GERMAN INSOLVENCY BASICS IN A THUMBNAIL SKETCH (2ND EDITION JUNE 2021)

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A Word from the Author[1]

This paper is not a comprehensive presentation of German insolvency law, so you may soon realize that some areas are not covered here (e.g., avoidance actions, secured creditors, restructuring proceedings).
Explaining all of those areas in this paper would exceed the scope of a “thumbnail sketch”.

I am planning to publish a more comprehensive book on German insolvency law in English for international readers, however.
By publishing this “thumbnail sketch” I also want to provide an opportunity for you to let me know which topics you want me to cover in that book.
You can contact me either by browsing my website insolvencycourts.org or by writing directly to postmaster@insolvencycourts.org .

Additional information on German insolvency laws can be found at the website of the European e-justice portal.

Glossary

Abbreviation	**Meaning in German**	**Meaning in English**
InsO	Insolvenzordnung	Insolvency Code
AnfG	Anfechtungsgesetz	Statute on the Pre-Insolvency Avoidance of Transactions by a Debtor
BGB	Bürgerliches Gesetzbuch	Civil Code
BVerfG	Bundesverfassungsgericht	Federal Constitutional Court
BGH	Bundesgerichtshof	Federal Court of Justice

[1] The author is a German insolvency judge who retired in November of 2020, and a certified court sworn translator for English and German

“Administrative Claims” (Masseverbindlichkeiten):

Those claims mentioned in InsO sections 53 – 55.
They must be paid before any payments are made to general creditors.

"Insolvency Administrator” (Insolvenzverwalter):

This term is the German equivalent for the person called trustee in the US Bankruptcy Code or "insolvency practitioner” in the European Insolvency Regulation. "Insolvency Administrator” is the literal translation of the German term "Insolvenzverwalter”.
The insolvency administrator is appointed in the judgment by which insolvency proceedings are opened.

“Interim Insolvency Administrator” (vorläufiger Insolvenzverwalter)

A person who is appointed by the court before the decision whether insolvency proceedings are opened is made.
The purpose of this appointment is to preserve the assets that will be treated as the insolvency estate after the proceedings have been opened.

“Rechtspfleger”:

A German junior judicial officer (literally translated: “law nurse”).
For details see below.

“Trustee” (Treuhänder):

The term "trustee” is used in a different context than, e.g., under the U.S. Bankruptcy Code, as a translation for the German "Treuhänder”. Treuhänder is the person supervising an individual debtor during the period between the closing of the insolvency proceedings and the expiration of the "assignment period” (see InsO section 287 subsec. 2).

"Unappealable / Unappealably”:

This term is used as a translation of the German term "rechtskräftig”. It means that a decision cannot be appealed because either the Insolvenzordnung does not provide for an appeal or the legal time limit for filing an appeal has expired without an appeal having been filed.

Introduction

Until 1999, German insolvency law was focused on liquidation and best satisfaction of the creditors.
Then, the Insolvenzordnung (Insolvency Code, hereinafter referred to as "InsO"[1]) was introduced and its first section states two additional objectives:

- Keeping the debtor business alive through a plan
- Giving the honest debtor a fresh start

The German InsO includes a large set of default provisions which apply to all proceedings, including both, corporate and personal insolvencies.
The provisions of the InsO cover substantive matters, such as executory contracts, avoidance, labor contracts (termination issues), liability of executive officers or liquidators for improper payments (InsO section 15b), and on rules of procedure.
A feature that may appear odd to non-German lawyers is that the InsO also includes a provision on the criminal liability of executive officers or liquidators of business entities (InsO section 15a). It states that these persons have to file a voluntary petition within three weeks after the company has become cash flow insolvent or within six weeks after it has become balance sheet insolvent. Failure to do so is a criminal offense carrying up to three years imprisonment or a fine.
Due to the Covid 19 pandemic, this obligation to file a voluntary insolvency petition had been temporarily suspended under certain conditions between March 1, 2020, and April 30, 2021[2].
Germany being a Member State of the European Union, the provisions of the European Insolvency Regulation (hereinafter referred to as "EIR") apply automatically.
Germany has not adopted the UNCITRAL Model Law on Cross-border Insolvency.
Cross-border cases outside the European Insolvency Regulation's scope of applicability are governed by title 12 of the German Insolvency Code headed "International Insolvency Law".

[1] An English translation of the InsO (current as of October 2020) can be found in Schultze-Braun's Yearbook 2021 (https://www.schultze-braun.de/fileadmin/de/Fachbuecher/Insolvenzjahrbuecher/Insolvenzjahrbuch_2021/Insolvency_and_Restructuring_2021_rz.pdf?_=1618475256) on pages 84-163. This yearbook also includes other relevant information.
[2] Act to Temporarily Suspend the Obligation to File for Insolvency and to Limit Directors' Liability in the Case of Insolvency Caused by the COVID-19 Pandemic (COVID-19- Insolvenzaussetzungsgesetz – COVInsAG) of March 27, 2020

As a consequence of the EU Directive on preventive restructuring frameworks, the German legislator adopted the “Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen” (an English translation hereof can be found by clicking here: Act on the Stabilization and Restructuring Framework for Business Enterprises).
For the time being, please refer to public sources on the internet, such as https://www.noerr.com/en/newsroom/news/german-restructuring-and-insolvency-law-update or Schultze Braun’s Yearbook 2021, for more information on this new law.

Jurisdiction

International and Local Jurisdiction

If the provisions of the European Insolvency Regulation (EIR) apply to a case, international jurisdiction is determined by its Article 3 which provides that international jurisdiction lies with the courts of the Member State in which the debtor has the center of its main interests (COMI).
In non-EIR cases, international jurisdiction is determined on the basis of InsO section 3.
This section governs the local jurisdiction (venue) of courts within Germany.
If the local jurisdiction of a German court is established, this is evidence of the international jurisdiction of the German courts.
InsO section 3 does not include a presumption like EIR Article 3 does.
It provides that the court in the circuit of which the debtor’s legal (personal or corporate) domicile is situated has exclusive jurisdiction to administer the insolvency proceedings. If the debtor is self-employed, however, the exclusive jurisdiction for the administration of the insolvency proceedings lies with the court in the circuit of which the center of the debtor’s self-employed economic activity is located.

Insolvency Courts

The insolvency courts are organized as divisions of the Amtsgericht (local court).
Their subject matter jurisdiction is unlimited.
Litigation between individual creditors and the debtor or the insolvency administrator, avoidance actions and other actions by the insolvency administrator on behalf of the estate are not heard by the insolvency court but by the civil division of the court with subject matter jurisdiction (Amtsgericht (local court) if the amount in dispute does not exceed €5,000, Landgericht (district court) if the amount in dispute exceeds €5,000; Familiengericht (family

court), Arbeitsgericht (labor court) or Sozialgericht (social court) if claims are based on domestic relations law, labor law or social law).

Peculiarities of German Insolvency Law

Insolvency Event

An insolvency case may be commenced by either the debtor itself or a creditor (InsO section 13).

No petition will be admitted, however, unless it is based on an insolvency event (InsO sec. 16).

The petitioner must show that an insolvency event has occurred.

The Insolvency Code defines three different insolvency events:

- cash flow insolvency (InsO section 17; available as a basis for voluntary petitions by and involuntary petitions against any kind of debtor)
- anticipated cash flow insolvency (InsO section 18; only available as a basis for voluntary petitions; generally, the basis for determining whether cash flow insolvency is to be anticipated is a projection period of 24 months)
- balance sheet insolvency (InsO section 19; only available as a basis for voluntary petitions by and involuntary petitions against legal entities)

No automatic stay

Unlike under, e.g., section 362 of the U.S. Bankruptcy Code, the filing of an insolvency petition per se does not operate as an automatic stay of the enforcement of claims against the debtor or against property of the estate.

There is no stay without judicial action.

Until the insolvency proceedings are formally opened, the judge has discretion whether or not to grant a stay.

Stages of the Proceedings (Pre-Opening and Post-Opening Stage)

General

A judgment by the court is required for insolvency proceedings to be opened in terms of German insolvency law.

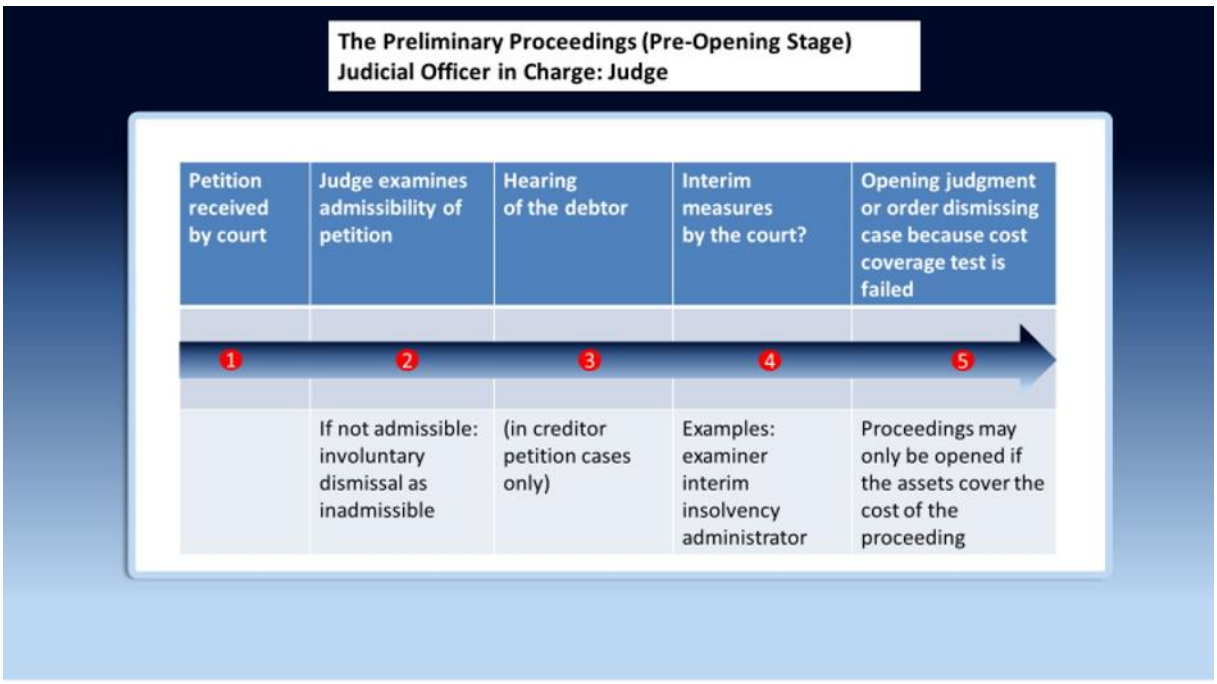
In this judgment the court appoints an insolvency administrator (Insolvenzverwalter) who

takes charge of managing the debtor's assets and business.
Please note that the EIR treats an interim insolvency administrator (vorläufiger Insolvenzverwalter) as an equivalent of the (permanent) insolvency administrator (Annex B Deutschland) in terms of the definition of Article 2 (5). Thus, a German insolvency proceeding is treated as "opened" in the parlance of the EIR (e.g., Article 2 (7) and (8), Article 3 (3)) upon the appointment of an interim insolvency administrator (the English version of the EIR uses the term "insolvency practitioner"), although it is not treated as opened under German law.
Before a judgment opening insolvency proceedings is rendered, the court has to investigate the facts of the case on its own motion and decide whether the requirements for opening the proceedings are satisfied.
This duty to investigate the facts does not apply if the insolvency petition fails to meet the applicable formal requirements (InsO sections 13 through 15) or if the court lacks jurisdiction.
In particular, the court needs to find out during its investigations if a case is an asset case or a no asset case. No asset cases are dismissed and no proceedings are opened because there is nothing to be liquidated for the benefit of the creditors.
The "cost coverage test" determines whether a case is an asset or no asset case.
The proceedings will be opened if there are enough assets to cover the cost of the proceedings (court fees, the remuneration of the interim insolvency administrator and the insolvency administrator, the remuneration of the members of the creditors' committee (if any), InsO section 54).
Otherwise, the party having filed the petition will be requested to make an advance payment in an amount sufficient to cover those fees and remunerations. If this request is not complied with, the petition will be dismissed as a no asset case (InsO section 26).
An individual (non-corporate) debtor may obtain permission by the court to pay the cost of the proceedings in a later stage of the proceedings if the individual's assets are not sufficient to cover the cost of the proceedings. Then the proceedings will be opened even if the "cost coverage test" is failed.
In business insolvency cases, the court normally does not have the means to perform the "cost coverage test" without external help, especially when the business is still operating. This help is obtained from an expert witness appointed by the court.
In her expert opinion, the expert witness will tell the court if the "cost coverage test" has been passed or failed.
All judgments by which insolvency proceedings are opened or are dismissed as no asset

cases are published on the internet (www.insolvenzbekanntmachungen.de).

Pre-opening Stage

Visual



Preservation Measures (InsO section 21)

In business insolvency cases, the pre-opening investigation stage may extend up to three months.

This period may be so long because an interim insolvency administrator (vorläufiger Insolvenzverwalter) may avail herself of "insolvency money" (Insolvenzgeld) to continue the debtor's business operations.

"Insolvency Money" is a statutory relief available for the debtor's employees. The Federal Labor Agency (Bundesagentur für Arbeit) will compensate the employees for any wage or salary losses suffered during a period of up to 3 months preceding the opening of the proceedings. The interim insolvency administrator can obtain a loan from a bank in the amount of three monthly salaries and use the loan funds to pay the employees for their work. The employees' rights to "insolvency money" are then assigned to the bank to guarantee repayment of the loan.

Thus, the interim insolvency administrator can motivate the employees to keep working for the debtor and generate income which will become part of the insolvency estate after the

proceedings have been opened.
The court is under a statutory obligation to take all measures required for avoiding a reduction of the debtor's assets which is adverse to the collective interests of the creditors. Standard measures to preserve the debtor's assets are a stay order and the appointment of an interim insolvency administrator.
The powers of this interim insolvency administrator are determined by the court.
In most cases, the debtor will be prohibited to dispose of any assets without the interim insolvency administrator's permission but remain in charge of managing its assets and business (the so-called "weak interim insolvency administrator").
Liabilities resulting from transactions by the debtor or the "weak interim insolvency administrator" are treated as general claims (except for some tax claims specified under InsO section 55 subsection 4, e.g., unpaid sales tax, which are treated as administrative claims).
In some cases, the debtor is prohibited by the court to go on managing its assets and business operations. All the management rights are then transferred upon the interim insolvency administrator (who then becomes a so-called "strong interim insolvency administrator").
The interim insolvency administrators are generally not keen on becoming "strong interim insolvency administrators" because all liabilities resulting from their transactions will then be treated as administrative claims.

Opening of the Proceedings

The judgment by which the proceedings are opened is the key event.

Its effects are manifold:

- All liabilities resulting from transactions by the insolvency administrator after the proceedings have been opened are treated as administrative claims.
- The right to manage and dispose of the debtor's assets passes from the debtor to the insolvency administrator (InsO section 80).
- Disposals made by the debtor are invalid (InsO section 81)
- Claim collection by individual creditors is prohibited (stay) (InsO section 89).
- InsO section 97 creates specific duties of the debtor (information, cooperation).
- All pending litigation and judicial claim collection is stayed (ZPO section 240).

Security interests in assets owned by the debtor which are part of the insolvency estate

obtained by judicial enforcement measures during the last month before the petition was filed or after the petition was filed, are invalid (InsO section 88).

The selection and appointment of the insolvency administrator to be made in this judgment is a decision which can determine the fate of the proceedings.

Table of Procedural Steps during the Post-Opening Stage

Step1	Step 2	Step 3	Step 4	Step 5
First meeting of the creditors including status report by the insolvency administrator § 156 InsO	**Second meeting of the creditors including the examination of filed claims by the court** § 176 InsO	**Special meeting of the creditors (if required)**	**Final meeting of the creditors to decide whether the insolvency administrator's final account and the final distribution are approved** § 197 InsO	**Termination of the insolvency proceeding** § 200
				or discontinuance because
Option to elect a different insolvency administrator to replace the court-appointed insolvency administrator (§ 57 InsO**)**	**The claims filed pursuant to** § 174 InsO **for entry into the schedule of claims (**§ 175 InsO**) are examined by the court.**	**E.g.,** § 160 InsO **vote on litigation with a high amount in dispute planned by the insolvency administrator.**	**Approval of the insolvency administrator's final account (**§ 66 InsO**) and of the final distribution (**§ 196 InsO**).**	• **the assets are not sufficient to cover the cost of the proceedings (**§ 207 InsO**)** • **the assets are only sufficient to cover the cost of the proceedings but not the administrative claims** (§ 208 InsO - § 212 InsO) • **the legal basis for opening insolvency proceedings has ceased to exist (**§ 212 InsO**)** • **the debtor has obtained the consent of all creditors who have filed claims with the discontinuance of the insolvency proceedings (**§ 213 InsO**)**

Excursion: The German Rechtspfleger

After the proceedings have been opened by the judge, they are from then on generally presided by the Rechtspfleger (literally translated: “law nurse”), a special type of junior judicial officer. This means that the Rechtspfleger represents the court in the post-opening stage.

The Rechtspfleger is a type of junior judge who has authority to make rulings on a limited basis.

The powers of the Rechtspfleger are governed by a special act of federal legislation (Rechtspflegergesetz [RPflG], click here for viewing an English translation of this act)[1].

RPflG section 18 provides for some exceptions of the general rule that the formally opened proceedings are presided over by the Rechtspfleger (e.g., insolvency plans, cross-border cases), however.

Pursuant to RPflG section 18 subsec. 2, the judge may decide to retain control of the proceedings even if no exception applies. The judges very rarely do that, however.

This German version of a junior judge has full independent judicial power for (almost) all decisions to be made after the proceedings have been opened by the judge.

Each German state has a college offering programs for Rechtspfleger candidates.

In the state of Baden-Württemberg, the candidates have to go through a three-year college BA program. The program includes several stages of college classes and on-the-job training.

Selection of the Insolvency administrator (InsO sections 56, 56a, 56b)

Unless the debtor is permitted to continue managing its affairs itself (debtor in possession), the court will appoint an insolvency administrator (Insolvenzverwalter) whose functions are similar to a trustee’s functions in US Chapter 7 or 11 bankruptcy proceedings.

Only an individual can be appointed insolvency administrator.

On January 12, 2016, a constitutional complaint filed with the Bundesverfassungsgericht (Federal Constitutional Court), claiming that that limiting access to the office of an

[1] The translation uses “senior judicial officer” instead of “junior judicial officer”. In my view, there is no English term providing an adequate translation of the German term.

insolvency administrator to individuals and disallowing legal entities to become insolvency administrators is unconstitutional, was dismissed (1 BvR 3102/13 only available in German).

Until 2004, the judges selected the insolvency administrators from among the membership of the local bar who had shown an interest in this kind of work.
When more and more attorneys realized that this line of work may be lucrative, the situation changed.
A group of attorneys decided to apply for work with other courts than their home court.
When their applications were denied, they appealed those denials and took some of them all the way through the court system up to the Federal Constitutional Court (Bundesverfassungsgericht).

In 2004, the Federal Constitutional Court ruled that, provided the applicants were sufficiently qualified, these denials were unconstitutional because they violated the applicants' right of free choice of their profession.
Now each court must have a preselection list of attorneys willing and qualified to be appointed insolvency administrator. From this list, the judge will choose the insolvency administrator for any particular case.
Article 102a of the German Insolvency Code Introductory Act (EGInsO) provides that professionals from other EU Member States or of a state which is a contracting party to the Agreement on the European Economic Union may apply to be included into the preselection list of a German insolvency court.
If petitions for opening insolvency proceedings regarding debtors that are members of the same group of companies are filed, the courts requested to open such proceedings have to discuss and determine whether appointing only one insolvency administrator in all of those proceedings is in the best interest of the creditors (InsO section 56b).

Legal Status and Duties of the Insolvency Administrator

The insolvency administrator is an independent officer of the court appointed for the purpose of administering a particular insolvency estate.
She is not a representative of the debtor.
She is exercising her functions as a fiduciary of the court but is acting under her own name on behalf of the insolvency estate.

She has standing to sue and be sued on behalf of the insolvency estate.
Upon the opening of the insolvency proceedings, the insolvency administrator is to take over possession of the entire insolvency estate and its management immediately (InsO section 148).
Afterwards she has to report to the creditors' meeting (InsO section 156).
Unless the creditors' meeting decides otherwise, the insolvency administrator is to liquidate the insolvency estate immediately (InsO section 159).
Liquidation is performed by collecting outstanding receivables and selling all assets.
At the same time, the insolvency administrator needs to examine all claims filed by creditors and determine whether to acknowledge or contest them.
She has to prepare lists of all assets and creditors (InsO sections 151 – 153) and fulfill all accounting requirements under commercial and tax laws as far as the insolvency estate is concerned (InsO section 155).
If a creditors' committee (Gläubigerausschuss) has been appointed, it is obliged to support and supervise the insolvency administrator (InsO section 69).
In some cases, the insolvency administrator needs to obtain the consent of the creditors' meeting before taking action (InsO sections 158, 160, 162, 163).

Supervision of the Insolvency Administrator by the Court (InsO Section 58)

The court must supervise the management of the proceedings by the insolvency administrator. It can require the insolvency administrator to provide specific information or a status of the proceedings and a management report at any time.
This supervision by the court is designed to guarantee the lawfulness of the proceedings. Its scope is limited to the examination whether the insolvency administrator fulfills the insolvency-specific duties imposed on her by insolvency laws.
The court is not authorized, however, to control the practicability of measures taken by the insolvency administrator provided they do not constitute a breach of any duty.
If the insolvency administrator fails to perform her duties as required, the court can fine her (InsO section 58 subsec. 2) or remove her from office (InsO section 59).

Liability of the Insolvency Administrator

If the insolvency administrator culpably breaches a duty resulting in damages to any party exposed to action taken by the insolvency administrator, she is liable to compensate the

injured party for those damages.
The standard applicable to that liability is defined in InsO section 60 subsec. 1 sentence 2 as the diligence reasonably and ordinarily exercised by a prudent insolvency administrator. This shows that the business judgment rule as defined in section 93 subsec. 1 sentence 2 of the German Stock Corporation Act (AktG) does not apply to the liability of an insolvency administrator in Germany.
InsO section 61 governs the liability of the insolvency administrator for the non-payment of administrative debt.

Debtor Self-Management (Debtor in Possession) Proceedings

Until 2012, debtor self-management proceedings (the German type of debtor in possession proceedings) were not common in Germany.
But a modernized law entering into force on March 1, 2012, was designed to change that. The significantly increased number of debtor self-management proceedings permitted since then shows that the modernized law has served its purpose.
The provisions on debtor self-management proceedings were again amended in late 2020.
Debtor self-management proceedings are a subtype of business insolvency proceedings, they are not mere restructuring proceedings.
If a debtor requests to be granted debtor self-management proceedings in its voluntary petition, it has to attach a plan for the self-management proceedings which meets the requirements specified in InsO section 270a.
Provided that the debtor's request meets the requirements of InsO section 270b subsec. 1, the court does not appoint an interim insolvency administrator nor limit the debtor's rights to dispose of its assets until the decision whether insolvency proceedings are opened is made. Instead, the court appoints an interim curator-type supervisor (vorläufiger Sachwalter, hereinafter called interim curator) to monitor the debtor's activities during the pre-opening stage of the proceedings (interim self-management proceedings).
Should the self-management plan show deficits mentioned in InsO section 270b subsec. 2, the debtor must show that it is willing and able to manage its business in line with the interest of the creditors regardless of those deficits.
In a case with such deficits, the court must hear the interim creditors' committee (if any) before deciding whether to grant self-management proceedings.
If debtor self-management proceedings are permitted in the court's judgment by which insolvency proceedings are opened, the court will appoint a curator-type supervisor

(Sachwalter, hereinafter called curator).
Generally, the interim curator is appointed curator in the judgment by which the insolvency proceedings are opened.
The curator is to examine the debtor's financial situation and to monitor the business operations and the debtor's cost of living expenses and to report to the court (InsO section 270c).
A comparison of 28 U.S.C. 586 and InsO section 274 shows that the functions of the US Trustee in Chapter 11 proceedings and the functions of a curator in German debtor self-management proceedings are not the same.
If the curator becomes aware of circumstances which make the continuation of debtor self-management proceedings appear to be adverse to the interests of the creditors, she has to notify the creditors' committee and the court thereof immediately.
The court is to revoke the permission of debtor self-management proceedings (InsO section 270e) if

- the debtor severely breaches its duties under insolvency laws or otherwise shows that it is not willing or capable to keep the operations of its business in line with the interests of the creditors;
- there is no hope that the objectives of the self-management proceedings can be achieved;
- the majority of the creditors' meeting so requests;
- a secured or general creditor so requests and shows that continuing the debtor in possession proceedings is adverse to the interests of the creditors;
- the debtor so requests.

A subtype of debtor self-management procedure to prepare a reorganization by a plan included in the Insolvency Code is the so-called "protective umbrella procedure" (InsO section 270d).
Protective umbrella proceedings require a voluntary petition by the debtor based on anticipated cash flow or balance sheet insolvency (it is not available if cash flow insolvency has already occurred). The petition must include a request to grant debtor self-management proceedings and to fix a deadline for the submission of a plan. This deadline is not to exceed three months.
Unlike in ordinary debtor self-management proceedings, only the debtor is permitted to submit a plan.
The petition must be backed by the certificate of a tax consultant, auditor or attorney with

considerable insolvency law experience showing that insolvency is to be anticipated but has not yet occurred and that the restructuring plans are not obviously futile.
There is considerable debate about the qualifications required for persons issuing such certificates.
The main difference between protective umbrella proceedings and ordinary debtor self-management proceedings is that the protective umbrella proceedings are primarily reorganization proceedings, not pre-opening proceedings for the purpose of investigating whether proceedings can be opened.
Therefore, the debtor will try to either settle the case with all creditors before the proceedings are opened (and then voluntarily dismiss its case) or have the plan confirmed soon after the opening of the proceedings.
It will remain to be seen if the attractiveness of the “protective umbrella procedure” is going to suffer as a consequence of the options available under the new German Act on the Stabilization and Restructuring Framework for Businesses.

Plans

The process of reorganizing a business through a plan was designed on the basis of Chapter 11, but only fragments of the Chapter 11 provisions were eventually included in the German provisions.
InsO section 217 provides that a plan may include provisions on the satisfaction of secured creditors and distributions to unsecured creditors which are inconsistent with the provisions governing ordinary insolvency proceedings.
A plan may generally be filed by either the insolvency administrator or the debtor (InsO section 218).
The plan is discussed and voted on during a court hearing (InsO section 235).
If the requirements for acceptance by the creditors (InsO sections 244-246a) are met and the debtor agrees to the plan, the court can confirm the plan (InsO section 248).
A visual of German plan proceedings (in German) can be found at http://www.insolvencycourts.org/DL/Trier/Frank/Frank 02 PlanverfahrenAblauf DINA3.pdf.
Before a plan can be confirmed, the insolvency proceedings must be opened.

Creditor Participation in German Insolvency Proceedings

Traditionally, creditor participation was only provided for during the post-opening stage of

the proceedings (InsO sections 156 et seq.).
The problem with this tradition was that the creditors had no influence on the development of the case until some time after the opening of the proceedings.
The course of the proceedings had, however, often been set during the pre-opening stage already.
For example, the creditors have the right to elect another person than the individual appointed by the court as insolvency administrator in the first creditors' meeting after the opening of the proceedings (InsO section 57).
By that time, the appointed insolvency administrator (who is almost always identical with the interim insolvency administrator used during the pre-opening stage of the proceedings) has invested considerable time in investigating the facts of the case, often entered into intitial negotiations with prosepctive investors, etc. All these efforts may become useless if the key person (the insolvency administrator) is replaced by someone else. Moreover, the remuneration earned by the appointed insolvency administrator will have to be paid without the insolvency estate receiving the benefits of the appointed insolvency administrator's work.
Therefore, the legislator thought it wise to let the creditors participate in the process of selecting the insolvency administrator during an early stage of the proceedings.
The process of how the insolvency administrator is selected was often criticized as non-transparent for the debtor and the creditors.
Debtors and creditors complained that filing an insolvency petition included elements of gambling because nobody knew whom the court would appoint (interim) insolvency administrator.
Since March 1,2012, an interim creditors’ committee has to be appointed if certain threshold requirements (InsO section 22a) are satisfied.
This was a great step in German insolvency legislature because, until then, the creditors had no say in any matter before the judgment opening the proceedings was announced.
If an interim creditors’ committee is appointed by the court and it unanimously proposes an individual to be appointed the (interim) insolvency administrator, the court has no discretion to appoint someone else but is bound by the unanimous proposal unless the proposed individual is not qualified to be an insolvency administrator, InsO section 56a subsection 2.
Should the court not appoint the unanimously proposed individual but someone else, the interim creditors’ committee may elect another interim insolvency administrator during their first meeting following the appointment by the court.

Sometimes delaying the appointment of an interim insolvency administrator until the interim creditors' committee has been heard may adversely affect the debtor's financial situation. In that case, the court may appoint an interim insolvency administrator immediately without hearing the interim creditors' committee.
The interim creditors' committee then has the option, however, to unanimously elect another individual as interim insolvency administrator in its first meeting, InsO section 56a subsection 3.

An individual who has acted as a restructuring practitioner or rehabilitation mediator during a previous restructuring proceeding regarding the debtor, can only be appointed insolvency administrator or interim insolvency administrator subject to the consent of the interim creditors' committee, if any, provided that certain threshold requirements (InsO section 22a) have been exceeded.

The interim creditors' committee has other responsibilities as well, such as keeping themselves up- to-date on the debtor's business operations, inspecting the debtor's books and business documents, checking the available funds and the monetary transactions made by the debtor.
If the (interim) insolvency administrator plans to enter into transactions of particular importance for the development of the case, such as selling all the inventories or selling real estate, she needs to obtain the (interim) creditors' committee's permission (InsO section 160).

Rights of Shareholders

Traditionally, the shareholders of a debtor company could not be divested of their ownership interest in the debtor without their agreement. They could not prevent asset deals entered into by the insolvency administrator. But when the insolvency administrator wanted to assign shareholder interests or certain other rights, such as licenses or favorable long-term agreements, to third parties, she might have needed the shareholders' cooperation to avoid difficult and costly processes for becoming able to do so. Shareholders who were aware of this situation tried to exploit it for the purpose of receiving special benefits in exchange for their cooperation.
InsO section 225a, which entered into force on March 1, 2012, is designed to prevent such negotiation tactics by the shareholders, however.

Under this provision, a plan may provide that creditor claims be converted into shares in the debtor if the affected creditor agrees to the conversion of the claim even if the affected shareholders disagree (debt equity swap).

Insolvency Proceedings Regarding Multiple Debtors (Groups of Enterprises)

The legal definition of a group of enterprises is found in InsO section 3e.
Only companies which have the center of their main interest in Germany can be treated as members of a group of enterprises in terms of the special InsO provisions governing such groups (sections 3a-3d, 269a – 269i).
Jurisdictional issues regarding groups of enterprises are covered by InsO sections 3a – 3d.
Under certain conditions, section 3a permits a court to assume jurisdiction for all insolvency proceedings regarding members of the enterprise group.
Requirements on the coordination of multiple proceedings regarding members of a group of enterprises are included in InsO title 10 (sections 269a – 269i).

In cases regarding multi debtor proceedings regarding groups of enterprises the members of which have their COMI in different Member States of the EU, the Articles under Chapter V of the EIR apply.

Special Provisions on Insolvencies of Individuals (Personal Insolvency)

General

Default Case or Consumer Case?

Insolvencies of individuals (often referred to as "natural persons”) can either be governed by the default set of provisions mentioned above or by a combination of those default provisions and special provisions on consumer insolvencies.
The relevant criteria are determined in InsO section 304.
This means that individuals who are self-employed when filing an insolvency petition are not subject to the special provisions on consumer insolvencies.
In cases of individuals who have been self-employed before filing an insolvency petition but are no longer self-employed when the petition is received by the court, the following applies:

The special provisions on consumer insolvencies are applicable in these cases if

a) the debtor has less than 20 creditors (= a maximum of 19 creditors)

b) there are no creditors with employment-related claims.

The BGH has defined the term "employment-related claims" as including not only wages or salaries but also those portions of payroll taxes and social security contributions which must be withheld by the employer from the employees' wages or salaries and paid directly to the tax authorities and social security providers.

The differences between the default provisions and the special provisions on consumer insolvencies are only procedural, not substantive.

Differences only exist during the pre-petition stage and the pre-opening stage (between the filing of the petition and the opening of the proceedings). After the proceedings have been opened by a judgment of the court, the proceedings are in each case governed by the default set of rules.

If the consumer insolvency provisions apply, the debtor must use an official form for filing the petition (the form is only available in German). Other forms related to insolvency petitions (in German) can be found at http://www.amtsgericht-heilbronn.de/pb/,Lde/Startseite/DAS+AMTSGERICHT/Die+Insolvenzabteilung.

The common goal of insolvency proceedings of individuals is the discharge, regardless if the default provisions or the special provisions on consumer insolvencies apply.

An insolvency plan is also available under both sets of provisions. Insolvency plans can only be voted on and confirmed after the proceedings have been formally opened by a court judgment, however.

No Asset Cases and Deferral of Payment of Costs

Most of the personal insolvency cases are also no asset cases.

In 2001, the German legislator decided to provide a procedure that gives individuals access to personal insolvency proceedings even if their assets are insufficient to cover the cost of the proceedings.

This procedure is deferral-based which means that the debtor can put off paying the cost of the proceedings until after the court has granted her the discharge.

This means that the debtor does not have to make any payment on the cost before the discharge order by the court has become unappealable.

The discharge itself is independent from the subsequent payment of the cost of the proceedings and cannot be revoked if the debtor fails to make payments ordered by the

court after the discharge has been granted. Only the deferral itself can then be revoked if the debtor culpably fails to make such a payment for more than 3 months (InsO section 4 c subitem 3).

The deferral is not available, however, if the debtor has been convicted of insolvency-related criminal offenses during the last five years before filing an insolvency petition or gets convicted of such an offense after having filed a petition.

The debtor has to apply for a deferral of costs and show that her assets are probably insufficient to cover the costs. The assets are considered insufficient if the debtor is unable to pay the cost in one installment (case law: BGH IX ZB 459/02 in German).

A married debtor also has to disclose the income of her spouse.

If the debts have been made for expenses related to the spouses' joint life as a married couple, the debtor has a claim against her spouse for payment of the anticipated cost of the proceedings under BGB section 1360a subsection 4 if making the spouse pay is fair and equitable (case law: BGH IX ZB 539/02 in German).

Should this claim exist, the court will deny an application for the deferral of costs.

This case law rule does not have much practical relevance, however, because, in the vast majority of cases, the spouse's income is insufficient for such a payment.

If the court grants a deferral of costs, it can later revoke the granting order if the debtor does not comply with her duties under the insolvency code or if the requirements for a deferral had not been met when the deferral was granted (InsO section 4c).

The debtor has the right to appeal a decision denying or revoking a deferral of costs (InsO section 4d).

Provisions on Insolvencies of Consumers

The specific requirements for a consumer insolvency petition are laid down in InsO section 305.

A case is only treated as a consumer case if the debtor has filed the petition.

Creditor petitions are always treated as non-consumer cases.

The most prominent features of consumer insolvency proceedings are the requirement of a pre-petition attempt by the debtor to settle all debts with all creditors and the availability of a post-petition but pre-opening judicial debt settlement plan.

The judicial debt settlement plan is not the same as an insolvency plan. The main difference is that the judicial debt settlement plan is a pre-opening tool whereas the insolvency plan is a post-opening tool. The judicial debt settlement plan is only available

under the special provisions for consumer insolvency, whereas the insolvency plan is available under both, the default provisions and the consumer insolvency provisions.

The Pre-petition Debt Settlement Attempt

The pre-petition debt settlement attempt has to be made between the debtor and all creditors. Any offer for a settlement by the debtor only becomes binding if all creditors explicitly accept that offer.

As soon as one creditor disagrees with the settlement proposed by the debtor or remains silent, the pre-petition settlement attempt has failed.

If all creditors agree, the debtor does not need to file a petition for insolvency proceedings any longer because she will be discharged of her debt after the agreed upon payments to the creditors have been made.

The judicial debt settlement plan is a very time- and cost-efficient tool for consumers to get rid of their debt.

When a debtor files a consumer insolvency petition, she has to submit the documents exchanged between him and her debtors during the pre-petition debt settlement attempt. In addition to that, she must submit a proposal for a judicial debt settlement plan.

When the judge receives the petition, she decides whether the proposed judicial debt settlement plan is likely to be successful.

Should the judge determine that the proposed judicial debt settlement plan is not likely to be successful, she orders the proceedings to be continued (InsO section 306 (1) sentence 3).

If the judge thinks that the likelihood of success is sufficient, she has the debt settlement plan served on all creditors identified by the debtor. Following the service of the judicial debt settlement plan, the creditors have one month to let the court know whether they agree with the plan. Should a creditor fail to respond to the court within the one-month period, her silence is counted as agreement with the judicial debt settlement plan (InsO section 307).

The judicial debt settlement plan has the same effects as a settlement in terms of ZPO section 794 (1) 1 if no creditor explicitly disagrees with the judicial debt settlement plan.

Should any creditor explicitly disagree with the judicial debt settlement plan, the court can replace that creditors disagreement by the court's agreement unless InsO section 309 (1) sentence 2 or section 309 (3) prohibits the court to do so (akin to a cram-down procedure).

If no creditor has disagreed to the judicial debt settlement plan or if the replacement of any creditor disagreement by the court's agreement has become unappealable or confirmed by the appellate court, the judicial debt settlement plan is treated as accepted (InsO section

308).
The insolvency proceedings end when the order under InsO section 308 has been made. Should the court be prohibited from replacing a creditor's disagreement by the court's agreement, the proceedings are continued (InsO section 311).

Discharge

General

The discharge for the honest debtor is the second objective of the insolvency proceedings mentioned in InsO section 1 sentence 2.
Generally, the creditors can re-start collecting claims against the debtor after the proceedings have been terminated, InsO section 201.
This general principle has been limited by the introduction of the discharge into German insolvency law, however.
If the debtor is granted a discharge by the court, the debts covered by the discharge become "imperfect debts". This means that the debts are still legally existing and can be voluntarily satisfied. The creditor may no longer enforce the debts by means of debt collection, however.
If a creditor has an enforceable copy of a judgment, she can still execute on that judgment, regardless of the imperfectness of her claim. It is up to the debtor to avoid such execution by bringing an "execution avoidance action" against the judgment creditor on the basis of ZPO section 767. In this action, she can raise the objection that the creditor has lost the right to collect on her claim and obtain a judgment declaring the creditor's execution on the former judgment wrongful.
The general principle of the discharge is stated in InsO section 286.

Procedure

The debtor must file a written request for discharge jointly with the voluntary insolvency petition (InsO § 287). This request must be accompanied by a declaration to the effect that the debtor assigns the garnishable (i.e., the non-exempt) portion of her income to the court-appointed insolvency administrator for a period of three years (the assignment period) as of the date on which the proceedings have been opened. The amount of the garnishable income is determined by ZPO section 850c.
If none of the bars to discharge mentioned in InsO section 287a (2) apply, the court declares in the judgment by which the proceedings are opened that the debtor will be

discharged of her residual debt if she complies with the duties mentioned under InsO section 295 and if no circumstances require the discharge to be denied pursuant to InsO sections 290, 297, and 298 (InsO section 287a (1)).
Between the opening and the closing of the proceedings, the debtor has to comply with the disclosure and cooperation duties provided under InsO section 97 and the duty to exercise an employment under InsO section 287b.
If the insolvency proceedings are closed or discontinued before the assignment period has expired, the debtor's duties through the end of the assignment period are determined by InsO section 295. Colloquially, the period between the closing or discontinuance of the insolvency proceedings and the expiration of the assignment period is colloquially called "period of good conduct" because of the duties listed in InsO section 295.
Although the stay provided under InsO section 89 no longer applies after the proceedings have been closed, the debtor remains protected by InsO section 294 which prohibits claim enforcement measures by individual creditors between the closing of the insolvency proceedings and the expiration of the assignment period. The office of the insolvency administrator ends when the insolvency proceedings are closed (InsO section 200) or discontinued because the assets are only sufficient to cover the cost of the proceedings but not the administrative claims (InsO section 211).
If the insolvency proceedings are closed or discontinued after the assignment period has expired, there will be no "period of good conduct" and the court has to decide whether or not the discharge is granted.
This can be derived from InsO section 300 subsection 1 sentence 1. This provision clearly states that the decision on the discharge must be made when the assignment period has expired. It applies regardless of the stage the proceedings are in.
The rationale behind this provision is that the discharge is not to be delayed if the insolvency proceedings cannot be closed or discontinued before the assignment period expires.

The Trustee

In the order by which the proceedings are closed or discontinued, the court appoints the trustee who becomes the owner of the garnishable income received by the debtor as a consequence of the assignment declared by the debtor according to InsO section 287 subsection 2 when filing the insolvency petition (InsO section 288).
This does not apply, however, if the assignment period has already expired when the

proceedings are closed or discontinued. The assignment declaration becomes invalid after the three-year period has expired, so there would no longer be a legal basis for the trustee to become the owner of the garnishable income.
In almost all cases, the same individual who had been appointed insolvency administrator is also appointed trustee for the period between the closing or discontinuance of the proceedings and the expiration of the assignment period.
The trustee has the duty to notify the debtor's employer of the assignment and to collect the assigned portion of the debtor's income.
Once a year, the trustee must distribute the received amounts to the insolvency creditors (InsO section 292 subsection 1 sentence 2). The basis of the distributions is the final account rendered by the insolvency administrator pursuant to InsO sections 188 et seq. when the insolvency proceedings were closed or discontinued.
The trustee is entitled to compensation (InsO section 293) on the basis of the Insolvency Remuneration Regulation (in German: https://www.gesetze-im- internet.de/insvv/).

Denial of Discharge

During the final meeting of the creditors, the court must hear the insolvency creditors with regard to the debtor's application for a discharge.
The insolvency creditors may file applications for a denial of the discharge at any time between the opening of the proceedings and the final meeting of the creditors. The grounds for such a denial of a discharge are specified in InsO section 290.
InsO section 290 subsection 1 subitem 5 is the practically most relevant alternative for a denial of the discharge. The duties it relates to are those mentioned in InsO section 97.
After the final meeting of the creditors, applications for a denial of the discharge are only admissible under the special provision of InsO section 297a if the ground for a denial pursuant to InsO section 290 has only come to light after the final meeting of the creditors or the discontinuance according to InsO section 211.
Only insolvency creditors who have filed a claim have standing to apply for a denial of discharge.
If the application by an insolvency creditor for a denial of the discharge is dismissed by the court, the insolvency proceedings are closed and the trustee for the remainder of the assignment period is appointed. Should the discharge be denied, the case is closed and no trustee is appointed.

Between the Closing or Discontinuance of the Insolvency Proceedings and the Expiration of the Assignment Period (Stage of Good Conduct)

In this stage, applications by creditors to deny the discharge can no longer be based on InsO section 290 unless InsO section 297a applies.
Only a breach of the duties specified in InsO section 295 can provide a basis for such an application.
The alternative with the highest practical relevance is InsO section 295 subsection 1 subitem 3.
InsO section 296 provides that any application for a denial of the discharge must be filed within one year following the time at which the applying insolvency creditor became aware of the breach of a duty.
While only two of the alternatives under InsO section 290 (subsection 1 subitems 4 and 7) require an adverse effect on the satisfaction of the creditors, section 296 subsection 1 sentence 1 provides that a denial of the discharge on the basis of section 295 always requires such an adverse effect. Therefore, the procedural hurdle to be passed by the applicant is mostly higher than under section 290. It is often very difficult for insolvency creditors to show that the breach of a duty adversely affected the satisfaction of the creditors.
If the application to deny the discharge meets the requirements provided by section 296 subsection 1 sentence 1, the application is served on the debtor. Section 296 subsection 2 sentence 2 provides that the debtor then has to provide information on how she complies with her duties under section 295. The court may either set a deadline for the debtor to provide the information in writing or schedule a hearing the debtor is obligated to attend. If the debtor fails to provide written information within the deadline or fails to attend the hearing, the discharge is to be denied.

Grant of Discharge

The discharge can be granted after the assignment period has expired and no creditor has successfully applied for a denial of the discharge.
It can be granted before the assignment period of three years has expired if the requirements mentioned under InsO section 300 subsection 2 sentence 1 have been met:

- no claims have been filed during the insolvency proceedings or
- the claims of all general creditors have been satisfied

  and

- the debtor has paid the cost of the proceedings and the other administrative claims

Reminder: The assignment period begins to run when the proceedings are opened.

Revocation of Discharge

A discharge which has been granted can be revoked if the requirements of InsO section 303 subsection 1 are met.

Revocation is available if the debtor has intentionally breached any duty and, thus, caused a substantial negative effect on the satisfaction of the creditors.

Claims Exempt from the Discharge

The discharge only covers claims that existed when the insolvency proceedings were opened, regardless whether the creditors of those claims have filed them during the insolvency proceedings (InsO section 301 subsection 1).

This means that claims acquired after the opening of the insolvency proceedings are unaffected by the discharge.

The discharge has no effect on claims against co-debtors or guarantors of the debtor. Nor does it affect security interests in the debtor's property through which the creditor obtains a proprietary right in the collateral (right in rem), e.g., a mortgage or a lien (InsO section 301 subsection 2).

InsO section 302 includes an exhaustive list of claims that remain unaffected by a discharge.

The creditors of such claims do not have to apply for a denial of the discharge because their claims continue to stand as fully enforceable.

To obtain such a status for her claim, a creditor has to file her claim accompanied by a statement that this claim is exempt from the discharge under one of the alternatives of InsO section 302.

She has to let the court know which alternative applies and which facts justify the application of the statutory exemption.

If the debtor does not contest the creditor's application for an exemption from the discharge, this is all the creditor must do.

Should the debtor contest the application, the creditor has to bring a civil action against the debtor and obtain a declaratory judgment to the effect that the claim is based on one of the alternatives under InsO section 302.