Unless indicated otherwise the following answers apply to stock corporations (Aktiengesellschaften, AG) as well as limited liability companies (Gesellschaften mit beschränkter Haftung, GmbH).

List of Statutes and Acts with Abbreviations
- German Insolvency Act, InsO
- German Act on Limited Liability Companies, GmbHG
- German Stock Corporation Act, AktG
- German Banking Act, KWG
- German Debenture Bond Act, SchVG
- Act for the further Facilitation of the Reorganisation of Companies, ESUG
- Law on the Reorganisation and Winding-up of Banks, Restrukturierungsgesetz 2010
- German Insurance Supervision Act, VAG

Selected provisions of the InsO may be found in the annex to the responses.

I. Introductory questions on the insolvency procedures available in the relevant jurisdiction.

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

German insolvency law provides for liquidation as well as reorganization within a single framework, the Insolvenzordnung (InsO).
It can be distinguished between a standard procedure and debtor in possession (DIP) procedures (Eigenverwaltung = self administration). The option of self-administration (Sec. 270 et seq InsO) is meant to provide an incentive for the debtor to file its petition early in order to maximize the chances of reorganization. When the court has granted a motion to initiate the insolvency proceeding as a DIP-proceeding the debtor retains the right to administrate the estate even after the commencement of the proceedings. The debtor is merely supervised by a monitor. Given that the debtor has extensive powers under this procedure, self-administration there are considerable concerns that the debtor may act to the detriment of the creditors. These concerns, however, are unjustified if the director of the company is a chief restructuring officer, who was appointed shortly before the filing of the petition. It is a common practice in complex company insolvencies to install a CRO with a view to enjoy the benefits of a DIP-proceeding.

DIP as well as standard insolvency procedures allow for the implementation of an insolvency plan. The insolvency plan is in practice a restructuring plan which aims at the company’s reorganization (Sec. 1 InsO); theoretically, however, it may also be used for liquidating the company. The plan may provide for a cram down of secured and unsecured claims and may also affect the position of the shareholders as well as the structure and legal form of the company (see question no. 35).

In a recent amendment (2012), the Act for the further Facilitation of the Reorganization of Companies (ESUG) implemented a special “protection shield procedure” (Sec. 270b InsO). This special procedure provides for a (maximum) three-month-period before insolvency proceedings are formally opened. In this period, the debtor remains in possession of the estate and has to come up with a draft reorganization plan. In this period, creditors are barred to foreclose their claims, but a complete automatic stay is not imposed. The debtor can incur new debts which will enjoy priority over insolvency claims in the insolvency
proceedings. Only debtors that are not illiquid, as defined in Sec. 17 InsO, (at the moment when the petition is filed) but are either imminent illiquid, as defined in Sec. 18 InsO, or overindebted, as defined in Sec. 19 InsO, are eligible for such a procedure. Furthermore, the success of the reorganization must not be completely unlikely. Upon application, the debtor must provide an expert opinion to the effect that these conditions are met.

The plan may provide for a cram down of secured and unsecured claims and may also affect the position of the shareholders as well as the structure and legal form of the company (see question no. 35).

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

The InsO is applicable to all kinds of debtors (natural persons and legal persons) and irrespective of the business the debtor is involved in. However, outside of the InsO there are a number of special provisions, which apply to distressed or insolvent insurance companies and credit institutions (e.g., Sec. 45 et seq KWG; Restrukturierungsgesetz 2010; VAG). These special rules are mainly of European origin and are, thus, common to all member states of the EU.

3. Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?

There are no specific provisions for out-of-court restructurings. However, with respect to bonds issued under the German Debenture Act from 2009 a bondholder may subject to a cram down agreed upon by the majority of all bondholders (§ 5 SchVG).

With respect to the future development one should have in mind that the EU
has issued a recommendation (C(2014) 1500 final) called “a new approach to business failure and insolvency”. Recommendation 6 reads as follows:

“Debtors should have access to a framework which allows them to restructure their business with the objective of preventing insolvency. The framework should contain the following elements:

(a) the debtor should be able to restructure at an early stage, as soon as it is apparent that there is a likelihood of insolvency;

(b) the debtor should keep control over the day-to-day operation of its business;

(c) the debtor should be able to request a temporary stay of individual enforcement actions;

(d) a restructuring plan adopted by the majority prescribed by national law should be binding on all creditors provided that the plan is confirmed by a court;

(e) new financing which is necessary for the implementation of a restructuring plan should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.”

If this recommendation eventually finds its way in a directive (which is not unlikely) the German legislator will have to provide for a out-of-court restructuring mechanism.

4. What are the commencement criteria for insolvency procedures?

Insolvency proceedings are not initiated ex officio but only upon a petition by a creditor or by the debtor (Sec. 13 InsO). A reason for the application has to be given (Sec. 16 InsO). The InsO provides for three different reasons: Illiquidity, imminent illiquidity and overindebtedness (Sec. 17 et seq InsO).

Illiquidity is the “general” insolvency reason as it is applicable to all kinds of debtors and to all kinds of petitions. It requires that the debtor is not able to pay its current and due obligations.

The option to file for insolvency if the debtor is imminent illiquid (Sec. 18 InsO)
allows the distressed company to initiate insolvency proceedings at a relatively early stage in order to restructure itself within insolvency proceedings. Only the debtor has the right to file if it is imminent illiquid.

Overindebtedness is an opening reason only with respect to legal persons and other entities with limited liability.

A court will not open insolvency proceedings unless the costs of the proceedings are covered (Sec. 26 InsO).

5. Who can propose a restructuring plan? (e.g., corporate bodies, insolvency representatives, creditors)

A restructuring plan may be proposed by the debtor or the insolvency administrator (Sec. 218 InsO). However, under Sec. 157 InsO the creditors’ assembly can ask the administrator to draft an insolvency plan. Thereby, the creditor’s assembly may also determine the plan’s objective.

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

With respect to a partnership outside insolvency the German Federal Supreme Court of Justice (BGH) has decided that a shareholder may be required either to leave the company or to contribute to a reorganization by providing fresh money for the partnership (BGH, judgement of 19th October 2009 - II ZR 240/08 – NJW 2010, 65). This approach, however, has so far not been applied to corporations.

With respect to corporations German law does not provide for any fiduciary
duties of the shareholders in case of distress or insolvency of the company. In particular, there is no duty to accept a restructuring plan for the shareholders outside insolvency. If company law requires consent of the shareholders with respect to a given restructuring measure – e. g., capital measures or other fundamental measures that affect shareholders’ rights – the board cannot act unless the shareholders have consented with the required majority.

II. Shareholders’ Rights in Companies Subject to Insolvency Proceedings

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

The court will inform only the company but not its shareholders of the filing of a petition or of the opening of proceedings. However, the opening of proceedings will be publicized over the internet under <www.insolvenzbekanntmachungen.de>. Moreover, the board will usually inform the shareholders of the fact that proceedings have been initiated. If it fails to do so the members of the board are liable under Sec. 93 AktG or Sec. 43 GmbHG for any damages.

8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?

Shareholders as such are not considered as claimants in the insolvency proceeding.

However, if shareholders have given loans to their company or any other,
economically comparable performance – the claims resulting therefrom are subordinated in an insolvency proceeding (Sec. 39 para 1 no. 5 InsO). As such, they participate in the proceeding only when and if the general unsecured creditors are likely to receive a 100 % dividend.

9. **Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?**

Generally speaking, shareholders can continue to trade and transfer shares in the same way and under the same conditions that apply before the initiation of the insolvency process.

However, with respect to stocks traded on the stock exchange the stock exchange supervision authority has the option to suspend the trading of stocks of insolvent companies. In such instances the stocks of the company may only be traded off the exchange.

10. **Do shareholders have the right to request that a shareholders’ meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

**Stock Corporations:**

The AG has a two-tier board system consisting of a board of directors and a non-executive supervisory board. The management and representation of the corporation lie exclusively with the board of directors. Its members are appointed, supervised and removed by the supervisory board, which is elected by the shareholders’ meeting.

The shareholders’ assembly as a corporate body only has a relatively small number of statutory responsibilities. These competences can be differentiated into regularly recurring tasks (e. g., resolving on the appropriation of
distributable profits, Sec. 172 et seq AktG), structural measures like the amendment of the company’s articles (Sec. 119 para 1 no. 5 AktG) and measures of particular importance like the conclusion of intercompany agreements (Sec. 293 AktG). Beyond the statutory functions the shareholders’ assembly has no competences. The articles cannot deviate from this list of tasks due to the principle of formal strictness of the articles (Sec. 23 para 5 AktG). Neither a single shareholder nor the shareholders’ meeting can give directions concerning management decisions to the board of directors (Sec. 119 para 2, 76 para 1 AktG).

However, in addition to the statutory functions some unwritten shareholders’ assembly’s competences are also recognized by the German Federal Supreme of Justice (BGHZ 83, 122 = NJW 1982, 1703; BGHZ 159, 30 = NJW 2004, 1860; BGH ZIP 2004, 1001): Facing extraordinary important decisions (e. g., the outsourcing of an important department that accounts for 80 % of the assets), the board has the duty to call a shareholders’ meeting and ask for its approval.

Outside insolvency proceedings, a shareholders’ assembly shall be called by the board of directors in all cases provided for in the AktG or in the articles or whenever required by the interests of the company (Sec. 121 para 1 AktG). Shareholders whose holding in aggregate equals or exceeds one-twentieth of the share capital can demand a shareholders’ meeting (Sec. 122 para 1 sentence 1 AktG). However, if the shareholder’s request is not related to one of the competences of the shareholders’ assembly, the board does not need to regard the demand.

In the course of a standard insolvency proceeding:

The shareholders’ assembly does not cease to exist in the course of insolvency proceedings, but because of the fact that in standard insolvency proceedings the debtor’s right to administer and dispose of the insolvency estate passes to
the insolvency administrator (Sec. 80 par. 1 InsO), the shareholders’ assembly may only deal with issues that do not affect the insolvency estate (so-called "Schuldnerbereich", i.e., the field of duties/functions/responsibilities left to the company and its corporate bodies because of the only company-internal effects of the matters concerned). In insolvency shareholders have the right to demand a shareholders’ assembly as described above only with respect to matters within this internal sphere. With respect to subjects that do affect the insolvency estate (so-called "Verdrängungsbereich", external sphere) the insolvency administrator is solely responsible and cannot be forced to call a shareholders’ assembly, neither under insolvency law nor in under Sec. 122 para 1 sentence 1 AktG.

Debtor in possession proceedings (DIP-proceedings):

According to sec. 276a InsO the supervisory board, the shareholders’ assembly and comparable bodies shall have no influence on the debtor’s management in DIP-proceedings, at least with respect to issues within the external sphere. In particular, the exclusion and appointment of members of the board of directors shall be effective only if the insolvency monitor gives his consent. Consent must be given if the measure does not place the creditors at a disadvantage.

In view of the fact that Sec. 276a InsO is relatively new law (entry into force March 2012), things are not yet settled. It is doubtful whether the influence of the above-mentioned company bodies is also excluded with respect to issues within the internal sphere. In any event, the limitations of the competences of the shareholders’ assembly under company law apply.

Limited Liability Companies:

The structure of the German Limited Liability Company is much more flexible compared to the structure of the German Stock Corporation. The principle of
formal strictness of the articles does not apply to the Limited Liability Company. The shareholders of a Limited Liability Company have a larger scope of competences as opposed to the shareholders of a Stock Corporation. The rights of the shareholders in matters of the company as well as their exercise, in particular with respect to the conduct of the business, in principle follow from the articles (Sec. 45 para 1 GmbHG). Only as far as there are no special provisions in the articles, the provisions in Sec. 46 to 51 GmbHG define the shareholders’ functions (Sec. 45 para 2 GmbHG).

Outside insolvency proceedings, the shareholders’ assembly is called by the managing directors (Sec. 49 para 1 GmbHG). Apart from the cases expressly provided for by law or by the articles, it shall be called if this appears to be required by the interest of the company (Sec. 49 para 1 GmbHG). Shareholders whose aggregate shares amount to at least one tenth of the share capital are entitled to request the calling of the meeting by stating the purpose and the reasons (Sec. 50 para 1 GmbHG).

The opening of insolvency proceedings has the same effects on the competences of the shareholders’ assembly as it was described above for the AG.

11. Do shareholders have the right of requesting information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company, if they remain in charge of the company, or vis-à-vis the insolvency representative?

**Stock Corporations:**

Outside insolvency, the individual shareholder may only request information in a shareholders’ meeting (Sec. 131 para 1 sentence 1 AktG). In accordance with Sec. 131 para 1 AktG each shareholder will, upon request, be informed by the
board of directors about the company's affairs, including the company's legal and business relationships with associated companies, the situation of the group and the companies included in the consolidated financial statements, to the extent that such information is necessary to permit a proper evaluation of the relevant item on the agenda and provided no right of non-disclosure applies (Sec. 131 para 3 AktG).

If there is a shareholders' meeting while the company is subject of insolvency proceedings, a shareholder right to request information is not affected. One has to distinguish with respect to the question who has the duty to provide the information. In general, the person or body, which has called the meeting, has to provide the information.

➔ If the board of management has called the shareholders' meeting (Sec. 121 para 2 sentence 1 AktG), because the meeting deals with issues regarding the internal sphere (see question 10), the shareholders have to pose their questions to the board of directors.

➔ If the shareholders' meeting is called by the insolvency administrator, the shareholders have to request the information from the insolvency administrator.

It may be argued that the situation is different in DIP-proceedings (Sec. 270 para 1 sentence 1 InsO) because of Sec. 276a InsO. It is a matter of debate whether the exclusion of influence of corporate bodies on the company's affairs under Sec. 276a InsO also means that the shareholders have no longer the right to request information from the board of directors.

Please also note the response to question no. 10.

**Limited Liability Companies:**

Compared to the German Stock Corporation, shareholders of a German Limited
Liability Company have much broader information rights. Upon request of each individual shareholder the managing directors shall inform the shareholder without undue delay about the affairs of the company and permit him to inspect the books and records (Sec. 51a GmbHG). The managing directors may refuse to give the information and to inspect the books and records, only if there is reason to fear that the shareholder will use the information for purposes extraneous to the company and will thereby cause harm, which is not immaterial, to the company or to an affiliated enterprise. These provisions are not subject to the articles (see Sec. 51a GmbHG).

In the course of standard insolvency proceedings, the shareholders have information rights against the directors only with respect to issues concerning the internal sphere. With respect to information concerning the external sphere it is not settled whether Sec. 51a GmbHG applies to the administrator. The dominant view, however, is that the administrator has a duty to inform the shareholders about issues concerning the external sphere.

For the situation in DIP-proceedings see above.

12. Can shareholders make proposals for nomination of directors, if the directors continue managing the company?

Stock Corporations:

Outside insolvency proceedings shareholders have no right to make proposals for nomination of directors. The directors are chosen and elected by the supervisory board. The shareholders, however, elect the members of the supervisory board at the shareholders’ meeting. Subject to Sec. 127, 126 AktG shareholders can make proposals with respect to the election of members of the supervisory board.

In DIP-proceedings, Sec. 276a InsO does not preclude the shareholders’ right to
elect the members of the supervisory board. However, the consent of the insolvency monitor is required if the supervisory board wishes to fire or appoint managing directors or (Sec. 276a sentence 2 InsO).

**Limited Liability Companies**

In the Limited Liability Company the shareholders appoint the managing directors. In standard insolvency proceedings this right of the shareholders is not restricted. The directors of course have no longer any influence on the insolvency estate, as it is administered and disposed of solely by the insolvency administrator.

Within DIP-proceedings Sec. 276a InsO requires the monitor’s consent for the withdrawal and appointment of new managing directors.

Please also note the responses to questions no. 10 and 11.

13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Additional governance rights exist in the form of rights of single shareholders to appoint members to the supervisory board. The shareholder who enjoys such rights in principle retains her position in insolvency proceedings.

The same is true in principle with respect to special voting rights. With respect to the adoption of an insolvency plan, however, voting rights are determined solely by the shareholders’ participating interest, Sec 238a InsO. Hence, special voting rights as well as voting restrictions do not apply to the adoption of an insolvency plan.
14. Can shareholders challenge the decisions of the shareholder’s meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Stock Corporations:

The shareholders’ assembly as a corporate body does continue to exist during insolvency proceedings. Under specific formal and substantive requirements a resolution of the shareholders’ meeting may be set aside. These conditions also apply to resolutions made while the company is undergoing insolvency proceedings.

First of all, the contesting action is admissible only if the personal and formal conditions laid down in Sec. 245 et seq. AktG are met. In accordance with Sec. 243 para 1 AktG, a resolution of the shareholders’ meeting may be set aside upon an action based on a violation of the law or of the articles. A contesting action may also be based on the ground that a shareholder has attempted by exercising voting rights to attain special benefits for himself or another person to the detriment of the company or other shareholders and that the resolution is apt to serve such purpose unless the resolution does grant adequate compensation to other shareholders for their losses (Sec. 243 para 2 AktG).

On the ground of incorrect, incomplete or refused information a contesting action may only be based if a shareholder of rational and sound reasoning would have regarded the provision of the information as essential for its ability to exercise its participation and membership rights duly. If the information provided in the shareholders’ meeting was incorrect, incomplete or insufficient information with respect to the determination, amount or appropriateness of
compensation payments, additional payments or other payments a contesting action will not be successful if the law provides for a corporate appraisal procedure for complaints concerning such assessment matters (Sec. 243 para. 4 German Stock Corporation Act).

Within insolvency proceedings as well as outside insolvency shareholders cannot take action directly against acts of the directors. The directors are supervised exclusively by the members of the supervisory board (see question no. 10)

Shareholders have no right to take action against the acts of an insolvency administrator. The insolvency administrator acts under the surveillance only of the insolvency court and the creditors’ assembly.

**Limited Liability Companies:**

The GmbHG has no provisions on challenging decisions of the shareholders’ meeting. However, according to the dominant view, the respective provisions of the AktG (with the exception of Sec. 246 para 1 AktG, contestation period) are applicable.

The directors in a limited liability company are appointed and supervised by the shareholders (Sec. 46 no. 5, 6 GmbHG). The shareholders can limit the director’s authority in the articles or by resolutions. They can, for example, restrict the right of the directors to represent the company with respect to certain kinds of transactions (see Sec. 37 para 1, 2 sentence 2 GmbHG). However, such a limitation is without legal effect towards third persons (Sec. 37 para 2 sentence 1 GmbHG). If the director does not comply with such binding-limitations, he can be sued for damages. It is also possible to obtain an interim injunction.

In standard insolvency proceedings the shareholders keep their full range of competences only with respect to matters that do not affect the insolvency estate (internal sphere). As in the Stock Corporation, the shareholders in a
limited liability company have no right to take action against the acts of an insolvency administrator.

Within DIP-proceedings, Sec. 276a InsO precludes any influence of the shareholders on the directors (except concerning issues within the internal sphere).

15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

**Stock Corporations:**
No. Shareholders do not have a right to call a special investigation of the affairs of the company neither within nor outside insolvency proceedings. As already mentioned German law does not grant shareholders permanent access to all kinds of information from the company, nor do they have a right to call a shareholders’ meeting in general.

**Limited Liability Companies:**
Shareholders do not have the right to monitor and review the insolvency administrator with respect to issues that affect the insolvency estate.

Within DIP-Proceedings any influence on the conduct of the directors is precluded by Sec. 276a sentence 1 InsO.

16. Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

There is no provision for the creation of a shareholders’ committee.
17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

The commencement of an insolvency process does not have any impacts on the application of articles/bylaws restricting voluntary transfers of shares. Shareholders can only transfer shares in accordance with the articles or bylaws (Sec. 15 et seq GmbHG; Sec. 67 et seq AktG).

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

According to Sec. 225a para 3 InsO outstanding shares of the company undergoing insolvency proceedings may be assigned to third parties in the context of a restructuring plan. There is no case law on the question whether provisions restricting the transfer of shares (Sec. 15 para 5 GmbHG, Sec. 68 para 2 AktG) apply to such transfers. However, the majority of authors are of the view that such provisions do not apply to involuntary transfers.

In addition to the option of transferring shares there is also the possibility to implement a debt-to-equity-swap, which may have the effect that shareholders lose their rights in the company (Sec. 225a para 2 InsO).

Technically, the adoption of the plan requires the consent of all groups, among them the shareholders. However, under the conditions of Sec 245 Insolvency Act consent of a group shall be deemed. These conditions are:

1. The members of the group are likely not to be placed at a
disadvantage by the insolvency plan compared with their situation without such plan,

2. the members of the group participate to a reasonable extent in the economic value devolving on the parties under the plan, and

3. the majority of the voting groups have backed the plan with the necessary majorities.

With respect to shareholders these conditions are usually met, as their shares are worthless at least if the company is insolvent according to a balance-sheet test.

A compensation is only required (for purposes of assumed consent), if under the plan the shareholders shall receive less than they would receive in a liquidation procedure. However, as the shareholders would usually receive nothing in liquidation, the shareholders hardly ever are entitled to compensation.

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e. g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

Outstanding shares of the company can be cancelled without the consent of the affected shareholders, as a restructuring plan may provide for all measures that are admissible under corporate law (Sec. 225a InsO). According to the dominant view, the conditions of Sec. 237 AktG, which deals with the cancellation of shares outside insolvency, are not applicable with respect such measures in the context of a restructuring plan. However, the possibility to cancel shares is in practice not used in German restructuring procedures, as the
20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares? (1) Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?)

According to Sec. 225a para 1 InsO the plan may provide for all kinds of measures that are admissible under company law. The theoretically necessary consent of the shareholders as a group for the adoption of a plan which affects their rights, is in practice usually overridden according to Sec. 245 InsO, see question no. 18.

This approach is also applicable with respect to the issues of new shares. In practice, shareholders can usually prevent neither the reduction of capital nor the new issue of shares.

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company’s assets have been transferred) even if the company was insolvent according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In liquidation proceedings the shareholders lose their participation in the
company, they (in theory) receive a payment after all insolvency claims (including junior claims) have been satisfied.

If the company is restructured by way of an insolvency plan, the plan can leave the position of the shareholders unaffected. However, the adoption of the plan requires consent of all creditors, subject to cram-down-possibilities of Sec. 245 InsO. The creditors will usually not consent to a plan that leaves the rights of the shareholders unaffected if the company is insolvent according to a balance sheet test. In such a situation it is not possible to deem their consent as given to a plan that does not affect the position of the shareholders.

22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The ranking of classes of shares and the preferential rights of classes of shares are not affected by the fact that the company is undergoing an insolvency process.

However, shareholders’ rights may be affected by an insolvency plan, as these rights may be included in the plan (Sec. 217 para 1 sentence 2 InsO). Shareholders whose rights are included in the plan (e.g., if the plan provides for a decrease or an increase in capital) have a right to vote upon the plan (Sec. 222 para 1 sentence 2 no. 4, 238a InsO). The voting right shall be determined solely by the shareholders’ participating interest (Sec. 238a para 1 sentence 1 InsO). Of limitations on voting rights, special or multiple voting rights shall be taken no account (Sec. 238a para 1 sentence 2 InsO).

23. Can shareholders, in the course of an insolvency procedure, supply goods,
services or financial resources to the company? If yes, under what conditions (e. g., judicial authorization)? What would their ranking position be towards other creditors?)

In principle, nothing in the law precludes shareholders from supplying goods, services or financial resources to their company in the course of an insolvency procedure. Their position as shareholders does not affect the treatment of their claim arising from a contract concluded with the administrator. Such claims enjoy preference over insolvency claims (Sec. 55 InsO).

In DIP-proceedings, the conclusion of contracts between the debtor and its shareholders may be subject to the consent of the insolvency monitor under Sec. 275 InsO.

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Shareholders in their capacity as counterparties are in principal treated like all other contracting partners. Subject to a termination of the contract either automatically or due to a termination by the administrator under Sec. 103 et seq InsO, they must comply with their contractual obligations, otherwise they are liable for damages to the insolvent company.

However, Sec. 135 para 3 InsO states that if a company has the right to use an asset belonging to a shareholder, for example under a lease contract, the right to reclaim the asset may not be exercised for the duration of the insolvency proceedings, at most, however, for a period of one year from the date on which the insolvency proceedings are opened if the object is of considerable significance for the continued existence of the debtor’s enterprise. The shareholder is entitled to compensation for the period for which the company
25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors’ meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

As company loan creditors, shareholders are in principle insolvency creditors, however their claims are subordinated and rank behind all other insolvency claims (Sec. 39 para 1 no. 5 InsO). As insolvency creditors they can participate in the creditor’s meeting (Sec. 74 para 1 sentence 2 InsO) but have no voting rights because of the junior status of their claims (Sec. 77 para 1 sentence 1 InsO).

This approach also applies with respect to voting rights regarding the adoption of a plan. In most situations the shareholders will have no voting rights in their capacity as junior creditors. Only if the insolvency court has specifically requested junior creditors to file their claims (which is exceptional), the shareholder/creditor not only has a right to participate in the creditors’ meeting but also a voting right upon the insolvency plan (Sec. 174 para 3 sentence 1, 237 para 1 sentence 1, 77 para 1 sentence 1 InsO). However, the consent of the junior creditors that are also shareholders can be deemed to be given under the conditions provided for in Sec. 246 InsO.
26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No. Based on their status as shareholders they have no right to participate in the creditors’ meeting. However, the directors of the company have a right to participate in creditors’ meetings.

27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

No.

III. The Role of the Shareholders’ Meeting

28. Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

All corporate bodies (board of directors, the supervisory board and the shareholders’ meeting) continue to exist in insolvency proceedings. Regardless of the fact that the opening of an insolvency proceeding is a ground for the dissolution of the company (Sec. 262 para 1 no. 3 AktG; Sec. 60 para 1 no. 4 GmbHG), the company as a legal entity and all its corporate bodies continue to exist until the company is wound up.

29. Does the shareholders’ meeting preserve all of its competences, generally?
(If there are separate reorganization and liquidation procedures, does this affect the response?)

Please see answers to questions no. 10, 11 and 12.

30. Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?

**Stock Corporations:**

No. Even outside insolvency, approving the company accounts is not within the competences of the shareholders’ meeting unless the board of directors and the supervisory board have resolved that the accounts are to be approved by the shareholders’ meeting or the supervisory board has not approved them or the supervisory board of a parent enterprise does not approve the consolidated accounts.

In insolvency proceedings, however, the administrator has to approve the accounts.

**Limited Liability Companies:**

In accordance with Sec. 46 no. 1 GmbHG, the shareholders have to approve the company’s accounts. If the company is undergoing insolvency proceedings, however, the administrator has to approve the accounts according to Sec. 155 para 1 InsO.

31. Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the
In DIP-proceedings, the exclusion and appointment of directors shall be effective only if the insolvency monitor gives his consent, which must be given if the measure does not place the creditors at a disadvantage (see also question no. 12).

The shareholders’ meeting has no right to request the removal of the administrator. Only the creditors’ meeting may in its first meeting elect a new administrator. The insolvency court may remove the administrator sua sponte or upon a request by the administrator herself, the creditor’s committee or the creditor’s meeting.

**32. Is a shareholders’ meeting authorization required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

A shareholders’ meeting authorization is not required to start an insolvency procedure. According to the Sec. 15 InsO all members of the board can file a petition to initiate an insolvency process. Permission by the shareholders is not required by insolvency law.

If the company is either in a state of insolvency or insolvent according to a balance sheet test, the directors are under a duty to file the insolvency petition within three weeks (Sec. 15a InsO). A violation of this obligation is a criminal offense and is a ground for liability vis-à-vis the creditors.

If a director in such a situation files without to ask the shareholders for permission the petition is not only valid but the director is also not liable towards the shareholders.

This is different if the company is only under the threat of insolvency. In such a situation the directors may file a petition but there is no legal duty to do so. As
filing is voluntary, the currently prevailing view is that a director has to get the shareholders’ approval before he files, at least with respect to limited liability companies. With respect to stock corporations it is unclear whether approval of the shareholders’ meeting is required or whether approval by the supervisory board suffices.

If the director in this situation files without the consent, the petition is – according to the dominant view – nevertheless valid, however, the director may be liable for damages vis-à-vis the shareholders.

### 33. Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders challenge an insolvency or reorganization plan?

The shareholder’s meeting as a corporate body has no right to vote on the plan. However, if the plan affects the rights of the shareholders their consent as a group is required for the adoption of the plan. Their consent maybe deemed to be given under the conditions of Sec. 245 InsO, see question no. 18.

Shareholders (like all parties affected by a plan) have two remedies against a plan that was adopted by all groups. They can try to keep the court from confirming the plan under Sec. 251 InsO. To be successful, the shareholder has to prove that she would receive less under the plan as opposed to a liquidation procedure. The court will nevertheless set aside such a motion by a shareholder if the plan provides for funds from which the shareholder maybe compensated.

The shareholder may also appeal the confirmation of the plan by the court under Sec. 253 InsO. This motion will only succeed if the shareholder can prove that the plan substantially disadvantages her compared to a liquidation scenario. Such a request will be immediately dismissed if the appeal would unduly delay the entry into force of the plan (Sec. 253 para 4 InsO).
34. Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? (2) If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

Outside insolvency proceedings the issue of new shares requires a shareholders’ meeting resolution with a majority of not less than three fourths of the share capital present unless the articles provide for a different majority (Sec. 182 para 1 sentences 1 and 2 AktG). This procedure may (theoretically) also be used in standard insolvency proceedings.

If the issue of new shares is part of an insolvency plan all groups (creditors and shareholders) have to vote upon the plan und therefore upon the de- and/or increase in capital. Shareholders may only vote as one of the groups, not in their shareholders’ meeting as such. Consent of a group may be deemed under Sec. 245, see question no. 18.

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e. g., by merger, spin-off, or change of the legal form)? Is a shareholders’ meeting authorization required for this?

Since the reform of the InsO in 2012, a plan may affect the structure of the corporate entity. According to Sec. 225 para 3 InsO, it is possible that the insolvency plan may include all measures admissible under corporate law. Hence, also a change of the legal form of a company or a merger is feasible. A

(2) These questions are aimed at understanding whether the fact that the company is subject to insolvency proceedings allows or causes deviations from the company law rules determining the body competent to take decisions on the issue of new shares of the company, and/or from the company law rules establishing the criteria and purposes with which such decisions must comply.
confirmation from the shareholders’ meeting as organ is not required (see question no. 32).

36. **On what conditions can the company carry on business during an insolvency procedure?** (If there are separate reorganization and liquidation procedures, does this affect the response?). Is a shareholders’ meeting authorisation required?

If the insolvency proceedings are formally opened, the creditors’ meeting shall decide whether the debtor’s business shall be closed down or provisionally continued (Sec. 157 Sentence 1 InsO). The creditors may modify their decision at later meetings (Sec. 157 Sentence 3 InsO). Until the first meeting of the creditors the insolvency administrator is in principle obliged to carry on business. Neither a court’s permission nor a shareholders’ meeting resolution is necessary.

The same rule applies in DIP-proceedings.

37. **In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company?** Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In standard proceedings, i.e. non-DIP-proceedings, the administrator is required to obtain the consent of the creditor’s committee with respect to decisions of fundamental importance, such as the sale of the debtor’s business, sec. 160 InsO.

The creditor’s assembly has to decide upon such measures, if a creditor’s committee does not exist or if the enterprise is to be sold to a shareholder of the debtor or to other insiders.
In principle, the same applies in DIP-proceedings. Sec. 276a InsO forecloses any influence of the shareholders on the management of the debtor.

38. Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

Neither in standard procedures, nor in DIP-proceedings the shareholders’ meeting has such a right. Only the administrator may terminate a contract by exercising her rights under Sec. 103 et seq InsO. In DIP-proceedings it is for the debtor to decide upon the continuation of contracts.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for minority shareholders of the companies that are not insolvent?

German law does currently not provide for the possibility of inter group-plans. A plan can only affect the assets or the shareholders of one company. For the future reform of German law see question no. 40.
40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders of the relevant companies involved in the coordination mechanisms, if any?

Currently (spring 2014) a bill is being passed to the effect that proceedings regarding different companies belonging to the same group can be coordinated to a certain extent. These measures mainly pertain to

- jurisdiction,
- the appointment of the administrator,
- the cooperation between courts, administrators and creditors,
- the coordination of reorganization plans.

It may be pointed that under the bill only those companies of the group are affected by the coordination mechanisms, which are undergoing insolvency proceedings.

The shareholders are not involved in the coordination mechanisms.

IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.
Selected Provisions of the InsO

A complete translation of the German Insolvency Act may be accessed under <http://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html#p1106>, which is also the source of the translation used here

Section 1 Objectives of the Insolvency Proceedings

The insolvency proceedings shall serve the purpose of collective satisfaction of a debtor's creditors by liquidation of the debtor's assets and by distribution of the proceeds, or by reaching an arrangement in an insolvency plan, particularly in order to maintain the enterprise. Honest debtors shall be given the opportunity to achieve discharge of residual debt.

Section 15a Obligation to Request in the Case of Legal Persons and Associations Without Legal Personality

(1) Where a legal person becomes illiquid or overindebted, the members of the board of directors or the liquidators shall file a request for the opening of proceedings without culpable delay, at the latest, however, three weeks after the commencement of insolvency or overindebtedness. The same shall apply to the organ representatives of the partners authorized to represent the company or the liquidators in the case of a company without legal personality where none of the general partners is a natural person; this shall not apply if one of the general partners is another company in which a general partner is a natural person.

(2) In the case of a company within the meaning of subsection (1), second sentence, subsection (1) shall apply correspondingly if the organ representatives of the partners authorized to represent the company are, in turn, companies in which none of the general partners is a natural person, or the grouping of companies continues in this way.

(3) Where a private limited company lacks a management, each partner, in the case of lack of management of a public limited company or a cooperative each member of the supervisory board, is also obligated to file a request, unless that person is not aware of the insolvency or overindebtedness or the lack of management.

(4) Whoever, contrary to subsection (1), first sentence, also in conjunction with the second sentence or subsection (2) or subsection (3), does not file a request for the opening of proceedings, does not correctly file a request or does not file a request in good time shall be punished with imprisonment for not more than three years or a fine.
(5) If the perpetrator under subsection (4) acts negligently, the punishment shall be imprisonment for not more than one year or a fine.

Section 17 Insolvency

(1) Insolvency shall be the general reason to open insolvency proceedings.

(2) The debtor shall be deemed illiquid if he is unable to meet his mature obligations to pay. Insolvency shall be presumed as a rule if the debtor has stopped payments.

Section 18 Imminent Insolvency

(1) If the debtor requests the opening of insolvency proceedings, imminent insolvency shall also be a reason to open.

(2) The debtor shall be deemed to be faced with imminent insolvency if he is likely to be unable to meet his existing obligations to pay on the date of their maturity.

(3) If in the case of a legal person, or of a company without legal personality, the request is not filed by all members of the board of directors, all general partners or all liquidators, subsection (1) shall only apply if the person or persons filing the request are empowered to represent the company or the partnership.

Section 19 Overindebtedness

(1) Overindebtedness shall also be a reason to open insolvency proceedings for a legal person.

(2) Overindebtedness shall exist if the debtor’s assets no longer cover his existing obligations to pay, unless it is highly likely, considering the circumstances that the enterprise will continue to exist. As regards claims in respect of the restitution of shareholder loans or claims deriving from legal transactions corresponding in economic terms to such a loan, for which the creditors and the debtor have agreed, in accordance with section 39 subsection (2), that they shall rank lower behind the claims set out in section 39 subsection (1), nos. 1 to 5 in the insolvency proceedings, consideration shall not be given to the obligations under the first sentence.

(3) If none of the general partners of a company without legal personality is a natural person, subsections (1) and (2) shall apply mutatis mutandis. This shall not apply if the general partners include another company with a natural person as general partner.

Section 38 Definition of the Insolvency Creditors

The insolvency estate shall serve to satisfy the well-founded claims held by the personal creditors against the debtor on the date when the insolvency proceedings were opened
(insolvency creditors).

Section 39  Lower-ranking Insolvency Creditors

(1) The following claims shall be satisfied ranking below the other claims of insolvency creditors in the order given below, and according to the proportion of their amounts if ranking with equal status:

1. the interest and penalties for late payment accruing on the claims of the insolvency creditors from the opening of the insolvency proceedings;
2. the costs incurred by individual insolvency creditors due to their participation in the proceedings;
3. fines, regulatory fines, coercive fines and administrative fines, as well as such incidental legal consequences of a criminal or administrative offence binding the debtor to pay money;
4. claims to the debtor’s gratuitous performance of a consideration;
5. pursuant to subsections (4) and (5) claims for restitution of a loan replacing equity capital or claims resulting from legal transactions corresponding in economic terms to such a loan.

(2) Claims which the creditor and the debtor agreed to be non-privileged in insolvency proceedings shall be satisfied after the claims mentioned at subsection (1) if the agreement does not provide otherwise.

(3) Interest accruing on the claims of non-privileged insolvency creditors, and the costs incurred by such creditors due to their participation in the proceedings shall rank with equal status as the claims of such creditors.

(4) Subsection (1) no. 5 shall apply to companies which neither have a natural person nor a company as general partner in which a general partner is a natural person. If, in the case of the company’s impending or existing insolvency or its overindebtedness, a creditor acquires shares for the purpose of the company’s rehabilitation, this shall, until the company has been rehabilitated to become sustainable, not lead to the application of subsection (1) no. 5 to his claims from existing or newly granted loans or to claims from legal transactions which correspond in economic terms to such a loan.

(5) Subsection (1) no. 5 shall not apply to the non-managing partner of a company within the meaning of subsection (4), first sentence, who holds ten per cent or less of the liable equity capital.
Section 74  Convening the Creditors' Assembly

(1) The creditors’ assembly shall be convened by the insolvency court. All creditors with a right to separate satisfaction, all insolvency creditors, the insolvency administrator, the members of the creditors’ committee and the debtor shall be entitled to attend such assembly.

(2) The time, place and agenda of the creditors’ assembly shall be published. Such publication may be waived if a creditors’ assembly adjourns its transactions.

Section 77  Determination of Voting Right

(1) A voting right shall be vested in claims filed by the creditor and not disputed by the insolvency administrator or by a creditor with a voting right. Lower-ranking creditors shall have no voting rights.

(2) Creditors with disputed claims shall have a voting right to the extent to which the administrator and the attending creditors with a right to vote have agreed such vote during the creditors’ assembly. If the parties cannot reach an agreement, the decision of the insolvency court shall prevail. The insolvency court may modify its decision at the request of the administrator or of a creditor attending the creditors’ assembly.

(3) Subsection (2) shall apply mutatis mutandis to
   1. creditors holding claims subject to a condition precedent;
   2. creditors with a right to separate satisfaction.

Section 80  Right to Manage and Transfer the Insolvency Estate Vested in the Insolvency Administrator

(1) Upon the opening of the insolvency proceedings the debtor’s right to manage and transfer the insolvency estate shall be vested in the insolvency administrator.

(2) An existing prohibition of transfers imposed on the debtor and purporting to protect only certain persons (section 135 and 136 of the Civil Code) shall have no binding effect on the proceedings. The provisions governing the effects of an attachment or seizure by way of execution shall remain unaffected.

Section 103  Option to be exercised by the Insolvency Administrator

(1) If a mutual contract was not or not completely performed by the debtor and its other party at the date when the insolvency proceedings were opened, the insolvency administrator may perform such contract replacing the debtor and claim the other party’s consideration.

(2) If the administrator refuses to perform such contract, the other party shall be entitled to its
claims for non-performance only as an insolvency creditor. If the other party requires the administrator to opt for performance or non-performance, the administrator shall state his intention to claim performance without negligent delay. If the administrator does not give his statement, he may no longer insist on performance.

Section 135 Loans Replacing Equity Capital

(1) A transaction may be contested which, in consideration of a partner’s claim to restitution of his loan replacing equity capital within the meaning of section 39 subsection (1) no. 5 or in consideration of an equivalent claim,

1. provided a security if such transaction was made during the last ten years prior to the request to open insolvency proceedings or subsequent to such request; or
2. provided satisfaction if such transaction was made during the last year prior to the request to open insolvency proceedings or subsequent to such request.

(2) A transaction may be contested by means of which a company has provided satisfaction to a third party for a claim to restitution of a loan within the period quoted in subsection (1) no. 2 if a partner has provided security for the claim or was liable as guarantor; this shall apply correspondingly to benefits which correspond in economic terms to a loan.

(3) If a partner entrusted the debtor with an object for use or exercise, the right to separate satisfaction may not be claimed for the duration of the insolvency proceedings, at most, however, for a period of one year from the date on which the insolvency proceedings are opened if the object is of considerable significance for the continued existence of the debtor’s enterprise. The partner shall be recompensed for the use or exercise of the object; when calculating such compensation, the average paid in the last year prior to the opening of the proceedings shall be applied, if the period of surrender is shorter, the average during that period.

(4) Section 39 subsections (4) and (5) shall apply mutatis mutandis.

Section 157 Decision on the Further Proceedings

At the report meeting the creditors’ assembly shall decide whether the debtor’s enterprise should be closed down or temporarily continued. The assembly may commission the administrator to draw up an insolvency plan and determine the plan’s objective for him. The assembly may modify its decisions at subsequent meetings.

Section 160 Transactions of Particular Importance

(1) The insolvency administrator shall obtain the consent of the creditors’ committee if he
intends to engage in transactions, which are of particular importance to the insolvency proceedings. If no creditors' committee has been appointed, he shall obtain the consent of the creditors' assembly. If a creditors' assembly, which has been convened, is without a quorum, consent shall be deemed to have been given; the creditors shall be informed of these consequences in the invitation to the creditors' assembly.

(2) Consent under subsection (1) shall be required in particular

1. if such transaction purports to sell the enterprise, plant, the entire stock, a part of real property to be disposed of by private sale, the debtor's shares in another enterprise if such shares are intended to bring about a permanent affiliation to such other enterprise or the entitlement to receive recurring earnings;

2. if such transaction purports to enter into a loan contract with considerable burdens on the insolvency estate;

3. if such transaction purports to bring or join a court action amounting to a considerable value in dispute, to refuse the bringing of such action, or to negotiate a settlement or compromise to settle or avoid any such action.

Section 217  Policy

Counter to the provisions of this Statute, the satisfaction of creditors entitled to separate satisfaction and of the insolvency creditors, the disposition of the insolvency estate and its distribution to the parties concerned, as well as the insolvency procedure and the debtor's liability subsequent to the termination of the insolvency proceedings may be settled in an insolvency plan. If the debtor is not natural person, the share rights and membership rights of those persons with a participating interest in the debtor may be included in the plan.

Section 218  Submission of the Insolvency Plan

(1) The insolvency administrator and the debtor shall be entitled to submit an insolvency plan to the insolvency court. Submission by the debtor may be connected with a request to open insolvency proceedings. A plan received by the court after the final creditors' assembly shall not be taken into account.

(2) If the creditors' assembly has charged the administrator with the establishment of an insolvency plan, the administrator shall submit such plan to the court within a reasonable period of time.

(3) The creditors' committee, if one has been appointed, the works council, the spokesman of officers and the debtors shall assist in and advise on the establishment of the plan by the administrator.
Section 222  Formation of Groups

(1) While determining the rights held by the parties involved in the insolvency plan, groups shall be formed where the parties concerned have differing legal status. A distinction shall be made between

1. the creditors entitled to separate satisfaction if their rights are encroached upon by the plan;
2. the non-lower-ranking creditors;
3. each class of lower-ranking insolvency creditors, unless their claims are deemed to be waived pursuant to section 225.
4. those persons with a participating interest in the debtor where their share rights or membership rights are included in the plan.

(2) Parties with equal rights may form groups in which parties with equivalent economic interests are set together. Such groups shall be adequately separated from each other. The criteria of their separation shall be indicated in the plan.

(3) Employees shall form a separate group if they are claiming major amounts as insolvency creditors. Separate groups may be formed for minor creditors and for minor shareholders whose share in the liable capital amounts to less than one per cent or to less than one thousand euros.

Section 225  Rights of Lower-ranking Insolvency Creditors

(1) The claims of lower-ranking insolvency creditors shall be deemed waived unless the insolvency plan provides otherwise.

(2) If the insolvency plan provides otherwise, the constructive part, for each group of lower-ranking creditors, shall give the indications required under section 224.

(3) The debtor's liability for fines and his obligations equal to such penalties under section 39 subsection (1) no. 3 subsequent to termination of the insolvency proceedings can neither be excluded nor limited by a plan.

Section 225a Rights of the Shareholders

(1) The share rights and membership rights of those persons with a participating interest in the debtor shall remain unaffected by the insolvency plan, unless otherwise provided in the plan.

(2) The constructive part of the plan may provide that the creditors' claims may be converted into share rights or membership rights in the debtor. Such conversion shall be ruled out if it is against the will of the creditors concerned. In particular, the plan may provide for a decrease or increase in capital, the provision of contributions in kind, the ruling out of subscription rights, or
the payment of compensation to outgoing shareholders.

(3) The plan may set out any rule permissible under company law, in particular regarding the continuation of a dissolved enterprise or the transfer of share rights and membership rights.

(4) Measures in accordance with subsection (2) or (3) shall not authorize the holder to rescind or terminate contracts to which the debtor is a party. Nor do they lead to the contracts being otherwise rescinded. Any contrary contractual agreements shall be invalid. Agreements reached on the basis of the debtor's breach of duty shall remain unaffected by the first and second sentences, insofar as they do not consist solely in a measure referred to in subsection (2) and (3) being contemplated or carried out.

(5) Where a measure in accordance with subsection (2) or (3) represents an important reason for a person with a participating interest in the debtor leaving the legal entity or company without legal personality and if use is made of this right of withdrawal, the financial status which would have arisen if the debtor had been wound up shall be decisive in regard to determining the amount of any possible compensation. Payment of the compensation may be deferred over a period of no more than three years to avoid placing an inappropriate burden on the debtor's financial status. Interest shall be added to any unpaid compensation.

Section 237 Voting Right of the Insolvency Creditors

(1) Section 77 subsection (1), first sentence, as well as subsections (2) and (3) no. 1 shall apply mutatis mutandis to the voting right of the insolvency creditors while voting on the insolvency plan. Creditors entitled to separate satisfaction may only vote as insolvency creditors if the debtor is personally liable to them and if they waive their right to separate satisfaction or are not satisfied under such right; as long as their non-satisfaction has not been determined, they shall be taken into account with the probable value of their non-satisfaction.

(2) Creditors whose claims are not impaired by the plan shall have no voting right.

Section 238a Voting Right of Shareholders

(1) The voting right of the debtor's shareholders shall be determined solely by their participating interest in the debtor's subscribed capital or assets. No account shall be taken of any limitations on voting rights, of special or multiple voting rights.

(2) Section 237 subsection (2) shall apply mutatis mutandis.

Section 245 Prohibition to Obstruct

(1) Even if the necessary majorities have not been achieved, a voting group shall be deemed to have consented if
1. the members of such a group are likely not to be placed at a disadvantage by the insolvency plan compared with their situation without such plan,

2. the members of such a group participate to a reasonable extent in the economic value devolving on the parties under the plan, and

3. the majority of the voting groups have backed the plan with the necessary majorities.

(2) A reasonable participation of a group of creditors for the purpose of subsection (1) no. 2 shall exist if under the plan

1. no other creditor will receive economic values exceeding the full amount of his claim;

2. neither a creditor with a lower-ranking claim to satisfaction without a plan, compared with the creditors forming his group, nor the debtor nor a person holding the debtor’s shares receives an economic value; and

3. no creditor to be satisfied on an equal footing with the creditors forming his group without a plan receives an advantage with respect to such creditors.

(3) A reasonable participation of a group of shareholders for the purpose of subsection (1) no. 2 shall exist if under the plan

1. no creditor receives economic benefits exceeding the full amount of his claim and

2. no shareholder who would be equal in rank to the shareholders in the group if no plan were drawn up is better placed than they are.

Section 246  Consent of Lower-ranking Creditors of the Insolvency Proceedings

The following supplemental provisions shall apply to acceptance of the insolvency plan by the lower-ranking insolvency creditors:

1. The consent of the groups ranking behind section 39 subsection (1) no. 3 shall be deemed to have been given if none of the insolvency creditors receives an advantage under the plan compared with the creditors forming such groups.

2. If none of the creditors forming a group votes at all, the consent of this group shall be deemed to have been given.

Section 251  Protection of Minorities

(1) At the request of a creditor or, if the debtor is not a natural person, a person with a participating interest in the debtor, approval of the insolvency plan shall be refused if

1. the person filing the request opposed the plan in writing or for the records at the latest in the voting meeting, and
2. the person filing the request is likely to be placed at a disadvantage by the plan compared with his situation without a plan.

(2) Such request shall be admissible only if the requesting party shows to the satisfaction of the court at the latest on the day of the voting meeting that he is likely to be placed at a disadvantage on account of the plan.

(3) The request shall be rejected if the constructive part provides for funds being made available in the event that a party concerned shows to the satisfaction of the court that he will be placed at a disadvantage. Whether the party concerned is to receive compensation from such funds shall not be a matter for the insolvency proceedings.

Section 253 Appeal

(1) The creditors, the debtor and, if the debtor is not a natural person, those persons with a participating interest in the debtor, may file an immediate appeal against the order approving or refusing to approve the insolvency plan.

(2) The immediate appeal against the approval shall be admissible only if the party filing the appeal

1. has objected to the plan in writing or for the records at the latest during the voting meeting,
2. has voted against the plan and
3. has shown to the satisfaction of the court that he will be placed at a significant disadvantage on account of the plan than without the plan and that this disadvantage cannot be compensated by means of a payment from the funds referred to in section 251 subsection (3).

(3) Subsection (2) no. 1 and 2 shall apply only if when publishing the date of the meeting (section 235 subsection (2)) and the summons to the meeting (section 235 subsection (3)) special reference was made to the need to object and to reject the plan.

(4) Upon the request of the insolvency administrator, the regional court shall immediately dismiss the appeal if it appears to be preferential that the insolvency plan take effect as soon as possible because, to the unfettered satisfaction of the court, the disadvantages on account of a delay in enforcing the plan override the disadvantages for the party filing the appeal; redress proceedings in accordance with section 572 subsection (1), first sentence, of the Code of Civil Procedure shall not be taken. This shall not apply in the event of an especially serious statutory violation. If the court dismisses the appeal in accordance with the first sentence, the applicant shall be compensated, from the insolvency estate, for that damage arising on account of the execution of the plan; the reversal of effects arising from the insolvency plan cannot be claimed as damages. The regional court that dismissed the immediate appeal shall have sole jurisdiction in regard to
actions for the payment of compensation for damages in accordance with the third sentence.

Section 270 Prerequisites

(1) The debtor may manage and dispose of the assets involved in insolvency proceedings under the supervision of an insolvency monitor if the insolvency court orders such debtor-in-possession management while deciding on the opening of the insolvency proceedings. Such proceedings shall be subject to the general provisions unless this Part provides otherwise.

(2) The order shall require

1. that it has been requested by the debtor and
2. that no circumstances are known which lead to the expectation that the order will place the creditors at a disadvantage.

(3) Before a decision is taken on the request, the provisional creditors’ committee must be given the opportunity to comment provided that this will not manifestly lead to a detrimental change in the debtor’s financial status. If the request is backed by a unanimous decision by the provisional creditors’ committee, the order shall be deemed not to place the creditors at a disadvantage.

(4) If the request is rejected, written grounds shall be supplied therefor; section 27 subsection (2) no. 5 shall apply mutatis mutandis.

Section 270b Preparations for Reorganisation

(1) If the debtor has made his request for the opening of insolvency proceedings on account of imminent insolvency or overindebtedness and has requested debtor-in-possession management and if the intended restructuring does not manifestly lack the prospect of success, the insolvency court shall, upon the request of the debtor, set a deadline for submission of the insolvency plan. The deadline may not exceed three months. The debtor shall enclose with the request certification, with grounds, provided by a tax advisor, accountant or lawyer with experience in insolvency matters or a person with comparable qualifications which provides evidence of the imminent insolvency or overindebtedness but that the debtor is not already insolvent and that the intended restructuring does not manifestly lack the prospect of success.

(2) In the order referred to in subsection (1), the court shall appoint a provisional insolvency monitor in accordance with section 270a subsection (1) who must not be the same person issuing the certification referred to in subsection (1). The court may decide not to appoint the provisional insolvency monitor proposed by the debtor only if the proposed person is manifestly not suited to taking on the office; the court shall provide reasons for its decision. The court may order provisional measures in accordance with section 21 subsection (1) and (2) no. 1a, 3 to 5; it must order measures in accordance with section 21 subsection (2) no. 3 if the debtor submits a
request therefor.

(3) Upon the request of the debtor the court must order that the debtor provide grounds for the debts incumbent on the estate. Section 55 subsection 2 shall apply mutatis mutandis.

(4) The court shall revoke the order in accordance with subsection (1) before the deadline expires if

1. the envisaged restructuring no longer has prospects of success;
2. the provisional creditors’ committee requests that the order be revoked or
3. a creditor entitled to separate satisfaction or a creditor requests that the order be revoked and circumstances become known that lead to the expectation that the order will lead to the creditors being placed at a disadvantage; the request shall be admissible only if no provisional creditors’ committee has been appointed and the party filing the appeal can show the circumstances to the satisfaction of the court.

The debtor or the provisional insolvency monitor shall immediately notify the court of the debtor becoming insolvent. After revoking the order or after expiry of the deadline the court shall take a decision regarding the opening of insolvency proceedings.

**Section 275  Consent of the Insolvency Monitor**

(1) No obligations exceeding the range of his ordinary business may be entered into by the debtor without the insolvency monitor’s consent. The debtor may even not enter into obligations falling under the range of his ordinary business if the insolvency monitor objects to such obligations.

(2) The insolvency monitor may require the debtor to allow collection of all payments received only by the insolvency monitor and payments to be made by the insolvency monitor only

**Section 276a  Involvement of Supervisory Organs**

If the debtor is a legal entity or a company without legal personality, the supervisory board, the shareholders’ meeting or comparable organs shall have no influence on the debtor’s management. The withdrawal and appointment of new members of the board of management shall be effective only if the insolvency monitor gives his consent. That consent must be given if the measure does not place the creditors at a disadvantage.