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Introduction

Coming into force on 1 March 2012, the German Act on the Further Facilitation of the Restructuring of Companies (Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen), in particular in conjunction with the insolvency plan and through what is known

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

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

e agreed proposal of the preliminary creditors' committee

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

e majority proposal of the preliminary creditors' committee

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

e Insolvency Plan

Introduc

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Structuring of the insolvency plan

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

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

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

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

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

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

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

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

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

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

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

to continue the business [45]

Formation of Groups

e formation of voting groups of creditors as prescribed in Art. 222 InsO must be set out in the constructive section of the insolvency plan. e sense and purpose of forming groups is to make allowance for the di erent economic interests of the various creditor groups. e signi cance of the formation of groups relates to the planning strategy.

Citation:

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

Compensation for cancellation of equity interest

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

Change-of-control clauses

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

Art. 225a par. 5 InsO

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

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As a result of Art. 245 par. 3 InsO, the prohibition to obstruct is extended to the former shareholders [64]. is extension will not entail any great e ect, since the consent of the former shareholders is ctitious, if the insolvency plan provides for a decision in favour of

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

- Appoint a preliminary creditors' committee pursuant to Art. 21 par. 2 sentence 1 No. 1a InsO

- Order a total restriction or temporary restriction on measures of execution against the debtor (Art. 21 par. 2 sentence 1 No. 3 InsO)

- Order a temporary interception of the debtor's mail (Art. 21 par. 2 sentence 1 No. 4 InsO)

- Order that items for which segregation is demanded be used to continue the debtor's business

Justi cation of preferential debt

On the application of the debtor, the court shall order that the debtor may justify preferential debt (Art. 55 par. 2 InsO). is provision was created to enable the business to continue during the opening of insolvency proceedings, and thus establish the basic prerequisites for restructuring. e provision was originally intended to protect persons who conclude business transactions with a provisional insolvency administrator, or meet a long-term debt obligation with the latter that they had originally agreed with the debtor. Particularly in the critical

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

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

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

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

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

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

E ect of the insolvency plan: e legal e ects of the provisions set out in the constructive section ensue immediately when the order con rming the insolvency plan becomes nal (Art. 254 InsO). Any declarations of intent included in the plan to constitute, amend, transfer or cancel in rem rights are therefore deemed to have been issued in accordance with formal requirements, without requiring any further

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22. Hess (Footnote 1) Art. 22a marginal note 17
23. Siemon ZInsO 2011, 381; Preuss ZIP 2011, 933; Frind NZI 2010, 705
24. Hess/Weis, WM 1998, 2349
25. Hess (Footnote 1) Art. 217 marginal note 10 ff.; Gross in Hess Sanierungshandbuch, 6th ed. 2013, Chapter 32 marginal note 33; cf. also BGH 6.10.2005 – IX Z 36/22 – ZIP 2006, 39; diverging opinion in Smid/Rattunde/Martini insolvency plan marginal note 368 ff., which asserts the judgement nature of the insolvency plan
26. Gross (Footnote 25) marginal note 59 et al.
27. Gross (Footnote 25) marginal note 47 ff.
28. Gross (Footnote 25) marginal note 68 ff.
29. Gross (Footnote 25) marginal note 77
30. Hess/Weis, WM 1998, 2349, 2351 ff.; Gross (Footnote 25) marginal note 78
31. For details, see Gross (Footnote 25) marginal note 84 ff.
32. Hess/W