1 Who may insolvency proceedings be brought against?

Austrian insolvency law is not confined to entrepreneurs. Capacity for insolvency is in fact defined as part of legal capacity under private law: any person who can hold rights and obligations also has capacity for insolvency. On the other hand, it is not a matter of capacity to transact. This means that any natural person (even a child) can be an insolvency debtor, as can legal persons (private or public), registered partnerships pursuant to the Commercial Code (Unternehmensgesetzbuch) (general partnerships (offene Gesellschaften), limited partnerships (Kommanditgesellschaften)) and estates of deceased persons. On the other hand, silent partnerships (stille Gesellschaften) and companies constituted under civil law (Gesellschaften bürgerlichen Rechts) do not have capacity for insolvency.

After the dissolution of a legal person or registered partnership, the opening of insolvency proceedings is permitted as long as the assets have not been distributed (§ 68 of the Insolvency Code (Insolvenzordnung - IO)).

Bankruptcy proceedings (Konkursverfahren), but not reorganisation proceedings (Sanierungsverfahren), can be brought against the assets of credit institutions, securities firms, investment services firms and insurance undertakings (§ 82(1) of the Banking Act (Bankwesengesetz – BWG), § 79 of the 2018 Securities Supervision Act (Wertpapieraufsichtsgesetz - WAG 2018), and § 309(3) of the 2016 Insurance Supervision Act (Versicherungsaufsichtsgesetz - VAG 2016)).

2 What are the conditions for opening insolvency proceedings?

Since the 2010 Insolvency Law Amendment Act (Insolvenzrechtsänderungsgesetz 2010) took effect, there has been only one type of **standard insolvency proceedings** under Austrian law. However, at the same time, different designations are given depending on the actual course of the proceedings:

Insolvency proceedings are known as **bankruptcy proceedings (Konkursverfahren)** if no restructuring plan is yet available when the proceedings are opened. In principle, both liquidation and restructuring are possible under bankruptcy proceedings.

Insolvency proceeding are termed **reorganisation proceedings (Sanierungsverfahren)** if a restructuring plan already exists when the proceedings are opened. The proceedings focus on the reorganisation of the debtor. They are available to natural persons who run a business, legal persons, partnerships and estates of deceased persons (§ 166 IO).

Reorganisation proceedings are possible **with or without debtor in possession (Eigenverwaltung)**. A debtor remains in possession (under the supervision of a reorganisation administrator (Sanierungsverwalter)) if they offer a dividend of at least 30% to the insolvency creditors in the restructuring plan, and further documents are also available. For instance, a financial plan is necessary, showing that financing is ensured for 90 days.

Debt settlement proceedings (Schuldenregulierungsverfahren), which are available to natural persons who do not run a business, are a further variant of insolvency proceedings.

A **request** for opening insolvency proceedings must be made either by the debtor or by a creditor. In the case of reorganisation proceedings, a request must in any case be made by the debtor and a restructuring plan must exist.

A prerequisite for opening insolvency proceedings is that in principle the debtor is **insolvent** (§ 66 IO). Insolvency proceedings may also be opened in the form of reorganisation proceedings in the event of **imminent insolvency** (§ 167(2) IO). Opening insolvency proceedings with respect to registered partnerships in which no partner with unlimited liability is a natural person or with respect to the assets of legal persons and the estates of deceased persons also occurs in the case of **over-indebtedness** (§ 67 IO).

A further condition for opening insolvency proceedings is the availability of **assets to cover the costs**. At least the initial costs of insolvency proceedings must be covered (exception: debt settlement proceedings in certain cases).

The opening of insolvency proceedings is published in an edict on the Internet (www.edikte.gv.at). The opening of insolvency proceedings produces legal effects at the start of the day following publication of the edict. The opening of insolvency proceedings is also recorded in public registers (Land Register (Grundbuch), Commercial Register (Firmenbuch), etc.).

If the insolvency proceedings cannot be opened immediately, the insolvency court (Insolvenzgericht) must order **interim measures** to secure the estate and in particular to prevent voidable legal acts and ensure the continuation of a business, on condition that the request to open the proceedings is not clearly unfounded (§ 73 IO). The court may prohibit the debtor from carrying out certain legal acts (e.g. sale or encumbrance of property) or make such acts subject to court approval. The appointment of a temporary administrator is also possible.

3 Which assets form part of the insolvency estate? How are the assets treated which are acquired by or which devolve on the debtor after the opening of the insolvency proceedings?

The opening of insolvency proceedings has the effect of withdrawing from the debtor the right of free disposal over all the assets subject to enforcement that belong to the debtor at this time or which the debtor acquires during the insolvency proceedings (§ 2(2) IO). They accrue to the insolvency estate (Insolvenzmasse).

The insolvency estate thus includes all movable and immovable property belonging to the debtor, such as shares in immovable property, co-ownership shares, claims, property rights, and inheritances. The insolvency estate does not include claims by the debtor for maintenance in kind, personal labour, or the non-attachable part of the payments (the minimum required for subsistence). Likewise the estate does not include unattachable movables (e.g. things for personal use) and strictly personal rights (e.g. industrial property rights).

If the debtor lives in a house belonging to the insolvency estate (or an owner-occupied flat), they and their family initially are not evicted from essential residential premises (§ 5(3) IO). However, this does not prevent realisation of the house (owner-occupied flat) in the insolvency proceedings. The insolvency court also leaves tenancy rights (or other rights of use) concerning residential premises which are indispensable for the debtor and their family at the free disposal of the debtor (§ 5(4) IO). Leaving such rights at the free disposal of the debtor gives rise to their segregation from the insolvency estate.

The creditors' committee (Gläubigerausschuss) may also decide, with the approval of the insolvency court, to segregate claims which are unlikely to adequately succeed or items of minor value from the insolvency estate (§ 119(5) IO). The reason for such segregation is that it avoids the expense of realising each item belonging to the estate which would not bring any benefit for the estate.

4 What powers do the debtor and the insolvency practitioner have, respectively?

Bankruptcy procedure

The debtor

is entitled to apply for bankruptcy and to appeal against the opening of bankruptcy proceedings;

loses power of disposal in relation to the assets belonging to the estate when bankruptcy proceedings are opened;

is entitled to attend the creditors' meeting (Gläubigerversammlung) and the creditors' committee;

is entitled to make an application for conclusion of a restructuring plan.

The trustee in bankruptcy

is responsible for the practical conduct of the insolvency proceedings;

reviews the financial position of the debtor;

continues to run the business if it is not yet closed on opening the proceedings and no disadvantage from continuation arises for the creditors;

examines the claims lodged;

examines whether a restructuring plan is in the interests of the creditors and whether it is likely to be executable;

establishes and disposes of the assets;

administers and represents the insolvency estate;

exercises the right of challenge for the insolvency estate;

distributes the proceeds from the estate.

Where bankruptcy proceedings concern natural persons who do not run a business (debt settlement proceedings), the appointment of a trustee in bankruptcy is the exception. If the insolvency court does not appoint a trustee in bankruptcy, it must itself deal with the matters entrusted to the trustee in bankruptcy under the Insolvency Code.

Restructuring procedure without debtor in possession

The debtor

applies for the opening of the reorganisation proceedings and the conclusion of a restructuring plan;

loses power of disposal in relation to the assets belonging to the estate when insolvency proceedings are opened;

is entitled to attend meetings of creditors and of the creditors' committee.

The trustee in bankruptcy

is responsible for the practical conduct of the insolvency proceedings;

reviews the financial position of the debtor;

continues to run the business if it is not yet closed on opening the proceedings and no disadvantage from continuation arises for the creditors;

examines the claims lodged;

examines whether a restructuring plan is in the interests of the creditors and whether it is likely to be executable;

administers and represents the insolvency estate;

exercises the right of challenge for the insolvency estate.

Restructuring procedure with debtor in possession

The debtor

applies for the opening of the reorganisation proceedings with debtor in possession and the conclusion of a restructuring plan and also presents the necessary documents for debtor in possession with the application;

retains a (limited) power of disposal and in principle continues to administer his or her assets himself or herself;

is under the supervision of the reorganisation administrator and the insolvency court.

The reorganisation administrator

supervises the debtor and the debtor's business management;

grants or refuses authorisation for legal acts which are not carried out in the normal course of business;

represents the debtor in all matters in which the debtor does not have power of disposal;

ascertains the financial position of the debtor;

examines whether the restructuring plan is executable and whether reasons exist for withdrawal of possession;

examines the claims lodged;

exercises the right of challenge for the insolvency estate.

The **insolvency court** has to supervise the activities of the insolvency administrator (Insolvenzverwalter). It can issue the insolvency administrator with written or oral instructions, obtain reports and explanations, inspect accounts and other documents and conduct the necessary inquiries. The court may also order the insolvency administrator to obtain instructions from the creditors' committee on individual matters. The insolvency administrator must notify the court of certain transactions prior to concluding them (§ 116 IO); other transactions require approval of the creditors' committee and the insolvency court (§ 117 IO).

Appointment and remuneration of the insolvency administrator:

The insolvency administrator is to be appointed by the insolvency court of its own motion on opening the insolvency proceedings. The administrator must be respectable, reliable and experienced in business and have knowledge of the insolvency system (§ 80(2) IO). In insolvency proceedings concerning businesses, sufficient knowledge of business law or business administration is necessary (§ 80(3) IO). Persons interested in insolvency administration can register on a list of insolvency administrators. The list is available on the Internet at https://www.justiz.gv.at/ and is used by the insolvency courts to facilitate the selection of a suitable insolvency administrator.

The insolvency administrator may not be a close relative (§ 32 IO), but also not a competitor of the debtor and must be independent of both the debtor and the creditors (§ 80b(1) IO).

Legal persons can also be appointed as insolvency administrators. They must inform the court of the name of the natural person representing them in carrying out the insolvency administration (§ 80(5) IO).

The insolvency administrator is entitled to reimbursement of their cash expenses and to remuneration for their efforts, plus value added tax (§ 82, first sentence, IO). The amount of the administrator's fee is regulated by law (§ 82 IO) and depends on the gross proceeds that the insolvency administrator has obtained from the realisation of the assets. However, this includes only the proceeds which the insolvency administrator was responsible for collecting. The minimum remuneration for the insolvency administrator is EUR 3 000. There is additional remuneration on adoption of a restructuring or payment plan (§ 82a IO) and for the realisation of a sub-estate (§ 82d IO). Separate remuneration is also paid for continuation of a business (§ 82(3) IO).

5 Under which conditions may set-offs be invoked?

The possibility of **set-off** against a claim of the debtor is in principle maintained during the insolvency proceedings.

However, it is a prerequisite that the **claims were eligible for set-off when the proceedings were opened**. Set-off is not permitted if an insolvency creditor has become a debtor of the insolvency estate only after the opening of insolvency proceedings or if the claim against the debtor has been acquired only after the opening of insolvency proceedings (§ 20(1), first sentence, IO). Furthermore, set-off is **precluded** if the third party acquired the counterclaim against the debtor in the last **six months prior to the opening of insolvency proceedings** and at the time of acquisition **knew or should have known of the insolvency** (§ 20 (1) and (2) IO). In such cases, even minor negligence is detrimental to the third party.

In the insolvency proceedings, set-off against a **conditional claim** is possible, irrespective of whether the conditional claim is held by the insolvency creditor or the debtor. If the insolvency creditor has a conditional claim, the insolvency court may make the set-off dependent on provision of security (§ 19 Abs. 2 IO).

Set-off in insolvency proceedings is also not precluded by the fact that the insolvency creditor's claim **is non-monetary** (§ 19(2) IO). This does not give rise to difficulties because such entitlements are converted into monetary claims when the insolvency proceedings are opened (§ 14(1) IO).

Insolvency creditors with claims eligible for set-off do not have to lodge them **in the insolvency proceedings**, provided that they are covered by the counterclaim (§ 19(1) IO). The Supreme Court (Oberster Gerichtshof – OGH) has ruled however that if an insolvency creditor does not avail themselves of the statutory possibility of set-off during the insolvency proceedings pursuant to § 19(1) IO, once the restructuring plan has been finally confirmed and the insolvency proceedings have been closed they will as a rule be able to set off their claim only at the rate of the restructuring plan dividend (RIS-Justiz RS0051601 [T4]).

6 What effect do insolvency proceedings have on current contracts the debtor is a party to?

Bilateral contracts

If a bilateral contract has not been performed or has not been performed in its entirety by the debtor and the other party at the time of the opening of insolvency proceedings, the insolvency administrator may either perform the contract (in its entirety) on behalf of the debtor and demand performance from the other party or else rescind the contract (§ 21(1) IO). In reorganisation proceedings with debtor in possession, the debtor is called upon to make a statement pursuant to § 21 IO. If the debtor wishes to rescind the contract, the approval of the reorganisation administrator is necessary (§ 171(1) IO). If the other party is under an obligation to perform the contract in advance, they may refuse to perform it until provision of a security, unless at the time of conclusion of the contract they were aware of the debtor's adverse financial circumstances (§ 21(3) IO).

Leases

In the event of insolvency proceedings in relation to the tenant, the insolvency administrator is entitled to terminate the lease subject to compliance with the statutory or agreed shorter period of notice (§ 23 IO).

Contracts of employment;

If the debtor is an employer and if the employment relationship has already been entered into, then it may in principle be terminated by the employee through early resignation, or by the insolvency administrator, subject to observance of the statutory term of notice, the collectively agreed term of notice or the admissibly agreed shorter term of notice, with consideration of the statutory restrictions relating to termination, within one month of publication of the decision ordering, approving or establishing the closure of the undertaking or a division of the undertaking. Special provisions apply for insolvency proceedings with debtor in possession.

Bar to termination of contracts

If termination of a contract could jeopardise the continuation of the debtor's business, the other party may terminate a contract entered into with the debtor, for a period of six months starting from the opening of the insolvency proceedings, only for good cause. Deterioration of the debtor's economic situation and the debtor's default in satisfying claims that became due prior to the opening of insolvency proceedings are not deemed to be good cause (§ 25a(1) IO). The restrictions do not apply if the termination of the contract is essential to avert severe personal or economic hardship to the contracting party, in the case of entitlement to disbursement of loans and in the case of employment contracts (§ 25a(2) IO).

Invalid agreements

According to § 25b(2) IO, a contractual provision rescinding or terminating a contract in the event of opening of insolvency proceedings is not permitted. This applies in principle for all contracts (a few exceptions concern contracts under the Banking Act or Stock Exchange Act (Börsegesetz)).

7 What effect does an insolvency proceeding have on proceedings brought by individual creditors (with the exception of pending lawsuits)?

From the opening of the insolvency proceedings, insolvency creditors can no longer pursue their claims against the debtor by judicial process, either individually or outside the insolvency (**bar to proceedings**, § 6(1) IO). Injunctions in favour of insolvency claims also cannot be issued. Only in reorganisation proceedings with debtor in possession does the debtor remain entitled to engage in litigation and other proceedings where matters of possession are concerned (§ 173 IO). If contrary to § 6(1) IO an action is brought by the debtor or against the debtor after the opening of insolvency proceedings, it must be dismissed.

Furthermore, after the opening of insolvency proceedings, no lien or right of satisfaction may be acquired to enforce payment of an insolvency claim (**bar to enforcement**, § 10(1) IO). Regarding entitlement to segregation and to separate settlement already established before the opening of insolvency proceedings, there is no general bar to enforcement; enforcement may therefore be pursued in insolvency proceedings too.

The bars to proceedings and enforcement must be complied with **of the court's own motion**, and extend to all insolvency creditors.

8 What effect does an insolvency proceeding have on the continuation of lawsuits pending at the moment of the opening of the insolvency proceeding?

Lawsuits pending in relation to the estate are **stayed** ex lege on the opening of insolvency proceedings (§ 7(1) IO). The stay of proceedings is exercised of the court's own motion.

Proceedings concerning insolvency claims may in any event not be resumed before the verification meeting (§ 7(3) IO). If the claim is **contested**, at the verification meeting by the insolvency administrator or by one of the creditors entitled to do so, the stayed proceedings can be continued **as a verification process** (§ 113 IO).

Proceedings concerning claims which are not subject to lodgement in the insolvency proceedings can be resumed **immediately**.

Enforcement proceedings commenced before the opening of insolvency proceedings **Exekutionsverfahren** are in principle not stayed. However, liens and rights of satisfaction acquired to enforce payment in the 60 days prior to the opening of insolvency proceedings lapse ex lege, unless they are in respect of claims under public law (§ 12(1) IO). In the case of lapsing, the **enforcement proceedings for realisation** are to be **stayed** at the request of the insolvency court or the insolvency administrator (§ 12(2) IO).

9 What are the main features of the participation of the creditors in the insolvency proceeding?

Creditors' meeting

The creditors' meeting is the general body of insolvency creditors and serves to enable the insolvency creditors to participate in the proceedings. The insolvency court is responsible for convening and chairing the creditors' meeting (§ 91(1) IO). The first creditors' meeting is convened on the opening of insolvency proceedings and is required by law. Further meetings are convened by the insolvency court at its discretion. A creditors' meeting is convened in particular if applied for by the insolvency administrator, the creditors' committee or at least two creditors whose claims represent about a quarter of the insolvency claims, specifying the items of the agenda.

The creditors' meeting has certain petition rights (e.g. for appointment of a creditors' committee or dismissal of the insolvency administrator). It is also responsible for voting on the adoption of a restructuring plan.
Decisions and applications by the creditors' meeting generally require an absolute majority of votes, to be calculated on the basis of the amount of the claims (§ 92(1) IO).

Creditors' committee

A creditors' committee is not necessarily always appointed in insolvency proceedings, but only where it seems advisable on account of the nature or particular scale of the business. If the sale or lease of the business or part of the business is pending (§ 117(1), number 1, IO), a creditors' committee must always be appointed. It serves to supervise and assist the insolvency administrator (§ 89(1) IO). The administrator must consult the creditors' committee in respect of important arrangements (§ 114(1) IO). For certain important transactions (e.g. sale of the business), the consent of the creditors' committee is a precondition for validity.
A creditors' committee consists of three to seven members. The appointment is made by the court of its own motion or on application. Not only creditors, but also other natural or legal persons may be appointed as members.

Creditor protection associations

In practice, the interests of the insolvency creditors are in many cases represented by **creditor protection associations (Gläubigerschutzverbände)**. These associations carry out the lodgement of claims, attend meetings and exercise the voting rights of the insolvency creditors they represent in the case of a restructuring plan. The creditor protection associations also monitor disbursements by the insolvency administrator.

10 In which manner may the insolvency practitioner use or dispose of assets of the estate?

The trustee in bankruptcy is in principle required to dispose of the items belonging to the insolvency estate out of court, in particular via **sale on the open market**. **Auction by the court** in accordance with the Enforcement Code (Exekutionsordnung) only takes place in exceptional instances, where this is decided by the insolvency court in response to an application by the trustee in bankruptcy.
With the approval of the insolvency court, the creditors' committee may decide that claims whose enforcement is unlikely to adequately succeed, and items of minor value, should be surrendered to the debtor for the debtor's free disposal.

11 Which claims are to be lodged against the debtor's insolvency estate and how are claims arising after the opening of insolvency proceedings treated?

Insolvency claims

Insolvency claims (Insolvenzforderungen) are claims of creditors who have pecuniary claims against the debtor when the insolvency proceedings are opened (§ 51 IO). However, interest on insolvency claims since the opening of insolvency proceedings, the costs of participation in the insolvency proceedings, fines for criminal offences of any kind, as well as claims related to gifts, and, in the case of insolvency proceedings over a deceased person's estate, also claims arising out of legacies, are not insolvency claims (§ 58 IO).
The principle of equal treatment applies in principle to insolvency claims. Neither public authorities nor employees are given preference in the insolvency proceedings.
However, claims of a shareholder for repayment of a shareholder loan which replaces equity are subordinate claims.
If a creditor wishes for satisfaction from the insolvency estate, they must lodge their insolvency claim in the insolvency proceedings, even if a lawsuit is pending or a judgment has already been handed down in this respect.

Claims for debts incurred by the estate

Claims for debts incurred by the insolvency estate (Massenforderungen) are claims expressly listed in the Code which arise only after the opening of insolvency proceedings. Claims for debts incurred by the estate are to be satisfied out of the estate on a preferential basis, i.e. before satisfying the insolvency creditors (§ 47(1) IO). The most important such claims are (§ 46(1) IO):
the costs of the insolvency proceedings;
the disbursements associated with preservation, administration and management of the insolvency estate;
all public charges relating to the estate, if and in so far as the circumstances triggering the charge materialise after the insolvency proceedings are opened;
claims by employees for regular remuneration for periods after the insolvency proceedings are opened;
claims for fulfilment of bilateral contracts entered into by the insolvency administrator;
claims arising out of legal acts by the insolvency administrator;
claims arising out of enrichment of the insolvency estate without cause;
claims arising out of the termination of an employment relationship, if this was entered into during the insolvency proceedings.
Claims for debts incurred by the estate need not be lodged in the insolvency proceedings. If the insolvency administrator refuses to satisfy such a claim when it has fallen due, then the creditor in question may assert the claim through the courts.

12 What are the rules governing the lodging, verification and admission of claims?

Insolvency claims must be lodged in writing with the insolvency court. They must be lodged in the national currency (euros); any currency conversion will take place on the date of the opening of insolvency proceedings. When lodging a claim, it is necessary to state its amount and the facts on which it is based, as well as the evidence which can be provided to prove the alleged claim.
The creditor must also state whether there is any reservation of title for the claim and which assets fall under such a reservation, and whether any set-off is claimed and, if so, the amounts of the mutual claims existing on the date when insolvency proceedings were opened. The creditor must provide their email address and bank account details.
Claims should be lodged using the form provided on www.justiz.gv.at. If the creditor lodges a claim without using this form, the claim must still contain the information listed in the form.
This EU Insolvency Regulation applies to claims lodged by foreign creditors. A standard form is provided in the Implementing Regulation; if the creditor does not use that form the claim lodged must still contain the information listed in the Insolvency Regulation.
Insolvency claims must be lodged within the time limit for lodging claims which is indicated in the insolvency edict. If a creditor lodges a claim late, they may have to pay the associated costs of a special verification meeting. Claims lodged later than 14 days prior to the meeting for the verification of the final accounts will not be considered (§ 107(1), last sentence, IO).
If a lodged claim is recognised by the insolvency administrator and not contested by any other insolvency creditor, it is considered to be admitted. This means in particular that the insolvency creditor is considered in the distribution.
If a lodged claim is contested by the insolvency administrator or an insolvency creditor, the claim can be verified only in civil proceedings in court. Whether the claim is considered to be admitted in the insolvency proceedings then depends on the outcome of these civil proceedings.

13 What are the rules governing the distribution of proceeds? How are claims and the rights of creditors ranked?

The distribution of proceeds is regulated in §§ 128-138 IO.
Claims for debts incurred by the insolvency estate are to be satisfied by way of priority, followed by the insolvency claims.

The **creditors whose claims are for debts incurred by the estate** are to be satisfied as soon as their claims are fixed and due, without regard to the status of the proceedings. If the available funds are insufficient to cover claims for debts incurred by the estate in full, they must be satisfied according to the following ranking (§ 47 IO):
cash expenses advanced by the insolvency administrator;
the other costs of the proceedings;
the costs advanced by a third party in so far as was necessary to cover the costs of the proceedings;
claims of employees, in so far as they are not secured under the Insolvency Remuneration Guarantee Act (Insolvenz-Entgeltsicherungsgesetz);
claims of employees arising out of termination of an employment relationship, in so far as they are not secured under the Insolvency Remuneration Guarantee Act;
other claims for debts incurred by the estate.
The amount remaining after those claims have been satisfied in full is to be distributed as a dividend to the **insolvency creditors**. Satisfaction of the insolvency creditors may not commence until after the general verification meeting. The insolvency administrator must in principle effect distribution following consultation with the creditors' committee and on the basis of the approval of the distribution plan by the insolvency court.
Secured creditors take precedence over the insolvency creditors and the creditors with claims for debts incurred by the estate in so far as their claims are covered by the property serving as security (e.g. collateral). Any surplus from the proceeds of disposal is transferred to the common insolvency estate (§ 48 (1) and (2) IO).

14 What are the conditions for, and the effects of closure of insolvency proceedings (in particular by composition)?

Restructuring plan

A restructuring plan (Sanierungsplan) is an agreement concluded under the insolvency proceedings between the debtor and the insolvency creditors on the reduction and stay of payment of the insolvency claims and is used for debt settlement. It requires the approval of the majority of creditors and confirmation by the insolvency court. If, in the insolvency proceedings, the debtor's proposed restructuring plan is approved by the majority of creditors and the restructuring plan is confirmed by the insolvency court, the debtor is released from liabilities in excess of the restructuring plan dividend.
The debtor may in principle conclude a restructuring plan in any form of insolvency proceedings, i.e. not only in reorganisation, but also in bankruptcy proceedings (bankruptcy proceedings are not primarily directed towards realisation of assets and break-up; rather, in bankruptcy proceedings too, it should first be examined whether a restructuring plan is possible).
In a restructuring plan, the debtor must make an offer to the insolvency creditors to pay at least 20% of the insolvency claims within two years. In the case of natural persons who do not run a business, the payment period may amount to up to five years. The entitlements of segregation or separate settlement creditors must not be affected by the restructuring plan. Creditors with claims for debts incurred by the insolvency estate are to be satisfied in full, and insolvency creditors must in principle receive equal treatment.
Insolvency proceedings are termed reorganisation proceedings if a restructuring plan already exists when the proceedings are opened.

Debt settlement proceedings

A restructuring plan is available not only to businesses and legal persons, but also to natural persons who do not run a business. If no restructuring plan is arrived at during the debt settlement proceedings, the debtor's assets are realised. Further debt relief options are the payment plan (Zahlungsplan) and failing that the levy procedure (Abschöpfungsverfahren). A payment plan is a special form of restructuring plan. The main difference relates to the absence of a specific minimum dividend.
If the creditors do not approve a payment plan, then the court must rule on an application by the debtor for a levy procedure with a repayment plan, or with a levy plan for release from residual debts, that will result in release from residual debts. The repayment plan is subject to stricter conditions than the levy plan: these take the form of additional barriers to discharge. The approval of the creditors is not necessary in either case. The attachable proportion of income is levied first. The debtor must assign corresponding (salary) claims to a trustee of the creditors for a period of three years where there is a repayment plan, and for a period of five years where there is a levy plan. Upon expiry of the deed of assignment, the court must close a levy procedure that is still open and, at the same time, declare that the debtor is released from any remaining unpaid debts towards the insolvency creditors (release from residual debts, Restschuldbefreiung).
Collective judicial execution (Gesamtvollstreckung) is a subcategory of debt settlement proceedings, which is initiated at the request of a creditor. It must be closed as soon as the debtor requests the approval of a restructuring or payment plan or the initiation of a levy procedure.

Termination of insolvency

If a restructuring plan (or payment plan) is confirmed by the insolvency court, the insolvency proceedings are closed when the decision confirming the plan becomes final. Automatic closure of the insolvency proceedings also follows once a levy procedure has been finally instituted.
If there is no restructuring or payment plan, the insolvency proceedings are to be closed by the insolvency court once evidence of completion of the final distribution has been provided.
The insolvency proceedings must also be closed if all the creditors - insolvency creditors and creditors with claims for debts incurred by the estate - approve, or if it should be found during the course of the insolvency proceedings that the assets are insufficient to cover the costs of the insolvency proceedings.
Decisions on the closure of the insolvency proceedings are published in the insolvency proceedings database (Insolvenzdatei).
As a result of the final closure of the insolvency proceedings, the debtor again acquires full power of disposal with respect to their assets (except where a levy procedure has been instituted); the powers of the insolvency administrator end. Furthermore, the debtor once again acquires unrestricted capacity to sue and be sued. In pending lawsuits there is a statutory change of party, from the estate to the debtor. In certain sectors, the debtor may operate a business again only subject to administrative restrictions (e.g. under the trade regulations (Gewerbeordnung)) or professional restrictions (e.g. under the Order on Lawyers (Rechtsanwaltsordnung)). Criminal penalties are provided for especially in the case of intentional prejudice to creditors.

15 What are the creditors' rights after the closure of insolvency proceedings?

In so far as insolvency proceedings do not end with discharge from debt (as a result of a restructuring plan, payment plan or release from residual debt after a levy procedure), the insolvency creditors are **free to make an additional claim** after the final closure of the insolvency proceedings, i.e. they can now once again assert a residual claim not satisfied in the insolvency proceedings, by legal action or enforcement against the former insolvency debtor.
The variants of insolvency proceedings in which there is release from residual debts, on the other hand, have the effect that the residual claim exceeding the dividend is only an imperfect obligation (Naturalobligation), i.e. a debt without liability, which may be paid but cannot be enforced.

16 Who is to bear the costs and expenses incurred in the insolvency proceedings?

The costs of the insolvency proceedings are to be borne by the insolvency estate.
If there are insufficient assets to cover the costs, the insolvency proceedings are nevertheless to be opened if the creditor making the application pays an amount to cover the costs by way of an advance (exception § 183a IO). The claim of such a creditor to repayment takes precedence over the claims of other claims for debts incurred by the estate (§ 46, number 1, IO).

17 What are the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors?

Legal acts by the debtor prior to the opening of insolvency proceedings

Certain legal acts which have been undertaken before the insolvency proceedings were opened and which are detrimental to creditors are voidable (§§ 27 et seq. IO). Both positive legal acts and omissions concerning the debtor's assets can be challenged. The prerequisite for a successful challenge is that the effect of the legal transaction to be challenged has been **detrimental** to the insolvency creditors. This is the case if the legal act caused a loss of satisfaction for the other creditors, for instance by reducing the assets or increasing the liabilities. A further condition for a successful challenge is that, as a result of the challenge, the **prospects for satisfaction** of the creditors **are improved**. In addition to these general conditions, the characteristics of one of the following situations for contesting a legal act must be met:

Voidability on account of intention to disadvantage creditors (§ 28, numbers 1-3, IO)

If the debtor has acted with the intention to disadvantage creditors and the third party was aware of this, the voidability covers a period of ten years before the opening of insolvency proceedings (§ 28, number 1, IO). If the lack of awareness of the intention to disadvantage creditors was merely negligent, the challenge is limited to a period of two years prior to the opening of insolvency proceedings.

Voidability on account of squandering of assets (§ 28, number 4, IO)

Purchase, exchange and supply contracts concluded in the last year before the opening of insolvency proceedings are voidable in so far as they caused squandering of assets detrimental to the creditors, and the other party was or should have been aware of this.

Voidability on account of disposals free of charge (§ 29 IO)

Disposals free of charge by the debtor undertaken in the two years before the opening of insolvency proceedings are voidable.

Voidability on account of preferential treatment (§ 30 IO)

This circumstance enables the voidability of certain legal acts through which one creditor is accorded preferential treatment above the others. A condition for voidability is the undertaking of the act within the last year before opening of insolvency proceedings. At the same time, it is a proviso that the insolvency or over-indebtedness has already arisen, or an application for the opening of insolvency proceedings has been brought, or the act occurred in the last 60 days before the opening of insolvency proceedings. If the creditor was not entitled to claim the satisfaction or security in accordance with the terms of the relevant legal relationship, or not in that form or not at that time (inkongruente Deckung), there are no further conditions relating to intention or knowledge. If the other party was indeed entitled to claim the satisfaction or security in that form or at that time (kongruente Deckung), the act may also be voidable under § 30 IO. In that event, voidability requires that the debtor intended the preferential treatment and that the other party was aware or should have been aware of the intention.

Voidability on account of knowledge of insolvency (§ 31 IO)

This circumstance covers certain legal acts which were undertaken in the six months prior to the opening of insolvency proceedings and after the occurrence of insolvency (over-indebtedness), in so far as the other party knew or at least should have known of the insolvency, the over-indebtedness or the request to open the proceedings. A further prerequisite is that the legal act gives the creditor security or satisfaction, or that the legal transaction is directly detrimental. Only the insolvency administrator is entitled to challenge. Before this, the administrator must consult the creditors' committee (§ 114(1) IO). The challenge is to be made by court application (Klage), objection (Einrede, § 43(1) IO), opposition (Widerspruch) in the enforcement proceedings for realisation, or lodgement in proceedings for the insolvency of the opponent to the challenge. If the claim expires in some other fashion, the court application must be made within one year of the opening of insolvency proceedings, this time limit being extended if the insolvency practitioner and the defendant so agree; the extension may be agreed only once and may not exceed three months (Section 43(2) IO).

Legal acts by the debtor after the opening of insolvency proceedings

In so far as the debtor is not entitled to remain in possession, legal acts by the debtor undertaken after the opening of insolvency proceedings, and affecting the insolvency estate, are in principle no longer valid in relation to the insolvency creditors (§ 3(1) IO). This is a matter of **unenforceability**. The debtor can enter into contractual obligations even after the opening of insolvency proceedings, but claims deriving from such obligations cannot be asserted to the detriment of the insolvency creditors before the closure of the insolvency proceedings. However, the insolvency administrator can put such transactions into effect by approving them retrospectively.

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