

Annika Wolf

Promoting an Effective Rescue Culture with Debt-Equity-Swaps?

A Comparative Study of Restructuring Public Companies in Germany and England



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Foreword

The developments of the past twenty years have led to a rethinking of the purpose of restructuring and insolvency law. The primary objective in many jurisdictions, and the purpose of legislative action, is no longer the liquidation and market exit of companies in distress but the rescue of a going concern. England and Wales seemed to be better prepared to deal with distressed companies than Germany in the aftermath of the financial crisis – and one of the reasons given for this was the debt-equity-swap as a tool of financial restructuring.

The City of London has dominated the British economy since the 1970s and financial products have become the (almost) only relevant economic product of the nation. This may explain why the City wants to retain its position as forerunner in all financial products, precisely for financial restructuring. The anchored thinking of efficiency follows financial goals alone and is often exported to legal policy and legal doctrine. Most of continental Europe resisted this attack until the financial crisis. While other European countries then amended their restructuring and insolvency law, the German legislator acted with extreme caution at first, before introducing the debt-equity-swap into German insolvency law with the “Act to Further Facilitate the Restructurings of Companies (ESUG)”.

In her dissertation *Annika Wolf* touches on the most current and competitive issue in the European legal order of restructuring and insolvency law. With a functional legal approach she has taken the logical point in comparing legal norms with regard to debt-equity-swaps in Germany and England, and whether the amendments in German law have (so far) succeeded in providing companies in financial distress with an improved legal environment for corporate rescue. The core question is whether the migration of German public companies to England for the purposes of a purely financial restructuring via a debt-equity-swap remains to be necessary.

Her analysis embraces the cultural differences between England and Germany with regard to rescue culture in general and corporate culture in particular. The debt-equity-swap may be a preferred option for a purely financial restructuring of public companies in distress, however, there are still other factors that affect the effectiveness of restructuring companies,

Foreword

such as a distinctive rescue culture and the influence of legal history, legal sociology and legal policy, the role of governments and national banks, the judicial infrastructure and access to finance.

The strength of her thesis is to provide the clear view of an economist on restructuring and insolvency law, as it provides an accurate presentation of the purely economic assessment of legal regulatory models. The emphasis is, thus, less on the detailed legal argumentation and more on the economic one.

With the discussion of these points, *Annika Wolf* provides valuable insight and promotes a deeper understanding of the obstacles and challenges for corporate rescue, and explains why the legal codification of the debt-equity-swap may not be enough to make progress towards a rescue culture in Germany. Her results will attract the attention of practitioners and researchers alike.

Prof. Christoph G. Paulus

Preface

Coinciding with the financial failure of Lehman Brothers in September 2008, I began working on distressed debt and was in the front line to experience the challenges financial institutions faced when companies began to fail, write-offs started to damage profitability and overall tightened regulations on capital requirements limited further financing. The market disruptions in the aftermath of Lehman initiated a market selection process in which non-viable companies eventually failed and exited the market. Since the global financial markets were shaken to their foundation, even viable companies began to become financially distressed, either because of the heavy burdens of debt carried forward from previous years or as a result of the effect of a general economic downturn in their industries.

When liquidity was withdrawn from the markets, the secondary market in which distressed assets were traded eventually dried up. With financial institutions no longer able to provide additional funds to their borrowers to finance them through the period of drought, the debt-equity-swap came under consideration as an instrument to provide for the rescue of companies, rather than their liquidation. This strategy seemed to work well in England, where the financial industry seemed better prepared to handle large-scale complex restructurings, and even German companies were attracted to being restructured under English law. The economic downturn resulting from the financial crisis and the forum shopping by German companies for English law has led to extensive reforms of the insolvency law in various countries. It was an exciting time to attend the discussions on whether Germany would need a pre-insolvency restructuring proceeding, and on whether the debt-equity-swap would be a godsend for companies in financial distress or whether state-owned banks should do their duty to society by rescuing insolvent debtors.

Having worked in both Germany and England, I was able to gather insight into the different legal frameworks and the factors affecting the effectiveness of restructuring companies. This motivated me to write this dissertation as I wanted to contribute to the existing literature and to foster the discussions on German and English restructuring and insolvency law.

Preface

The dissertation was accepted by the Law Faculty of the Humboldt-Universität zu Berlin in the winter term 2013/14. The text has been carefully revised and updated for publication; literature, case law and further developments were considered until December 2014.

My gratitude goes to my doctoral supervisor *Prof. Christoph G. Paulus* for his trust and encouragement during the past years, and for granting me a remarkable degree of freedom in defining my theme and pursuing my research; *Prof. Stephan Madaus* for being a critical and curious advisor and thesis referee. I would like to thank the editors of the “Schriftenreihe zur Restruktutierung” for including my work in their series.

A valuable contribution to this thesis was given by the many practitioners and lawyers in Germany and England, offering their time to discuss my questions and by providing an insight into the issues and challenges of restructuring and insolvency law cases. I thank them for the courtesy of sharing their experiences with me.

I would like to thank *Prof. Klaus J. Hopt* for welcoming me to the Max Planck Institute for Comparative and International Private Law in Hamburg. The atmosphere of high spirit, intellectual discussions and mutual support I experienced there, and for which I thank especially *Dr. Felix Steffek* and *Prof. Christoph Kumpan*, nurtured this thesis. To conduct most of my research in the Institute’s library with its always committed and helpful staff was a fortunate circumstance.

My research was also conducted at the European University Institute in Florence. I followed an invitation by *Prof. Hans-W. Micklitz*, my advisor during my masters’ studies, and to whom I owe my passion for restructuring and insolvency law. Later on, he also gave me the opportunity for a truly academic experience there by becoming my mentor at the Max Weber Fellowship Programme with an affiliation to the Department of Law.

My deepest gratitude goes to my family. Their continuous care and loving encouragement, patience and unconditional faith in me led to the genesis and completion of this doctoral thesis: Thank you.

Florence and Berlin, December 2014

Annika Wolf

Contents

Abbreviations	15
Table of Cases	19
Chapter I Introduction and Background	23
1 Introduction	23
1.1 Setting the Scene	23
1.2 Definitions and Limitations	26
1.3 Research Question and Course of Examination	29
1.4 Research Methodology	31
2 Background	35
2.1 Insolvency Law in a Market Economy	35
2.2 Insolvency Theories	40
2.1.1 Creditors' Bargain Theory	42
2.1.2 Bankruptcy-Policy Theory	43
2.1.3 Value-Based Theory	45
2.1.4 Team Production Theory of Bankruptcy Reorganisation	45
2.1.5 Risk-Sharing Theory	46
2.3 Summary	48
Chapter II Factors Affecting the Effectiveness of Restructuring Companies	50
Introduction	50
3 Rescue Culture versus Insolvency Culture	50
3.1 Legal Culture	52
3.1.1 Germany	54
3.1.2 England	55
3.1.3 Summary	58
3.2 The Stigma of Insolvency	59
3.2.1 Germany	59
3.2.2 England	60

Contents

3.2.3	Summary	61
3.3	Legal Competition versus Legal Harmonisation	62
3.4	Forum Shopping	67
3.5	Company Rescue: Business or Legal Entity?	75
3.5.1	Pro-Debtor or Pro-Creditor	76
3.5.2	Germany	77
3.5.3	England	80
3.5.4	Summary	81
4	Role of Governments and National Banks	81
4.1	Germany	82
4.2	England	82
4.3	Summary	89
5	Judicial Infrastructure: Courts and Administrators	89
5.1	Germany	90
5.1.1	Courts	90
5.1.2	Administrator	92
5.2	England	95
5.2.1	Courts	95
5.2.2	Administrators	96
5.3	Summary	98
6	Financial Markets and Corporate Finance	99
6.1	Germany	101
6.2	England	103
6.3	Summary	103
	Conclusion	104
Chapter III Restructuring Companies using Debt-Equity-Swaps		106
	Introduction	106
7	Informal versus Statutory Proceedings for Restructuring	106
7.1	Germany	109
7.1.1	Insolvency	111
7.1.2	Opening Insolvency Proceedings	112
7.1.3	Grounds for Insolvency	112
7.1.3.1	Insolvency (<i>Zahlungsunfähigkeit</i>)	113
7.1.3.2	Imminent Insolvency (<i>Drohende Zahlungsunfähigkeit</i>)	113

	7.1.3.3	Over-Indebtedness (<i>Überschuldung</i>)	113
7.1.4		Restructuring and Insolvency Proceedings	114
	7.1.4.1	Liquidation	114
	7.1.4.2	Business-Asset Sale	115
	7.1.4.3	Insolvency Plan Proceeding	117
	7.1.4.4	Self-Administration	132
	7.1.4.5	Protective Shield Proceeding	137
7.2		England	144
	7.2.1	Insolvency	144
	7.2.2	Opening Insolvency Proceedings	145
	7.2.3	Grounds for Insolvency	146
	7.2.3.1	Cash Flow Test	147
	7.2.3.2	Balance Sheet Test	147
	7.2.4	Restructuring and Insolvency Proceedings	148
	7.2.4.1	Winding-Up	149
	7.2.4.2	Administrative Receivership	150
	7.2.4.3	Administration	151
	7.2.4.4	Pre-Pack Administration	153
	7.2.4.5	Company Voluntary Arrangement	154
	7.2.4.6	Scheme of Arrangement	156
7.3		Summary	158
8		Debt-Equity-Swaps to Restructure Public Companies	160
	8.1	Opportunities and Risks involved in Debt-Equity-Swaps	161
	8.1.1	Opportunities	162
	8.1.2	Risks	163
	8.2	Germany	164
	8.2.1	Capital Decrease	165
	8.2.2	Capital Increase	167
	8.2.3	Participation of Shareholders and Creditors	169
	8.2.3.1	Shareholders	170
	8.2.3.2	Creditors	181
	8.2.4	Contribution and Valuation of Claim, Differential Liability	182
	8.2.5	Restructuring Privileges	186
	8.3	England	187
	8.3.1	Capital Decrease	188
	8.3.2	Capital Increase	188

Contents

8.3.3	Participation of Shareholders and Creditors	190
8.3.3.1	Shareholders	190
8.3.3.2	Creditors	191
8.3.4	Contribution and Valuation of Claim, Differential Liability	191
8.3.5	Restructuring Privileges	192
8.4	Summary	192
	Conclusion	194
Chapter IV Legal Competition and Forum Shopping for Debt-Equity-Swaps in Practice		195
	Introduction	195
9	Competition of Insolvency Law – Migration for Forum Shopping	195
9.1	Deutsche Nickel	196
9.2	Schefenacker	197
9.3	Brochier	199
9.4	Migration is the Past – Negotiation is the Future?	202
10	Competition of Company Law – Negotiation for Forum Shopping	203
10.1	Tele Columbus	203
10.1.1	Jurisdiction by an English court over a German company?	204
10.1.2	Prerequisites for a Scheme of Arrangement Fulfilled?	205
10.1.3	English Court to Sanction the Scheme?	205
10.2	Rodenstock	206
10.2.1	Recognition of the Scheme of Arrangement?	208
10.2.2	Comparable Proceeding in German Law?	210
10.2.2.1	Recognition of Foreign Judgement or Procedural Law Approach?	210
10.2.2.2	Recognition of Foreign Insolvency Proceeding or Substantive Law Approach?	212
10.3	PrimaCom	214
10.4	APCOA Parking	216
10.5	Conclusion	219

11 Rescue Culture or Mean to an End?	219
11.1 Background Suhrkamp	220
11.2 Discussion Suhrkamp	227
11.3 Summary / Conclusion Suhrkamp	232
Conclusion	233
Chapter V Summary and Conclusion	234
12 Summary	234
13 Conclusion	237
Bibliography	239

Abbreviations

ABLJ	American Bankruptcy Law Journal
AG	Die Aktiengesellschaft
AG	Amtsgericht (<i>Lower District Court</i>)
AktG	Aktiengesetz (<i>Law on Companies Limited by Shares</i>)
AJICL	Arizona Journal of International and Comparative Law
ALER	American Law and Economics Review
Am. Bankr. L. J.	American Bankruptcy Law Journal
Aufl.	Auflage (<i>edition</i>)
BB	Betriebs-Berater
B.C.	Bankruptcy Code
BCC	British Company Law Cases
BCLC	Butterworths Company Law Cases
Bd.	Band
Begr.	Begründung (<i>Reasons Given</i>)
Beil.	Beilage (<i>Supplement</i>)
Berkley Bus. L. J.	Berkley Business Law Journal
BFH	Bundesfinanzhof (<i>German Federal Finance Court</i>)
BFuP	Betriebswirtschaftliche Forschung und Praxis
BGB	Bürgerliches Gesetzbuch (<i>German Civil Code</i>)
BGH	Bundesgerichtshof (<i>German Federal Court of Justice</i>)
BGHZ	Amtliche Sammlung der Entscheidungen des Bundesgerichtshof in Zivilsachen (<i>Official Journal of Decisions of the Federal Court of Justice in Civil Matters</i>)
BJIBFL	Butterworths Journal of International Banking and Financial Law
BKR	Zeitschrift für Bank- und Kapitalmarktrecht
BLJ	Business Law Journal
BLR	Business Law Review
BMJ	Bundesjustizministerium (<i>German Federal Ministry of Justice</i>)
BR	Bundesrat (<i>German Federal Council</i>)
BR-Drucks.	Bundesrat-Drucksachen (<i>Printed Items from the Federal Council</i>)
Brook. J Int'l Law	Brooklyn Journal of International Law
BT	Bundestag (<i>German Federal Diet</i>)
BT-Drucks.	Bundestags-Drucksachen (<i>Printed Items from the Federal Diet</i>)
BVerfG	Bundesverfassungsgericht (<i>German Federal Constitutional Court</i>)
c.	Cause
CA	Companies Act
CA 1985	Companies Act 1985
CA 1989	Companies Act 1989
CA 2004	Companies Act 2004
Cambridge L. J.	Cambridge Law Journal
CDDA	Company Directors Disqualification Act 1986
CFILR	Company Financial and Insolvency Law Review
CFS	Center for Financial Studies
Ch	Chancery
ChD	Chancery Division
CL	Company Lawyer
CLC	Commercial Law Cases
CLJ	Company Law Journal

Abbreviations

Colum. L. Rev.	Columbia Law Review
COMI	Centre of Main Interest
CR&I	Corporate Rescue and Insolvency
CVA	Company Voluntary Arrangement
DB	Der Betrieb
DIP	Debtor-in-Possession
Disk-E	Diskussionsentwurf
DStR	Deutsches Steuerrecht
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht
EA 2002	Enterprise Act 2002
EBLR	European Business Law Review
EBOR	European Business Organisation Law Review
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECJ	European Court of Justice
ECFR	European Company and Financial Law Review
ECR	European Court Reports
eds.	editors
e.g.	example given
et al.	and others
et seq.	et sequentia
EIR	European Insolvency Regulation (<i>Council Regulation No. 1346/2000 on Insolvency Proceedings</i>)
ELJ	European Law Journal
ESUG	Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (<i>Act for the Further Facilitation of the Restructuring of Companies</i>)
EuR	Zeitschrift Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court of Justice
EWIR	Entscheidungen zum Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
FAZ	Frankfurter Allgemeine Zeitung
FG	Finanzgericht (<i>Taxation Court</i>)
FK	Frankfurter Kommentar (<i>Frankfurt Commentary</i>)
Fn.	Footnote
GG	Grundgesetz (<i>Basic Law of the Federal Republic of Germany</i>)
GmbHR	GmbH-Rundschau
GWR	Gesellschafts- und Wirtschaftsrecht
Harv. L. Review	Harvard Law Review
HB	Handelsblatt
HC	House of Commons
HGB	Handelsgesetzbuch (<i>German Commercial Code</i>)
HL	House of Lords
IA 1986	Insolvency Act 1986
IA 2000	Insolvency Act 2000
IBFL	International Banking and Financial Law
I.C.C.L.R.	International Company and Commercial Law Review
ICLQ	International and Comparative Law Quarterly
ICR	International Corporate Rescue
IFLR	International Financial Law Review
IL&P	Insolvency Law and Practice
InsVZ	Zeitschrift für Insolvenzverwaltung und Sanierungsberatung
Int'l Rev. L. & Econ.	International Review of Law and Economics
Int. Insolv. Rev	International Insolvency Review

IR 1986	Insolvency Rules 1986
IRLE	International Review of Law and Economics
InsO	Insolvenzordnung (<i>German Insolvency Statute</i>)
InsVZ	Zeitschrift für Insolvenzverwaltung und Sanierungsberatung
Iowa L. Rev	Iowa Law Review
Iss.	Issue
J. Appl. Corp. Fin.	Journal of Applied Corporate Finance
J.B.L.	Journal of Business Law
JBF	Journal of Banking and Finance
JCLS	Journal of Corporate Law Studies
J. Corp. Fin.	Journal of Corporate Finance
J. Corp. L.	The Journal of Corporation Law
J. Econ. Behav. & Org.	Journal of Economic Behavior & Organization
J. Econ. Persp.	Journal of Economic Perspectives
J. Fin. Econ.	Journal of Financial Economics
JIBL	Journal of International Banking Law
JIBLR	Journal of International Banking, Law and Regulation
J.L. & Econ.	The Journal of Law and Economics
JZ	Juristenzeitung
Kö-Ko	Kölner Kommentar (<i>Cologne Commentary</i>)
KredReorgG	Kreditinstitute-Reorganisationsgesetz (<i>Financial Institutions Restructuring Act</i>)
KSI	Zeitschrift für Krisen-, Sanierungs- und Insolvenzberatung
KTS	Zeitschrift für Insolvenzrecht
LBO	Leveraged Buy-Out
LG	Landgericht (<i>District Court</i>)
LR	Law Reports
LS	Legal Studies
LSG	Law Society's Gazette
Ltd	Limited
Mich. L. Rev.	Michigan Law Review
mn.	marginal number
MüKo	Münchener Kommentar (<i>Munich Commentary</i>)
N. C. L. Rev.	The North Carolina Law Review
NJW	Neue Juristische Wochenzeitschrift
No.	Number
Nw. U. L. Rev.	Northwestern University Law Review
NZG	Neue Zeitschrift für Gesellschaftsrecht
NZI	Neue Zeitschrift für das Recht der Insolvenz und Sanierung
OJ	Official Journal
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht (<i>Court of Appeal</i>)
ORDO	Jahrbuch für die Ordnung von Wirtschaft
p.	page(s)
para	paragraph
paras.	paragraphs
Plc	Public limited company
Q. J. Econ.	Quarterly Journal of Economics
QREF	Quarterly Review of Economics & Finance
r.	Rule
RabelsZ	Rabels Zeitung
Rev. Econ. Stud.	Review of Economic Studies
RiW	Recht der Internationalen Wirtschaft
Sch.	Schedule
sec.	Section

Abbreviations

ss.	Sections
Stan. L. Rev.	Stanford Law Review
SZ	Süddeutsche Zeitung
Tex. L. Rev.	Texas Law Review
UNCITRAL	United Nations Commission on International Trade Law
U. Chi. L. Rev.	University of Chicago Law Review
UK	United Kingdom
US	United States
Va. L. Rev.	Virginia Law Review
Vand. L. Rev.	Vanderbilt Law Review
VG	Verwaltungsgericht
Vol.	Volume
Wash. U. L. Q.	Washington University Law Quarterly
Western Econ. J.	Western Economic Journal
Wis. L. Rev.	Wisconsin Law Review
WM	Wertpapiermitteilungen – Zeitschrift für Wirtschafts- und Bankrecht
Yale L. J.	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZBB	Zeitschrift für Bankrecht und Bankwirtschaft
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfB	Zeitschrift für Betriebswirtschaft
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZInsO	Zeitschrift für das gesamte Insolvenzrecht
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis
ZRP	Zeitschrift für Rechtspolitik
ZP	Zeitschrift für Planung & Unternehmenssteuerung
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft
ZZP	Zeitschrift für Zivilprozess

Table of Cases

Germany

AG Charlottenburg, 36s IN 2196/13, 36i IN 2311/13
AG Köln, Beschl. v. 19.2.2008, 73 IE 1/08
BGH, Urt. v. 11.10.1961 – VII ZR 113/60
BGH, Urt. v. 29. 1. 1964 – Ib ZR 197/62, BGHZ 41, 98
BGH, Urt. v. 11. 5. 1978 – VII ZR 55/77, BGHZ 71, 309, 312
BGH, Urt. v. 24.5.2005 – IX ZR 123/04
BGH, Beschl. v. 17.7.2014 – IX ZB 13/14, ZIP 2014, 1442
BGH, Beschl. v. 7. 7. 2005 – IX ZB 266/04, BGHZ 163, 344, 347
BGH, Beschl. v. 22. 3. 2007 – IX ZB 10/06
BGH, Beschl. v. 29. 3. 2007 – IX ZB 204/05
BGH, Beschl. v. 26. 4. 2007 – IX ZB 5/06, NZI 2007, 521
BGH, Beschl. v. 10. 1.2008 – IX ZB 97/07
BGH, Urt. v. 13. 10. 2009 – X ZR 79/06, WM 2009, 2330
BGH, Urt. v. 6. 10. 2005 – IX ZR 36/02
BGHZ 15, 52
BGHZ 54, 247
BGHZ 71, 40, 43
BGHZ 83, 319
BGHZ 83, 319, 321
BGHZ 90, 37
BGHZ 90, 370, 373
BGHZ 110, 47, 61
BGHZ 113, 335
BGHZ 116, 319
BGHZ 119, 305, 319
BGHZ 120, 140, 145
BGHZ 125, 141
BGHZ 125, 141, 145
BGHZ 125, 239, 241
BGHZ 129, 136
BGHZ 132, 141, 143
BGHZ 136, 133, 139
BGHZ 142, 167, 169
BVerfG, Beschl. v. 17.10.2013 – 2 BvR 1978/13
BVerfG, Beschl. v. 27.4.1999 – 1 BvR 1613/94, BVerfGE 100, 289

(Akkordstörer)

Table of Cases

BVerfG, Beschl. V. 20.8.2000 – 1 BvR 68/95	
BVerfG NJW 2007, 828	(Siemens Nixdorf)
BVerfG NJW 2007, 3266, 3267	(Wüstenrot/Württembergische)
BVerfG NJW 2007, 3268, 3270	(Edscha)
BVerfG ZIP 2007, 1261	
BVerfG ZIP 2007, 2121	
BVerfGE 14, 263, 276	(Feldmühle)
BVerfGE 25, 371, 407	(Rheinstahl)
BVerfGE 50, 290, 341	
BVerfGE 102, 197, 211	
FG Köln, EFG 2001, 588	
LAG Rheinland-Pfalz Urt. v. 12. 10. 2006 – 4 Sa 281/06	
LG Bielefeld, Beschl. v. 30. 11. 2001 – 23 T 365/01	
LG Neubrandenburg, Beschl. v. 31.7. 2000 – 4 T 260/00,	
LG Berlin, BB 1977, 213	
LG Berlin, Beschl. v. 16.6.2014 – 95 O 52/13, ZIP 2014, 1388	
LG Berlin, Beschl. v. 20. 10. 2004 – 86 T 578/04	
LG Berlin, Bescheid v. 8. 10. 2004 – 86 T 588/04	
LG Berlin, Beschl. v. 29. 10. 2002 – 86 T 534/02	
LG Berlin, Urt. v. 10.12.2012, 99 O 79/11 = KG 23 U 186/12	
LG Cottbus, Beschl. v. 17. 7. 2001 – 7 T 421/00	
LG Frankfurt/M., Urt. v. 13.11.2013 – 3-13 O 72/12	
LG Frankfurt/M., Urt. v. 20.3.2013 – 3-13 O 119/12	
LG Frankfurt/M., Urt. v. 13.8.2013 – 03-9O 78/13	
LG Potsdam 22.10.2008 – 2 O 501/07	
LG Rottweil, 17. 5. 2010 – 3 O 2/08	
OLG Bamberg NZG 2005, 808	
OLG Celle, Hinweisbeschl. v. 20. 11. 2006 – 4 U 166/06	
OLG Celle, Urt. v. 8. 9. 2009 – Case 8 U 46/09	
OLG Dresden, Beschl. v. 21. 6. 2000 – 7 W 951/00	
OLG Düsseldorf, GmbHR 1992, 112	
OLG Düsseldorf, NZG 2004, 328, 329	
OLG Jena, Urt. v. 6. 2. 2002 – 2 U 1033/01	
OLG Naumburg, Beschl. v. 2. 5. 2000 — 5 W 47/00	
RG, Urt. v. 8.7. 1930 – VII 476/29	
RG, Urt. v. 15. 12. 1899 – 240/99 III, JW 1900, 73	

United Kingdom / United States / Canada

Anglo-Continental Supply Co Ltd, re [1922] 2 Ch 723
APCOA Parking (UK) Ltd & Ors [2014] EWHC 997 (Ch), EWHC 1867 (Ch)
Barclays Mercantile Business Finance Ltd & Another v Sibec Developments Ltd [1992] 1 WLR 1253

Bluebrook Ltd, re [2009] EWHC 2114 (Ch)
BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3bl plc and others [2010] EWCA 2005 (Ch),
[2011] EWCA Civ 227
Boys v Chaplin [1969] 2 All ER 1085
Broderip v. Salomon [1893] B 4793, [1895] 2 Ch 323, 337
Cavell Insurance Company 21.2.2005, re Ontario Supreme Court (unreported)
Cheyne Finance Plc (No 2), re [2007] EWHC 2402 (Ch)
Ci4net.com Inc, re [2005] BCC 277
Collins & Aikman Europe SA Collins and others, re [2006] EWHC 1343 (Ch)
Company, re a [1986] BCLC 261
Company (No 001418 of 1988), re a [1990] BCC 526
Connock and another v Fantozzi (Re Alitalia Linee Aeree Italiane SpA) [2011] EWHC 15 (Ch)
Countrywide PLC and others [2009] EWHC 1347 (Ch)
Damovo Group SA (unreported) re, 25 April 2007 (Ch D)
DAP Holding NV, re [2005] EWHC 2092 (Ch) B
Debtor (No. 64 of 1992), re a [1994] 1 WLR 264
Devi v Peoples Bank of Northern India Ltd. [1938] 4 AER 337
DKLL Solicitors v Revenue and Customs Commissioners [2007] BCC 908
DKLL Solicitors v Her Majesty's Revenue & Customs [2007] EWHC 2067 (Ch)
Eurofood IFSC Ltd, re [2006] Ch 508
European Directories v DH6 BV [2010] EWHC 3472 (Ch)
Equitable Life Assurance Society (No. 2), re [2002] EWHC 140 (Ch)
Hans Brochier Holdings Ltd v Exner [2006] EWHC 2594 (Ch), [2007] BCC 127 (Ch)
Hawk Insurance Company Limited, re [2001] 2 BCLC 450, CA, [2001] 2 BCLC 67
Hellas Telecommunications (Luxembourg) II SCA, re [2009] EWHC 3199 (Ch)
Heron International NV, re [1994] 1 BCLC 667
House of Lords [1897] AC 22
Jessel Trust Ltd, re [1985] BCLC 119
Johns-Manville Corp., in re 36 B.R. 727 (S.D.N.Y. 1984)
Kaupthing Capital Partners Master LP Inc (unreported), 31 March 2010 (Ch D)
La Seda De Barcelona SA, re [2010] EWHC 1364 (Ch)
Lennox Holdings Plc, re [2009] EWHC B11 (Ch)
Marconi Corp plc, re [2003] EWHC 1083 (Ch)
Minister Assets plc, re [1985] BCLC 200
MyTravel Group Plc, re [2005] 1 WLR 2365
NFU Development Trust Ltd, re [1973] 1 ALL ER 153
Olympia & York Canary Wharf Ltd (No.1) [1993] BCC 154
Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA [2012] EWHC 1413 (Ch)
Osiris Insurance, re [1999] 1 BCLC 182
Primacom Holding GmbH, re [2011] EWHC 3746 (Ch), [2012] EWHC 164 (Ch)
Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch)
Rodenstock GmbH, re [2011] EWHC 1104 (Ch)

Table of Cases

Sao Paulo (Brazilian) Rly. Co. Ltd. V. Carter [1896] AC 31
Savoy Hotel Ltd, re [1981] Ch 351, [1981] 3 All ER 646
Shierson v Vlieland-Boddy [2005] EWCA Civ. 974
Sovereign Marine & General Insurance Co Ltd and other companies, re [2006] EWHC 1335 (Ch)
Sovereign Life Assurance Company v. Dodd, re [1892] 2 QB 573
Stanford International Bank Ltd and others, re [2009] EWHC 1441 (Ch), [2010] EWCA Civ 137
T&D Industries plc [2001] 1 BCLC 471
The Atlantic Star [1972] 3 All ER 705
Texaco Inc., in re 73 B.R. 960 (S.D.N.Y. 1987)
Trimast Holding Sarl – and – Tele Columbus GmbH [2010] EWHC 1944 (Ch)
Truex v Toll [2009] EWHC 396
Uniq plc, re [2011] EWHC 749 (Ch)

European Union

ECJ, C-81/87 [1988] ECR I-05483	(Daily Mail)
ECJ, C-19/90 & C-20/90 [1991] ECR I-2691	(Karella and Karellas)
ECJ, C-381/89 [1992] ECR I-2111	(Syndesmos Melon)
ECJ, C-441/93 [1996] ECR I-1347	(Panagis Pafitis)
ECJ, C-212/97 [1999] ECR I-01459	(Centros)
ECJ, C-208/00 [2002] ECR I-09919	(Überseering)
ECJ, C-167/01 [2003] ECR I-10155	(Inspire Art)
ECJ, C-9/02 [2004] ECR I-02409	(de Lasteyrie)
ECJ, C-341/04 [2004] ECR I-3813	(Eurofood)
ECJ, C-411/03 [2005] ECR I-10805	(SEVIC)
ECJ, C-1/04 [2006] ECR I-701	(Susanne Staubitz-Schreiber)
ECJ, C-210/06 [2008] ECR I-9641	(Cartesio)
ECJ, C-396/09 [2011] ECR I-0000	(Interedil)
EJC, C-191/10 [2011] ECR I-13209	(Rastelli Davide)
ECJ, C-378/10 [2012] ECR I-00000	(VALE)

Chapter I Introduction and Background

1 Introduction

1.1 Setting the Scene

With the global financial and economic crisis causing uncertainties and disruptions in financial markets and provoking increased capital requirements for banks, corporate financial distress has been a great economic challenge.¹ In the past, companies were able to accrue massive funds on generous terms; now they suffer from these excessive burdens of debt.² The debts will have to be repaid or restructured in the near future in order to prevent the company suffering financial distress. With credit terms having changed and credit becoming harder and more expensive to obtain,³ some companies will face fierce competition to finance their daily business – and will eventually fail. Distorted market conditions may also push companies with a viable core business towards insolvency,⁴ leading to enormous losses that may cripple economies by suffocating any economic growth, harming the economic prosperity and the overall social welfare of a country.⁵

Insolvency law plays a fundamental role in credit societies and the economic concept of insolvency is an integral part of a market economy, providing an effective competitive mechanism for the survival of viable companies and the failure of unviable and inefficient businesses.⁶ The legal framework ought to provide effective tools to either facilitate an orderly insolvency process or the restructuring of companies in financial distress.

1 *Laryea*, IMF 2010, p. 3.

2 *Bork*, mn. 1.10: Mezzanine financing in the years 2004 to 2007 in Germany alone amount to some EUR4.6bn, for leveraged buyouts USD72.61bn are required for re-financing before 2016. See also *Hölzle*, KTS 2011, 291, 300; *Sullivan / Warren / Westbrook*, 59 *Stan. L. Rev.* (2006-2007) 213, 220 for empirical evidence.

3 *Jostardt / Rodt*, in *FS Rudolph*, p. 1100, 1101.

4 *Hommel / Knecht / Wohlenberg*, in *Hommel / Knecht / Wohlenberg*, p. 27, 30.

5 *Wood*, *The Law and Practice of International Finance*, mn. 1-23; *Easterbrook / Fischel*, viii.

6 See Chapter I 2.1.

The competitive race inherent in globalised markets has also led to competition between corporate legal entities⁷ and, furthermore, to legal competition including the field of insolvency and restructuring law.⁸ German companies such as *Deutsche Nickel*⁹, *Schefenacker*¹⁰ or *Brochier*¹¹ have engaged in forum shopping,¹² particularly in England. They have realised that migrating to a country with a legal framework favourable to restructuring can also be an important economic factor in the choice of location, despite the complexity and costs involved.¹³ *Tele Columbus*¹⁴, *Rodenstock*¹⁵, *PrimaCom*¹⁶ and most recently *APCOA Parking*¹⁷ have found a way of benefitting from English restructuring law without fully moving to the country.

This legal competition has revealed an urgent need for reform in Germany.¹⁸ The nation has lagged behind other European countries,¹⁹ which have already pushed through such reforms over the past few years. The past English law reforms are believed to have established a rescue culture by offering legal proceedings to companies in financial distress that allow for regaining going concern status by restructuring as opposed to liquidation. As a result, the German legislature came under pressure to offer a more attractive restructuring and insolvency law²⁰ to prevent companies from relocating their businesses abroad, as this would result in an exodus of local businesses, endangering the national economy.²¹

7 *Eidenmüller*, ZGR 2007, 168, 170 et seq.; *Witt*, ZGR 2009, 872, 873.

8 *Eidenmüller*, ZGR 2006, 467 et seq.; *Eidenmüller*, Finanzkrise, Wirtschaftskrise und das deutsche Insolvenzrecht, p. 8; *Jacoby*, ZGR 2010, 359, 362 et seq.; *Bork*, ZIP 2010, 397, 398 et seq.

9 *Vallender*, NZI 2007, 129, 131 et seq.

10 *Windsor / Müller-Seils / Burg*, NZI 2007, 7.

11 *Hans Brochier Holdings Ltd v Exner* [2006] EWHC 2594 (Ch), [2007] BCC 127 (Ch).

12 *May*, ZInsO 2012, 165: „jurisdiction shopping“.

13 *Eidenmüller*, ZIP 2010, 649, 650; *Eidenmüller / Frobenius / Prusko*, NZI 2010, 545, 546 et seq.

14 *Trimast Holding Sarl – and – Tele Columbus GmbH* [2010] EWHC 1944 (Ch).

15 *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch).

16 *Re Primacom Holding GmbH* [2011] EWHC 3746 (Ch); *Re Primacom Holding GmbH* [2012] EWHC 164 (Ch).

17 *Re APCOA Parking (UK) Ltd & Ors* [2014] EWHC 997 (Ch.).

18 *Gebler*, NZI 2010, 665 ff.; *Jaffé / Friedrich*, ZIP 2008, 1849.

19 *Wessels*, ECL 2011, 27, 28.

20 *Schelo*, NZI 2006, VII, VIII; *Eidenmüller*, ZJP 2008, 273, 275.

21 *Vallender*, NZI 2007, 129, 130.

With the “Act for the Further Facilitation of the Restructuring of Companies” (*Gesetz zur Erleichterung der Sanierung von Unternehmen*)²², the German legislature made amendments to the German Insolvency Statute (*Insolvenzordnung*)²³ to facilitate the restructuring of companies in financial distress. The shift was also motivated by a need to establish a culture in which insolvency is no longer seen as a stigma but rather as giving companies a real chance to survive. The German legislature recognised that changing debt into equity was an important restructuring tool for a company in financial distress²⁴ and anchored the measure as part of the insolvency plan proceeding in German law.

The legal uncertainties in a debt-equity-swap are reflected in the new legal rules.²⁵ In the future, a debt-equity-swap may even be implemented against the will of the shareholders.²⁶ Shareholders are integrated into the insolvency plan voting process as one or more independent voting groups and under certain conditions they cannot reject or prevent the validity of the insolvency plan. Regarding creditors, a conversion of debt into equity against their will is still not possible. Other measures in the ESUG include a modification of the insolvency plan proceeding, which had only very rarely been used as a restructuring tool in the past. One of the reasons for this was a strict separation between company and insolvency law measures, which caused uncertainties in insolvency plan proceedings. With ESUG, structural changes now interlink insolvency with company law, thereby lifting the neutrality of the Insolvency Statute and overcoming the separation between corporate and insolvency law.²⁷ German insolvency law should now be in a position to compete with other European jurisdictions.²⁸

22 Gesetz zur Erleichterung der Sanierung von Unternehmen (ESUG), *herewithafter* ESUG.

23 Insolvenzordnung (InsO), *herewithafter* InsO.

24 BMJ, RegE-ESUG, BT-Drucks. 17/5712, p. 28.

25 *Ibid.* p. 27, 47 especially with regard to constitutional issues.

26 BMJ, Begr. DiskE-ESUG, ZIP 2010, Beil. 1, p. 2. Critical see *Kresser*, ZInsO 2010, 1409 et seq.; *Spetzler*, KTS 2010, 433, 444 et seq.

27 BMJ, RegE-ESUG, BT-Drucks. 17/5712, p. 26. The change in perception was likely due to the decision made by the BVerfG in Squeeze-Out-Proceedings, BVerfG, NJW 2007, 3268.

28 BMJ, RegE-ESUG, BT-Drucks. 17/5712, p. 1.

1.2 Definitions and Limitations

There are various definitions and limitations that apply to this dissertation.

Rescue culture has many different aspects. The basic concept aims to create a legal environment that favours the restructuring of a company in financial distress as opposed to liquidation.²⁹ A rescue culture is effective when it is fit for purpose and allows the rescue of the company in financial distress in a timely, low cost and constructive manner. *Financial distress*³⁰ is a situation where a company's cash flow is insufficient to meet current obligation,³¹ which may eventually lead to *insolvency*.³²

The term *restructuring*³³ is neither a legal term nor is there a generally accepted definition.³⁴ Restructuring generally includes the totality of “*organizational*³⁵, *financial*³⁶ and *legal measures to lead a company out of an unfavourable economic situation*³⁷ in order to ensure a continued existence; [... including the] *conversion [...] of debt into equity*”³⁸. Restructuring may cover any measures that give creditors access to the going concern value of the debtor's assets.³⁹ A restructuring is economically rea-

29 *Müller-Seils*, p. 20 et seq.

30 Compared to market distress or industry distress, see *Ofek*, 34 J.F.E. (1993), 3, 19.

31 *Wruck*, 27 J. Fin. Econ. (1990) 419, 421: financial distress “is not synonymous with corporate death”.

32 *Altman*, p. 4 et seq., defining the terms failure, insolvency, default and bankruptcy and, despite that these terms are used interchangeably in this dissertation, they are distinctly different in their formal use; *Baird*, 54 U. Chi. L. Rev. (1987) 815, 829: default is not necessarily bankruptcy.

33 For distinctions between restructuring, turnaround and reorganisation, see *Holbein*, p. 65 et seq.

34 *K. Schmidt*, GmbH in Krise, Sanierung und Insolvenz, p. 148; *Belcher*, p.11 et seq.; *Bork*, ZIP 2011, 101; *Wellensiek*, NZI 2002, 233, 233; *Claussen*, ZHR 174 (1983) 195, 197; *Uhlenbruck*, KTS 1981, 531, 533 et seq.

35 *Wruck*, 27 J. Fin. Econ. (1990) 419, 420 et seq.

36 *Gilson / John / Lang*, 27 J. Fin. Econ. (1990), 315 et seq. For overview of equity and debt measure, see *Thierhoff et al.*, mn. 40 et seq.

37 *Wellensiek*, NZI 2002, 233; *Flessner*, ZRP 1982, 244; *Uhlenbruck*, KTS 1981, 513, 534.

38 *Flessner*, Sanierung und Reorganisation, p. 2; *Gless*, p. 44; *Wellensiek*, NZI 2002, 233, 234; *Ofek*, 34 J. Fin. Econ. (1993), 3; *Kilger*, ZIP 1982, 779, 781; *Uhlenbruck*, KTS 1981, 513, 533 et seq.

39 *Balz*, Sanierung von Unternehmen, p. 13.

sonable only if the business or the legal entity is worth preserving.⁴⁰ A company in distress decides whether to contemplate liquidation or restructuring⁴¹ by establishing whether its going concern value is higher than its liquidation value.⁴² This is its restructuring potential. With the successful implementation of restructuring measures, generally accompanied or followed by an operational restructuring,⁴³ the company will regain its competitiveness and return on investment,⁴⁴ generating a surplus of revenues over expenditures.⁴⁵

Extrinsic restructuring, as opposed to intrinsic restructuring,⁴⁶ deals with changes in the relationship between the company and its creditors and in the creditors' relationships to each other (financial restructuring),⁴⁷ focused on the law of obligation.⁴⁸ On the one hand, extrinsic restructuring can include the preservation of the business and the legal entity;⁴⁹ on the other hand, it can involve the preservation of the business in a new legal entity and the liquidation of the old legal entity through a business-asset sale,⁵⁰ allowing for a restructuring regardless of the approval of the shareholders.⁵¹ However, some risks are involved⁵² and in certain cases restructuring may be uneconomic or impossible.⁵³

With regard to a company in *crisis*, there is no one definition provided by legislator or jurisprudence for the word. It generally indicates “*a time of great difficulty*”⁵⁴ for a company, a “*state of being in danger or difficul-*

40 Hommel / Knecht / Wohlenberg, in Hommel / Knecht / Wohlenberg, p. 27, 47 et seq.

41 Wellensiek, NZI 2002, 233 et seq.

42 Körner, p. 125; Eidenmüller, Unternehmenssanierung, p. 31.

43 Laryea, IMF 2010, p. 10.

44 IDW Anforderungen an die Erstellung Sanierungskonzepten (IDW 6), 2010; Undritz, Kölner Schrift zur InsO, p. 932, 933.

45 Wellensiek, NZI 2002, 233, 234.

46 Eidenmüller, Unternehmenssanierung, p. 262.

47 Eidenmüller, BB 1998, Beil. 10, p. 19.

48 Eidenmüller, Unternehmenssanierung, p. 262.

49 Eidenmüller / Engert, ZIP 2009, 541, 542; Ehlers, ZInsO 2009, 320, 322; Fritze, DZWIR 2007, 89 et seq.

50 Schlegel, MüKo-InsO / Länderbericht, mn. 5: “übertragende Sanierung” = business-asset sale.

51 Ehlers, ZInsO 2009, 320, 321.

52 Ibid. 322.

53 Westpfal / Janjuah, ZIP 2008, Beil. 3, p. 1, 13.

54 Oxford Dictionary, 1989.