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THE CREDITORS' COMMITTEE – PROS AND CONS OF MEMBERSHIP

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I. WHY THIS TOPIC IS IMPORTANT

Alongside the creditors' meeting (*Gläubigerversammlung*), the creditors' committee (*Gläubigerausschuss*) is the central body for creditor autonomy in insolvency proceedings. Unlike the creditors' meeting, which, as the decision-making body of all insolvency creditors, primarily decides on fundamental procedural matters, the creditors' committee, as a smaller, permanently active body, primarily performs an ongoing monitoring and support function, particularly vis-à-vis the insolvency administrator. In larger proceedings, the establishment of a creditors' committee is mandatory if specific thresholds defined by law regarding the debtor's total assets, revenue, and number of employees are met. However, even in smaller proceedings where the formation of a creditors' committee is not legally required, its establishment can nevertheless be beneficial to ensure effective oversight of the proceedings.

II. ROLE, RIGHTS, AND DUTIES OF COMMITTEE MEMBERS

The core task of the creditors' committee is to support and monitor the insolvency administrator, which includes, in particular, receiving updates on the course of business, inspecting books and business records, and reviewing the debtor company's financial transactions. Through regular meetings, the committee can react more quickly and flexibly than the creditors' meeting. In addition, the members have an information advantage over the creditors' meeting, as they are entitled to comprehensive rights to information and disclosure from the insolvency administrator and the debtor.

Co-determination rights are also significant: Under § 160 InsO, actions of particular importance—such as the sale of the company or the taking out of a loan that places a significant burden on the estate—require the committee's approval. Furthermore, the creditors' committee participates in the appointment of the insolvency administrator and may request the administrator's dismissal or the convening of a creditors' meeting.

However, these rights are accompanied by obligations: Each member must perform their duties impartially and in the interest of the entire body of creditors. In the event of a culpable breach of duty, members are personally liable to the standard expected of a diligent and conscientious committee member; in the case of joint misconduct, they are even jointly and severally liable. Furthermore, membership entails a certain amount of time and effort for meetings and audits.

III. RECOMMENDATIONS FOR ACTION

For creditors who are considering membership on the creditors' committee or are already members, the following measures are recommended:

- **Ensure insurance coverage:** Have it verified whether insurance equivalent to D&O insurance is in place for members of the creditors' committee. This can significantly reduce liability risks.
- **Careful documentation:** Carefully document your activities on the creditors' committee. In the event of a subsequent liability lawsuit, the committee member bears the burden of proof regarding the fulfillment of their supervisory duties.
- **Avoid conflicts of interest:** Ensure that you perform your duties on the creditors' committee impartially and in the best interests of the creditors as a whole. Disclose potential conflicts of interest early on and, if necessary, recuse yourself from voting on relevant resolutions.
- **Actively exercise your rights to information:** Actively exercise your rights to information and briefing to ensure you can properly fulfill your supervisory duties.
- **Legal advice:** If you are uncertain about your duties and rights as a committee member, consult specialized attorneys. Especially in complex proceedings, sound legal guidance can help minimize liability risks.

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