the period specified in sentence 1 cannot be asserted in the insolvency proceedings. If the administrator effects termination pursuant to sentence 1 or if he/she makes a

declaration pursuant to sentence 2, the other party may claim damages as an insolvency creditor in respect of the premature termination of the contractual relationship or in respect of the consequences of the declaration.

- (2) If the debtor had not yet taken possession of the immovable property or premises at the time of commencement of insolvency proceedings, both the insolvency administrator and the other party may withdraw from the contract. If the insolvency administrator withdraws from the contract, the other party may claim damages as an insolvency creditor in respect of the premature termination of the contractual relationship. Each party must notify the other party on request within two weeks as to whether it wishes to withdraw from the contract; if the party in question fails to do so, such party loses the right to withdraw from the contract.

#### **Section 110 – Debtor as Landlord or Lessor**

- (1) If the debtor, as landlord or lessor of immovable property or premises, disposed of future claims for rent prior to commencement of insolvency proceedings, this disposal shall be effective only insofar as it relates to the rent for the calendar month during which insolvency proceedings are commenced. If insolvency proceedings are commenced after the fifteenth day of a month, the disposal shall be effective also in respect of the following calendar month.
- (2) A disposal within the meaning of subsection (1) includes, in particular, the collection of rent. A disposal effected by means of compulsory enforcement shall be equivalent to an act disposing of a right.
- (3) The tenant or lessee may set off a claim held against the debtor against the claim for rent for the period specified in subsection (1). Sections 95 and 96 Nos 2 to 4 remain unaffected.

#### **Section 111 – Sale of Let or Leased Property**

If the insolvency administrator sells immovable property or premises let or leased by the debtor and the acquirer takes over the tenancy or lease agreement in place of the debtor, the acquirer may terminate the tenancy or lease agreement subject to the statutory notice period. Termination can be effected only as of the earliest permitted date.

#### **Section 112 – Prohibition of Termination**

After the application for commencement of insolvency proceedings has been lodged, a tenancy or lease agreement which the debtor entered into as tenant or lessee cannot be terminated by the other party on the grounds of:

1. default in the payment of rent -arising prior to the application for commencement of insolvency proceedings;
2. deterioration in the debtor's financial circumstances.

#### **Section 113 – Termination of a Service Contract**

A service contract under which the debtor is entitled to services may be terminated by the insolvency administrator and by the other party irrespective of the agreed term of the contract and the agreed exclusion of the ordinary right of termination. The notice period shall amount to three months to the end of a month unless a shorter notice period is applicable. If the insolvency administrator terminates the contract, the other party may claim compensation as an insolvency creditor for the premature termination of the service contract.

#### **Section 114 (repealed)**

#### **Section 115 – Extinguishment of Mandates**

- (1) A mandate issued by the debtor relating to the assets of the insolvency estate is extinguished upon commencement of insolvency proceedings.
- (2) If suspension of the mandate represents a risk, the mandated party shall continue to handle the transferred business until the insolvency administrator is able to take care of the business himself/herself. The mandate shall be deemed to continue to this extent. The mandated party is a preferential creditor in respect of the claims to reimbursement arising from this continuation of the mandate.
- (3) If the mandated party is unaware of the commencement of insolvency proceedings through no fault on its part, the mandate shall be deemed to continue to its benefit. The mandated party is an insolvency creditor in respect of the claims to reimbursement arising from this continuation of the mandate.

#### **Section 116 – Extinguishment of Business Management Contracts**

If anyone is obliged under a service contract or a contract for work to manage a business for the debtor, section 115 shall apply with the necessary modifications. The provisions regulating reimbursement claims

arising from the continuation of the business management contract shall also apply in respect of remuneration claims. Sentence 1 does not apply to payment orders, orders between payment service providers or intermediaries or orders for the transfer of securities; these shall continue to apply with effect for the insolvency estate.

#### **Section 117 – Extinguishment of Powers of Attorney**

- (1) A power of attorney issued by the debtor relating to the assets of the insolvency estate is extinguished upon commencement of insolvency proceedings.
- (2) If a mandate or a business management contract continues pursuant to section 115 (2), the power of attorney shall also be deemed to continue.
- (3) If the authorised representative is unaware of the commencement of insolvency proceedings through no fault on his/her part, he/she shall not be liable under section 179 of the Civil Code [*Bürgerliches Gesetzbuch*].

#### **Section 118 – Dissolution of Companies**

If a partnership with legal personality or a partnership limited by shares is dissolved through the commencement of insolvency proceedings relating to the assets of a partner, the managing partner is a preferential creditor in respect of the claims to which the managing partner is entitled arising out of the interim continuation of urgent business transactions. The managing partner is an insolvency creditor in respect of the claims arising out of the continuation of business transactions in the period during which it was unaware of the commencement of insolvency proceedings through no fault on its part; section 84 (1) remains unaffected.

#### **Section 119 – Invalidity of Divergent Agreements**

Agreements that exclude or restrict the applicability of sections 103 to 118 in advance are invalid.

#### **Section 120 – Termination of Works Agreements**

- (1) If provision is made in works agreements for benefits that burden the insolvency estate, the insolvency administrator and the works council shall consult on a mutually agreed reduction in the benefits. Such works agreements may also be terminated subject to three months' notice, even if a longer notice period has been agreed.
- (2) The right to terminate a works agreement for good cause without notice remains unaffected.

#### **Section 121 – Operational Changes and Conciliation Proceedings**

In insolvency proceedings relating to the assets of the employer, section 112 (2) sentence 1 of the Works Constitution Act [*Betriebsverfassungsgesetz*] applies subject to the proviso that the proceedings before the conciliation committee shall be preceded by an attempt at mediation only if the insolvency administrator and the works council jointly seek conciliation.

#### **Section 122 – Judicial Approval for Undertaking an Operational Alteration**

- (1) If an operational alteration is planned and no agreement on a reconciliation of interests can be reached between the insolvency administrator and the works council pursuant to section 112 of the Works Constitution Act [*Betriebsverfassungsgesetz*] within three weeks from the date of commencement of negotiations or of a written request to commence negotiations, despite the administrator having provided comprehensive information to the works council in good time, the insolvency administrator may apply for the approval of the Labour Court to the implementation of the operational alteration without this being preceded by proceedings pursuant to section 112 (2) of the Works Constitution Act [*Betriebsverfassungsgesetz*]. To this extent section 113 (3) of the Works Constitution Act [*Betriebsverfassungsgesetz*] shall not be applicable. The right of the insolvency administrator to bring about a re-conciliation of interests pursuant to section 125 or to lodge an application for declaratory judgment pursuant to section 126 remains unaffected.
- (2) The court shall grant its approval if the financial position of the enterprise, taking into consideration the social interests of the employees as well, requires the operational alteration to be implemented without prior proceedings pursuant to section 112 (2) of the Works Constitution Act [*Betriebsverfassungsgesetz*]. The provisions of the Labour Court Act [*Arbeitsgerichtsgesetz*] concerning court order proceedings apply with the necessary modifications; the parties to the proceedings are the insolvency administrator and the works council. The application shall be dealt with as a matter of priority in accordance with section 61a (3) to (6) of the Labour Court Act [*Arbeitsgerichtsgesetz*].
- (3) There is no right of appeal against the decision of the court to the Higher Labour Court. An appeal may be brought before the Federal Labour Court if this is allowed in the decision of the Labour Court; section 72 (2) and (3) of the Labour Court Act shall apply with the necessary modifications. The substantiated appeal

must be lodged with the Federal Labour Court within one month of service of the Labour Court's full written decision.

### **Section 123 – Scope of the Social Compensation Plan**

- (1) In order to compensate for or mitigate the financial prejudice sustained by employees as a result of the planned operational alteration, a social compensation plan drawn up subsequent to commencement of insolvency proceedings may provide for a total of up to two and a half months' salary (section 10 (3) of the Protection Against Unfair Dismissal Act [*Kündigungsschutzgesetz*]) for the employees affected by dismissal.
- (2) The liabilities under such a social compensation plan are preferential liabilities. However, if an insolvency plan does not materialise, not more than one third of the insolvency estate which would be available for distribution to the insolvency creditors in the absence of a social compensation plan may be used for the settlement of social compensation plan claims. If the total amount of all social compensation plan claims exceeds this limit, the individual claims shall be reduced proportionately.
- (3) Whenever sufficient liquid funds are available in the insolvency estate, with the approval of the insolvency court the insolvency administrator shall make payments on account towards the social compensation plan claims. Compulsory enforcement against the insolvency estate is not permitted in respect of a social compensation plan claim.

### **Section 124 – Social Compensation Plan Prior to Commencement of Insolvency Proceedings**

- (1) A social compensation plan drawn up prior to the commencement of insolvency proceedings but no earlier than three months prior to the application for commencement of insolvency proceedings may be revoked by the insolvency administrator or by the works council.
- (2) If the social compensation plan is revoked, the employees entitled to claims under the social compensation plan may be taken into account if a social compensation plan is drawn up within the insolvency proceedings.
- (3) Benefits received by employees towards their claims from the revoked social compensation plan prior to commencement of insolvency proceedings cannot be reclaimed on the grounds of the revocation. When a new social compensation plan is drawn up, in calculating the total amount of the social compensation plan claims pursuant to section 123 (1), such benefits to dismissed employees shall be deducted to the extent of up to two and a half months' salary.

### **Section 125 – Reconciliation of Interests and Protection against Dismissal**

- (1) If an operational alteration (section 111 of the Works Constitution Act [*Betriebsverfassungsgesetz*]) is planned and the employees who are to be dismissed are designated by name in a reconciliation of interests between the insolvency administrator and the works council, section 1 of the Protection Against Unfair Dismissal Act [*Kündigungsschutzgesetz*] shall apply subject to the provisos that:
  1. it shall be presumed that termination of the employment contracts of the designated employees is due to compelling operational requirements which preclude the continued employment of the employees in the company or their continued employment on unchanged terms of employment;
  2. selection of employees on the basis of social criteria may be reviewed only with respect to length of service, age and maintenance obligations and in this respect only for gross errors; the maintenance or creation of a balanced personnel structure shall not be regarded as grossly erroneous. Sentence 1 shall not apply if circumstances have significantly changed since the reconciliation of interests was achieved.
- (2) The reconciliation of interests under subsection (1) replaces the work council's right to comment pursuant to section 17 (3) sentence 2 of the Protection Against Unfair Dismissal Act [*Kündigungsschutzgesetz*].

### **Section 126 – Court Order Proceedings Relating to Protection Against Dismissal**

- (1) If the company does not have a works council or if no reconciliation of interests in accordance with section 125 (1) is achieved on other grounds within three weeks from the date of commencement of negotiations or of a written request to commence negotiations, despite the administrator having provided comprehensive information to the works council in good time, the insolvency administrator may apply for a declaration by the Labour Court that the termination of the employment of the specific employees designated in the application is due to compelling operational requirements and justified on social grounds. The selection of employees on the basis of social criteria may be reviewed only with respect to length of service, age and maintenance obligations.
- (2) The provisions of the Labour Court Act [*Arbeitsgerichtsgesetz*] relating to court order proceedings apply with the necessary modifications; the parties to the proceedings are the insolvency administrator, the works council and the designated employees, insofar as they do not agree to the termination of their employment or to the amended terms of employment. Section 122 (2) sentence 3 and (3) apply with the necessary modifications.

- (3) Section 12a (1) sentences 1 and 2 of the Labour Court Act [*Arbeitsgerichtsgesetz*] apply with the necessary modifications to the costs incurred by the parties in the proceedings at first instance. In the proceedings before the Federal Labour Court, the provisions of the Code of Civil Procedure [*Zivilprozessordnung*] relating to the payment of the costs of the proceedings apply with the necessary modifications.

#### **Section 127 – Legal Action by an Employee**

- (1) If the insolvency administrator gives notice to an employee who is designated in the application pursuant to section 126 (1) and the employee brings an action for declaratory judgment that his/her employment is not terminated by the dismissal or that the change to his/her terms of employment is unjustified on social grounds, the final judgment in the proceedings under section 126 shall be binding on both parties. This shall not apply if circumstances have changed significantly since the last hearing.
- (2) If the employee brings an action before the decision in the proceedings under section 126 has become final, on application by the insolvency administrator the hearing of the action shall be suspended until this time.

#### **Section 128 – Sale of Business Operation**

- (1) The application of sections 125 to 127 shall not be excluded by reason of the fact that the operational alteration on which the reconciliation of interests or the application for declaratory judgment is based is to be implemented only after the sale of a business operation. The acquirer of the business operation shall be a party to the proceedings under section 126.
- (2) In the case of a transfer of undertakings, the presumption pursuant to section 125 (1) sentence 1 No. 1 or the declaration by the court pursuant to section 126 (1) sentence 1 shall also be to the effect that the employment relationship is not being terminated by reason of the transfer of undertakings.

### **Chapter Three – Avoidance in Insolvency**

#### **Section 129 – Principle**

- (1) Legal acts undertaken prior to commencement of insolvency proceedings which are prejudicial to the insolvency creditors may be avoided by the insolvency administrator in accordance with sections 130 to 146.
- (2) An omission is deemed to be equivalent to a legal act.

#### **Section 130 – Congruent Coverage**

- (1) A legal act providing security to or enabling the satisfaction of an insolvency creditor may be avoided if it was undertaken
1. during the three months prior to the application for commencement of insolvency proceedings, if the debtor was illiquid at the time when the act was undertaken and if the creditor was aware at that time of the debtor's illiquidity or
  2. after the application for commencement of insolvency proceedings is filed and if the creditor was aware of the debtor's illiquidity or of the application for commencement of insolvency proceedings when the act was undertaken.
- This shall not apply if the legal act is based on a financial collateral arrangement containing an obligation to provide financial collateral, other financial collateral or additional financial collateral within the scope of section 17 (1) of the Banking Act [*Kreditwesengesetz*] in order to restore the ratio agreed in the financial collateral arrangement between the value of the secured liabilities and the value of the collateral (margin collateral).
- (2) Awareness of circumstances that necessarily indicate the debtor's illiquidity or the application for the commencement of proceedings is deemed to be equivalent to awareness of the debtor's illiquidity or of the application for commencement of proceedings.
- (3) A person with a close relationship to the debtor at the time when the act was undertaken (section 138) shall be presumed to have been aware of the debtor's illiquidity or of the application for commencement of proceedings.

#### **Section 131 – Incongruent Coverage**

- (1) A legal act providing security to or enabling the satisfaction of an insolvency creditor to which the creditor had no right or no right to claim in that manner or at that time may be avoided if it was undertaken
1. during the month prior to the date of the application for commencement of insolvency proceedings or following such application;
  2. within the second or third month prior to the date on which the application for commencement of insolvency proceedings is filed and the debtor was illiquid when the act took place or

3. within the second or third month prior to the date on which the application for commencement of insolvency proceedings is filed and the creditor was aware when the act took place that it would prejudice the insolvency creditors.
- (2) For application of subsection (1) No. 3, awareness of circumstances that necessarily indicate prejudice to the insolvency creditors is deemed to be equivalent to awareness of the prejudice to the insolvency creditors. A person with a close relationship to the debtor when the act was undertaken (section 138) shall be presumed to have been aware of the prejudice to the insolvency creditors.

### **Section 132 – Legal Acts Directly Prejudicial to the Insolvency Creditors**

- (1) A transaction by the debtor that is directly prejudicial to the insolvency creditors may be avoided if it is entered into
  1. during the three months prior to the date of the application for commencement of insolvency proceedings, if at the time the transaction took place, the debtor was illiquid and the other party to the transaction was aware of the debtor's illiquidity when the transaction took place or
  2. after the application for commencement of insolvency proceedings has been filed and if the other party to the transaction was aware of the debtor's illiquidity or of the application for commencement of insolvency proceedings when the transaction took place.
- (2) Any other transaction by the debtor as a result of which the debtor loses a right or is no longer able to assert such right or as a result of which a pecuniary claim against the debtor is maintained or becomes enforceable is deemed to be equivalent to a transaction that is directly prejudicial to the insolvency creditors.
- (3) Section 130 subsections (2) and (3) apply with the necessary modifications.

### **Section 133 – Intentional Prejudice**

- (1) A legal act which was intended to prejudice its creditors undertaken by the debtor during the ten years prior to the date of the application for commencement of insolvency proceedings, or after the date of the application, may be avoided if the other party was aware of the debtor's intention when the legal act was undertaken. Such awareness shall be presumed if the other party was aware of the debtor's imminent illiquidity and that the act would prejudice the creditors.
- (2) If the legal act provided security to or enabled the satisfaction of the other party, the period in subsection (1) sentence 1 shall amount to four years.
- (3) If the legal act provided security to or enabled the satisfaction of the other party and such party had a right to claim it in that manner and at that time, imminent illiquidity under subsection (1) sentence 2 shall be replaced by existing illiquidity. If the other party concluded a payment agreement with the debtor or otherwise granted it relaxed payment terms, it shall be presumed that the other party was not aware of the debtor's illiquidity at the time of the act.
- (4) A contract for pecuniary interest entered into by the debtor with a closely connected person (section 138) which is directly prejudicial to the insolvency creditors may be avoided. Avoidance is excluded if the contract was entered into more than two years prior to the date of the application for commencement of insolvency proceedings or if at the time the contract was concluded, the other party to the contract was unaware of the debtor's intention to prejudice the creditors.

### **Section 134 – Gratuitous Performance**

- (1) Gratuitous performance by the debtor may be avoided unless it took place more than four years prior to the date of the application for commencement of insolvency proceedings.
- (2) Performance provided in return for a customary occasional gift of small value is not subject to avoidance.

### **Section 135 – Shareholder Loans**

- (1) A legal act which, in respect of the claim of a shareholder to repayment of a loan within the meaning of section 39 (1) No. 5 or an equivalent claim,
  1. provided security, if the act was undertaken during the ten years prior to the application for commencement of insolvency proceedings or after the application has been filed; or
  2. satisfied the claim, if the act was undertaken during the year prior to the application for commencement of insolvency proceedings or after the application has been filed may be avoided.
- (2) A legal act undertaken by a company within the time frames specified in subsection (1) No. 2 in order to satisfy a third party's claim to repayment of a loan may be avoided if a shareholder had provided security or was liable as surety for such claim. This shall also apply with the necessary modifications to payments on claims equivalent in economic terms to a loan.
- (3) If the debtor has been granted an asset for use or exercise by a shareholder, the shareholder's right to segregation cannot be claimed for the duration of the insolvency proceedings, but for a maximum period of one year from the date of commencement of the insolvency proceedings, if the asset is of substantial im-



portance for the continuation of the debtor's business. The shareholder is entitled to compensation for the use or exercise of the asset which shall be calculated on the basis of the average remuneration paid during the year preceding the commencement of insolvency proceedings; if the asset has been provided for use or exercise for a shorter period, the average remuneration during this period is applicable.

- (4) Section 39 subsections (4) and (5) apply with the necessary modifications.

#### **Section 136 – Silent Partnership**

- (1) A legal act by means of which a silent partner's capital contribution is wholly or partially repaid or a silent partner's share of accrued losses is wholly or partially waived may be avoided if the underlying agreement was entered into during the year prior to the application for commencement of insolvency proceedings relating to the assets of the owner of the business or after the filing of the application. This shall also apply even if the silent partnership has been dissolved in connection with the agreement.
- (2) Avoidance is excluded if a ground for commencement of insolvency proceedings arose only after the agreement was concluded.

#### **Section 137 – Bill of Exchange and Cheque Payments**

- (1) Bill of exchange payments by the debtor cannot be reclaimed from the payee on the basis of section 130 if, in accordance with the law on bills of exchange, the payee would have lost its claim under the bill of exchange against other parties liable on the bill upon refusal to accept payment.
- (2) The amount paid on a bill of exchange shall, however, be refunded by the last party liable for recourse or, if the latter endorsed the bill of exchange in favour of a third party, by the third party if the last party liable for recourse or the third party was aware of the debtor's illiquidity or of the application for commencement of insolvency proceedings at the time when it endorsed the bill of exchange or caused it to be endorsed. Section 130 subsections (2) and (3) apply with the necessary modifications.
- (3) Subsections (1) and (2) apply with the necessary modifications to cheque payments by the debtor.

#### **Section 138 – Closely Connected Persons**

- (1) If the debtor is a natural person, closely connected persons are:
1. the debtor's spouse, even if the marriage did not take place until after the legal act or was dissolved during the year prior to the legal act;
  - 1a. the debtor's civil partner, even if the civil partnership was entered into only after the legal act or was dissolved during the year prior to the legal act;
  2. the ascendants and descendants of the debtor or of the debtor's spouse as specified in number 1 above or of the debtor's civil partner as specified in number 1a above and also full and half-siblings of the debtor or of the debtor's spouse as specified in number 1 above or of the debtor's civil partner as specified in number 1a above as well as the spouses or civil partners of these persons;
  3. persons living in the household of the debtor or having lived in the household of the debtor during the year prior to the legal act and also persons who have the opportunity to become aware of the debtor's financial circumstances by virtue of a contractual connection to the debtor under a service contract;
  4. a legal entity or a partnership with legal personality, if the debtor or one of the persons mentioned in numbers 1 to 3 is a member of the representative or supervisory body, a general partner or holds more than one quarter of its capital or has the opportunity by virtue of a comparable connection on the basis of company law or of a service contract to become aware of the debtor's financial circumstances.
- (2) If the debtor is a legal entity or a partnership with legal personality, closely connected persons are:
1. the members of the debtor's representative or supervisory body and general partners of the debtor and also persons who hold more than one quarter of the debtor's capital;
  2. a person or company with the opportunity to become aware of the debtor's financial circumstances by virtue of a comparable connection to the debtor on the basis of company law or a service contract;
  3. a person with a personal connection as detailed in subsection (1) to one of the persons specified in number 1 or 2; this shall not apply if the persons specified in number 1 or 2 are bound by law to secrecy in relation to the debtor's affairs.

#### **Section 139 – Calculation of Time Periods Prior to the Application for Commencement of Insolvency Proceedings**

- (1) The time periods specified in sections 88 and 130 to 136 commence at the start of the day corresponding in number to the day on which the application to commence insolvency proceedings is received by the insolvency court. If a month lacks such a day, the time period commences at the start of the following day.
- (2) If several applications for commencement of insolvency proceedings are filed, the first admissible and well-founded application shall be applicable even if the proceedings are commenced on the basis of a later ap-

plication. An application rejected with final effect shall be taken into account only if it was rejected due to insufficiency of assets.

#### **Section 140 – Date of Performance of a Legal Act**

- (1) A legal act is deemed to be performed on the date on which its legal effects occur.
- (2) If registration in the Land Register, Register of Ships, Register of Ships under Construction or Register of Liens on Aircraft is necessary for a transaction to take effect, the transaction shall be deemed to be performed as soon as the remaining requirements for it to take effect have been met, the debtor's declaration of intent has become binding and the other party has lodged the application for registration of the change of title. If an application for registration of a priority notice to secure the right to the change of title has been lodged, sentence 1 shall apply subject to the proviso that this application takes the place of the application for registration of the change of title.
- (3) In the case of a conditional or fixed term legal act, fulfilment of the condition or occurrence of the expiry date shall not be taken into account.

#### **Section 141 – Enforceable Title**

A legal act may be avoided even if an enforceable title was obtained for the legal act or if the act was performed by way of compulsory enforcement.

#### **Section 142 – Cash Transactions**

- (1) Any performance by the debtor for which counter-performance of the same value is received directly into the debtor's assets may be avoided only if the requirements of section 133 (1) are fulfilled and the other party recognised that the debtor acted dishonestly.
- (2) The exchange of performance and counter-performance is direct if there is a close temporal connection between performances, depending on the nature of the performances exchanged and taking into account customary business practices. If the debtor pays wages to its employees, a close temporal connection exists if the period between the performance of work and the payment of wages does not exceed three months.

#### **Section 143 – Legal Consequences**

- (1) Any property of the debtor which is sold, given away or relinquished by means of the avoidable act must be returned to the insolvency estate. The provisions regulating the legal consequences of unjust enrichment where the recipient was aware that there were no legal grounds for the performance apply with the necessary modifications. Interest is payable on money owed only if the requirements of debtor default or of section 291 of the Civil Code [*Bürgerliches Gesetzbuch*] are met; an additional claim to surrender of benefits obtained from an amount of money received is excluded.
- (2) The recipient of gratuitous performance has to make restitution only to the extent that it is thereby enriched. This shall not apply as soon as it knows or must know in the circumstances that the gratuitous performance is prejudicial to the creditors.
- (3) In the case of avoidance under section 135 (2), the shareholder who provided security or was liable as surety must refund the benefit granted to the third party to the insolvency estate. The obligation shall exist only up to the amount for which the shareholder was liable as surety or which corresponds to the value of the security provided by such shareholder at the time of repayment of the loan or of the payment on the equivalent claim. The shareholder shall be released from the obligation if it makes the property which served the creditor as security available to the insolvency estate.

#### **Section 144 – Claims by the Recipient of Avoidable Performance**

- (1) If the recipient of avoidable performance returns what it has received, its claim revives.
- (2) Any consideration shall be refunded out of the insolvency estate insofar as it is still present in distinct form within the insolvency estate or the insolvency estate is enriched by its value. Over and above this, the recipient of avoidable performance may assert a claim for return of the consideration only as an insolvency creditor.

#### **Section 145 – Avoidance against Legal Successors**

- (1) Avoidance of a legal act may be asserted against the heirs or other universal successors of the recipient of avoidable performance.
- (2) Avoidance of a legal act may be asserted against any other legal successor:
  1. if the legal successor was aware at the time of his/her acquisition of the circumstances on which the voidability of the acquisition by his/her predecessor is based;

2. if, at the time of his/her acquisition, the legal successor belonged to the circle of persons closely connected to the debtor (section 138), unless he/she was unaware at this time of the circumstances on which the voidability of the acquisition by his/her predecessor is based;
3. if the legal successor acquired the property by gratuitous transfer.

#### **Section 146 – Limitation of the Right of Avoidance**

- (1) The right of avoidance is subject to the provisions on the standard limitation period under the Civil Code [*Bürgerliches Gesetzbuch*].
- (2) Even if the right of avoidance has become time-barred, the insolvency administrator may refuse to fulfil a duty of performance based on an avoidable act.

#### **Section 147 – Legal Acts after Commencement of Proceedings**

A legal act undertaken after the commencement of insolvency proceedings which is valid in accordance with section 81 (3) sentence 2, sections 892 and 893 of the Civil Code [*Bürgerliches Gesetzbuch*], sections 16 and 17 of the Act Governing Rights in Registered Ships and Ships under Construction [*Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken*] and sections 16 and 17 of the Act Governing Rights in Aircraft [*Gesetz über Rechte an Luftfahrzeugen*] may be avoided under the provisions applicable to the avoidance of a legal act undertaken prior to the commencement of insolvency proceedings. Sentence 1 applies to legal acts based on the claims and performance specified in section 96 (2) provided that as a result of such avoidance clearing, including settlement of balances, is not reversed and the relevant payment orders, orders between payment service providers or intermediaries or orders for the transfer of securities do not become ineffective.

### **Part Four – Management and Realisation of the Insolvency Estate**

#### **Chapter One – Securing the Insolvency Estate**

##### **Section 148 – Taking Charge of the Insolvency Estate**

- (1) After commencement of the insolvency proceedings the insolvency administrator shall immediately assume possession and management of all the assets belonging to the insolvency estate.
- (2) The administrator may enforce the surrender of property in the debtor's custody on the basis of an enforceable execution copy of the order commencing proceedings by way of compulsory enforcement. Section 766 of the Code of Civil Procedure [*Zivilprozessordnung*] applies subject to the proviso that the insolvency court takes the place of the court of enforcement.

##### **Section 149 – Valuables**

- (1) The creditors' committee may determine where and on what conditions funds, securities and objects of value are to be deposited or invested. If a creditors' committee has not been appointed, or if the creditors' committee has not yet passed a relevant resolution, the insolvency court may make a corresponding order.
- (2) The creditors' meeting may decide on differing arrangements.

##### **Section 150 – Sealing**

In order to secure the assets of the insolvency estate, the insolvency administrator may have seals affixed by a bailiff or other person authorised by statute. The record documenting the sealing or unsealing of assets must be deposited by the insolvency administrator in the court registry for the parties' inspection.

##### **Section 151 – List of Assets of the Insolvency Estate**

- (1) The insolvency administrator shall draw up a list of the individual assets belonging to the insolvency estate. The debtor shall be consulted, if this is possible without prejudicial delay.
- (2) The value of each asset shall be stated. If the value depends on whether the enterprise continues to operate or is closed down, both values shall be stated. Valuations that are particularly difficult to assess may be passed to an expert.
- (3) On application by the administrator the insolvency court may waive the drawing up of the list; the application must state the grounds on which it is based. If a creditors' committee is appointed, the administrator may submit the application only with the consent of the creditors' committee.

##### **Section 152 – List of Creditors**

- (1) The insolvency administrator shall draw up a list of all the debtor's creditors ascertained by him/her from the debtor's books and business records, from other information from the debtor, through the filing of their claims or in any other way.

- (2) The list shall record the creditors entitled to separate satisfaction and the individual ranking categories of the subordinated insolvency creditors separately. The creditor's address and the basis and the amount of the creditor's claim shall be stated in each case. In the case of the creditors entitled to separate satisfaction, the asset subject to the right of separate satisfaction and the amount of the probable shortfall shall also be indicated; section 151 (2) sentence 2 applies with the necessary modifications.
- (3) The list shall further indicate the possibilities which exist for set-off. The amount of the preferential liabilities in the event of a prompt realisation of the debtor's assets shall be estimated.

#### **Section 153 – Statement of Assets and Liabilities**

- (1) The insolvency administrator shall draw up a structured overview as of the date of commencement of the insolvency proceedings listing and comparing the assets of the insolvency estate and the debtor's liabilities. Section 151 (2) applies with the necessary modifications to the valuation of the assets; section 151 (2) sentence 1 applies with the necessary modifications to the classification of the liabilities.
- (2) After the statement of assets and liabilities has been drawn up, on application by the insolvency administrator or a creditor the insolvency court may order the debtor to affirm the completeness of the statement of assets and liabilities by affidavit. Sections 98 and 101 (1) sentences 1 and 2 apply with the necessary modifications.

#### **Section 154 – Deposit in the Court Registry**

The list of assets of the insolvency estate, the list of creditors and the statement of assets and liabilities shall be deposited in the court registry for the parties' inspection no later than one week prior to the report meeting.

#### **Section 155 – Accounting under Commercial and Tax Law**

- (1) The debtor's duties under commercial and tax law to keep books and present accounts remain unaffected. The insolvency administrator shall fulfil these duties in relation to the insolvency estate.
- (2) A new financial year begins upon commencement of the insolvency proceedings. However, the period up to the report meeting will not be taken into account in the statutory periods for drawing up and publishing financial statements.
- (3) Section 318 of the Commercial Code [*Handelsgesetzbuch*] applies to the appointment of the auditor in the insolvency proceedings, provided that the appointment shall be made exclusively by the registration court on application by the insolvency administrator. If an auditor has already been appointed for the financial year prior to commencement of the insolvency proceedings, the validity of the appointment shall not be affected by commencement of the insolvency proceedings.

### **Chapter Two – Decision on Realisation**

#### **Section 156 – Report Meeting**

- (1) At the report meeting the insolvency administrator shall report on the debtor's financial position and the causes thereof. The insolvency administrator shall state whether prospects exist for the debtor's business to be maintained in full or in part, what possibilities exist for an insolvency plan and what the implications would be in each case for the satisfaction of the creditors.
- (2) At the report meeting the debtor, the creditors' committee, the works council and the committee representing executive staff shall be given the opportunity to comment on the administrator's report. If the debtor conducts a trade or business, or is a farmer, the competent official professional organisation representing the industry, business, trade or agriculture may also be given the opportunity to make representations at the meeting.

#### **Section 157 – Decision on the Future Course of the Proceedings**

The creditors' meeting shall decide at the report meeting whether the debtor's business should be closed down or temporarily continued. It may instruct the insolvency administrator to draw up an insolvency plan and specify the objective of the plan. It may alter its decisions at subsequent meetings.

#### **Section 158 – Measures Prior to the Decision**

- (1) If the insolvency administrator wishes to close down or dispose of the debtor's business prior to the report meeting, he/she must obtain the consent of the creditors' committee, if one has been appointed.
- (2) The administrator must notify the debtor prior to the adoption of a resolution by the creditors' committee, if one has been appointed, or, if a creditors' committee has not been appointed, prior to the closure or disposal of the business. On the debtor's application and after hearing the administrator the insolvency court

shall prohibit the closure or disposal of the business if this can be suspended until the report meeting without a significant reduction in the insolvency assets.

#### **Section 159 – Realisation of the Insolvency Estate**

Following the report meeting, the insolvency administrator shall realise the assets forming the insolvency estate without delay unless the resolutions of the creditors' meeting preclude this.

#### **Section 160 – Legal Acts of Particular Importance**

- (1) The insolvency administrator must obtain the consent of the creditors' committee if he/she wishes to undertake legal acts that are of particular importance for the insolvency proceedings. If a creditors' committee has not been appointed, the consent of the creditors' meeting must be obtained. If the convened creditors' meeting does not have a quorum, consent shall be deemed to have been granted; the creditors shall be informed of this consequence in the notice calling the creditors' meeting.
- (2) Consent in accordance with subsection (1) is required in particular
  1. in the case of a planned disposal of the enterprise or a business operation, the entire stock, an immovable asset by private sale, the debtor's interest in another company which is intended to create a durable link to this company or the right to receive income of a recurring nature;
  2. if a loan is to be taken out that would significantly burden the insolvency estate;
  3. if legal action involving a significant amount in dispute is to be brought or initiated, or if the initiation of such legal action is rejected or if a scheme of composition or an arbitration agreement is entered into for the purpose of settling or averting such legal action.

#### **Section 161 – Temporary Prohibition of the Legal Act**

In the cases specified in section 160 the insolvency administrator shall notify the debtor prior to the adoption of a resolution by the creditors' committee or the creditors' meeting, if this is possible without prejudicial delay. If the creditors' meeting has not granted its consent, on application by the debtor or a majority of creditors as specified in section 75 (1) No. 3 and after hearing the administrator, the insolvency court may temporarily prohibit performance of the legal act and convene a creditors' meeting to decide on performance of the legal act.

#### **Section 162 – Disposal of Business Operations to Parties with a Special Interest**

- (1) The disposal of the enterprise or of a business operation requires the consent of the creditors' meeting if the acquirer or a person who holds at least one fifth of the acquirer's capital
  1. belongs to the group of persons with a close relationship to the debtor (section 138);
  2. is a creditor with a right to separate satisfaction or a non-subordinated insolvency creditor whose rights to separate satisfaction and claims are assessed by the insolvency court as together reaching one fifth of the total resulting from the value of all rights to separate satisfaction and the amounts of the claims of all non-subordinated insolvency creditors.
- (2) A person shall also be deemed to hold a participating interest in the acquirer within the meaning of subsection (1) insofar as a company controlled by the person or a third party holds a participating interest in the acquirer for the account of the person or of the controlled company.

#### **Section 163 – Disposal of Business Operations Below Value**

- (1) On application by the debtor or a majority of creditors as specified in section 75 (1) No. 3 and after hearing the administrator, the insolvency court may order that the planned disposal of the enterprise or of a business operation requires the consent of the creditors' meeting if the applicant demonstrates to the satisfaction of the court that a disposal to another acquirer would be more favourable for the insolvency estate.
- (2) If costs are incurred by the applicant as a result of the application, the applicant is entitled to reimbursement of these costs from the insolvency estate as soon as the court order is issued.

#### **Section 164 – Validity of the Acts of the Insolvency Administrator**

The validity of the acts of the insolvency administrator shall not be affected by any contravention of sections 160 to 163.

### **Chapter Three – Assets Subject to Rights to Separate Satisfaction**

#### **Section 165 – Realisation of Immovable Assets**

The insolvency administrator may apply to the competent court to conduct the forced sale or sequestration of an immovable asset of the insolvency estate even if the asset is subject to a right to separate satisfaction.

### **Section 166 – Realisation of Movable Assets**

- (1) The insolvency administrator may realise a movable asset that is subject to a right to separate satisfaction by private sale if he/she has the item in his/her possession.
- (2) The insolvency administrator may collect or otherwise realise an account receivable which the debtor has assigned in order to secure a claim.
- (3) Subsections (1) and (2) do not apply
  1. to assets subject to a security interest in favour of the operator of or a participant in a system pursuant to section 1 (16) of the Banking Act [*Kreditwesengesetz*] in order to secure its claims under the system;
  2. to assets subject to a security interest in favour of the central bank of a Member State of the European Union or a contracting state of the Agreement on the European Economic Area or in favour of the European Central Bank or
  3. to a financial collateral arrangement within the meaning of section 1 (17) of the Banking Act [*Kreditwesengesetz*].

### **Section 167 – Provision of Information to the Creditor**

- (1) If the insolvency administrator is entitled to realise a movable asset pursuant to section 166 (1), he/she must provide information on the condition of the asset to the creditor entitled to separate satisfaction on the latter's request. In place of providing information, he/she may permit the creditor to inspect the asset.
- (2) If the insolvency administrator is entitled to collect an account receivable pursuant to section 166 (2), he/she must provide information about it to the creditor entitled to separate satisfaction on the latter's request. In place of providing information, he/she may permit the creditor to inspect the debtor's books and business records.

### **Section 168 – Notification of Intention to Sell**

- (1) Before the insolvency administrator sells an asset to a third party which he/she is entitled to realise pursuant to section 166, he/she must notify the creditor entitled to separate satisfaction of the means by which the asset is to be sold. He/she must give the creditor the opportunity to indicate, within one week, another option for realising the asset which would be more beneficial for the creditor.
- (2) If the creditor's proposal is made within the one week period or in good time prior to the sale, the insolvency administrator must take advantage of the realisation option put forward by the creditor or put the creditor in the position it would have been in if the insolvency administrator had taken advantage of the proposed option.
- (3) The other realisation option may also consist in the creditor taking over the asset itself. A realisation option is also more favourable if it results in cost savings.

### **Section 169 – Protection of the Creditor against a Delay in Realisation**

As long as an asset which the insolvency administrator is entitled to realise pursuant to section 166 is not realised, the interest due is payable to the creditor out of the insolvency estate on a regular basis from the date of the report meeting onwards. If the creditor has already been prevented prior to commencement of the insolvency proceedings from realising the asset on the basis of an order under section 21, the interest due is payable at the latest with effect from the date which falls three months after this order. Sentences 1 and 2 shall not apply insofar as the creditor is unlikely to obtain satisfaction from the proceeds of realisation, taking into account the amount of the claim and also the value of and other encumbrances on the asset.

### **Section 170 – Distribution of Proceeds**

- (1) After a movable asset or a claim has been realised by the insolvency administrator, the costs incurred in assessing and realising the object shall first be taken from the realisation proceeds for the benefit of the insolvency estate. The remaining amount shall be applied without undue delay to satisfy the creditors entitled to separate satisfaction.
- (2) If the insolvency administrator hands over an asset which he/she is entitled to realise pursuant to section 166 to the creditor for realisation, out of the realisation proceeds achieved by the creditor the latter must first pay an amount covering the costs of assessing the asset and also the amount of the value added tax (section 171 (2) sentence 3) to the insolvency estate.

### **Section 171 – Calculation of the Contribution to Costs**

- (1) The costs of assessment include the costs of the actual assessment of the asset and of determining the rights in the asset. They shall be charged at a flat rate of four per cent of the realisation proceeds.
- (2) The costs of realisation shall be charged at a flat rate of five per cent of the realisation proceeds. If the costs actually and necessarily incurred for realisation of the asset are considerably lower or higher than this,

these costs shall be charged. If realisation of the asset results in a charge to the insolvency estate of value added tax, the amount of the value added tax shall be charged in addition to the flat rate pursuant to sentence 1 or the actual costs incurred pursuant to sentence 2.

#### **Section 172 – Other Use of Movable Assets**

- (1) The insolvency administrator may use a movable asset for the insolvency estate which he/she is entitled to realise, provided the loss in value thereby resulting is compensated for by regular payments to the creditor from the date of commencement of the insolvency proceedings. The obligation to make compensatory payments exists only insofar as the loss in value resulting from the use adversely affects the security of the creditor entitled to separate satisfaction.
- (2) The insolvency administrator may combine, intermix and process such an asset insofar as this does not adversely affect the security of the creditor entitled to separate satisfaction. If the creditor's right continues in another asset, the creditor must release the new security to the extent that it exceeds the value of the previous security.

#### **Section 173 – Realisation by the Creditor**

- (1) If the insolvency administrator is not entitled to realise a movable asset or a claim subject to a right of separate satisfaction, the creditor's right of realisation remains unaffected.
- (2) On application by the insolvency administrator and after hearing the creditor, the insolvency court may set a period of time within which the creditor has to realise the asset or claim. After the expiry of the period of time the insolvency administrator is entitled to realise the asset or claim.

### **Part Five – Satisfaction of the Insolvency Creditors. Discontinuation of Proceedings**

#### **Chapter One – Acceptance of Claims**

#### **Section 174 – Filing of Claims**

- (1) The insolvency creditors must file their claims in writing with the insolvency administrator. The claim submission shall include copies of the documentation evidencing the claim. Persons providing collection services (registered persons pursuant to section 10 (1) sentence 1 No. 1 of the Legal Services Act [*Rechtsdienstleistungsgesetz*]) are also authorised to represent the creditor in the proceedings pursuant to this section.
- (2) When the claim is filed the basis and the amount of the claim must be stated, together with the facts which, in the view of the creditor, indicate that the claim is based on the commission of an intentional tort, an intentional violation, in breach of duty, of a statutory maintenance obligation or a criminal offence by the debtor under sections 370, 373 or 374 of the Fiscal Code [*Abgabenordnung*].
- (3) The claims of subordinated creditors have to be filed only if the insolvency court specifically requires the filing of these claims. When such claims are filed, reference must be made to their subordination and the ranking to which the creditor is entitled.
- (4) Claims may be submitted by the transmission of an electronic document if the insolvency administrator has expressly agreed to the transmission of electronic documents. In this case, an electronic invoice may also be transmitted as documentation within the meaning of subsection (1) sentence 2. On the request of the insolvency administrator or the insolvency court, printouts, copies or originals of documentation must be submitted.

#### **Section 175 – Schedule**

- (1) The insolvency administrator shall register each filed claim in a schedule together with the information specified in section 174 subsections (2) and (3). The schedule containing the filed claims together with the documentation attached shall be deposited in the court registry of the insolvency court for the parties' inspection within the first third of the period of time between the expiry of the time limit for filing claims and the verification meeting.
- (2) If a creditor has filed a claim on the basis of an intentional violation, in breach of duty, of a statutory maintenance obligation or a criminal offence by the debtor under sections 370, 373 or 374 of the Fiscal Code [*Abgabenordnung*], the insolvency court shall advise the debtor of the legal consequences of section 302 and the possibility of objection.

#### **Section 176 – Format of the Verification Meeting**

The amount and ranking of the filed claims shall be verified at the verification meeting. Claims disputed by the insolvency administrator, the debtor or an insolvency creditor shall be discussed individually.

### **Section 177 – Late Claim Submission**

- (1) Claims filed after the expiry of the period allowed for filing shall also be verified at the verification meeting. However, if the insolvency administrator or an insolvency creditor objects to this verification or if a claim is only filed after the verification meeting, at the defaulting party's expense the insolvency court shall either fix a special verification meeting or order the verification process to be undertaken in writing. Sentences 1 and 2 apply with the necessary modifications to subsequent amendments to filed claims.
- (2) If the court has requested subordinated creditors to file their claims pursuant to section 174 (3) and if the period allowed for filing expires less than one week prior to the verification meeting, at the expense of the insolvency estate the court shall either fix a special verification meeting or order the verification process to be undertaken in writing.
- (3) Notice of the special verification meeting shall be published. The insolvency creditors who have filed claims, the insolvency administrator and the debtor shall be specifically invited to the meeting. Section 74 (2) sentence 2 applies with the necessary modifications.

### **Section 178 – Requirements for and Effects of Acceptance of Claims**

- (1) A claim is deemed to be accepted insofar as no objection is raised against it at the verification meeting or during the written verification process (section 177) either by the insolvency administrator or by one of the insolvency creditors, or any objection raised is overcome. An objection by the debtor shall not preclude acceptance of the claim.
- (2) For each filed claim the insolvency court shall register in the schedule the extent to which the claim has been accepted in terms of amount and ranking or who objected to acceptance of the claim. An objection by the debtor shall also be registered. The clerk of the court registry shall note the acceptance of the claim on bills of exchange and other debt instruments.
- (3) In terms of the amount and the ranking of accepted claims, the entry in the schedule has the effect of a final judgment against the insolvency administrator and all insolvency creditors.

### **Section 179 – Disputed Claims**

- (1) If a claim is disputed by the insolvency administrator or one of the insolvency creditors, it is left to the creditor to pursue acceptance of the claim against the party disputing the claim.
- (2) If an enforceable debt instrument or a final judgment exists for such a claim, it is the responsibility of the party disputing the claim to pursue the objection.
- (3) The insolvency court shall issue the creditor whose claim has been disputed with a certified extract from the schedule. In the case specified in subsection (2), the party disputing the claim shall also receive a certified extract. The creditors whose claims have been accepted will not be notified; this shall be indicated to the creditors prior to the verification meeting.

### **Section 180 – Competence for Acceptance of Claims**

- (1) An action for acceptance of a claim must be brought in ordinary proceedings. The local court at which the insolvency proceedings are or were pending has exclusive jurisdiction for the action. If the matter in dispute is not within the competence of local courts, the regional court within whose district the insolvency court is located shall have exclusive jurisdiction.
- (2) If an action concerning the claim was pending at the time of commencement of insolvency proceedings, acceptance of the claim shall be pursued by resumption of the action.

### **Section 181 – Scope of the Acceptance**

Acceptance of a claim in terms of the basis, amount and ranking of the claim may only be requested in accordance with the description of the claim stated upon its filing or at the verification meeting.

### **Section 182 – Amount in Dispute**

The value of the matter in dispute in an action for acceptance of a claim, the legal validity of which was disputed by the insolvency administrator or by an insolvency creditor, shall be determined on the basis of the amount to be expected for the claim upon distribution of the insolvency estate.

### **Section 183 – Effects of the Decision**

- (1) A final decision in terms of which a claim is accepted or an objection is held to be well-founded is effective with respect to the insolvency administrator and all insolvency creditors.
- (2) It is the responsibility of the successful party to apply to the insolvency court for amendment of the schedule.



- (3) If only individual creditors conducted the action and not the insolvency administrator, these creditors may claim reimbursement of their costs out of the insolvency estate insofar as a benefit has accrued to the estate as a result of the decision.

#### **Section 184 – Action against an Objection by the Debtor**

- (1) If the debtor has disputed a claim at the verification meeting or during the written verification process (section 177), the creditor may bring an action against the debtor for acceptance of the claim. If an action concerning the claim was pending at the time of commencement of the insolvency proceedings, the creditor may resume this action against the debtor.
- (2) If an enforceable debt instrument or a final judgment exists for such a claim, it is the responsibility of the debtor to pursue the objection within a time limit of one month commencing on the date of the verification meeting or, during the written verification process, when the claim is disputed. After the expiry of this time limit, if the objection is not pursued, an objection shall be deemed not to have been raised. The insolvency court shall issue the debtor and the creditor whose claim was disputed with a certified extract from the schedule and draw the debtor's attention to the consequences of a failure to observe the time limit. The debtor must prove to the court that it has pursued the claim.

#### **Section 185 – Special Jurisdiction**

If an action for acceptance of a claim cannot be brought by recourse to the ordinary courts, acceptance of the claim shall be pursued at the other court with jurisdiction or by the competent administrative authority. Section 180 (2) and sections 181, 183 and 184 apply with the necessary modifications. If acceptance of the claim is to be pursued at another court, section 182 also applies with the necessary modifications.

#### **Section 186 – Restoration of the Status Quo Ante**

- (1) If the debtor failed to attend the verification meeting, on application the insolvency court shall grant the debtor restoration of the status quo ante. Section 51 (2), section 85 (2) and sections 233 to 236 of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications.
- (2) The pleadings relating to the application for restoration of the status quo ante shall be served on the creditor whose claim is to be retroactively disputed. If restoration of the status quo ante is granted, the challenge raised in these pleadings is equivalent to a challenge raised at the verification meeting.

### **Chapter Two – Distribution**

#### **Section 187 – Satisfaction of the Insolvency Creditors**

- (1) Satisfaction of the insolvency creditors may commence only after the general verification meeting.
- (2) Distributions may be made to the insolvency creditors whenever sufficient cash funds are available in the insolvency estate. Subordinated insolvency creditors shall not be included in interim distributions.
- (3) Distributions are made by the insolvency administrator. If a creditors' committee has been appointed, its consent must be obtained by the insolvency administrator prior to each distribution.

#### **Section 188 – Distribution Schedule**

Prior to each distribution the insolvency administrator shall draw up a schedule of the claims to be included in the distribution. The schedule shall be deposited in the court registry for the parties' inspection. The insolvency administrator shall notify the court of the total amount of the claims and the amount available for distribution from the insolvency estate; the court shall publish the notified total amount of the claims and the amount available for distribution.

#### **Section 189 – Consideration of Disputed Claims**

- (1) An insolvency creditor whose claim has not been accepted and in respect of whose claim no enforceable title or final judgment exists must prove to the insolvency administrator, at the latest within a time limit of two weeks from the date of the publication by the court, that an action for declaratory judgment has been raised together with the amount of such claim, or that proceedings in an earlier pending case have been resumed.
- (2) If the appropriate proof is provided within the specified time, the share apportioned to the claim shall be withheld from distribution while the action is pending.
- (3) If the appropriate proof is not provided within the specified time, the claim shall not be taken into consideration when the distribution is made.

#### **Section 190 – Consideration of Creditors Entitled to Separate Satisfaction**

- (1) A creditor who is entitled to separate satisfaction must prove to the insolvency administrator, at the latest within the time limit specified in section 189 (1), that it has waived its right to separate satisfaction or suf-

ferred a shortfall in relation thereto, together with the amount of such waiver or shortfall. If proof is not provided within the time limit, the claim shall not be taken into consideration when the distribution is made.

- (2) It is sufficient in order for claims to be taken into consideration in relation to an interim distribution if the creditor proves to the administrator, at the latest within the time limit, that realisation of the asset which is subject to the right of separate satisfaction is being pursued and credibly establishes the amount of the probable shortfall. In this event, the share apportioned to the claim shall be withheld from distribution. If the requirements of subsection (1) are not met by the time of the final distribution, the retained share shall become freely available for the final distribution.
- (3) If only the insolvency administrator is entitled to realise the asset which is subject to the right of separate satisfaction, subsections (1) and (2) are not applicable. In the case of an interim distribution, if the insolvency administrator has not yet realised an asset, he/she shall estimate the amount of the creditor's shortfall and retain the share apportioned to the claim.

#### **Section 191 – Consideration of Claims Subject to a Condition Precedent**

- (1) The full amount of a claim subject to a condition precedent shall be taken into consideration in relation to an interim distribution. The share apportioned to the claim shall be withheld from distribution.
- (2) A claim subject to a condition precedent shall not be taken into consideration in relation to the final distribution if the possibility of the condition occurring is so remote that the claim has no asset value at the time of the distribution. In this event a share retained pursuant to subsection (1) sentence 2 shall become freely available for the final distribution.

#### **Section 192 – Subsequent Consideration**

Creditors not taken into consideration in an interim distribution who subsequently meet the requirements of sections 189 and 190 shall, on the next distribution, first receive an amount from the remaining insolvency estate which puts them in the same position as the other creditors.

#### **Section 193 – Amendment of the Distribution Schedule**

The insolvency administrator shall undertake the amendments to the schedule required on the basis of sections 189 to 192 within three days of the expiry of the time limit specified in section 189 (1).

#### **Section 194 – Objections to the Distribution Schedule**

- (1) In the case of an interim distribution, an objection to the schedule by a creditor must be notified to the insolvency court within one week of the expiry of the time limit specified in section 189 (1).
- (2) A decision by the court rejecting the objection shall be served on the creditor and the insolvency administrator. The creditor has the right of immediate appeal against the order.
- (3) A decision by the court ordering the amendment of the schedule shall be served on the creditor and the insolvency administrator and deposited in the court registry for the parties' inspection. The administrator and the insolvency creditors have the right of immediate appeal against the order. The period for lodging an appeal begins on the day on which the decision was deposited in the court registry.

#### **Section 195 – Determination of the Fraction**

- (1) The creditors' committee shall determine the fraction to be paid by way of an interim distribution on the recommendation of the insolvency administrator. If no creditors' committee has been appointed, the insolvency administrator shall determine the fraction.
- (2) The insolvency administrator shall notify the creditors taken into consideration in the interim distribution of the fraction.

#### **Section 196 – Final Distribution**

- (1) The final distribution shall take place as soon as realisation of the insolvency estate has been completed, with the exception of ongoing income.
- (2) The final distribution may only be made with the approval of the insolvency court.

#### **Section 197 – Final Meeting**

- (1) On approving the final distribution, the insolvency court shall fix the date for a final creditors' meeting. The purpose of this meeting is:
  1. to discuss the insolvency administrator's final accounts;
  2. to raise objections to the final schedule and
  3. for the creditors to make a decision in relation to assets of the insolvency estate which cannot be realised.

- (2) There must be a period of not less than one month and not more than two months between publication of notice of the meeting and the date of the meeting.
- (3) Section 194 (2) and (3) apply with the necessary modifications to the decision of the court on a creditor's objections.

#### **Section 198 – Deposit of Retained Amounts**

The insolvency administrator shall deposit any amounts retained when the final distribution is made with an appropriate institution for the account of the parties concerned.

#### **Section 199 – Surplus on Final Distribution**

If the claims of all the insolvency creditors can be settled in full by the final distribution, the insolvency administrator shall hand over any surplus remaining to the debtor. If the debtor is not a natural person, the administrator shall hand over to each party holding a participating interest in the debtor the share of the surplus to which such party would be entitled under liquidation outside insolvency proceedings.

#### **Section 200 – Termination of the Insolvency Proceedings**

- (1) As soon as the final distribution has been carried out, the insolvency court shall order the termination of the insolvency proceedings.
- (2) The order and the grounds for termination of the proceedings shall be published. Sections 31 to 33 apply with the necessary modifications.

#### **Section 201 – Rights of the Insolvency Creditors after Termination of the Proceedings**

- (1) After termination of the insolvency proceedings the insolvency creditors may assert their remaining claims against the debtor without restriction.
- (2) Insolvency creditors whose claims were accepted and not disputed by the debtor at the verification meeting may pursue compulsory enforcement against the debtor on the basis of their entry in the schedule as under an enforceable judgment. A claim in relation to which an objection raised has been overcome is equivalent to an undisputed claim. An application for the issue of an execution copy of the schedule may be submitted only after termination of the insolvency proceedings.
- (3) The provisions regulating the discharge of residual debt remain unaffected.

#### **Section 202 – Jurisdiction in Relation to Enforcement**

- (1) In the circumstances specified in section 201, the local court where the insolvency proceedings are or were pending has exclusive jurisdiction
  1. for an action for the issue of the court certificate of enforceability;
  2. for an action following the issue of the court certificate of enforceability disputing that the requirements for its issue had arisen;
  3. for an action asserting objections affecting the claim itself.
- (2) If the matter in dispute is not within the competence of local courts, the regional court within whose district the insolvency court is located shall have exclusive jurisdiction.

#### **Section 203 – Order for a Subsequent Distribution**

- (1) On application by the insolvency administrator or an insolvency creditor or ex officio, the insolvency court shall order a subsequent distribution if, subsequent to the final meeting,
  1. retained amounts become available for distribution;
  2. amounts paid out of the insolvency estate are returned to it or
  3. assets of the insolvency estate are identified.
- (2) Termination of the insolvency proceedings does not preclude the ordering of a subsequent distribution.
- (3) The court may refrain from making such an order and transfer the available amount or the identified asset to the debtor if this appears appropriate having regard to the insignificance of the amount or the low value of the asset and the costs of a subsequent distribution. The court may make the ordering of a subsequent distribution subject to advance payment of a sum of money covering the costs of the subsequent distribution.

#### **Section 204 – Appeal**

- (1) The order refusing the application for subsequent distribution shall be served on the applicant. The applicant has the right of immediate appeal against the order.
- (2) The decision ordering a subsequent distribution shall be served on the insolvency administrator, the debtor and, if a creditor applied for the distribution, this creditor. The debtor has the right of immediate appeal against the decision.

### **Section 205 – Implementation of the Subsequent Distribution**

After a subsequent distribution has been ordered, the insolvency administrator shall distribute the available amount or the proceeds from the realisation of the identified asset on the basis of the final schedule. He/she shall present accounts to the insolvency court in relation to the distribution.

### **Section 206 – Exclusion of Preferential Creditors**

Preferential creditors whose claims became known to the insolvency administrator

1. in relation to an interim distribution, only after determination of the fraction;
2. in relation to the final distribution, only after the conclusion of the final meeting or
3. in relation to a subsequent distribution, only after its public announcement may demand satisfaction only out of the funds remaining in the insolvency estate after the distribution.

## **Chapter Three – Discontinuation of Proceedings**

### **Section 207 – Discontinuation due to Insufficient Assets**

- (1) If it transpires after commencement of insolvency proceedings that the insolvency estate is insufficient to cover the costs of the proceedings, the insolvency court shall discontinue the proceedings. The proceedings shall not be discontinued if a sufficient sum of money is advanced or if the costs are deferred pursuant to section 4a; section 26 (3) applies with the necessary modifications.
- (2) The creditors' meeting, the insolvency administrator and the preferential creditors shall be heard prior to discontinuation.
- (3) Any cash funds available in the insolvency estate shall be used by the administrator prior to discontinuation to settle the costs of the proceedings and of these, in the first place, the expenses in proportion to their amounts. The administrator is no longer obliged to realise the assets of the insolvency estate.

### **Section 208 – Notification of Deficiency of Assets**

- (1) If the costs of the insolvency proceedings are covered but the insolvency estate is insufficient to meet the other preferential liabilities which are due, the insolvency administrator shall notify the insolvency court that there is a deficiency of assets. The same shall apply if it is likely that the estate will be insufficient to meet the other existing preferential liabilities when they become due.
- (2) The court shall publish the notification of deficiency of assets. It shall be served separately on the preferential creditors.
- (3) The duty incumbent on the insolvency administrator to manage and realise the insolvency estate shall continue even after the notification of deficiency of assets.

### **Section 209 – Satisfaction of the Preferential Creditors**

- (1) The insolvency administrator shall settle the preferential liabilities in the following order; liabilities with the same ranking shall be settled in proportion to their amounts:
  1. the costs of the insolvency proceedings;
  2. preferential liabilities that were created after the notification of deficiency of assets without forming part of the costs of the insolvency proceedings;
  3. the remaining preferential liabilities, including lastly the maintenance permitted pursuant to sections 100 and 101 (1) sentence 3.
- (2) The following shall also be deemed to be preferential liabilities within the meaning of subsection (1) No. 2:
  1. liabilities arising out of a reciprocal contract which the insolvency administrator has chosen to perform subsequent to the notification of deficiency of assets;
  2. liabilities arising out of a contract for continuing obligations for the period after the first date on which the insolvency administrator could have given notice of termination subsequent to the notification of deficiency of assets;
  3. liabilities arising out of a contract for continuing obligations insofar as the insolvency administrator has claimed counter-performance on behalf of the insolvency estate subsequent to the notification of deficiency of assets.

### **Section 210 – Prohibition of Enforcement**

As soon as the insolvency administrator has given notification of deficiency of assets, enforcement in respect of a preferential liability within the meaning of section 209 (1) No. 3 is not permitted.

### **Section 210a – Insolvency Plan on Deficiency of Assets**

Where notification of deficiency of assets is given, the provisions regulating insolvency plans are applicable subject to the provisos that

1. the preferential creditors with the ranking of section 209 (1) number 3 take the place of the non-subordinated insolvency creditors and
2. the non-subordinated insolvency creditors take the place of the subordinated insolvency creditors.

#### **Section 211 – Discontinuation after Notification of Deficiency of Assets**

- (1) As soon as the insolvency administrator has distributed the insolvency estate in accordance with section 209, the insolvency court shall discontinue the insolvency proceedings.
- (2) The insolvency administrator shall render a separate account of his/her activities subsequent to the notification of deficiency of assets.
- (3) If assets of the insolvency estate are identified after the discontinuation of the proceedings, on application by the administrator or a preferential creditor or ex officio, the court shall order a subsequent distribution. Section 203 (3) and sections 204 and 205 apply with the necessary modifications.

#### **Section 212 – Discontinuation Where the Grounds for Commencement of Proceedings Cease to Exist**

The insolvency proceedings shall be discontinued on application by the debtor if it is warranted that, after the proceedings are discontinued, the debtor will neither be in a position of illiquidity nor imminent illiquidity, nor of overindebtedness, if overindebtedness was the ground for commencement of insolvency proceedings. The application shall be admissible only if the debtor demonstrates to the satisfaction of the court that no ground for commencement of proceedings exists.

#### **Section 213 – Discontinuation with the Consent of the Creditors**

- (1) The insolvency proceedings shall be discontinued on application by the debtor if, after the expiry of the time limit for filing claims, the debtor procures the consent of all the insolvency creditors who have filed claims. In the case of creditors whose claims are disputed by the debtor or the insolvency administrator and in the case of creditors entitled to separate satisfaction, the insolvency court shall decide at its own discretion to what extent it requires the consent of these creditors or the provision of security in relation to them.
- (2) The proceedings may be discontinued on application by the debtor prior to the expiry of the time limit for filing claims if no other creditors are known beyond the creditors whose consent the debtor has procured.

#### **Section 214 – Proceedings Concerning Discontinuation**

- (1) An application for discontinuation of insolvency proceedings pursuant to section 212 or section 213 shall be published. It shall be deposited in the court registry for the parties' inspection; in the case specified in section 213 it must be accompanied by the creditors' declarations of consent. The insolvency creditors may object in writing to the application within one week of its publication.
- (2) The insolvency court shall make its decision on discontinuation after hearing the applicant, the insolvency administrator and the creditors' committee, if one has been appointed. In the case of an objection, the objecting creditor shall also be heard.
- (3) The insolvency administrator shall settle the undisputed preferential claims and provide security for the disputed preferential claims prior to discontinuation of the proceedings.

#### **Section 215 – Publication and Effects of Discontinuation**

- (1) The order discontinuing insolvency proceedings pursuant to section 207, 211, 212 or 213 and the reason for discontinuation shall be published. The debtor, the insolvency administrator and the members of the creditors' committee shall be informed in advance when the discontinuation will become effective (section 9 (1) sentence 3). Section 200 (2) sentence 2 applies with the necessary modifications.
- (2) Upon discontinuation of the insolvency proceedings, the right to freely dispose of the insolvency estate reverts to the debtor. Sections 201 and 202 apply with the necessary modifications.

#### **Section 216 – Appeal**

- (1) If insolvency proceedings are discontinued pursuant to section 207, 212 or 213, each insolvency creditor and, if discontinuation occurs pursuant to section 207, the debtor has the right of immediate appeal.
- (2) If an application pursuant to section 212 or section 213 is refused, the debtor has the right of immediate appeal.

## **Part Six – Insolvency Plan**

### **Chapter One – Preparation of the Plan**

#### **Section 217 – Principle**

- (1) The satisfaction of the creditors entitled to separate satisfaction and of the insolvency creditors, the realisation of the insolvency estate and its distribution to the parties concerned as well as the handling of the proceedings and the liability of the debtor subsequent to termination of the insolvency proceedings may be regulated in an insolvency plan derogating from the provisions of this Code. If the debtor is not a natural person, the share and membership rights of the parties holding a participating interest in the debtor may also be included in the plan.
- (2) The insolvency plan may also modify the rights of holders of insolvency claims to which they are entitled because an affiliated enterprise within the meaning of section 15 of the Stock Corporation Act [*Aktiengesetz*] assumed liability as surety or co-debtor or on some other basis, as well as to assets of that business (intra-group third-party collateral).

#### **Section 218 – Submission of the Insolvency Plan**

- (1) The insolvency administrator and the debtor are entitled to submit an insolvency plan to the insolvency court. Submission by the debtor may be combined with the application for commencement of insolvency proceedings. A plan that is only received by the court after the final meeting will not be considered.
- (2) If the creditors' meeting has instructed the insolvency administrator to draw up an insolvency plan, the administrator must submit the plan to the court within a reasonable period of time.
- (3) Where the plan is drawn up by the insolvency administrator, the creditors' committee, if one has been appointed, the works council, the committee representing executive staff and the debtor shall assist in an advisory capacity.

#### **Section 219 – Structure of the Plan**

The insolvency plan consists of the declaratory part and the constructive part. It shall be accompanied by the attachments specified in sections 229 and 230.

#### **Section 220 – Declaratory Part**

- (1) The declaratory part of the insolvency plan describes the measures taken or yet to be taken following the commencement of insolvency proceedings in order to establish the basis for the planned modification of the rights of the parties concerned.
- (2) The declaratory part must contain all other information concerning the basis and effects of the plan which is relevant for the decision of the parties concerned on approval of the plan and for its confirmation by the court. It shall include, in particular, a comparative analysis showing the effects of the plan on the likely satisfaction of the creditors. If the plan provides for continued operation of the business, it is generally to be assumed that the business will continue to be operated when ascertaining likely satisfaction without a plan. The foregoing does not apply if a sale of the business or its continuation in some other manner has no prospect of success.
- (3) If the insolvency plan provides for altering the rights of insolvency creditors arising under intra-group third-party collateral (section 217 (2)), the declaratory part is also to include the circumstances of the affiliated enterprise that granted the collateral and the effects of the plan on that enterprise.

#### **Section 221 – Constructive Part**

The constructive part of the insolvency plan sets out how the legal status of the parties concerned is to be changed as a result of the plan. The insolvency administrator may be authorised by the plan to take the necessary measures for implementation of the plan and to correct any manifest errors in the plan.

#### **Section 222 – Formation of Groups**

- (1) In determining the rights of the parties involved in the insolvency plan, insofar as parties with differing legal status are affected, groups shall be formed. A distinction shall be made between
  1. creditors entitled to separate satisfaction, if their rights are impaired by the plan;
  2. non-subordinated insolvency creditors;
  3. the individual ranking categories of the subordinated insolvency creditors, unless their claims are deemed to be waived pursuant to section 225;
  4. parties holding a participating interest in the debtor, if their share or membership rights are included in the plan;
  5. the holders of rights arising from intra-group third-party collateral.

- (2) Groups of parties with the same legal status may be formed, grouping together parties with equivalent economic interests. The groups must be appropriately distinguished from one another. The differentiation criteria shall be specified in the plan.
- (3) The employees shall form a separate group if they hold significant claims as insolvency creditors. Separate groups may be formed for minor creditors and for small shareholders holding an interest in the liable equity capital of less than one per cent or less than Euro 1,000.

#### **Section 223 – Rights of Parties Entitled to Separate Satisfaction**

- (1) Unless otherwise specified in the insolvency plan, the plan shall not affect the right of the creditors entitled to separate satisfaction to obtain satisfaction from the assets that are subject to rights to separate satisfaction. A derogating provision is excluded in relation to financial collateral arrangements within the meaning of section 1 (17) of the Banking Act [*Kreditwesengesetz*] as well as to securities provided
  1. to the operator of or participant in a system pursuant to section 1 (16) of the Banking Act [*Kreditwesengesetz*] in order to secure its claims under the system or
  2. to the central bank of a Member State of the European Union or the European Central Bank.
- (2) If the plan contains a derogating provision, the constructive part shall indicate in respect of the creditors entitled to separate satisfaction the fraction by which their rights are to be reduced, the period of time for which their rights are to be deferred and any other provisions to which they are to be subject.

#### **Section 223a – Intra-group Third-party Collateral**

Unless otherwise specified in the insolvency plan, the insolvency plan will not affect the right of an insolvency creditor arising from intra-group third-party collateral (section 217 (2)). If such provision is made, the alteration must be reasonably compensated. Section 223 (1) sentence 2 and (2) apply with the necessary modifications.

#### **Section 224 – Rights of Insolvency Creditors**

The constructive part of the insolvency plan shall indicate in respect of the non-subordinated creditors the fraction by which their claims are to be reduced, the period of time for which their claims are to be deferred, how their claims are to be secured and any other provisions to which they are to be subject.

#### **Section 225 – Rights of Subordinated Insolvency Creditors**

- (1) Unless otherwise specified in the insolvency plan, the claims of subordinated insolvency creditors shall be deemed to be waived.
- (2) If the plan contains a derogating provision, the constructive part shall contain the information specified in section 224 in respect of each group of subordinated creditors.
- (3) The liability of the debtor for fines and the comparable liabilities pursuant to section 39 (1) No. 3 subsequent to termination of the insolvency proceedings can neither be excluded nor restricted by a plan.

#### **Section 225a – Rights of Shareholders**

- (1) The share or membership rights of the parties holding a participating interest in the debtor remain unaffected by the insolvency plan unless the plan provides otherwise.
- (2) Provision may be made in the constructive part of the plan for creditors' claims to be converted into share or membership rights in the debtor. A conversion against the wishes of the creditors concerned is excluded. The plan may, in particular, provide for a reduction or an increase in the registered capital, the provision of in-kind contributions, the exclusion of subscription rights or the payment of financial settlements to departing shareholders.
- (3) Any provision that is admissible under company law may be made in the plan, in particular the continuation of a liquidated company or the transfer of share or membership rights.
- (4) Measures pursuant to subsections (2) or (3) shall not confer entitlement to rescind or terminate contracts involving the debtor. They shall further not result in any other cessation of contracts. Contractual agreements to the contrary are invalid. Agreements linked to a breach of duty by the debtor remain unaffected by sentences 1 and 2 insofar as this is not confined to a measure pursuant to subsections (2) or (3) being envisaged or implemented.
- (5) If a measure pursuant to subsection (2) or (3) constitutes good cause for a party holding a participating interest in the debtor to withdraw from the legal entity or partnership with legal personality and if this right of withdrawal is exercised, the financial position which would have arisen on liquidation of the debtor shall be applicable in determining the amount of any settlement claim. Payment of the settlement claim may be deferred over a period of up to three years in order to avoid an unreasonable burden on the debtor's financial position. Interest is payable on unpaid settlement balances.

### **Section 226 – Equal Treatment of the Parties Concerned**

- (1) Within each group equal rights shall be extended to all parties concerned.
- (2) Any differing treatment of the parties in a group is only permitted with the consent of all parties concerned. In this case the insolvency plan shall be accompanied by the declaration of consent of each party concerned.
- (3) Any agreement concluded between the insolvency administrator, the debtor or other parties and individual parties conferring on the latter an advantage not provided for in the plan in exchange for their conduct during voting or otherwise in connection with the insolvency proceedings is void.

### **Section 227 – Liability of the Debtor**

- (1) If nothing to the contrary is specified in the insolvency plan, the debtor shall be discharged from his/her residual obligations towards the insolvency creditors by way of the satisfaction of these creditors provided for in the constructive part of the plan.
- (2) If the debtor is a partnership with legal personality or a partnership limited by shares, subsection (1) shall apply with the necessary modifications to the personal liability of the partners.

### **Section 228 – Modification of Relationships under Property Law**

If rights in objects are to be created, modified, transferred or cancelled, the necessary declarations of intent by the parties concerned may be incorporated into the constructive part of the insolvency plan. If rights in a plot of land or in registered rights which are registered in the Land Register are involved, these rights shall be specified in compliance with section 28 of the Land Register Code [*Grundbuchordnung*]. Sentence 2 applies with the necessary modifications to rights registered in the Register of Ships, Register of Ships under Construction and Register of Liens on Aircraft.

### **Section 229 – Statement of Assets and Liabilities. Earnings and Financial Plan**

If the creditors are to be satisfied from the earnings resulting from the continuation of the enterprise by the debtor or a third party, the insolvency plan shall be accompanied by a statement of assets and liabilities listing the values of the assets and liabilities which would be set against each other if the plan were to become effective. In addition, the plan shall indicate the outgoings and earnings to be expected for the period during which the creditors are to be satisfied and the sequence of income and expenditure which is intended to ensure the liquidity of the enterprise during this period. The creditors who have not filed their claims but who are known about when the plan is drawn up must also be taken into consideration in this regard.

### **Section 230 – Additional Attachments**

- (1) If the insolvency plan provides for the continued operation of the debtor's enterprise by the debtor and the debtor is a natural person, the plan shall also be accompanied by the debtor's declaration of his/her willingness to continue to operate the enterprise on the basis of the plan. If the debtor is a partnership with legal personality or a partnership limited by shares, the plan shall be accompanied by a corresponding declaration by the persons who are to be general partners of the enterprise in terms of the plan. The debtor's declaration pursuant to sentence 1 is not required if the debtor submits the plan himself/herself.
- (2) If creditors are to take over share or membership rights or participating interests in a legal entity, an association without legal personality or a partnership with legal personality, the plan shall be accompanied by the declaration of consent of each of these creditors.
- (3) If a third party has agreed to assume obligations towards the creditors in the event that the plan is confirmed, the plan shall be accompanied by the declaration of the third party.
- (4) If the insolvency plan provides for alteration of the rights of creditors arising under intra-group third-party collateral, the plan is to be accompanied by the approval of the affiliated enterprise that provided the collateral.

### **Section 231 – Rejection of the Plan**

- (1) The insolvency court shall reject the plan ex officio
  1. if the provisions concerning the right to submit a plan and the contents of the plan, in particular the formation of groups, are not complied with and the submitting party cannot or does not remedy the defect within a reasonable period of time set by the court;
  2. if a plan submitted by the debtor clearly has no prospect of being accepted by the parties concerned or of being confirmed by the court or
  3. if the claims to which the parties concerned are entitled according to the constructive part of a plan submitted by the debtor clearly cannot be satisfied.The decision of the court shall be made within two weeks of submission of the plan.



- (2) If the debtor had already submitted a plan during the insolvency proceedings which was refused by the parties concerned, not confirmed by the court or withdrawn by the debtor after publication of the date of the discussion meeting, the court shall reject a new plan submitted by the debtor if the insolvency administrator, with the consent of the creditors' committee if one has been appointed, requests its rejection.
- (3) The submitting party has the right of immediate appeal against the order rejecting the plan.

### **Section 232 – Comments on the Plan**

- (1) If the insolvency plan is not rejected, the insolvency court shall forward the plan for comment, regarding the comparative analysis in particular, to:
  1. the creditors' committee, if one has been appointed, the works council and the committee representing executive staff;
  2. the debtor, if the insolvency administrator submitted the plan;
  3. the insolvency administrator, if the debtor submitted the plan.
- (2) The court may also give the debtor's competent official professional organisation representing industry, business, trade or agriculture, or other expert bodies, the opportunity to make representations.
- (3) The court shall fix a period for submission of representations. The submission period shall not exceed two weeks.
- (4) The court can forward the plan for comment to the parties specified in subsections (1) and (2) before the decision pursuant to section 231. If a comment received in response contains a new submission of facts on which the court wishes to base a decision to reject the plan, the court shall forward that comment for comment to the party which submitted the plan and the other parties entitled to comment pursuant to subsection (1) within a time limit of no longer than one week.

### **Section 233 – Stay of Realisation and Distribution**

On application by the debtor or the insolvency administrator, the insolvency court shall order the stay of the process of realisation and distribution insofar as the continued realisation and distribution of the insolvency estate would jeopardise the implementation of a submitted insolvency plan. The court shall not order a stay or shall revoke the stay order if it entails the risk of significant detriment to the insolvency estate or if the insolvency administrator, with the consent of the creditors' committee or creditors' meeting, requests the continuation of realisation and distribution.

### **Section 234 – Deposit of the Plan**

The insolvency plan, together with its attachments and any representations received, shall be deposited in the court registry for the parties' inspection.

## **Chapter Two – Acceptance and Confirmation of the Plan**

### **Section 235 – Discussion and Voting Meeting**

- (1) The insolvency court shall schedule a meeting at which the insolvency plan and the voting rights of the parties concerned can be discussed and for subsequent voting on the plan (discussion and voting meeting). The meeting shall be scheduled for no later than one month in advance. It may be called at the same time as the representations pursuant to section 232 are being obtained.
- (2) The date of the discussion and voting meeting shall be published. The public announcement of the meeting must indicate that the plan and the representations received may be inspected at the court registry. Section 74 (2) sentence 2 applies with the necessary modifications.
- (3) The insolvency creditors who have filed claims, the creditors entitled to separate satisfaction, the insolvency administrator, the debtor, the works council and the committee representing executive staff shall be specifically invited. A copy of the plan or a summary of the main content, which the submitting party must provide on request, shall be sent with the invitation. If the share or membership rights of the parties holding a participating interest in the debtor are included in the plan, these parties shall also be invited in accordance with sentences 1 and 2; this shall not apply to shareholders or to shareholders in a partnership limited by shares. Section 8 (3) applies with the necessary modifications. Section 121 (4a) of the Stock Corporation Act [*Aktiengesetz*] applies with the necessary modifications to quoted companies; they shall make a summary of the main content of the plan available on their website.

### **Section 236 – Combination with the Verification Meeting**

The discussion and voting meeting must not take place prior to the verification meeting. Both meetings may, however, be combined.

### **Section 237 – Voting Rights of the Insolvency Creditors**

- (1) Section 77 (1) sentence 1, section 77 (2) and section 77 (3) No. 1 apply with the necessary modifications to the voting rights of the insolvency creditors in relation to the vote on the insolvency plan. Creditors entitled to separate satisfaction are only entitled to vote as insolvency creditors to the extent that the debtor is also personally liable towards them and they waive their right to separate satisfaction or separate satisfaction fails; so long as the amount of the shortfall has not been determined, their claims shall be taken into consideration at the level of the probable shortfall.
- (2) Creditors whose claims are not impaired by the plan do not have a voting right.

### **Section 238 – Voting Rights of the Creditors Entitled to Separate Satisfaction**

- (1) Insofar as the legal position of creditors entitled to separate satisfaction is also regulated in the insolvency plan, the rights of these creditors shall be discussed individually at the meeting. Rights to separate satisfaction which are not disputed by the insolvency administrator, by a creditor entitled to separate satisfaction or by an insolvency creditor give entitlement to a voting right. Section 41, section 77 (2) and section 77 (3) No. 1 apply with the necessary modifications to voting rights in the case of disputed rights, rights subject to a condition precedent or rights that have not yet matured.
- (2) Section 237 (2) applies with the necessary modifications.

### **Section 238a – Voting Rights of Shareholders**

- (1) The voting rights of the debtor's shareholders are determined solely in accordance with their participating interest in the subscribed capital or the debtor's assets. Restrictions on voting rights, special voting rights and multiple voting rights shall be disregarded.
- (2) Section 237 (2) applies with the necessary modifications.

### **Section 238b – Voting Rights of Holders of Rights arising from Intra-group Third-party Collateral**

If the plan provides for altering the rights of creditors arising under intra-group third-party collateral, voting rights are to be determined by the probable amount of the contribution to satisfaction from assertion of the rights arising from the third-party collateral.

### **Section 239 – Voting List**

The registrar of the court registry shall draw up a list recording the voting rights of the parties concerned resulting from the discussions at the meeting.

### **Section 240 – Amendment of the Plan**

The party who submits the plan is entitled to amend the content of individual provisions of the insolvency plan on the basis of the discussions at the meeting. The amended plan may be voted on at the same meeting.

### **Section 241 – Separate Voting Meeting**

- (1) The insolvency court may schedule a separate meeting for the vote on the insolvency plan. In this event the period of time between the discussion meeting and the voting meeting shall amount to not more than one month.
- (2) The parties entitled to vote and the debtor shall be invited to the voting meeting. This shall not apply to shareholders or to shareholders in a partnership limited by shares. It is sufficient in respect of these parties to publish the date of the meeting. Section 121 (4a) of the Stock Corporation Act [*Aktiengesetz*] applies with the necessary modifications to quoted companies. In the event of an amendment to the plan, specific reference shall be made to the amendment.

### **Section 242 – Written Vote**

- (1) If a separate voting meeting is scheduled, voting rights may be exercised in writing.
- (2) The insolvency court shall send out voting papers to the parties entitled to vote advising them of their voting right after the discussion meeting. Votes in writing shall only be taken into account if they are received by the court by no later than the day before the voting meeting; reference shall be made to this when the voting papers are sent out.

### **Section 243 – Voting in Groups**

Each group of parties entitled to vote shall vote separately on the insolvency plan.

### **Section 244 – Required Majorities**

- (1) Acceptance of the insolvency plan by the creditors requires that, in each group,

1. the majority of the voting creditors approve the plan and
  2. the total of the claims of the assenting creditors amounts to more than half of the total of the claims of the voting creditors.
- (2) Creditors who are entitled to a right jointly or whose rights constituted a single right until the occurrence of the ground for commencement of insolvency proceedings shall be counted as one creditor in the vote. The same applies where a right is encumbered with a lien or a usufruct.
- (3) Subsection (1) number 2 applies with the necessary modifications to the parties holding a participating interest in the debtor subject to the proviso that the total of the participating interests takes the place of the total of the claims.

#### **Section 245 – Prohibition of Obstruction**

- (1) Even if the required majorities have not been achieved, the approval of a voting group shall be deemed to have been granted if
1. the members of this group are likely to be in no worse a position as a result of the insolvency plan than they would be in without a plan;
  2. the members of this group participate to a reasonable extent in the economic value accruing to the parties concerned on the basis of the plan; and
  3. the majority of the voting groups approved the plan with the required majorities.
- (2) For a group of creditors reasonable participation within the meaning of subsection (1) number 2 exists if, pursuant to the plan,
1. no other creditor receives economic value exceeding the full amount of its claim;
  2. neither a creditor whose claim for satisfaction would rank behind the claims of the creditors in the group without a plan, nor the debtor, nor any party holding a participating interest in the debtor receives economic value that is not fully compensated for through performance received into the debtor's assets and
  3. no creditor whose claim for satisfaction would rank equally with the claims of the creditors in the group without a plan is placed in a better position than these creditors.

If the debtor is a natural person whose involvement in the continued operation of the enterprise, owing to special circumstances inherent in the debtor, is essential in order to realise the added value from the plan and the debtor has undertaken in the plan to continue operation of the enterprise as well as to transfer the economic value that he or she receives or retains in the event that his/her involvement ends before five years, or a shorter period provided for implementation of the plan, have elapsed for reasons for which he/she is responsible, reasonable participation of the group of creditors may also exist if the debtor receives economic value notwithstanding sentence 1 number 2. Sentence 2 applies with the necessary modifications for holders of share or membership rights involved in the management.

- (2a) If the required majority is not achieved in the group that is to be formed pursuant to section 222 (1) sentence 2 number 5, subsections (1) and (2) apply to this group only if the compensation envisaged for the alteration reasonably compensates the holders of rights arising from the intra-group third-party collateral for the loss of rights they are to suffer.
- (3) For a group of shareholders, reasonable participation within the meaning of subsection (1) number 2 exists if, pursuant to the plan,
1. no creditor receives economic value exceeding the full amount of its claim and
  2. no shareholder who would be on an equal footing with the shareholders in the group without a plan is placed in a better position than these shareholders.

#### **Section 245a – Less Favourable Treatment in the Case of Natural Persons**

If the debtor is a natural person, when examining the likelihood of less favourable treatment pursuant to section 245 (1) number 1 it is to be assumed in case of doubt that the income, assets and family circumstances of the debtor at the time of voting on the insolvency plan will be taken as a basis throughout the duration of the proceedings and the period during which insolvency creditors may assert their remaining claims against the debtor without restriction. If the debtor has lodged an admissible application for discharge of residual debt, in case of doubt it is also to be assumed that discharge of residual debt will be granted upon expiry of the assignment period provided for in section 287 (2).

#### **Section 246 – Approval of Subordinated Insolvency Creditors**

The following additional conditions apply to the acceptance of the insolvency plan by the sub-ordinated insolvency creditors:

1. The approval of the groups with claims ranking behind those specified in section 39 (1) No. 3 is deemed to be granted if no insolvency creditor is placed in a better position as a result of the plan than the creditors in these groups.

2. If none of the creditors in a group participates in the vote, the approval of the group is deemed to have been granted.

#### **Section 246a – Approval of the Shareholders**

If none of the members of a group of shareholders participates in the vote, the approval of the group is deemed to have been granted.

#### **Section 247 – Approval of the Debtor**

- (1) The approval of the debtor to the plan is deemed to have been granted if the debtor does not object to the plan in writing, at the latest at the voting meeting.
- (2) An objection under subsection (1) shall be disregarded if
  1. the debtor is likely to be in no worse a position as a result of the plan than it would be in without a plan and
  2. no creditor receives economic value exceeding the full amount of its claim.

#### **Section 248 – Court Confirmation**

- (1) Following acceptance of the insolvency plan by the parties concerned (sections 244 to 246a) and approval of the plan by the debtor, the plan must be confirmed by the insolvency court.
- (2) Prior to its decision confirming the plan, the court shall hear the insolvency administrator, the creditors' committee, if one has been appointed, and the debtor.

#### **Section 248a – Court Confirmation of Plan Correction**

- (1) Correction of the insolvency plan by the insolvency administrator pursuant to section 221 sentence 2 requires the confirmation of the insolvency court.
- (2) Prior to its decision confirming the plan, the court shall hear the insolvency administrator, the creditors' committee, if one has been appointed, the creditors and shareholders, insofar as their rights are affected, and also the debtor.
- (3) On application, confirmation shall be refused if a party is likely to be placed in a worse position by the plan amendment resulting from the correction than it would be in under the effects envisaged by the plan.
- (4) The creditors and shareholders specified in subsection (2) and the insolvency administrator have the right of immediate appeal against the order confirming or rejecting the correction. Section 253 (4) applies with the necessary modifications.

#### **Section 249 – Conditional Plan**

If the insolvency plan provides that prior to confirmation particular contributions are to be provided or other measures are to be put into effect, the plan may be confirmed only if these requirements are met. Confirmation shall be refused ex officio if the requirements are not met even after the expiry of a reasonable period of time set by the insolvency court.

#### **Section 250 – Breach of Procedural Provisions**

Confirmation shall be refused ex officio if

1. the provisions concerning the content and procedural handling of the insolvency plan, acceptance of the plan by the parties concerned and approval of the plan by the debtor have not been observed in a material respect and the defect cannot be remedied or
2. acceptance of the plan was improperly obtained, in particular by the preferential treatment of a party.

#### **Section 251 – Protection of Minorities**

- (1) On application by a creditor or, if the debtor is not a natural person, a party holding a participating interest in the debtor, confirmation of the insolvency plan shall be refused if
  1. the applicant objected to the plan in writing or had its objection minuted, at the latest at the voting meeting and
  2. the applicant is likely to be placed in a worse position as a result of the plan than it would be in without a plan; if the debtor is a natural person, section 245a applies with the necessary modifications.
- (2) The application is admissible only if the applicant demonstrates to the satisfaction of the court, at the latest at the voting meeting, that it is likely to be placed in a worse position as a result of the plan.
- (3) The application shall be rejected if funds are made available in the constructive part of the plan in case a party proves less favourable treatment. Whether the party concerned receives a settlement out of these funds shall be resolved outside the insolvency proceedings.

### **Section 252 – Publication of the Decision**

- (1) The order confirming or refusing confirmation of the insolvency plan shall be pronounced at the voting meeting or at a special meeting to be scheduled as soon as possible. Section 74 (2) sentence 2 applies with the necessary modifications.
- (2) If the plan is confirmed, a copy of the plan or a summary of the main content shall be sent to the insolvency creditors who filed claims and the creditors entitled to separate satisfaction referring to its confirmation. If the share or membership rights of the parties holding a participating interest in the debtor are included in the plan, the documents shall also be sent to them; this shall not apply to shareholders or shareholders in a partnership limited by shares. Quoted companies shall make a summary of the main content of the plan available on their website. The sending of a copy of the plan or a summary of the main content pursuant to sentences 1 and 2 is not required if a copy of the plan was sent with the invitation pursuant to section 235 (2) sentence 2 and the plan was accepted without change. Section 8 (3) applies with the necessary modifications.

### **Section 253 – Appeal**

- (1) The creditors, the debtor and, if the debtor is not a natural person, the parties holding a participating interest in the debtor have the right of immediate appeal against the order confirming or refusing confirmation of the insolvency plan.
- (2) The right of immediate appeal against the confirmation order is admissible only if the appellant
  1. objected to the plan in writing or had its objection minuted, at the latest at the voting meeting;
  2. voted against the plan and
  3. demonstrates to the satisfaction of the court that it will be placed in a substantially worse position as a result of the plan than it would be in without a plan and that this disadvantage cannot be compensated for by a payment out of the funds specified in section 251 (3); if the debtor is a natural person, section 245a applies with the necessary modifications.
- (3) Subsection (2) numbers 1 and 2 shall apply only if specific reference was made in the public announcement of the meeting (section 235 (2)) and in the notices of invitation to the meeting (section 235 (3)) to the necessity of an objection to and rejection of the plan.
- (4) On application by the insolvency administrator, the regional court shall refuse the appeal without delay if it appears that the entry into effect of the insolvency plan as soon as possible deserves priority because, in the view of the court, exercising its independent discretion, the disadvantages of a delay in implementing the plan outweigh the disadvantages for the appellant; a redress procedure pursuant to section 572 (1) sentence 1 of the Code of Civil Procedure [*Zivilprozessordnung*] shall not take place. This shall not apply in the event of a particularly serious infringement of the law. If the court refuses the appeal pursuant to sentence 1, the appellant shall be compensated out of the insolvency estate for the loss it incurs as a result of the implementation of the plan; cancellation of the effects of the insolvency plan cannot be requested as compensation. The regional court which refused the immediate appeal has exclusive jurisdiction for actions claiming compensation pursuant to sentence 3.

## **Chapter Three – Effects of the Confirmed Plan. Monitoring Implementation of the Plan**

### **Section 254 – General Effects of the Plan**

- (1) When the order confirming the insolvency plan becomes final, the effects set out in the constructive part become binding for and against all parties concerned.
- (2) With the exception of rights arising from intra-group third-party collateral (section 217 (2)) which are modified in accordance with section 223a, the plan shall not affect the rights of the insolvency creditors against co-debtors and sureties of the debtor, the rights of these creditors in objects which do not form part of the insolvency estate or rights under a priority notice relating to such objects. Under the plan the debtor is, however, discharged vis-à-vis its co-debtors, sureties or any other party holding a right of recourse in the same way as it is discharged vis-à-vis its creditors.
- (3) If a creditor receives satisfaction exceeding the amount it could claim under the plan, this shall not give rise to a duty on the part of the recipient to make restitution.
- (4) If creditors' claims are converted into share or membership rights in the debtor, following court confirmation of the plan the debtor cannot assert any claims against the former creditors on account of an overvaluation of the claims in the plan.

### **Section 254a – Rights in Objects. Other Effects of the Plan**

- (1) If rights in objects are to be created, amended, transferred or cancelled or if shareholdings in a company with limited liability are to be transferred, the declarations of intent by the parties concerned that are recorded in the insolvency plan shall be deemed to have been made in the prescribed form.

- (2) If the share or membership rights of the parties holding a participating interest in the debtor are included in the plan (section 225a), the resolutions of the shareholders or other declarations of intent by the parties concerned that are recorded in the plan shall be deemed to have been made in the prescribed form. Notices of meetings, announcements and other measures required under company law in preparation for resolutions of the shareholders shall be deemed to have been effected in the prescribed form. The insolvency administrator is entitled to undertake the necessary registrations with the relevant registration court.
- (3) The same shall apply with the necessary modifications to the undertakings recorded in the plan on which a measure pursuant to subsection (1) or (2) is based.

#### **Section 254b – Effect for all Parties Concerned**

Sections 254 and 254a apply also to insolvency creditors who have not filed their claims and to parties who have objected to the insolvency plan.

#### **Section 255 – Revival Clause**

- (1) If the claims of insolvency creditors are deferred or partially waived on the basis of the constructive part of the insolvency plan, the deferment or waiver will cease to be binding on a creditor against whom the debtor significantly defaults in implementing the plan. Significant default shall only be considered to have occurred when the debtor has not paid a liability that is due despite having received a written reminder from the creditor granting a period of grace of at least two weeks.
- (2) If new insolvency proceedings are commenced in respect of the debtor's assets before the plan has been implemented in full, the deferment or waiver of claims shall cease to be binding on all the insolvency creditors.
- (3) The plan may provide otherwise. However, subsection (1) cannot be departed from to the detriment of the debtor.

#### **Section 256 – Disputed Claims. Shortfall Claims**

- (1) If a claim was disputed at the verification meeting or if the amount of the shortfall claim of a creditor entitled to separate satisfaction has not yet been determined, default in the implementation of the insolvency plan within the meaning of section 255 (1) shall not be considered to have occurred if, until final determination of the amount of the claim, the debtor takes account of the claim to the extent corresponding to the decision of the insolvency court on the voting right of the creditor at the vote on the plan. If the insolvency court has not yet decided on the creditor's voting right, on application by the debtor or the creditor the court shall make a subsequent determination of the extent to which the debtor must take account of the claim on a provisional basis.
- (2) If the final determination results in the debtor having paid an insufficient amount, it shall make retrospective payment of the amount outstanding. Significant default in the implementation of the plan shall only be considered to have occurred when the debtor does not make retrospective payment of the amount outstanding despite having received a written reminder from the creditor granting a period of grace of at least two weeks.
- (3) If the final determination results in the debtor having paid an excessive amount, it may claim repayment of the excess only insofar as the excess also exceeds the unmatured part of the claim to which the creditor is entitled under the insolvency plan.

#### **Section 257 – Enforcement based on the Plan**

- (1) Insolvency creditors whose claims were accepted and not disputed by the debtor at the verification meeting may pursue compulsory enforcement against the debtor based on the confirmed, final and binding insolvency plan in conjunction with their entry in the schedule as under an enforceable judgment. A claim in relation to which an objection which was raised has been overcome is equivalent to an undisputed claim. Section 202 applies with the necessary modifications.
- (2) The same shall apply to compulsory enforcement against a third party who assumed obligations for the implementation of the plan alongside the debtor by means of a written declaration submitted to the insolvency court without reserving the defence of failure to pursue remedies.
- (3) If a creditor asserts the rights to which it is entitled in the event of significant default by the debtor in the implementation of the plan, the creditor has to satisfy the court in relation to the reminder and the expiry of the period of grace in order to obtain the issue of the court certificate of enforceability in respect of these rights and for the purpose of carrying out compulsory enforcement but is not required to produce any further evidence in respect of the debtor's default.

### **Section 258 – Termination of the Insolvency Proceedings**

- (1) As soon as the order confirming the insolvency plan has become final and binding, the insolvency court shall order the termination of the insolvency proceedings unless the insolvency plan provides otherwise.
- (2) The insolvency administrator shall settle the undisputed, mature preferential claims and provide security for disputed or unmatured preferential claims prior to termination of the proceedings. A financial plan may also be submitted showing that satisfaction of the unmatured preferential claims is ensured.
- (3) The order shall contain the date of termination, which must be no earlier than two days following the date of the order. The order and the grounds for termination of the proceedings shall be published. The debtor, the insolvency administrator and the members of the creditors' committee shall be informed in advance of the date of termination. Sections 31 to 33 apply with the necessary modifications. If the date of termination is not stated, the termination shall take effect when a further two days have elapsed since the day of publication.

### **Section 259 – Effects of Termination**

- (1) The offices of the insolvency administrator and members of the creditors' committee expire upon termination of the insolvency proceedings. The right to freely dispose of the insolvency estate reverts to the debtor.
- (2) The provisions concerning monitoring of implementation of the plan remain unaffected.
- (3) The insolvency administrator may continue a pending action concerning avoidance in insolvency even after termination of the proceedings if provision is made for this in the constructive part of the insolvency plan. In this case the action will be undertaken for account of the debtor unless the plan provides otherwise.

### **Section 259a – Protection from Enforcement**

- (1) If, after termination of the proceedings, compulsory enforcement by individual insolvency creditors who did not file their claims by the date of the voting meeting threatens the implementation of the insolvency plan, on application by the debtor the insolvency court may order the full or partial lifting of a measure of compulsory enforcement or prohibit it for a maximum of three years. The application is admissible only if the debtor credibly establishes the factual allegations substantiating the threat.
- (2) If the threat is credibly established, the court may also temporarily suspend compulsory enforcement.
- (3) The court shall set aside or vary its order on application if this is necessary taking account of a change in circumstances.

### **Section 259b – Special Limitation Period**

- (1) The claim of an insolvency creditor who did not file its claim by the date of the voting meeting becomes time-barred within one year.
- (2) The limitation period begins when the claim is due and payable and the order confirming the insolvency plan has become final and binding.
- (3) Subsections (1) and (2) are applicable only if this results in a claim becoming time-barred earlier than by application of the limitation provisions which would otherwise be applicable.
- (4) The limitation period for the claim of an insolvency creditor is suspended while enforcement is not permitted by reason of protection from enforcement pursuant to section 259a. The suspension ends three months after termination of protection from enforcement.

### **Section 260 – Monitoring of Plan Implementation**

- (1) Provision may be made in the constructive part of the insolvency plan for monitoring the implementation of the plan.
- (2) In the case provided for in subsection (1), after termination of the insolvency proceedings monitoring will be undertaken in relation to fulfilment of the claims to which the creditors are entitled against the debtor pursuant to the constructive part of the plan.
- (3) If so provided in the constructive part of the plan, the monitoring shall extend to fulfilment of the claims to which the creditors are entitled pursuant to the constructive part of the plan against a legal entity or partnership with legal personality set up after the commencement of insolvency proceedings in order to take over and continue the debtor's enterprise or a business operation of the debtor (takeover company).

### **Section 261 – Duties and Powers of the Insolvency Administrator**

- (1) The monitoring of implementation of the plan is the duty of the insolvency administrator. The offices of the insolvency administrator and members of the creditors' committee and also the supervision of the insolvency court will continue for this purpose. Section 22 (3) applies with the necessary modifications.
- (2) During the monitoring period the insolvency administrator must report annually to the creditors' committee, if one has been appointed, and to the court on the current status of and future prospects for imple-

mentation of the insolvency plan. The right of the creditors' committee and of the court to request specific information or an interim report at any time remains unaffected.

#### **Section 262 – Insolvency Administrator's Duty of Notification**

If the insolvency administrator ascertains that claims which are being monitored for fulfilment are not or cannot be met, he/she must notify the creditors' committee and the insolvency court accordingly without delay. If a creditors' committee has not been appointed, the administrator shall instead notify all creditors with claims against the debtor or the takeover company pursuant to the constructive part of the insolvency plan.

#### **Section 263 – Transactions Requiring Approval**

Provision may be made in the constructive part of the insolvency plan for particular transactions undertaken by the debtor or the takeover company during the monitoring period to require the approval of the insolvency administrator to be effective. Section 81 (1) and section 82 apply with the necessary modifications.

#### **Section 264 – Credit Limit**

- (1) Provision may be made in the constructive part of the insolvency plan for the insolvency creditors to be subordinated to creditors with claims arising under loans and other lending taken out by the debtor or the takeover company during the monitoring period or left in place by a preferential creditor into the monitoring period. In this event a total amount for such lending shall also be fixed (credit limit). This may not exceed the value of the assets listed in the statement of assets and liabilities annexed to the plan (section 229 sentence 1).
- (2) The insolvency creditors shall be subordinated under subsection (1) only to creditors with whom it is agreed that the lending granted by them is within the credit limit in terms of principal claim, interest and costs, the amounts of which shall be specified, and in relation to whom the insolvency administrator has confirmed this agreement in writing.
- (3) Section 39 (1) No. 5 remains unaffected.

#### **Section 265 – Subordination of New Creditors**

Creditors with other contractual entitlements which arise during the monitoring period are also subordinated to creditors with claims arising under loans taken out or left in place in accordance with section 264. Entitlements arising under a contract for continuing obligations entered into prior to the monitoring period shall also be regarded as such entitlements for the period after the first date on which the creditor could have terminated the contract after the commencement of monitoring.

#### **Section 266 – Consideration of Subordinated Ranking**

- (1) The subordinated ranking of the insolvency creditors and the creditors specified in section 265 shall be taken into account only in insolvency proceedings commenced prior to the termination of monitoring.
- (2) In these new insolvency proceedings these creditors shall rank senior to the other subordinated creditors.

#### **Section 267 – Notification of Monitoring**

- (1) If implementation of the insolvency plan is being monitored, an announcement to this effect shall be published along with the order terminating the insolvency proceedings.
- (2) Publication is also required of the following:
  1. in the case of section 260 (3), the extension of monitoring to the takeover company;
  2. in the case of section 263, the transactions requiring the approval of the insolvency administrator;
  3. in the case of section 264, the amount of the credit limit.
- (3) Section 31 applies with the necessary modifications. In the case of section 263, insofar as the right to dispose of a plot of land, a registered ship, ship under construction or aircraft, a right in such an object or a right in such a right is restricted, sections 32 and 33 shall apply with the necessary modifications.

#### **Section 268 – Termination of Monitoring**

- (1) The insolvency court shall order termination of monitoring
  1. if the claims whose fulfilment is subject to monitoring are fulfilled or if the fulfilment of these claims is guaranteed, or
  2. if three years have elapsed since termination of the insolvency proceedings and no application for commencement of new insolvency proceedings has been submitted.
- (2) The order shall be published.  
Section 267 (3) applies with the necessary modifications.



### **Section 269 – Costs of Monitoring**

The monitoring costs shall be borne by the debtor. In the case of section 260 (3), the takeover company shall bear the costs incurred for its monitoring.

## **Part Seven – Coordination of the Proceedings of Debtors Belonging to the Same -Corporate Group**

### **Chapter One. General Provisions**

#### **Section 269a – Co-operation between Insolvency Administrators**

The insolvency administrators for group-affiliated debtors are obligated to provide information to and co-operate with one another, unless this interferes with the interests of the parties to the proceedings for which they have been appointed. In particular, they must upon request promptly provide all information that may be of importance for the other proceedings.

#### **Section 269b – Co-operation between Courts**

If insolvency proceedings in respect of the assets of group-affiliated debtors are conducted before different insolvency courts, the courts are obligated to co-operate and, in particular, to exchange information that may be of importance for the other proceedings. This applies in particular to:

1. the ordering of protective measures,
2. the commencement of insolvency proceedings,
3. the appointment of an insolvency administrator,
4. material decisions relating to direction of the proceedings,
5. the scope of the insolvency estate, and
6. the submission of insolvency plans, as well as other measures to end the insolvency proceedings.

#### **Section 269c – Co-operation between Creditors' Committees**

- (1) Upon application by a creditors' committee that has been appointed in insolvency proceedings in respect of the assets of a group-affiliated debtor, the court at the place of group jurisdiction may appoint a group creditors' committee after hearing the other creditors' committees. Each creditors' committee or preliminary creditors' committee for a group-affiliated debtor that is manifestly not merely of secondary importance for the corporate group as a whole shall appoint one member of the group creditors' committee. A further member of this committee shall be appointed from among the representatives of the employees.
- (2) The group creditors' committee shall support the insolvency administrators and the creditors' committees in the individual insolvency proceedings in order to facilitate the co-ordinated handling of those proceedings. Sections 70 to 73 apply with the necessary modifications. With respect to remuneration, service as member of the group creditors' committee is considered to be service on the creditors' committee that is represented by the member of the group creditors' committee.
- (3) In the cases in subsections (1) and (2), a preliminary creditors' committee is equivalent to the creditors' committee.

### **Chapter Two. Coordination Proceedings**

#### **Section 269d – Coordination Court**

- (1) If an application for commencement of insolvency proceedings is lodged in relation to the -assets of debtors belonging to a group of companies or if such proceedings have been commenced, the court having jurisdiction for the commencement of other group proceedings (coordination court) may, on request, institute coordination proceedings.
- (2) Each group-affiliated debtor is entitled to lodge a request. Section 3a (3) applies with the necessary modifications. Each creditors' committee or preliminary creditors' committee formed in relation to a group-affiliated debtor is also entitled to lodge a request on the basis of a unanimous resolution.

#### **Section 269e – Proceedings Coordinator**

- (1) The coordination court shall appoint a person who is independent of the group-affiliated debtors and their creditors as proceedings coordinator. The person to be appointed should be independent of the insolvency administrators and of the supervisors appointed for group-affiliated debtors. The appointment of a group-affiliated debtor is excluded.
- (2) Before appointing a proceedings coordinator the coordination court shall give any group creditors' committee that has been appointed the opportunity to make representations concerning the person to be appointed as proceedings coordinator and the criteria to be applied in relation to him/her.

### **Section 269f – Duties and Legal Status of the Proceedings Coordinator**

- (1) The proceedings coordinator is responsible for ensuring the coordinated handling of the proceedings relating to the group-affiliated debtors, insofar as this is in the interests of the creditors. To this end the proceedings coordinator may, in particular, present a coordination plan. He/she may explain this plan at the respective creditors' meetings or have the plan explained by a person authorised by him/her.
- (2) The insolvency administrators and preliminary insolvency administrators of the group-affiliated debtors are obliged to co-operate with the proceedings coordinator. In particular they must, on request, provide him/her with the information that he/she requires for the proper exercise of his/her duties.
- (3) Unless provision to the contrary is made in this Part, section 27 (2) No. 4 and sections 56 to 60 and sections 62 to 65 apply with the necessary modifications to the appointment of the proceedings coordinator, supervision by the insolvency court, and liability and remuneration.

### **Section 269g – Remuneration of the Proceedings Coordinator**

- (1) The proceedings coordinator is entitled to remuneration for his/her activities and to reimbursement of reasonable expenses. The standard rate of remuneration is calculated on the basis of the value of the combined insolvency estates in the proceedings relating to group-affiliated debtors included in the coordination proceedings. Account shall be taken of the scope and complexity of the coordination role by means of derogations from the standard rate. Sections 64 and 65 apply with the necessary modifications.
- (2) The remuneration of the proceedings coordinator must be settled pro rata out of the insolvency estates of the group-affiliated debtors; in case of doubt the ratio of the value of the individual insolvency estates to one another shall be decisive.

### **Section 269h – Coordination Plan**

- (1) In order to coordinate the handling of the insolvency proceedings relating to the assets of the group-affiliated debtors, the proceedings coordinator and, if a proceedings coordinator has not yet been appointed, the insolvency administrators of the group-affiliated debtors may jointly present a coordination plan to the coordination court for confirmation. The coordination plan requires the approval of any group creditors' committee that has been appointed. The court shall reject the plan ex officio if the provisions concerning the right to present the plan, the content of the plan or the procedural handling of the plan have not been complied with and the presenting parties cannot or do not remedy the defect within a reasonable period of time set by the court.
- (2) The coordination plan may describe all measures that are relevant for coordinated handling of the proceedings. In particular the plan may include proposals:
  1. for restoring the financial standing of the individual group-affiliated debtors and the corporate group;
  2. for settling intra-group disputes;
  3. for contractual agreements between the insolvency administrators.
- (3) Each presenting party has the right of immediate appeal against the order refusing confirmation of the plan. The other presenting parties must be involved in the proceedings.

### **Section 269i – Derogations from the Coordination Plan**

- (1) The insolvency administrator of a group-affiliated debtor must explain the coordination plan at the report meeting if this is not done by the proceedings coordinator or a person authorised by him/her. Following the explanation of the plan the insolvency administrator must give reasons for wishing to derogate from measures described in the plan. If a coordination plan does not yet exist at the time of the report meeting, the insolvency administrator shall comply with his/her duties under sentences 1 and 2 at a creditors' meeting for which the insolvency court shall immediately set a date.
- (2) By resolution of the creditors' meeting the coordination plan must be based on an insolvency plan to be drawn up by the insolvency administrator.

## **Part Eight – Self-administration**

### **Section 270 – Principle**

- (1) The debtor is entitled to manage and dispose of the insolvency estate under the oversight of a supervisor if the court orders self-administration in its order for commencement of insolvency proceedings. The proceedings shall be governed by the general provisions unless provision to the contrary is made in this Part.
- (2) The provisions of this Part are not applicable to consumer insolvency proceedings under section 304.

### **Section 270a – Application; Self-Administration Strategy**

- (1) The debtor shall attach to the application for self-administration a self-administration strategy covering:

1. a financial plan that covers a period of six months and includes a detailed description of the financing sources through which the continuation of normal business activities and coverage of the costs of the proceedings are to be ensured during this period;
  2. a concept for implementation of the insolvency proceedings that, based on a description of the nature, extent and causes of the crisis, outlines the objective of the self-administration and the measures envisaged to achieve that objective;
  3. a description of the status of negotiations with creditors, persons holding a participating interest in the debtor and third parties concerning the envisaged measures;
  4. a description of the arrangements taken by the debtor in order to ensure its ability to meet its obligations under insolvency law; and
  5. a substantiated description of any additional or lesser costs that will be incurred during self-administration in comparison with standard proceedings and in relation to the insolvency estate.
- (2) In addition, the debtor must declare
1. whether it is in default in satisfying liabilities under employment relationships or pension commitments, tax liabilities, or liabilities to social security authorities or suppliers and, if so, the extent of such liabilities and the creditors to whom they are owed;
  2. whether enforcement or realisation prohibitions pursuant to this Code or pursuant to the Business Stabilisation and Restructuring Act [*Unternehmensstabilisierungs- und -restrukturierungsgesetz*] were ordered for its benefit during the last three years prior to the application and, if so, in what proceedings they were ordered; and
  3. whether it has satisfied its disclosure obligations, in particular under sections 325 to 328 or 339 of the Commercial Code [*Handelsgesetzbuch*], for the last three financial years.

#### **Section 270b – Order for Interim Self-Administration**

- (1) The court shall appoint a preliminary supervisor to whom sections 274 and 275 are applicable (interim self-administration) if
1. the debtor's self-administration strategy is complete and coherent; and
  2. no circumstances are known indicating that the self-administration strategy is based on inaccurate facts in material respects.
- If the self-administration strategy has defects that can be remedied, the court may order temporary interim self-administration; in this case it shall set a time limit for remedying the defects of no more than 20 days.
- (2) If the costs of self-administration and continuation of normal business activities are not covered under the finance plan submitted pursuant to section 270a (1) number 1, if the likely costs of self-administration shown pursuant to section 270a (1) number 5 significantly exceed the likely costs of standard proceedings, or if circumstances are known indicating that
1. there are payment arrears owed to employees or substantial payment arrears owed to the other creditors specified in section 270a (2) number 1;
  2. during the last three years prior to the application for commencement of insolvency proceedings enforcement or realisation prohibitions pursuant to this Act or pursuant to the Business Stabilisation and Restructuring Act [*Unternehmensstabilisierungs- und -restrukturierungsgesetz*] were ordered for the benefit of the debtor; or
  3. during one of the last three years prior to the application for commencement of insolvency proceedings the debtor breached its disclosure obligations, particularly pursuant to sections 325 to 328 or 339 of the Commercial Code [*Handelsgesetzbuch*] the preliminary supervisor is to be appointed only if, despite these circumstances, it may be expected that the debtor is willing and able to align its management with the interests of creditors.
- (3) A preliminary creditors' committee shall be given the opportunity to make representations prior to issuance of the decision pursuant to subsection (1) or (2). A decision may be issued without representations from the creditors' committee only if two business days have elapsed since the application was lodged or if prejudicial changes in the debtor's financial position which cannot be averted other than through appointment of a preliminary insolvency administrator are clearly likely. The court shall be bound by a unanimous resolution of the preliminary creditors' committee in favour of interim self-administration. If the preliminary creditors' committee votes unanimously against interim self-administration, the order shall not be issued.
- (4) If the court appoints a preliminary insolvency administrator, the reasons for doing so must be stated in writing. Section 27 (2) number 4 applies with the necessary modifications.

#### **Section 270c – Interim Self-Administration Proceedings**

- (1) The court may instruct the preliminary supervisor to report on

1. the self-administration strategy submitted by the debtor, in particular as to whether it is based on the actual identified and apparent circumstances, is coherent, and appears practicable;
  2. the completeness and suitability of the accounting and bookkeeping as the basis for the self-administration strategy and in particular for the financial plan;
  3. the existence of liability claims of the debtor against serving or former members of representative bodies.
- (2) The debtor must inform the court and the preliminary supervisor without delay of significant changes concerning the self-administration strategy.
  - (3) The court may order interim measures pursuant to section 21 (1) and (2) sentence 1 number 1a and (3) to (5). If the court orders interim self-administration pursuant to section 270b (1) sentence 2, it may also order that disposals by the debtor require the approval of the preliminary supervisor.
  - (4) On application by the debtor the court must decree that the debtor is creating preferential liabilities. Particular justification is required if this power extends to liabilities which are not included in the financial plan. Section 55 (2) applies with the necessary modifications.
  - (5) If the debtor has submitted the application for commencement of insolvency proceedings in the case of imminent illiquidity and applied for self-administration, but the court regards the requirements for self-administration as not being fulfilled, the court shall advise the debtor of its concerns and give the debtor the opportunity to withdraw the application for commencement of insolvency proceedings prior to the decision on commencement.

#### **Section 270d – Preparation for Reorganisation; Protective Shield**

- (1) If along with the application the debtor has submitted a substantiated statement from a tax advisor, certified public accountant, lawyer or other comparably qualified person experienced in insolvency matters attesting that the debtor faces imminent illiquidity or overindebtedness but is not illiquid and that the planned reorganisation does not clearly lack any prospect of success, on application by the debtor the insolvency court shall fix a period of time for submission of an insolvency plan. The time allowed shall amount to no more than three months.
- (2) The person who issued the statement pursuant to subsection (1) cannot be appointed as preliminary supervisor. The debtor may make proposals concerning the person to be appointed as preliminary supervisor. The court may deviate from a proposal by the debtor only if the proposed person is clearly unsuitable for the role; the court shall give written reasons for its decision.
- (3) The court must order measures pursuant to section 21 (2) sentence 1 number 3 if the debtor applies for this.
- (4) The debtor or the preliminary supervisor must notify the court without delay in the event of illiquidity occurring. After the order pursuant to subsection (1) has been revoked or after expiry of the time allowed for submission of an insolvency plan, the court shall decide on commencement of insolvency proceedings.

#### **Section 270e – Termination of Interim Self-Administration**

- (1) Interim self-administration is terminated by appointment of a preliminary insolvency administrator if
  1. the debtor seriously breaches obligations under insolvency law or it is otherwise apparent that it is not willing or able to align its management with the interests of creditors, in particular if it is found that
    - a) the debtor has based the self-administration strategy on inaccurate facts in material respects or is failing to meet its obligations under section 270c (2);
    - b) the accounting and bookkeeping are so incomplete or flawed as to make it impossible to evaluate the self-administration strategy, particularly the financial plan;
    - c) the debtor has liability claims against serving or former members of its representative bodies enforcement of which could be hampered during self-administration;
  2. defects in the self-administration strategy are not remedied within the period of time set pursuant to section 270b (1) sentence 2;
  3. achievement of the self-administration objective, in particular planned reorganisation, is found to have no prospect of success;
  4. the preliminary supervisor with the approval of the preliminary creditors' committee or the preliminary creditors' committee applies for this;
  5. the debtor applies for this.
- (2) Interim self-administration is also terminated by appointment of a preliminary insolvency administrator if a creditor entitled to separate satisfaction or insolvency creditor applies for termination and demonstrates to the satisfaction of the court that the requirements for an order for self-administration are not met and that it is threatened with significant detriment as a result of self-administration. The debtor shall be heard prior

to a decision on the application. The creditor and the debtor have the right of immediate appeal against the decision.

- (3) The former preliminary supervisor may be appointed as preliminary insolvency administrator.
- (4) The preliminary creditors' committee must be given the opportunity to make representations prior to issuance of the decision pursuant to subsection (1) number 1 or 3. Section 270b (3) sentence 2 applies with the necessary modifications. If the court appoints a preliminary insolvency administrator, it must state the grounds for doing so in writing. Section 27 (2) number 4 applies with the necessary modifications.

#### **Section 270f – Order for Self-Administration**

- (1) Self-administration is ordered on application by the debtor, unless interim self-administration could not be granted pursuant to section 270b or would have to be revoked pursuant to section 270e.
- (2) A supervisor shall be appointed in place of an insolvency administrator. The claims of the insolvency creditors shall be submitted to the supervisor. Sections 32 and 33 are not applicable.
- (3) Section 270b (1) subsections (3) and (4) applies with the necessary modifications.

#### **Section 270g – Self-administration in the case of Group-Affiliated Debtors**

If self-administration or interim self-administration is ordered for a group-affiliated debtor, the debtor is subject to the duties of co-operation in section 269a. The debtor in self-administration is entitled to the rights of application in sections 3a (1), 3d (2), and 269d (2) sentence 2.

#### **Section 271 – Subsequent Order**

If the creditors' meeting applies for self-administration with the majority specified in section 76 (2) and the majority of the creditors voting, the court shall make a corresponding order, provided the debtor consents. The former insolvency administrator may be appointed as supervisor.

#### **Section 272 – Revocation of the Order**

- (1) The insolvency court shall revoke the order for self-administration if
  1. the debtor seriously breaches obligations of insolvency law or it is otherwise apparent that it is not willing or able to align its management with the interests of creditors; this also applies if it is found that
    - a) the debtor has based the self-administration strategy on inaccurate facts in material respects;
    - b) the accounting and bookkeeping are so incomplete or flawed as to make it impossible to evaluate the self-administration strategy, particularly the financial plan;
    - c) the debtor has liability claims against serving or former members of the representative body enforcement of which could be hampered during self-administration;
  2. achievement of the self-administration objective, in particular planned reorganisation, is found to have no prospect of success;
  3. this is requested by the creditors' meeting with the majority specified in section 76 (2) and the majority of the creditors voting;
  4. this is requested by a creditor entitled to separate satisfaction or an insolvency creditor, the requirements for an order for self-administration provided for in section 270f (1) in conjunction with section 270b (1) sentence 1 have ceased to apply and the applicant is threatened with significant detriment as a result of self-administration;
  5. this is requested by the debtor.
- (2) An application by a creditor shall be admissible only if the requirements specified in subsection (1) number 4 are proved to the satisfaction of the court. The debtor shall be heard prior to a decision on the application. The creditor and the debtor have the right of immediate appeal against the decision.
- (3) The former supervisor may be appointed as insolvency administrator.

#### **Section 273 – Publication**

The decision of the insolvency court ordering self-administration or ordering revocation of the order for self-administration after commencement of insolvency proceedings shall be published.

#### **Section 274 – Legal Status of the Supervisor**

- (1) Section 27 (2) number 4, section 54 number 2 and also sections 56 to 60 and 62 to 65 apply with the necessary modifications to the appointment of the supervisor, his/her supervision by the insolvency court, his/her liability and his/her remuneration.
- (2) The supervisor shall investigate the financial position of the debtor and monitor the debtor's management of the business and living expenses. The court may order that the supervisor can support the debtor in relation to prefinancing of insolvency pay, insolvency-related accounting and negotiations with customers and suppliers. Section 22 (3) applies with the necessary modifications.

- (3) If the supervisor identifies circumstances suggesting prejudice to the creditors if self-administration continues, he/she shall notify the creditors' committee and the insolvency court without delay. If a creditors' committee has not been appointed, the supervisor shall instead notify the insolvency creditors who have submitted claims and the creditors entitled to separate satisfaction.

#### **Section 275 – Involvement of the Supervisor**

- (1) The debtor shall incur liabilities which fall outside the ordinary course of business only with the approval of the supervisor. Even liabilities which fall within the ordinary course of business may not be incurred by the debtor if the supervisor objects.
- (2) The supervisor may require the debtor to permit all incoming funds to be received and all payments to be made by the supervisor alone.

#### **Section 276 – Involvement of the Creditors' Committee**

The debtor must obtain the approval of the creditors' committee if it wishes to undertake legal acts that are of particular importance for the insolvency proceedings. Section 160 (1) sentence 2, section 160 (2), section 161 sentence 2 and section 164 apply with the necessary modifications.

#### **Section 276a – Involvement of Supervisory Bodies**

- (1) If the debtor is a legal entity or a partnership with legal personality, the supervisory board, shareholders' meeting or corresponding bodies shall have no influence over the debtor's management. The dismissal and new appointment of members of the management board shall be effective only with the supervisor's approval. Approval shall be granted if the measure does not result in prejudice to the creditors.
- (2) If the debtor is constituted as a legal entity, the members of the representative body are also liable pursuant to sections 60 to 62. In the case of a partnership with legal personality, this applies to the partners authorised to represent the company. If none of the partners authorised to represent the company is a natural person, this applies to the members of the representative bodies of the partners authorised to represent the company. Sentence 3 applies with the necessary modifications if the members of the representative bodies are partnerships with legal personality in which no natural person is a member of the representative body or the connection of partnerships continues in this manner.
- (3) Subsections (1) and (2) apply with the necessary modifications between the date of the interim self-administration order or the interim measures order pursuant to section 270c (3) and the date of commencement of insolvency proceedings.

#### **Section 277 – Ordering the Requirement of Approval**

- (1) On application by the creditors' meeting the insolvency court shall order that particular transactions by the debtor require the approval of the supervisor to be effective. Section 81 (1) sentences 2 and 3 and section 82 apply with the necessary modifications. If the supervisor approves the creation of a preferential liability, section 61 shall apply with the necessary modifications.
- (2) The order may also be issued on application by a creditor entitled to separate satisfaction or an insolvency creditor if it is required without delay in order to avoid prejudice to the creditors. The application shall be admissible only if this requirement is proved to the satisfaction of the court.
- (3) The order shall be published. Section 31 applies with the necessary modifications. Insofar as the right to dispose of a plot of land, a registered ship, ship under construction or aircraft or a right in such an object, or a right in such a right is restricted, sections 32 and 33 shall apply with the necessary modifications.

#### **Section 278 – Funds for the Debtor's Living Expenses**

- (1) The debtor is entitled to withdraw funds for himself/herself and the family members specified in section 100 (2) sentence 2 from the insolvency estate that permit a modest standard of living, taking into account the debtor's previous lifestyle.
- (2) If the debtor is not a natural person, subsection (1) shall apply with the necessary modifications to the debtor's general partners with authority to represent the debtor.

#### **Section 279 – Reciprocal Contracts**

The provisions on the performance of transactions and the co-operation of the works council (sections 103 to 128) shall apply subject to the proviso that the debtor takes the place of the insolvency administrator. The debtor shall exercise its rights under these provisions in agreement with the supervisor. The debtor can validly exercise the rights pursuant to sections 120, 122 and 126 only with the supervisor's approval.

### **Section 280 – Liability. Avoidance in Insolvency**

Only the supervisor may assert a claim of liability on behalf of the insolvency estate pursuant to sections 92 and 93 and avoid legal acts pursuant to sections 129 to 147.

### **Section 281 – Provision of Information to the Creditors**

- (1) The debtor shall draw up the list of assets of the insolvency estate, the list of creditors and the statement of assets and liabilities (sections 151 to 153). The supervisor shall review the lists and the statement of assets and liabilities and in each case state in writing whether the result of his/her review gives rise to any objections.
- (2) The debtor shall present the report at the report meeting. The supervisor shall comment on the report.
- (3) The debtor is obliged to present accounts (sections 66 and 155). Subsection (1) sentence 2 applies with the necessary modifications to the final presentation of accounts by the debtor.

### **Section 282 – Realisation of Collateral**

- (1) The right of the insolvency administrator to realise assets subject to rights to separate satisfaction is vested in the debtor. The costs of assessment of the assets and of determining the rights in these assets shall, however, not be charged. Only the costs actually and necessarily incurred for realisation of the assets and the amount of the value added tax shall be recognised as realisation costs.
- (2) The debtor shall exercise its realisation right in agreement with the supervisor.

### **Section 283 – Satisfaction of Insolvency Creditors**

- (1) During the verification of claims, claims filed may be disputed by the debtor and the supervisor as well as by the insolvency creditors. A claim disputed by an insolvency creditor, the debtor or the supervisor is not considered as accepted.
- (2) Distributions shall be carried out by the debtor. The supervisor shall review the distribution schedules and in each case state in writing whether the result of his/her review gives rise to any objections.

### **Section 284 – Insolvency Plan**

- (1) An instruction from the creditors' meeting to prepare an insolvency plan shall be addressed either to the supervisor or to the debtor. The preliminary creditors' committee may address an instruction to prepare an insolvency plan to the preliminary supervisor or to the debtor. If the instruction is addressed to the debtor, the preliminary supervisor or supervisor shall assist in an advisory capacity.
- (2) It is the duty of the supervisor to monitor implementation of the plan.

### **Section 285 – Deficiency of Assets**

The supervisor shall notify the insolvency court of a deficiency of assets.

## **Part Nine – Discharge of Residual Debt**

### **Section 286 – Principle**

If the debtor is a natural person, he/she shall be discharged from the liabilities towards the insolvency creditors not fulfilled during the insolvency proceedings pursuant to sections 287 to 303a.

### **Section 287 – Debtor's Application**

- (1) Discharge of residual debt requires an application by the debtor which should be combined with his/her application for commencement of insolvency proceedings. If the application is not so combined, it shall be lodged within two weeks of notification pursuant to section 20 (2). The debtor shall attach a declaration to the application stating whether one of the cases pursuant to section 287a (2) sentence 1 numbers 1 or 2 applies. The debtor must ensure that the declaration pursuant to sentence 3 is accurate and complete.
- (2) The application shall be accompanied by the declaration by the debtor assigning his/her attachable claims to emoluments due under a service contract, or to recurring emoluments replacing them, to a trustee to be designated by the insolvency court for a period of three years following commencement of insolvency proceedings (assignment period). If the debtor has already been granted discharge of residual debt on the basis of an application lodged after 30 September 2020, the assignment period in any new proceedings shall amount to five years; the debtor shall attach a declaration of assignment to this effect to the application.
- (3) Agreements by the debtor are invalid insofar as they would frustrate or impair the assignment declaration pursuant to subsection (2).
- (4) The insolvency creditors who have filed claims must be heard in relation to the debtor's application before the final meeting.

### **Section 287a – Decision of the Insolvency Court**

- (1) If the application for discharge of residual debt is admissible, the court shall make an order determining that the debtor will obtain discharge of residual debt if he/she complies with the obligations pursuant to sections 295 and 295a and if the conditions for a refusal under sections 290 and 297 to 298 are not present. The order shall be published. The debtor has the right of immediate appeal against the order.
- (2) The application for discharge of residual debt is inadmissible if
  1. during the last eleven years prior to the application for commencement of insolvency proceedings or subsequent to this application the debtor has been granted discharge of residual debt, or during the last five years prior to the application for commencement of insolvency proceedings or subsequent to this application the debtor has been refused discharge of residual debt pursuant to section 297 or
  2. during the last three years prior to the application for commencement of insolvency proceedings or subsequent to this application the debtor has been refused discharge of residual debt pursuant to section 290 (1) numbers 5, 6 or 7 or pursuant to section 296; this also applies in the case stipulated in section 297a if the subsequent refusal is based on grounds pursuant to section 290 (1) numbers 5, 6 or 7.In these cases the court shall give the debtor the opportunity to withdraw the application for commencement of insolvency proceedings prior to the decision on commencement.

### **Section 287b – Debtor's obligation to secure income**

With effect from commencement of the assignment period until termination of the insolvency proceedings the debtor must be in reasonable gainful employment and if unemployed must try to find such employment and not refuse any suitable activity.

### **Section 288 – Appointment of the Trustee**

The debtor and the creditors may recommend a natural person who is suitable in respect of the individual case to the insolvency court as trustee. If no decision concerning the discharge of residual debt has yet been issued, along with its decision by which it decides on the termination or discontinuation of the insolvency proceedings due to deficiency of assets, the court shall appoint the trustee upon whom the debtor's attachable emoluments devolve in accordance with the assignment declaration (section 287 (2)).

### **Section 289 – Discontinuation of the Insolvency Proceedings**

If the insolvency proceedings are discontinued, discharge of residual debt may be granted only if, after notification of deficiency of assets, the insolvency estate has been distributed pursuant to section 209 and the insolvency proceedings are discontinued pursuant to section 211.

### **Section 290 – Refusal of Discharge of Residual Debt**

- (1) Discharge of residual debt shall be refused by order if refusal has been requested by an insolvency creditor who has filed its claims and if
  1. during the last five years prior to the application for commencement of insolvency proceedings or subsequent to this application the debtor has been convicted of a criminal offence under sections 283 to 283c of the Criminal Code [*Strafgesetzbuch*] for which he/she was sentenced to a fine of more than 90 daily units or to imprisonment for a period of more than three months;
  2. during the three years prior to the application for commencement of insolvency proceedings or subsequent to the application the debtor has intentionally or through gross negligence provided incorrect or incomplete written information about his/her financial circumstances in order to obtain a loan, to receive payments from public resources or to avoid payments to public funds;
  3. (repealed)
  4. during the last three years prior to the application for commencement of insolvency proceedings or subsequent to the application the debtor has intentionally or through gross negligence prejudiced the satisfaction of the insolvency creditors by creating inappropriate liabilities, dissipating assets or delaying the commencement of insolvency proceedings without any prospect of an improvement in his/her financial position;
  5. the debtor has intentionally or through gross negligence breached obligations of disclosure and cooperation under this Code,
  6. in the lists of his/her assets and income, creditors and the claims against him/her to be submitted pursuant to the declaration to be submitted under section 287 (1) sentence 3 and pursuant to section 305 (1) No 3, the debtor has intentionally or through gross negligence provided incorrect or incomplete information,
  7. the debtor violates his/her obligation to secure income pursuant to section 287b and thereby prejudices the satisfaction of the insolvency creditors; this shall not apply if the debtor is not at fault; section 296 (2) sentences 2 and 3 apply with the necessary modifications.



- (2) The creditor's application may be made, in writing, up to the final meeting or to the decision pursuant to section 211 (1); it is admissible only if the creditor proves to the satisfaction of the court that a ground for refusal exists. The decision on the application for refusal shall be made after the relevant point in time pursuant to sentence 1.
- (3) The debtor and each insolvency creditor who has applied for refusal of discharge of residual debt has the right of immediate appeal against the order. The order shall be published.

### **Section 291 (repealed)**

### **Section 292 – Legal Status of the Trustee**

- (1) The trustee must notify the parties obliged to pay the emoluments of the assignment. He/she must keep the amounts he/she receives through the assignment and other payments from the debtor or third parties separate from his/her assets and distribute them once a year to the insolvency creditors on the basis of the final schedule, provided the costs of the proceedings deferred pursuant to section 4a less the costs of appointment of counsel have been discharged. Section 36 (1) sentence 2 and subsection (4) apply with the necessary modifications. The trustee may defer distribution until the end of the assignment period at the latest if this appears appropriate in view of the insignificance of the amounts to be distributed; the trustee must notify the court of this once a year, stating the level of the amounts received.
- (2) The creditors' meeting may also assign to the trustee the task of monitoring fulfilment of the debtor's obligations. In this case the trustee must inform the creditors without delay if he/she ascertains that the debtor has breached any of these obligations. The trustee is obliged to monitor the debtor's compliance only if the additional remuneration to which he/she is entitled for this is covered or paid in advance.
- (3) Upon termination of his/her office the trustee shall present accounts to the insolvency court. Sections 58 and 59 apply with the necessary modifications, section 59 with the proviso, however, that each insolvency creditor may apply for the dismissal of the trustee, including on grounds other than lack of independence, and each insolvency creditor has the right of immediate appeal.

### **Section 293 – Remuneration of the Trustee**

- (1) The trustee is entitled to remuneration for his/her activities and to reimbursement of reasonable expenses. Account shall be taken of the expenditure of time involved and the scope of activities performed by the trustee.
- (2) Section 63 (2) and sections 64 and 65 apply with the necessary modifications.

### **Section 294 – Equal Treatment of Creditors**

- (1) Compulsory enforcement against the debtor's assets on behalf of individual insolvency creditors is not permitted during the period between termination of the insolvency proceedings and the end of the assignment period.
- (2) Any agreement by the debtor or other persons with individual insolvency creditors creating a preference in favour of such creditors is void.
- (3) Set-off against the claim to the emoluments covered by the assignment declaration is inadmissible.

### **Section 295 – Debtor's Obligations**

During the period between termination of the insolvency proceedings and the end of the assignment period the debtor is obliged

1. to be in reasonable gainful employment and if unemployed to try to find such employment and not to refuse any suitable activity;
2. to surrender to the trustee one half of the value of property he/she acquires by testamentary disposition or in consideration of a future right of succession or as a gift, and the full value of property he/she acquires as a prize in a lottery, draw or other game with prizes; customary occasional gifts and winnings of low value are not subject to the obligation to surrender;
3. to notify the insolvency court and the trustee without delay of any change of residence or place of employment, not to conceal any emoluments covered by the assignment declaration or assets covered by number 2, and to provide the insolvency court and the trustee on request with information about his/her employment or his/her efforts to find employment and about his/her emoluments and assets;
4. to make payments in satisfaction of the insolvency creditors only to the trustee and not to create a preference for any insolvency creditor;
5. not to create inappropriate liabilities within the meaning of section 290 (1) No. 4.

On application by the debtor the insolvency court shall determine whether property acquired in accordance with sentence 1 No. 2 is excluded from the obligation to surrender.

### **Section 295a Debtor's obligations in the case of self-employed activity**

- (1) Insofar as the debtor is self-employed, he/she is obliged, by means of payments to the trustee, to put the insolvency creditors in the position they would be in if he/she had entered into a reasonable service contract. The payments must be made each calendar year by 31 January of the following year.
- (2) On application by the debtor, the court shall determine the sum corresponding to the emoluments under the service contract to be taken as a basis in accordance with subsection (1). The debtor must prove to the satisfaction of the court the amount of the emoluments that he/she could obtain under a reasonable service contract. The trustee and the insolvency creditors must be heard prior to the decision. The debtor and each insolvency creditor have the right of immediate appeal against the decision.

### **Section 296 – Breach of Obligations**

- (1) The insolvency court shall refuse the discharge of residual debt on application by an insolvency creditor if the debtor breaches one of his/her obligations during the period between termination of the insolvency proceedings and the end of the assignment period and thereby impairs the satisfaction of the insolvency creditors; this shall not apply if the debtor is not at fault; in the case of section 295 sentence 1 number 5, simple negligence shall be disregarded. The application may be lodged only within one year of the date on which the creditor became aware of the breach of an obligation. The application is admissible only if the prerequisites specified in sentences 1 and 2 are proved to the satisfaction of the court.
- (2) Prior to its decision on the application, the court shall hear the trustee, the debtor and the insolvency creditors. The debtor must provide information on the fulfilment of his/her obligations and, if the creditor so requests, affirm the accuracy of the information in an affidavit. If the debtor fails without reasonable excuse to provide the information or the affidavit within the time limit set by the court or if he/she fails without reasonable excuse to attend a hearing scheduled by the court for provision of the information or the affidavit despite having been duly summoned, the court shall refuse the discharge of residual debt.
- (3) The applicant and the debtor have the right of immediate appeal against the decision. The refusal of the discharge of residual debt shall be published.

### **Section 297 – Insolvency Offences**

- (1) On application by an insolvency creditor the insolvency court shall refuse the discharge of residual debt if the debtor has been convicted of a criminal offence under sections 283 to 283c of the Criminal Code [*Strafgesetzbuch*] for which he/she was sentenced to a fine of more than 90 daily units or to imprisonment for a period of more than three months during the period between the final meeting and termination of the insolvency proceedings or during the period between termination of the insolvency proceedings and the end of the assignment period.
- (2) Section 296 (1) sentences 2 and 3 and subsection (3) apply with the necessary modifications.

### **Section 297a – Grounds for refusal emerging subsequently**

- (1) On application by an insolvency creditor the insolvency court shall refuse the discharge of residual debt if it emerges after the final meeting or, in the case pursuant to section 211, after the proceedings are discontinued that a ground for refusal pursuant to section 290 (1) was present. The application may be lodged only within six months of the date on which the creditor became aware of the ground for refusal. It is admissible only if the creditor proves to the satisfaction of the court that the prerequisites specified in sentences 1 and 2 are met and that the creditor had no knowledge of them before the relevant date.
- (2) Section 296 (3) applies with the necessary modifications.

### **Section 298 – Cover for the Trustee's Minimum Remuneration**

- (1) On application by the trustee the insolvency court shall refuse the discharge of residual debt if the amounts paid to the trustee for his/her previous year of office do not cover the minimum remuneration and the debtor fails to pay in the outstanding amount despite being requested to do so by the trustee in writing within a time limit of at least two weeks and being informed of the possibility that the discharge of residual debt could be refused. This shall not apply if the costs of the insolvency proceedings have been deferred pursuant to section 4a.
- (2) The debtor shall be heard prior to the decision. Discharge shall not be refused if the debtor pays in the outstanding amount within two weeks of being requested to do so by the court or if the debtor is permitted to defer the amount in accordance with section 4a.
- (3) Section 296 (3) applies with the necessary modifications.

### **Section 299 – Premature Termination**

If the discharge of residual debt is refused pursuant to sections 296, 297, 297a or 298, the term of the assignment declaration, the office of the trustee and the restriction on the creditors' rights shall expire when the decision becomes final.

### **Section 300 – Decision on Discharge of Residual Debt**

- (1) The insolvency court shall decide on the grant of discharge of residual debt following expiry of the full assignment period. The order shall be issued after the insolvency creditors, the insolvency administrator or trustee and the debtor have been heard. Discharge of residual debt granted in accordance with sentence 1 shall be deemed to have been granted upon expiry of the assignment period.
- (2) If no claims have been filed in the insolvency proceedings or if the insolvency claims have been satisfied and if the debtor has settled the costs of the proceedings and the other preferential liabilities, the court shall on application by the debtor decide on the grant of discharge of residual debt before the assignment period has expired. Subsection (1) sentence 2 applies with the necessary modifications. The debtor must prove to the satisfaction of the court that the prerequisites of sentence 1 are met. If discharge of residual debt is granted pursuant to sentence 1, section 299 and section 300a apply with the necessary modifications.
- (3) The insolvency court shall refuse the discharge of residual debt on application by an insolvency creditor if the prerequisites of section 290 (1), section 296 (1) or (2) sentence 3, section 297 or section 297a are met, or on application by the trustee if the prerequisites of section 298 are met.
- (4) The order shall be published. The debtor and each insolvency creditor who applied for refusal of discharge of residual debt at the hearing pursuant to subsection (1) or (2) or who pleaded that the prerequisites for early discharge of residual debt under subsection (2) were not met has the right of immediate appeal.

### **Section 300a – New asset acquisitions in ongoing insolvency proceedings**

- (1) If the debtor is granted discharge of residual debt, the assets that the debtor acquires after the end of the assignment period, or after the occurrence of the prerequisites of section 300 (2) sentence 1, no longer form part of the insolvency estate. Sentence 1 does not apply to assets returned to the insolvency estate as a consequence of avoidance of a legal act by the insolvency administrator or which belong to the insolvency estate as a consequence of litigation conducted by the insolvency administrator or as a consequence of acts of realisation by the insolvency administrator.
- (2) Until the grant of discharge of residual debt has become final, new asset acquisitions to which the debtor is entitled must be received and managed by the administrator in a fiduciary capacity. After the grant of discharge of residual debt has become final, the provisions of section 89 do not apply. When the grant of discharge of residual debt has become final, the insolvency administrator shall hand over the new asset acquisitions to the debtor and render an account to the debtor of his/her management of the new asset acquisitions.
- (3) If discharge of residual debt is granted and has become final, the insolvency administrator has a claim against the debtor for remuneration for his/her services pursuant to subsection (2) and for reimbursement of reasonable expenses. Section 293 applies with the necessary modifications.

### **Section 301 – Effect of Discharge of Residual Debt**

- (1) If discharge of residual debt is granted, it takes effect against all insolvency creditors. This also applies in respect of creditors who have not filed their claims.
- (2) The rights of the insolvency creditors against co-debtors and sureties of the debtor and the rights of these creditors under a priority notice registered to secure a claim or under a right giving entitlement to separate satisfaction in insolvency proceedings are not affected by the discharge of residual debt. The debtor is, however, discharged vis-à-vis his/her co-debtors, sureties or any other party holding a right of recourse in the same way as he/she is discharged vis-à-vis the insolvency creditors.
- (3) If a creditor without entitlement to satisfaction by virtue of the discharge of residual debt is satisfied, this shall not give rise to a duty on the part of the recipient to make restitution.
- (4) A prohibition on the assumption or carrying on of a commercial activity, business, trade, or liberal profession issued solely by reason of the debtor's insolvency shall cease to apply when the grant of discharge of residual debt becomes final. Sentence 1 does not apply to the refusal and withdrawal of an authorisation to carry on a licensed activity.

### **Section 302 – Excluded Claims**

The following claims are not affected by the grant of discharge of residual debt:

1. liabilities of the debtor based on the commission of an intentional tort, on arrears of statutory maintenance which the debtor, in breach of duty, has intentionally not granted, or arising out of a liability

to tax if the debtor has received a final conviction in connection therewith on account of a criminal offence under sections 370, 373 or 374 of the Fiscal Code; the creditor must register the corresponding claim stating this as the legal ground pursuant to section 174 (2);

2. fines and the comparable liabilities of the debtor pursuant to section 39 (1) No. 3;
3. liabilities arising out of interest-free loans granted to the debtor for settlement of the costs of the insolvency proceedings.

### **Section 303 – Revocation of Discharge of Residual Debt**

- (1) On application by an insolvency creditor the insolvency court shall revoke the grant of discharge of residual debt if
  1. it subsequently transpires that the debtor intentionally breached one of his/her obligations and satisfaction of the insolvency creditors was significantly impaired as a result;
  2. it subsequently transpires that the debtor has been convicted pursuant to section 297 (1) during the assignment period, or if, only after grant of discharge of residual debt, the debtor is convicted pursuant to section 297 (1) for a criminal offence committed before the end of the assignment period or
  3. after grant of discharge of residual debt the debtor has intentionally or through gross negligence breached obligations of disclosure and co-operation incumbent upon him/her during the insolvency proceedings pursuant to this Code.
- (2) The creditor's application is admissible only if it is submitted within one year of the date on which the decision on the discharge of residual debt became final; revocation pursuant to subsection (1) No 3 may be applied for up to six months after the date on which termination of the insolvency proceedings became final. The creditor shall prove to the satisfaction of the court that the requirements for the ground for revocation are met. In the cases specified in subsection (1) No 1 the creditor must in addition prove to the satisfaction of the court that he/she had no knowledge of the ground for revocation before the decision became final.
- (3) The debtor and in the cases specified in subsection (1) Nos 1 and 3 also the trustee or the insolvency administrator shall be heard prior to the decision. The applicant and the debtor have the right of immediate appeal against the decision. The decision revoking the discharge of residual debt shall be published.

### **Section 303a – Registration in the List of Debtors**

The insolvency court shall order registration in the list of debtors pursuant to section 882b of the Code of Civil Procedure [*Zivilprozessordnung*]. Debtors shall be registered

1. who have been refused discharge of residual debt pursuant to sections 290, 296, 297 or 297a or on application by an insolvency creditor pursuant to section 300 subsection (3);
2. whose discharge of residual debt has been revoked.

The court shall immediately transmit the order electronically to the central enforcement court pursuant to section 882h (1) of the Code of Civil Procedure [*Zivilprozessordnung*]. Section 882c (2) and (3) of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications.

## **Part Ten – Consumer Insolvency Proceedings**

### **Section 304 – Principle**

- (1) If the debtor is a natural person who does or did not pursue a self-employed economic activity, the proceedings are governed by the general provisions unless provision to the contrary is made in this Part. If the debtor did pursue a self-employed economic activity, sentence 1 shall apply if his/her financial circumstances are straightforward and there are no claims against him/her under employment contracts.
- (2) Financial circumstances are straightforward within the meaning of subsection (1) sentence 2 only if, at the time when the application for commencement of insolvency proceedings is submitted, the debtor has fewer than 20 creditors.

### **Section 305 – Debtor's Application for Commencement of Insolvency Proceedings**

- (1) Along with the written application for commencement of insolvency proceedings or without delay following the application, the debtor must submit:
  1. a certificate issued by an appropriate person or body based on personal counselling and a detailed examination of the debtor's income and assets stating that within the last six months prior to the application for commencement of insolvency proceedings an unsuccessful attempt was made to reach an out-of-court debt settlement agreement with the creditors on the basis of a plan; the plan shall be attached and the principal reasons for its failure shall be explained; the Federal States may determine which persons or bodies are to be regarded as appropriate;
  2. the application for discharge of residual debt (section 287) or a declaration that an application for discharge of residual debt is not to be made;

3. a list of available assets and income (list of assets), a summary of the main content of this list (statement of assets and liabilities), a list of creditors and a list of the claims against the debtor; a declaration must be attached to the lists and to the statement of assets and liabilities stating that the information they contain is accurate and complete;
4. a debt settlement plan; this may include all arrangements which, taking account of the creditors' interests and the debtor's assets, income and family circumstances, are likely to lead to a reasonable debt settlement; the plan shall also state whether and to what extent guarantees, liens and other creditors' securities are to be affected by the plan.
- (2) In the list of claims pursuant to subsection (1) No. 3 reference may also be made to enclosed itemisations of claims by the creditors. At the debtor's request the creditors are obliged to provide the debtor with a written itemisation of their claims against him/her at their expense to enable him/her to prepare the list of claims; they must, in particular, state the amount of their claims broken down into principal claim, interest and costs. The debtor's request must contain a reference to an application for commencement of insolvency proceedings that has already been submitted to the court or to an application planned for the near future.
- (3) If information is missing from the official forms pursuant to subsection (5) that the debtor has submitted, the insolvency court shall request the debtor to provide the missing information without delay. If the debtor does not comply with this request within one month, his/her application for commencement of insolvency proceedings shall be deemed to have been withdrawn. In cases coming under section 306 (3) sentence 3, the period shall be three months.
- (4) The debtor may be represented before the insolvency court by an appropriate person or member of a body recognised as appropriate within the meaning of subsection (1) No. 1. Section 174 (1) sentence 3 applies with the necessary modifications to representation of the creditor.
- (5) In order to simplify consumer insolvency proceedings, the Federal Ministry of Justice and Consumer Protection is authorised to introduce forms for the parties concerned for the certificates, applications, and lists to be submitted in accordance with subsection (1) Nos 1 to 4 by means of statutory order issued with the approval of the *Bundesrat*. Insofar as forms are introduced pursuant to sentence 1, the debtor must use these forms. Different forms may be introduced for proceedings in courts where the proceedings are processed electronically and for proceedings in courts where the proceedings are not processed electronically.

#### **Section 305a – Failure of Out-of-Court Debt Settlement**

An attempt to reach an out-of-court debt settlement agreement with the creditors shall be deemed to have failed if a creditor pursues compulsory enforcement after the negotiations on out-of-court debt settlement have been initiated.

#### **Section 306 – Suspension of Proceedings**

- (1) The proceedings relating to the application for commencement of insolvency proceedings shall be suspended until the decision on the debt settlement plan. This period shall not exceed three months. After hearing the debtor the court shall order the proceedings relating to the application for commencement of insolvency proceedings to be continued if the court, exercising its independent discretion, determines that the debt settlement plan is not likely to be accepted.
- (2) Subsection (1) does not preclude the ordering of protective measures. If the proceedings are suspended, the debtor shall submit the number of copies of the debt settlement plan and statement of assets and liabilities required for service within two weeks of being requested to do so by the court. Section 305 (3) sentence 2 applies with the necessary modifications.
- (3) If a creditor applies for commencement of proceedings, prior to its decision on the application the insolvency court shall give the debtor the opportunity to lodge an application as well. If the debtor lodges an application, subsection (1) shall also apply to the creditor's application. In this case the debtor shall, in the first place, attempt to reach an out-of-court agreement pursuant to section 305 (1) No. 1.

#### **Section 307 – Service on the Creditors**

- (1) The insolvency court shall serve the debt settlement plan and statement of assets and liabilities on the creditors named by the debtor and at the same time request that the creditors comment on the lists specified in section 305 (1) No. 3 and the debt settlement plan within a strict time limit of one month; the creditors shall be informed that the lists have been deposited with the insolvency court for inspection. At the same time each creditor shall be given the opportunity within the time limit pursuant to sentence 1, with an express reference to the legal consequences of section 308 (3) sentence 2, to verify the details of its claim in the list of claims deposited for inspection with the insolvency court and if necessary to supplement the details. Section 8 (1) sentences 2 and 3 and subsections (2) and (3) do not apply to service pursuant to sentence 1.

- (2) If a creditor's comments are not received by the court with the time limit stated in subsection (1) sentence 1, this creditor shall be deemed to have approved the debt settlement plan. This must be pointed out in the request for comments.
- (3) After expiry of the time limit pursuant to subsection (1) sentence 1 the debtor shall be given the opportunity to amend or supplement the debt settlement plan within a time limit to be determined by the court, if this appears necessary based on the comments submitted by a creditor or expedient for facilitating a mutually agreed debt settlement. Where necessary, the amendments or additions shall be served on the creditors. Subsection (1) sentences 1 and 3 and subsection (2) apply with the necessary modifications.

### **Section 308 – Acceptance of the Debt Settlement Plan**

- (1) If no creditor has raised objections to the debt settlement plan or if approval is substituted pursuant to section 309, the debt settlement plan is deemed to have been accepted; the insolvency court shall issue an order to this effect. The debt settlement plan has the effect of a settlement within the meaning of section 794 (1) No. 1 of the Code of Civil Procedure [*Zivilprozessordnung*]. An official copy of the debt settlement plan and the order pursuant to sentence 1 shall be served on the creditors and the debtor.
- (2) The applications for commencement of insolvency proceedings and for the grant of discharge of residual debt are deemed to have been withdrawn.
- (3) If claims are not included in the debtor's list and have also not been taken into consideration subsequently on realisation of the debt settlement plan, the creditors may demand fulfilment from the debtor. This shall not apply insofar as a creditor failed to add the details of its claims to the list of claims deposited for inspection with the insolvency court within the time limit set by the court, although the debt settlement plan was sent to this creditor and the claim arose prior to the expiry of the time limit; the claim is extinguished to this extent.

### **Section 309 – Substitution of Approval**

- (1) If the debt settlement plan has been approved by more than half of the named creditors and if the total of the claims of the assenting creditors amounts to more than half of the total of the claims of the named creditors, on application by a creditor or the debtor the insolvency court shall substitute the objections of a creditor to the debt settlement plan with approval. This shall not apply if
  1. the creditor who raised objections does not receive a fair share in relation to the other creditors or
  2. this creditor is likely to be placed in a worse economic position as a result of the debt settlement plan than would be the case if the proceedings relating to the applications for commencement of insolvency proceedings and for the grant of discharge of residual debt had been conducted; in case of doubt the income, assets and family circumstances of the debtor applicable at the time of the application pursuant to sentence 1 shall be taken as a basis throughout the duration of the proceedings.
- (2) The creditor shall be heard prior to the decision. The reasons pursuant to subsection (1) sentence 2 opposing the substitution of the creditor's objections with approval must be demonstrated to the satisfaction of the court. The applicant and the creditor whose objections have been substituted with approval have the right of immediate appeal against the order. Section 4a (2) applies with the necessary modifications.
- (3) If a creditor credibly establishes facts which give rise to serious doubts as to whether a claim stated by the debtor exists or is for a higher or a lower amount than stated and if the outcome of the dispute is decisive with regard to whether the creditor receives a fair share in relation to the other creditors (subsection (1) sentence 2 No. 1), the objections of this creditor cannot be substituted with approval.

### **Section 310 – Costs**

The creditors do not have a claim against the debtor for reimbursement of the costs incurred by them in connection with the debt settlement plan.

### **Section 311 – Resumption of Proceedings Relating to the Application for Commencement of Insolvency Proceedings**

If objections to the debt settlement plan are raised that are not substituted with court approval pursuant to section 309, the proceedings relating to the application for commencement of insolvency proceedings are resumed ex officio.

### **Section 312 (repealed)**

### **Section 313 (repealed)**

### **Section 314 (repealed)**

## **Part Eleven – Special Types of Insolvency Proceedings**

### **Chapter One – Insolvency Proceedings Relating to a Deceased's Estate**

#### **Section 315 – Local Jurisdiction**

The insolvency court within whose district the deceased had his/her place of general jurisdiction at the time of his/her death has exclusive local jurisdiction in respect of insolvency proceedings relating to a deceased's estate. If the centre of a self-employed economic activity carried on by the deceased was located in a different place, the insolvency court within whose district this place is located has exclusive jurisdiction.

#### **Section 316 – Admissibility of Commencement**

- (1) Commencement of insolvency proceedings is not excluded by reason of the fact that the heir has not yet accepted the inheritance or that he/she has unlimited liability for the liabilities of the estate.
- (2) If there are several heirs, proceedings may also be commenced subsequent to division of the estate.
- (3) Insolvency proceedings shall not take place in respect of a share in an inheritance.

#### **Section 317 – Parties Entitled to Apply for Commencement**

- (1) Commencement of insolvency proceedings relating to a deceased's estate may be applied for by any heir, the administrator of the estate or any other curator of the estate, an executor entitled to manage the estate and any creditor of the estate.
- (2) If the application is not submitted by all the heirs, it shall be admissible if the ground for commencement is demonstrated to the satisfaction of the court. The insolvency court shall hear the other heirs.
- (3) Where an executor is entitled to manage the estate, if the heir applies for commencement of proceedings the executor shall be heard; if the executor applies for commencement of proceedings, the heir shall be heard.

#### **Section 318 – Right of Application in case of Joint Marital Property**

- (1) If the deceased's estate forms part of the joint marital property of a community of property, both the spouse who is the heir and the spouse who is not the heir but who manages the joint marital property alone or jointly with the other spouse may apply for commencement of insolvency proceedings relating to the deceased's estate. The consent of the other spouse is not required. The spouses retain the right of application if the community of property ends.
- (2) If the application is not submitted by both spouses, it shall be admissible if the ground for commencement is demonstrated to the satisfaction of the court. The insolvency court shall hear the other spouse.
- (3) Subsections (1) and (2) apply with the necessary modifications to civil partners.

#### **Section 319 – Time Limit for Application**

An application by a creditor of the estate for commencement of insolvency proceedings is inadmissible if two years have elapsed since acceptance of the inheritance.

#### **Section 320 – Grounds for Commencement**

The grounds for commencement of insolvency proceedings relating to a deceased's estate are illiquidity and overindebtedness. If the heir, the administrator of the estate or any other curator of the estate or an executor applies for commencement of proceedings, imminent illiquidity is also a ground for commencement.

#### **Section 321 – Compulsory Enforcement after Death of Deceased**

Compulsory enforcement measures against the estate undertaken after the death of the deceased do not confer any right to separate satisfaction.

#### **Section 322 – Avoidable Legal Acts by the Heir**

If the heir has satisfied claims to a compulsory portion, legacies or testamentary burdens prior to commencement of insolvency proceedings, this legal act may be avoided in the same way as gratuitous performance by the heir.

### **Section 323 – Heir’s Expenses**

The heir has no right of retention on account of the expenses which are reimbursable to him/her out of the estate under sections 1978 and 1979 of the Civil Code [*Bürgerliches Gesetzbuch*].

### **Section 324 – Preferential Liabilities**

- (1) In addition to the liabilities specified in sections 54 and 55, preferential liabilities are:
  1. the expenses reimbursable to the heir out of the estate under sections 1978 and 1979 of the Civil Code [*Bürgerliches Gesetzbuch*];
  2. the deceased’s funeral costs;
  3. the costs to the estate of proceedings for an official declaration of death in respect of the deceased;
  4. the costs of opening a testamentary disposition by the deceased and the court costs of securing the estate, curatorship, public notice to the creditors of the estate and filing an inventory;
  5. liabilities arising out of transactions under-taken by a curator or an executor;
  6. liabilities which have arisen for the heir towards a curator, an executor or an heir who has disclaimed his/her inheritance from the management of the estate by such persons insofar as the creditors of the estate would be liable if the designated persons had had to undertake the transactions for them.
- (2) In the event of a deficiency of assets, the liabilities specified in subsection (1) shall have the ranking of liabilities under section 209 (1) No. 3.

### **Section 325 – Liabilities of the Estate**

In insolvency proceedings relating to a deceased’s estate, only the liabilities of the estate may be claimed.

### **Section 326 – Claims of the Heirs**

- (1) The heir may assert the claims to which he/she is entitled against the deceased.
- (2) If the heir has settled a liability of the estate, insofar as such settlement is not deemed to have been made for the account of the deceased’s estate pursuant to section 1979 of the Civil Code [*Bürgerliches Gesetzbuch*], he/she shall take the place of the creditor unless he/she has unlimited liability for the liabilities of the estate.
- (3) If the heir has unlimited liability towards an individual creditor, he/she may assert the creditor’s claim in the event that the creditor does not assert the claim.

### **Section 327 – Subordinated Liabilities**

- (1) The following liabilities are subordinated to the liabilities specified in section 39 and shall be satisfied in the following order and in proportion to their respective amounts if they have equal ranking:
  1. liabilities towards persons entitled to a compulsory portion;
  2. liabilities arising out of legacies and testamentary burdens arranged by the deceased;
  3. (repealed)
- (2) A legacy through which the right of the beneficiary to the compulsory portion is excluded pursuant to section 2307 of the Civil Code [*Bürgerliches Gesetzbuch*] has the same ranking as the right to a compulsory portion insofar as it does not exceed the compulsory portion. If the deceased instructed by testamentary disposition that a legacy or testamentary burden should be satisfied before another legacy or testamentary burden, such legacy or testamentary burden shall have prior ranking.
- (3) A liability due to a creditor excluded by means of the public notice procedure or having the same status as an excluded creditor pursuant to section 1974 of the Civil Code [*Bürgerliches Gesetzbuch*] shall be satisfied only after the liabilities specified in section 39 and, if this liability is included in the liabilities specified in subsection (1), only after the liabilities with which it would have equal ranking without the restriction. The restrictions shall not affect the order of ranking in other respects.

### **Section 328 – Returned Assets**

- (1) Assets returned to the insolvency estate as a consequence of the avoidance of a legal act undertaken by or in relation to the deceased may not be used for settlement of the liabilities specified in section 327 (1).
- (2) Assets which have to be returned to the insolvency estate by the heir on the basis of sections 1978 to 1980 of the Civil Code [*Bürgerliches Gesetzbuch*] may be claimed by the creditors excluded by means of the public notice procedure or having the same status as an excluded creditor pursuant to section 1974 of the Civil Code [*Bürgerliches Gesetzbuch*] only insofar as the heir would also be liable to make restitution pursuant to the provisions on the restitution of unjust enrichment.

### **Section 329 – Subsequent Succession**

Sections 323, 324 (1) No. 1 and section 326 (2) and (3) apply to the prior heirs even after the occurrence of subsequent succession.



### **Section 330 – Purchase of an Inheritance**

- (1) If the heir has sold the inheritance the purchaser shall take his/her place in the insolvency proceedings.
- (2) The heir is entitled to apply for commencement of insolvency proceedings like a creditor of the deceased's estate with respect to a liability of the estate to be settled by the purchaser on the basis of the relationship between the heir and the purchaser. He/she shall also have the same right in respect of any other liability of the estate unless he/she has unlimited liability or an order subjecting the estate to administration is issued. Sections 323, 324 (1) No. 1 and section 326 shall apply to the heirs even after the sale of the inheritance.
- (3) Subsections (1) and (2) shall apply with the necessary modifications in the event that a party sells an inheritance acquired by contract or has placed himself/herself under an obligation in another way to sell an inheritance which has devolved on him/her or which he/she has otherwise acquired.

### **Section 331 – Simultaneous Insolvency of the Heir**

- (1) In insolvency proceedings relating to the assets of the heir, sections 52, 190, 192, 198 and 237 (1) sentence 2 apply with the necessary modifications to creditors of the estate to whom the heir has unlimited liability if insolvency proceedings are also commenced in respect of the deceased's estate or if an order subjecting the estate to administration is issued.
- (2) The same shall apply if one spouse is the heir and the deceased's estate forms part of the joint marital property which is managed by the other spouse alone, including in insolvency proceedings relating to the assets of the other spouse and, if the joint marital property is jointly managed by the spouses, including in insolvency proceedings relating to the joint marital property and in insolvency proceedings relating to the other assets of the spouse who is not the heir. Sentence 1 applies with the necessary modifications to life partners.

## **Chapter Two – Insolvency Proceedings Relating to the Joint Marital Property of a Continued Community of Property**

### **Section 332 – Reference to Insolvency Proceedings Relating to a Deceased's Estate**

- (1) In the case of continued community of property, sections 315 to 331 apply with the necessary modifications to insolvency proceedings relating to the joint marital property.
- (2) Only those creditors whose claims already existed as obligations on the joint marital property when the continuation of community of property occurred are insolvency creditors.
- (3) The descendants entitled to a share are not entitled to apply for commencement of proceedings. They shall, however, be heard by the insolvency court in relation to an application for commencement of insolvency proceedings.

## **Chapter Three – Insolvency Proceedings Relating to the Jointly Managed Joint Marital Property of a Community of Property**

### **Section 333 – Right of Application. Grounds for Commencement**

- (1) Any creditor who can demand fulfilment of an obligation from the joint marital property is entitled to apply for commencement of insolvency proceedings relating to the joint marital property of a community of property that is jointly managed by the spouses.
- (2) Each spouse is also entitled to submit an application. If the application is not submitted by both spouses, it shall be admissible if the illiquidity of the joint marital property is demonstrated to the satisfaction of the court; the insolvency court shall hear the other spouse. If the application is submitted by both spouses, imminent illiquidity shall also constitute a ground for commencement of proceedings.
- (3) Subsections (1) and (2) apply with the necessary modifications to life partners.

### **Section 334 – Personal Liability of the Spouses**

- (1) Where the fulfilment of obligations may be demanded from the joint marital property, the personal liability of the spouses or life partners for such obligations may be claimed only by the insolvency administrator or supervisor for the duration of the insolvency proceedings.
- (2) In the case of an insolvency plan, section 227 (1) applies with the necessary modifications to the personal liability of the spouses or life partners.

## **Part Twelve – International Insolvency Law**

### **Chapter One – General Provisions**

#### **Section 335 – Principle**

Unless otherwise provided, the law applicable to insolvency proceedings and their effects shall be that of the state within the territory of which the proceedings have been commenced.

#### **Section 336 – Contracts Relating to Immovable Property**

The effects of insolvency proceedings on a contract relating to a right in rem in immovable property or a right to make use of immovable property shall be governed by the law of the state in which the immovable property is situated. In the case of an asset registered in the Register of Ships, Register of Ships under Construction or Register of Liens on Aircraft, the applicable law shall be that of the state under the supervision of which the register is kept.

#### **Section 337 – Employment Relationships**

The effects of insolvency proceedings on an employment relationship shall be governed by the law applicable to the employment relationship under Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (Official Journal L 177 of 4.7.2008, p. 6).

#### **Section 338 – Set-off**

Commencement of insolvency proceedings shall not affect the right of set-off of an insolvency creditor if such set-off is permitted under the law applicable to the debtor's claim at the time of commencement of insolvency proceedings.

#### **Section 339 – Avoidance in Insolvency**

A legal act may be avoided if the requirements for the avoidance of legal acts in insolvency under the law of the state where the proceedings were commenced are met, unless the opposing party proves that the law of another state is applicable to the legal act and the legal act is not open to challenge in any way under this law.

#### **Section 340 – Organised Markets. Repurchase Agreements**

- (1) The effects of the insolvency proceedings on the rights and obligations of a participant in an organised market pursuant to section 2 (11) of the Securities Trading Act [*Wertpapierhandelsgesetz*] are governed by the law of the state which applies to this market.
- (2) The effects of the insolvency proceedings on repurchase agreements within the meaning of section 340b of the Commercial Code [*Handelsgesetzbuch*], and on contracts for novation and netting agreements, are governed by the law of the state which is applicable to these contracts.
- (3) Subsection (1) applies with the necessary modifications to the participants in a system within the meaning of section 1 (16) of the Banking Act [*Kreditwesengesetz*].

#### **Section 341 – Exercise of Creditors' Rights**

- (1) Each creditor may file its claims in the main insolvency proceedings and in any secondary insolvency proceedings.
- (2) The insolvency administrator is entitled to file a claim which has been filed in the proceedings for which he/she has been appointed in other insolvency proceedings relating to the debtor's assets. The creditor's right to decline or withdraw the filing of a claim is unaffected.
- (3) The administrator is deemed to be authorised to exercise the voting right arising from a claim filed in the proceedings for which he/she has been appointed in other insolvency proceedings relating to the debtor's assets unless the creditor determines otherwise.

#### **Section 342 – Return. Imputation**

- (1) If an insolvency creditor receives something through compulsory enforcement, through a payment by the debtor or in another way at the expense of the insolvency estate out of the assets that are not situated in the state where the insolvency proceedings were commenced, it shall return what it has obtained to the insolvency administrator. The provisions on the legal consequences of unjust enrichment apply with the necessary modifications.
- (2) The insolvency creditor may retain what it has obtained in insolvency proceedings commenced in another state. However, it will be included in distributions only if the other creditors are put on an equal footing.

- (3) On the request of the insolvency administrator the insolvency creditor shall provide information about what it has obtained.

## **Chapter Two – Foreign Insolvency Proceedings**

### **Section 343 – Recognition**

- (1) The commencement of foreign insolvency proceedings shall be recognised. This shall not apply
  1. if the courts of the state where the proceedings are commenced do not have jurisdiction under German law;
  2. insofar as the effects of recognition would be manifestly incompatible with material principles of German law and, in particular, incompatible with basic rights.
- (2) Subsection (1) applies with the necessary modifications to protective measures which are taken subsequent to the application for commencement of insolvency proceedings and to decisions issued in relation to the implementation or termination of recognised insolvency proceedings.

### **Section 344 – Protective Measures**

- (1) If a preliminary administrator has been appointed abroad prior to commencement of the main insolvency proceedings, on his/her application the competent insolvency court may order the measures pursuant to section 21 that appear necessary to secure the assets covered by domestic secondary insolvency proceedings.
- (2) The preliminary administrator also has the right of immediate appeal against the order.

### **Section 345 – Publication**

- (1) If the requirements for recognition of the commencement of proceedings are fulfilled, on application by the foreign insolvency administrator the insolvency court shall publish the main content of the decision commencing insolvency proceedings and of the decision appointing the insolvency administrator domestically. Section 9 (1) and (2) and section 30 (1) apply with the necessary modifications. If the commencement of insolvency proceedings has been published, the termination of proceedings shall be published in the same manner.
- (2) If the debtor has an establishment on domestic territory, publication takes place ex officio. The insolvency administrator or a permanent representative pursuant to section 13e (2) sentence 5 No. 3 of the Commercial Code [*Handelsgesetzbuch*] shall notify the insolvency court having jurisdiction in accordance with section 348 (1).
- (3) The application is admissible only if it is credibly established that the factual requirements for recognition of the commencement of proceedings are present. An official copy of the order instructing publication shall be issued to the administrator. The foreign administrator has the right of immediate appeal against the decision of the insolvency court refusing publication.

### **Section 346 – Land Register**

- (1) If the debtor's power of disposal is restricted as a result of the commencement of proceedings or the ordering of protective measures under section 343 (2) or section 344 (1), on application by the foreign insolvency administrator the insolvency court shall request the Land Registry to register the commencement of insolvency proceedings and the nature of the restriction of the debtor's power of disposal in the Land Register:
  1. in respect of plots of land for which the debtor is registered as owner;
  2. in respect of the debtor's registered rights in plots of land and in registered rights if there are concerns, based on the type of rights and in the circumstances, that the insolvency creditors would be disadvantaged in the absence of registration.
- (2) An application under subsection (1) is admissible only if it is demonstrated to the satisfaction of the court that the factual requirements for recognition of the commencement of proceedings are present. The foreign administrator has the right of immediate appeal against the decision of the insolvency court. Section 32 (3) sentence 1 applies with the necessary modifications to the deletion of the entry.
- (3) Subsections (1) and (2) apply with the necessary modifications to the registration of commencement of insolvency proceedings in the Register of Ships, Register of Ships under Construction and Register of Liens on Aircraft.

### **Section 347 – Proof of Appointment of Administrator. Notification of the Court**

- (1) The foreign insolvency administrator shall prove his/her appointment by means of a certified copy of the decision appointing him/her or by means of other certification issued by the competent agency. The insolvency court may require a translation which must be certified by a person authorised to do so in the state in which proceedings are commenced.

- (2) The foreign insolvency administrator who has lodged an application pursuant to sections 344 to 346 shall inform the insolvency court about all significant changes to the foreign proceedings and about all other foreign insolvency proceedings known to him/her relating to the debtor's assets.

#### **Section 348 – Competent Insolvency Court. Co-operation between Insolvency Courts**

- (1) The insolvency court within whose district the establishment is situated or, in the absence of an establishment, assets of the debtor are situated has exclusive jurisdiction for the decisions pursuant to sections 344 to 346. Section 3 (3) applies with the necessary modifications.
- (2) If the requirements for recognition of foreign insolvency proceedings are fulfilled or if clarification is required as to whether the requirements are met, the insolvency court may co-operate with the foreign insolvency court and in particular pass on information of relevance to the foreign proceedings.
- (3) In order for the proceedings to be appropriately facilitated or processed more rapidly, the governments of the Federal States are authorised to allocate the decisions pursuant to sections 344 to 346 for the districts of several insolvency courts to one of these by statutory order. The governments of the Federal States may delegate this power to the administration of justice departments of the Federal States.
- (4) The Federal States may agree that the decisions pursuant to sections 344 to 346 for several Federal States are allocated to the courts of one Federal State. If an application pursuant to sections 344 to 346 is received by a court without jurisdiction it shall forward the application without delay to the court with jurisdiction and inform the applicant accordingly.

#### **Section 349 – Disposals of Immovable Assets**

- (1) If the debtor disposes of an asset in the insolvency estate that is registered domestically in the Land Register, Register of Ships, Register of Ships under Construction or Register of Liens on Aircraft, or if the debtor disposes of a right in such an asset, sections 878, 892 and 893 of the Civil Code [*Bürgerliches Gesetzbuch*], section 3 (3) and also sections 16 and 17 of the Act Governing Rights in Registered Ships and Ships under Construction [*Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken*] and section 5 (3) and also sections 16 and 17 of the Act Governing Rights [*Gesetz über Rechte an Luftfahrzeugen*] in Aircraft shall apply.
- (2) If a priority notice is registered domestically in the Land Register, Register of Ships, Register of Ships under Construction or Register of Liens on Aircraft in order to secure a claim, section 106 remains unaffected.

#### **Section 350 – Performance to the Debtor**

Where performance is rendered to the debtor domestically in fulfilment of an obligation although the obligation had to be fulfilled for the benefit of the insolvency estate of the foreign insolvency proceedings, the party rendering performance shall be deemed to have discharged the obligation if it was unaware at the time of performance of the commencement of proceedings. If it rendered performance prior to the publication provided for in section 345, it shall be presumed to have been unaware of the commencement of proceedings.

#### **Section 351 – Rights in Rem**

- (1) Commencement of the foreign insolvency proceedings shall not affect the right of a third party in an asset of the insolvency estate that was situated on domestic territory at the time of commencement of the foreign insolvency proceedings which grants entitlement to segregation or to separate satisfaction under domestic law.
- (2) Notwithstanding section 336 sentence 2, the effects of foreign insolvency proceedings on the debtor's rights in immovable assets that are situated on domestic territory shall be determined in accordance with German law.

#### **Section 352 – Interruption and Resumption of Court Proceedings**

- (1) Court proceedings pending at the time of commencement of foreign insolvency proceedings relating to the insolvency estate are interrupted by commencement of the foreign insolvency proceedings. The interruption shall continue until the court proceedings are taken up by a person who is authorised in accordance with the law of the state where the insolvency proceedings have been commenced to resume the court proceedings or until the insolvency proceedings are terminated.
- (2) Subsection (1) applies with the necessary modifications where the power to manage and dispose of the debtor's assets has passed to a preliminary insolvency administrator through the ordering of protective measures pursuant to section 343 (2).

#### **Section 353 – Enforceability of Foreign Decisions**

- (1) Compulsory enforcement based on a decision handed down in foreign insolvency proceedings may be pursued only if such compulsory enforcement is ruled admissible by a judgment for enforcement. Section

722 (2) and section 723 (1) of the Code of Civil Procedure [*Zivilprozessordnung*] apply with the necessary modifications.

- (2) Subsection (1) applies with the necessary modifications to the protective measures specified in section 343 (2).

### **Chapter Three – Territorial Insolvency Proceedings Relating to Domestic Assets**

#### **Section 354 – Requirements for Territorial Insolvency Proceedings**

- (1) If a German court does not have jurisdiction to commence insolvency proceedings in respect of all the debtor's assets but the debtor has an establishment or other assets on domestic territory, on application by a creditor separate insolvency proceedings may be brought in respect of the debtor's domestic assets (territorial insolvency proceedings).
- (2) If the debtor does not have an establishment on domestic territory, the application of a creditor for commencement of territorial insolvency proceedings is admissible only if this creditor has a particular interest in the commencement of proceedings, in particular if it is likely to be placed in a substantially worse position in foreign proceedings than in domestic proceedings. The particular interest must be demonstrated by the applicant to the satisfaction of the court.
- (3) The insolvency court within whose district the establishment is situated or, in the absence of an establishment, assets of the debtor are situated has exclusive jurisdiction for the proceedings. Section 3 (3) applies with the necessary modifications.

#### **Section 355 – Discharge of Residual Debt. Insolvency Plan**

- (1) The provisions on discharge of residual debt are not applicable in territorial insolvency proceedings.
- (2) An insolvency plan providing for deferment, waiver or other restrictions on the creditors' rights may be confirmed in these proceedings only if all creditors affected have approved the plan.

#### **Section 356 – Secondary Insolvency Proceedings**

- (1) Recognition of foreign main insolvency proceedings does not exclude secondary insolvency proceedings in respect of the domestic assets. Sections 357 and 358 are applicable in addition in respect of secondary insolvency proceedings.
- (2) The foreign insolvency administrator is also entitled to apply for commencement of secondary insolvency proceedings.
- (3) The proceedings shall be commenced without a ground for commencement having to be established.

#### **Section 357 – Co-operation between Insolvency Administrators**

- (1) The insolvency administrator shall notify the foreign administrator without delay of all circumstances which may be of relevance for implementation of the foreign proceedings. He/she shall give the foreign administrator the opportunity to submit proposals for the realisation or other use of the domestic assets.
- (2) The foreign administrator is entitled to attend the creditors' meetings.
- (3) An insolvency plan must be forwarded to the foreign administrator for comment. The foreign administrator is entitled to submit his/her own plan. Section 218 (1) sentences 2 and 3 apply with the necessary modifications.

#### **Section 358 – Surplus on Final Distribution**

If all claims can be satisfied in full by the final distribution in the secondary insolvency proceedings, the insolvency administrator shall hand over any surplus remaining to the foreign administrator of the main insolvency proceedings.

### **Part Thirteen – Entry into Force**

#### **Section 359 – Reference to the Introductory Act**

This Act comes into force on the day appointed by the Introductory Act to the Insolvency Code [*Einführungsgesetz zur Insolvenzordnung*].