

# German Insolvency Code

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Bearbeitet von

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right of appeal. The former director of a limited liability company (GmbH) does not have the right of appeal. There is a right of appeal on the part of the debtor's statutory representatives even if the liquidator appointed under section 37 of the Banking Act (*Kreditwesengesetz*, KWG) lodged the application for insolvency. The **foreign insolvency practitioner** in main insolvency proceedings also has the right of appeal (Article 102 section 3 (1) sentence 3 of the Introductory Act to the Insolvency Code (*Einführungsgesetz zur Insolvenzordnung*, EGI<sub>InsO</sub>)), but not, however, a creditor who lodged the application in another EU Member State.

### 3. Cause of Complaint

A formal or substantive cause of complaint is a prerequisite for an appeal.

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### 4. Appeal Proceedings

See the commentary on section 6 in relation to the appeal proceedings.

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### 5. Consequences of a Successful Appeal against the Judgment Commencing Proceedings

If the appeal results in termination of the insolvency proceedings, in view of the right of appeal then arising for the applicant creditor, the judgment terminating proceedings becomes effective **only when it becomes final and binding** (exception: the appeal court sets aside the order commencing proceedings following a further appeal). As a consequence, the judgment terminating proceedings is published only when it becomes final.

8

In principle, the **consequence** of the termination of proceedings is that the debtor must be put in the position he/she would have been in if proceedings had never been commenced against him/her. The debtor is, in particular, retroactively deemed to have the power of disposal of assets. In order to protect legal relations, subsection 3 (3) provides an important **exception** to this: the acts of the insolvency administrator remain effective and even take precedence over disposals to different parties by the debtor. However, in order to avoid liability under section 60, during the period between publication of the judgment terminating proceedings and its becoming effective, the insolvency administrator is only permitted to carry out legal acts that are necessary and urgent.

9

After termination, the insolvency administrator must satisfy preferential liabilities – in particular his/her own remuneration – out of the administered assets; section 25 (2) applies with the necessary modifications. Provision of security for disputed claims in the same manner as in section 258 (2) may be considered.

10

Subsection (3) sentence 3 does not concern the general effects of commencement of insolvency proceedings as they are deemed not to have occurred (e.g. the prohibition of termination under section 112).

11

Subsection (3) sentence 3 does not apply if the commencement of proceedings was void from the outset. In such a case, the parties concerned only have claims based on the liability of the state for public officials; action taken by the insolvency administrator is ineffective on principle.

12

Subsection (3) sentence 3 is applicable in a similar manner if the court sets aside the ordering of preliminary insolvency administration without insolvency proceedings being commenced.

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## CHAPTER TWO INSOLVENCY ESTATE. CLASSIFICATION OF CREDITORS

### Section 35 Definition of Insolvency Estate

(1) Insolvency proceedings cover all of the assets which belong to the debtor at the time when the proceedings are commenced and which the debtor acquires during the proceedings (insolvency estate).

(2) <sup>1</sup>If the debtor pursues an activity as a self-employed person or intends to pursue such an activity in the near future, the insolvency administrator shall declare to him/her whether the assets from the self-employed activity belong to the insolvency estate and whether claims arising out of this activity can be asserted in the insolvency proceedings. <sup>2</sup>Section 295 (2) applies with the necessary modifications. <sup>3</sup>On application by the creditors' committee, or, if one has not been appointed, the creditors' meeting, the insolvency court shall order the declaration to be invalid.

(3) <sup>1</sup>The insolvency administrator's declaration shall be notified to the court. <sup>2</sup>The court shall publish the declaration and the order concerning its invalidity.

#### 1. Scope of the Insolvency Estate

- 1 Section 35 and the subsequent provisions in sections 36 and 37 define the recoverable assets to be used for the collective satisfaction of the creditors (**target estate**). Under section 35 (1), all of the assets which belong to the debtor at the time when proceedings are commenced and which the debtor acquires during the proceedings are included in the insolvency estate.
- 2 The debtor is under a **duty of cooperation** in relation to the realisation of foreign assets.<sup>1</sup> This means that the debtor must grant a power of attorney if there is evidence indicating the existence of assets situated abroad and the powers of the insolvency administrator are not automatically recognised there. If insolvency proceedings have already been commenced in respect of the assets situated abroad (main insolvency proceedings), under the conditions laid down in section 356, secondary insolvency proceedings are possible in respect of the assets situated in Germany.

#### 2. Release

##### a) Proper Release

- 3 **aa) Legal Basis.** Proper release is not expressly regulated in the Insolvency Code. However, it is recognised under customary law.<sup>2</sup> Section 35 (2) and (3) contains an express provision concerning release of a self-employed activity by the debtor.
- 4 **bb) Release Declaration.** The release is a unilateral declaration of intent without substantive content, which becomes complete upon receipt, made vis-à-vis those who formerly had the power to manage and dispose of the assets concerned. As a procedural declaration, the release declaration is made irrevocably and unconditionally, it cannot be avoided on the ground of error in accordance with section 119 of the Civil Code (*Bürgerliches Gesetzbuch*, BGB) and it cannot be made subject to a reservation. However, it may be avoided on the ground of wilful deceit or duress in accordance with section 123 BGB.

<sup>1</sup> BGH NZI 2004, 21–22 (decision of the Federal Court of Justice as published in the NZI journal).

<sup>2</sup> Federal Court of Justice judgment of 21 April 2005, case IX ZR 281/03.

The release declaration does not need to comply with any formal requirements and no declaration of acceptance or approval by the debtor or the debtor's representative body is necessary. It becomes effective upon receipt (section 130 (1) BGB).

**cc) Subject Matter of the Release.** Release of an object belonging to the insolvency estate is at the economic discretion of the insolvency administrator and will be granted if the costs of managing and realising the asset will exceed the likely realisation proceeds. The relevant date for this projection is the date of the release declaration.

**dd) Legal Consequence of the Release.** By means of the release, an asset belonging to the insolvency estate returns to the debtor's assets that are exempted from inclusion in the insolvency estate.

#### b) False Release

If an asset does not form part of the insolvency estate from the outset because, for example, it is subject to a right to segregation, the release declaration only has declaratory effect.

#### c) Modified Release

In the case of a modified release, the insolvency administrator releases the asset itself unconditionally but subject to the proviso that any proceeds from it form part of the insolvency estate.

### 3. The Assets in the Insolvency Estate in Detail

#### a) Real Property and Equivalent Rights

**Real property and equivalent rights**, such as the **heritable building right**, which are owned or held by the debtor form part of the insolvency estate. Rapid registration of the insolvency notice under section 32 prevents the possibility of acquisition in good faith by third parties.

**Commonhold (condominium)** and partial ownership by the debtor in accordance with section 1 (2) and section 3 of the Residential Property Act (*Wohnungseigentumsgesetz*, WEG) forms part of the insolvency estate. Realisation takes place through sale of the co-ownership interests (section 747 BGB). Division of the co-ownership community is excluded in the case of commonhold ownership. The commonhold court and not an ordinary civil court is the competent court for the enforcement of claims by the unit holders arising out of their co-ownership, even if the insolvency administrator releases the commonhold property before the litigation is commenced.

All liens on immovable property as well as the movable items falling with the **scope of the statutory extension of liens on immovable property** under section 1120 BGB, **in rem rights of residence** under section 1093 BGB, **permanent residential rights** under section 31 WEG and **easements** under section 1018 BGB are assets of the insolvency estate. In accordance with section 1092 (1) sentence 2 BGB, the **restricted personal easement** under section 1090 BGB only forms part of the insolvency estate if use of the easement can be ceded to another person (section 857 (3) of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO). The same applies to the **right of usufruct**. Under section 1059 sentence 1 BGB usufruct is not transferable. Exercise of the right of usufruct can be ceded to another person (section 1059 sentence 2 BGB). To this extent exercise of the right of usufruct is subject to attachment under section 857 (3) ZPO, so that the rights and revenues under the underlying entitlement flow into the insolvency estate even if cession of the exercise of the usufruct was excluded contractually with effect in rem. The insolvency administrator therefore has the power of disposal over the right of

usufruct and is entitled, in particular, to issue authorisations for cancellation of entries in the land register in order to reunite the right of use with the right of ownership.

### b) Movable Assets

- 13 **Movable assets** form part of the insolvency estate under the principles contained in section 36. It should be borne in mind in connection with real property that the debtor loses its ownership of movable assets if, under section 94 (1) BGB, they have become essential parts of the real property. The claim for unjust enrichment under section 951 and section 812 BGB against the owner of the real property falls within the insolvency estate.

### c) Expectant Right

- 14 The **expectant right** to ownership of movable and immovable assets falls within the insolvency estate.

### d) Entitlement to Fractional Shares

- 15 **Co-owned fractional shares** pursuant to section 1008 et seq. BGB and other entitlements to fractional shares form part of the insolvency estate.

### e) Intellectual Property Rights

- 16 **Intellectual property rights** such as patents, trade marks, utility models, industrial designs and brand names also form part of the insolvency estate as pure property rights. Due to the personal nature of copyright, copyrights in accordance with section 2 of the Act on Copyright and Related Rights (*Gesetz über Urheberrecht und verwandte Schutzrechte*, UrhG) can only be realised in favour of the insolvency estate within the framework of sections 113 to 118 UrhG when the author or his/her legal successor consents. Attachment of copyrights to the insolvency estate is therefore also subject to the debtor's consent. **Software** is copyright protected (section 2 (1) No. 1 and section 69a et seq. UrhG); it must be treated as a movable asset and forms part of the insolvency estate on the insolvency of the developer.
- 17 The debtor's **internet domain** forms part of the insolvency estate. The attachable property right is the totality of the contractual rights to which the domain owner is entitled under the contractual relationship with the registry. The domain is transferable in accordance with the contractual conditions and to this extent is realisable.
- 18 **Customer data** forms part of the insolvency estate. Data protection provisions must be observed when the data is realised.
- 19 **Licences** are in principle subject to attachment (section 857 and section 829 ZPO) and thus form part of the insolvency estate. In many cases, the transferability of the licence, a necessary prerequisite for it to be capable of being attached, will be subject to the approval of the licensor as provided for in the licence agreement. The licence agreement itself must be treated like a lease. If the licence was granted by a shareholder, the one-year prohibition on claiming segregation contained in section 135 (3) sentence 1 applies.

### f) Trust Agreements

- 20 Trust agreements are not regulated by law. The arrangements made are correspondingly diverse. The basic criterion for differentiation is whether full legal rights in the security collateral remain with the trustor (**improper trust or administrative trust**) or are transferred in rem to the trustee (**proper or fiduciary trust**) who administers the security collateral in accordance with the contractual trust agreement. Under section 116 sentence 1 and section 115 (1), the trust agreement is extinguished when proceedings are commenced.

In the case of the **administrative trust managed by the trustee in the interests of the trustor**, in insolvency proceedings in respect of the assets of the trustor, the claim to surrender of items received by the trustee under section 667 BGB forms part of the insolvency estate, as the trust property was handed over to the trustee merely for administration purposes and no transfer of ownership occurred. In insolvency proceedings in respect of the assets of the trustee, the trust property does not form part of the insolvency estate despite the insolvent trustee's formal status as owner; instead the trustor has a right to segregation as long as the trustee adheres to his/her fiduciary duty.

In the case of the **security trust serving the interests of a third party**, the trustor transfers ownership of the trust property subject to the contractual arrangement that the trust property must be managed in accordance with his/her instructions, so that under the law relating to liability, despite the trustee's formal status as owner, the trust property is attributed to the trustor and on the insolvency of the trustee, the trustor has a right to segregation geared towards the re-transfer of the trust property.

In the case of **trust agreements serving the trustee's own interests**, such as those relating to transfers of ownership as security or assignments for security purposes, the assets transferred by way of security form part of the insolvency estate on the insolvency of the trustor. Under section 51 No. 1, the trustee is a creditor entitled to separate satisfaction.

The **dual purpose security trust** is a hybrid form consisting of a security trust in relation to the trustor and an administrative trust in relation to the secured party. In insolvency proceedings in respect of the assets of the trustor, the trustee is entitled to claim a right of separate satisfaction (for third-party benefit) in the liable assets for the account of the secured party.

### g) Employment

aa) The attachable part of **earned income** forms part of the insolvency estate. This is governed by sections 850a to 850k ZPO. **Disguised earned income** is attachable under section 850h (2) sentence 1 ZPO.

The attachable part of social welfare benefits such as the **old age pension** or **benefits in lieu of salary**, for example, also forms part of the insolvency estate, as this would also be available to satisfy the creditors in the case of individual compulsory enforcement.

The attachable parts of **indemnity claims** under section 112 and section 113 of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG) and section 3 and section 10 of the Protection Against Unfair Dismissal Act (*Kündigungsschutzgesetz*, KSchG) are, in principle, also included in the insolvency estate.

An **invalidity pension** is not attachable at the level of the statutory entitlement. A **lump sum payment** is attachable and forms part of the insolvency estate.

bb) **Future retirement pensions** and **disability pensions** are entitlements to regular cash payments. They are attachable as earned income under section 54 (4) of the Book I of the Social Code (*Erstes Buch Sozialgesetzbuch*, SGB I), provided the legal ground for the future claim to arise, is established enabling determination of the claim.

cc) **Employee inventions** form part of the insolvency estate under section 7 (1) of the Act on Employee Inventions (*Gesetz über Arbeitnehmererfindungen*, ArbNErfG). In accordance with section 6 (2) ArbNErfG an invention is deemed to have been **claimed** by the employer by means of a written declaration by the employer to the employee, unless the employer releases the invention within four months of receipt of the employee's due notification of the invention in accordance with section 5 (2) sentences 1 and 3 ArbNErfG.

dd) **Occupational pension schemes**. Detailed distinctions must be made here as follows:

aaa) **Re-insurance cover** is taken out by the employer on the life of the controlling managing partner in order to finance the employer's contractually agreed pension commitments, as the controlling managing partner does not come under the insolvency protection of the Pensions-Sicherungs-Verein (PSV) (the statutory agency providing insolvency protection

for occupational pension schemes). On the insolvency of the employer who is subject to the pension obligation, the pension commitment itself is an insolvency claim. The policyholder and the party to whom the insured sum is payable under the insurance contract is the employer. The rights arising under the re-insurance cover are normally pledged to the beneficiary. If no pledge has been made, the rights and claims arising under the re-insurance cover form part of the insolvency estate. The pledging of the rights and claims arising out of the re-insurance cover is only effective if notice of the pledging has been made to the insurance company as third-party debtor (section 1280 BGB). The pledging establishes a right to segregation under section 47 if the circumstance for realisation of the pledge, i.e. the insured event, has already occurred. A pension commitment in favour of a director requires an assenting resolution by the shareholders' meeting. Otherwise the pension commitment is ineffective. The claims arising under re-insurance cover taken out for this purpose then form part of the insolvency estate.

- 33 **bbb)** Depending on the arrangements made in the insurance contract in respect of entitlement to benefit, rights to benefit under **direct life insurance policies** form part of the insolvency estate. The insurance contract is entered into between the insurer and the employer as policyholder in favour of the insured employee. There is a contract for the benefit of a third party in accordance with section 328 BGB. The beneficiary is the employee as the insured party. If the insured event occurs, the employee or his/her heirs can therefore claim the insurance benefit (section 330 BGB; section 166 (2) of the Insurance Contract Act (*Gesetz über den Versicherungsvertrag*, VVG). Up until this point the employee has an expectant right, described under insurance law as entitlement to benefit. The entitlement to benefit may be arranged so as to be revocable, irrevocable or restrictedly irrevocable. A further distinction must be made on the basis of whether the expectant right is forfeitable or non-forfeitable, i.e. has vested or not.
- 34 In the case of **revocable entitlement to benefit** the employer/policyholder is entitled to put another third-party in the place of the employee who is entitled to benefit. Unless the employer/policyholder has specified otherwise, the benefitted employee acquires the right to the insurance benefit only when the insured event occurs (section 166 (2) VVG). Until the occurrence of the insured event, an employee benefitted in this way merely has an unsecured expectant right which is worthless in the event of insolvency. Such an employee is not entitled to segregation of this asset from the insolvency estate under section 47. When insolvency proceedings are commenced in respect of the assets of the employer/policyholder, the right to the surrender value of the insurance policy forms part of the insolvency estate, unless the insolvency administrator demands performance of the contract. The right to payment of the surrender value requires a valid declaration of termination by the insolvency administrator.
- 35 If the entitlement to benefit is made revocable, the right to the surrender value forms part of the insolvency estate even if the **vesting requirements** in accordance with section 1b of the Act to Improve Occupational Pensions (*Gesetz zur Verbesserung der betrieblichen Altersversorgung*, BetrAVG) have been met.
- 36 If the entitlement to benefit is **revocable and the expectant right is forfeitable**, the PSV does not step in. Revocation of the entitlement to benefit represents a breach of an accessory obligation under the contract of employment. Since the claim for damages originates from the liquidation of a contractual relationship established before the commencement of insolvency proceedings, there is an insolvency claim under section 38.
- 37 If **irrevocable entitlement to benefit** is agreed in the insurance contract, the benefitted employee may demand segregation under section 47, since he/she acquired the right to the insurance benefit immediately.
- 38 If the **entitlement to benefit is restrictedly irrevocable**, the reservations and restrictions result from the insurance contract which is, as a rule, based on the wording of section 1b (1) BetrAVG, and which sets out the requirements for the vesting of the expectant right. The expectant right becomes non-forfeitable when the employee has reached the age of 25 and the pension commitment has at this point existed for at least five years.



### h) Claims for Debt Release

**Claims for debt release** under section 257 BGB form part of the insolvency estate. 39  
 Section 257 BGB gives the party entitled to reimbursement a claim for release if the party entitled to reimbursement has assumed an obligation which constitutes an expense within the meaning of section 256 BGB. The party entitled to reimbursement is the party owed the release. The party liable for reimbursement is the party liable for the release. The third party is the creditor of the obligation from which the party entitled to reimbursement (the party owed the release) is demanding release from the party liable for reimbursement (the party liable for the release). Claims for release can arise out of the obligation to pay damages under section 249 BGB and from sureties under section 775 BGB. By its nature, the claim for release is a claim to performance of an act. Upon commencement of insolvency proceedings in respect of the assets of the party entitled to reimbursement (the party owed the release), the claim for performance of an act is converted into a payment claim in the amount of the debt to be repaid. This payment claim falls into the insolvency estate. The prohibition of assignment contained in section 399 1st alternative BGB does not preclude this. The party liable for reimbursement (the party liable for the release) must therefore pay the full amount to the insolvency estate, while, as a consequence of the insolvency of the party entitled to reimbursement (the party owed the release), the creditor of the obligation can only enforce its obligation as an insolvency claim to be assessed in accordance with section 38.

### i) Unilateral Rights to Alter a Legal Relationship

**Unilateral rights to alter a legal relationship** form part of the insolvency estate if they 40  
 relate to rights belonging to the insolvency estate. They are not open to separate realisation. The right to alter a legal relationship can be exploited for commercial gain through the insolvency administrator granting a waiver refraining from exercising the right vis-à-vis the recipient of the waiver declaration in return for payment.

### j) Claims under Succession Law

If the debtor becomes an **heir** before or during the insolvency proceedings, the inherited 41  
 property forms part of the insolvency estate on an interim basis until acceptance or disclaimer of the inheritance (section 1922 (1) BGB; section 35 (1) of the Insolvency Code (*Insolvenzordnung*, InsO). The debtor has a strictly personal, non-transferable right to decide on acceptance or disclaimer of the inheritance (section 83 (1)). If a valid disclaimer is given, it is deemed that the inheritance never devolved on the debtor from the outset (section 1953 (1) BGB). Because of the familial bond between the testator and the debtor, disclaimer of the inheritance is a strictly personal right that is not open to avoidance in insolvency, even if the debtor disclaiming the inheritance acted with the heir replacing him/her with intent to prejudice the creditors, as otherwise the personal right of decision under section 83 (1) would be subject to application of the right of avoidance. Still less open to avoidance is a renunciation by the debtor of a future inheritance, since in relation to his/her status as an heir, he/she does not relinquish even a provisional legal position, but only the prospect of a future right to succeed.

If an inheritance that devolves after the commencement of insolvency proceedings is 42  
 accepted by the debtor, the full amount of the inheritance falls into the insolvency estate as newly acquired assets.

What has been said in relation to inheritance applies correspondingly in respect of **claims** 43  
**to a compulsory portion** under section 2303 BGB and a **legacy** left to the debtor.



### k) Claims in Tort

- 44 **Claims in Tort.** Damage to assets forming part of the insolvency estate results in the compensation claim falling within the insolvency estate on the basis of subrogation. Claims for non-pecuniary damage are attachable without restriction and the full amount therefore falls into the insolvency estate (section 36 (1) sentence 1).

### l) Partnership and Shareholder Interests

- 45 The debtor's **partnership and shareholder interests** form part of the insolvency estate as proprietary interests along with the preceding rights to information and accounting. The insolvency administrator and not the debtor is entitled to the right to vote stemming from the membership right and to the power of approval in relation to measures concerning the core areas of membership; this is because it is the partners/shareholders and therefore also the insolvency administrator who are entitled to the right to vote precisely in order that consequences that are detrimental for the company can be avoided through participation in decision making. A provision of the articles of association providing for the forfeiture of the share in the business in the event of the insolvency of the holder of the interest without full compensation is void. A partner's rights to a distribution quota on the termination of the partnership also form part of the insolvency estate.

### m) Corporate Name

- 46 With attachment to the insolvency estate of the business as such, the **corporate name** (section 17 (1) of the Commercial Code (*Handelsgesetzbuch*, HGB)) also becomes part of the insolvency estate, although it is not open to compulsory enforcement. The insolvency administrator may continue the business under the existing corporate name even without the debtor's consent and may realise the corporate name.

### n) Claims against the Shareholders

- 47 **Claims for contribution of capital and capital maintenance claims** fall within the insolvency estate by reason of their function to establish or maintain the company's basis for liability. This is not precluded by the fact that the articles of association will normally stipulate that the **capital contribution claim** is non-transferable and not subject to attachment if the company does not receive full consideration in the individual case.
- 48 **Liability claims** against a limited partner form part of the insolvency estate in accordance with section 171 (2) HGB. If a limited partner has already retired before commencement of insolvency proceedings in respect of the assets of the company, the limited partner is liable only in respect of the liabilities created before its departure from the company. If claims exist against the retired limited partner, the insolvency administrator asserts these in his/her own name and must create a **separate fund** out of the payments received from the retired limited partner which can only be used to satisfy the legacy creditors.

### o) Tax Refund Claims

- 49 **Tax refund claims** existing at the end of the assessment period form part of the insolvency estate even if the tax payments were made before commencement of insolvency proceedings, as the circumstances giving rise to the refund claim came into existence before commencement of insolvency proceedings. The time of assessment is irrelevant, as the tax assessment only has declaratory value in relation to the tax liability.
- 50 In the case of **real property tax refund claims**, the refund claim in respect of overpaid tax arises at the start of the calendar year, as real property tax is assessed at the start of the calendar year.