“Contractualised Distress Resolution in the Shadow of the Law”[1]

German National Report

A. Introduction / Overview

The project “Contractualised Distress Resolution in the Shadow of the Law – Effective Judicial Review and Oversight of Insolvency and Pre-insolvency Proceedings” (short: CoDiRe) consists of three major stages – partially overlapping in time. During the first stage, data has been gathered and compiled in the participating European jurisdictions, Italy, Spain, the UK and Germany, regarding the legal restructuring framework as well as the practical restructuring landscape, the latter both by evaluating quantitative data regarding pre-insolvency and insolvency restructuring proceedings and by gaining a deeper, qualitative insight, mostly through targeted interviews with expert practitioners in the field. During the second stage, the national insights have been shared and thoroughly discussed with the colleagues /project partners abroad and they have fed into a set of pan-European policy recommendations and guidelines (best practices) as well as comments on and suggestions for the undertaking of the EU to create a new directive on (i.a.) preventive restructuring frameworks, in particular on the draft presented by the EU commission in November 2016. The third stage saw the dissemination of these results and their discussion with international experts, refining and presenting on conferences in Brussels, Rome, Madrid and Berlin as well as publishing them online and as a book.

This particular “National Report” of the German CoDiRe research team firmly belongs to the first of these stages even though it has only been completed at the very end of the project and is, thus, to some degree informed by the results and insights gathered during the later stages and by later publications. This report is hugely based, however, on material shared with the whole CoDiRe research group throughout the project’s duration, including presentations at project meetings in Florence (April 2016 and May 2018), Madrid (March 2017), and Berlin

[1] The project “Contractualised distress resolution in the shadow of the law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings” (CoDiRe) is carried out by a partnership of several universities: Università degli Studi di Firenze (Project Coordinator), Humboldt-Universität zu Berlin (Partner) and Universidad Autónoma de Madrid (Partner), supported by the Consejo General del Poder Judicial (Associate Partner), Banca d’Italia (Associate Partner) and Entrepreneurship Lab Research Center (Associate Partner). – The project addresses several key issues highlighted in the Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU). It also considers the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM(2016) 723 final), published on November 22, 2016.

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(November 2017), and a summary of German national findings submitted for the Brussels conference in July 2018 (see annex A to this report).

The report will first provide some (very) basic information regarding the German research team and the methods and avenues followed, in particular due to certain specifics of the German legal framework and the (in-)accessibility of quantitative data (B.), before providing an equally brief overview of the German legal restructuring landscape outside of insolvency proceedings and its peculiarities, in particular compared to those in Italy, Spain and the UK (C.). Then, the main part of the report gives an overview of the German insolvency process / proceeding (D.) and its main participants, their roles, remuneration, qualification, liability, motivation, etc. (E.). A very short section will provide some pointers to the – as mentioned: very limited – quantitative sources of our research (F.), before concluding (G.).

B. German Research Team and Methods Pursued

The German Research Team consists of Dr. Christoph G. Paulus, LL. M. (Berkeley), full professor for civil law, civil procedure and insolvency law, and Roman law, at Humboldt-Universität zu Berlin, and Wolfgang Zenker, now Rechtsanwalt (solicitor) in Berlin, who was employed by Humboldt-Universität zu Berlin as a researcher especially for CoDiRe from April 2016 to March 2018 and who has been continuing to contribute to the project – partially under a contract for services – since April 2018.

The team's attempt to collect and analyse meaningful quantitative data ran into a number of problems, founded in as diverse roots as the specifics of the German legal framework for restructurings (see *sub* C. for details), the federal system and the sheer number of insolvency courts, the German attitude to data protection and confidentiality – or lack of publicity – even in in-court insolvency proceedings, insufficient statistics being kept and published regarding insolvency proceedings, and hesitation especially by bankers to provide quantitative business figures. This resulted in a focus on the qualitative side of the empirical research. Some pointers to quantitative data can, however, be found below (*sub* F.); it comes from official reports using data provided under the Insolvenzstatistikgesetz (*insolvency statistics statute*, in force since 1 January 2013), from an evaluation report on the 2012/2013 insolvency law reform (ESUG) published, though, only in October 2018, and from private studies that are, however, mostly relying on questionnaires rather than the analysis of core statistical data.

The qualitative data comes from conversations and discussions with experts from all parts of the restructuring "scene", regarding their experiences, perceptions and practices, and – in particular – from extensive (ranging from just under 90 minutes to approx. four hours) targeted interviews with advisors, mostly solicitors but also economists/business consultants, who graciously and generously provided their time, expertise and insights to our project. These interviews used a questionnaire based on a uniform draft created by the international CoDiRe research team (and in particular the Spanish team and its head, Ignacio Tirado) but amended to fit the specificities of the German legal framework as a starting point but deviated from it where appropriate to adapt the interview to the respective interviewee's particular expertise, etc. Also, feedback received during previous interviewees and on CoDiRe project meetings influenced the later interviews, asking the experts to address certain aspects (like the structure of borrowing) in more detail. The basic questionnaire can be found in annex B to this report; a list of the experts who agreed to be mentioned by name can be found in annex C to this report.

C. German Legal Restructuring Landscape (outside of Insolvency Proceedings)

Unlike the other jurisdictions and legal systems analysed in detail by CoDiRe (Italy, Spain, and the UK), German law does not provide (yet, pending the prospective EU directive and its transformation into national law) for any type of semi-formal, semi-collective, preventive, pre-insolvency, or dedicated restructuring proceeding – there are only two alternatives: (1) a merely contractual solution between the debtor and all or selected stakeholders, requiring unanimity of all those involved and to be bound,[2] and enjoying only very limited protection in a possibly subsequent formal insolvency proceeding, and (2) said formal insolvency proceeding. Until quite recently – basically, until German companies started to attempt and/or succeed in availing themselves of foreign restructuring mechanisms like the English *Scheme of Arrangement* (in cases like Telecolumbus, Rodenstock or APCOA) –, policy discussions in Germany revolved less around whether to create new and dedicated types of proceedings but rather around how to make the formal insolvency proceeding more attractive and less damaging for potentially viable companies that qualify for a restructuring. The major 2012/2013 law reform (ESUG, for more details see below, *sub* D.) shows this tendency or trend particularly well.

For merely contractual restructurings, the normal civil law rules apply; there are no special rules facilitating these agreements like in other jurisdictions. For example, a pre-insolvency transfer of contracts or intellectual property licenses is generally not possible without the consent of the other party, even in restructurings, public law licenses or permissions do not always and automatically follow the transferred business, and there are no written exemptions or safe harbours from criminal or civil liability or avoidance (with a very narrow exception in § 39 IV 2 InsO) in case of failure. The courts do take the intentions of the parties and the *ex-ante*-prospects of an attempted restructuring into account where liability or avoidance require fault but set the bar pretty high, e. g. usually requiring the restructuring attempt to be based on an implemented concept by an expert meeting certain standards (see the – mostly – corresponding standard S 6 published by the Institute of Public Auditors in Germany, IDW). This requirement, in turn, is an obstacle for restructuring attempts (in particular for smaller companies) as obtaining such a concept is often made a requirement for new financing by banks and is both costly and time-consuming, potentially delaying restructuring efforts; there

[2] Unless they themselves have, in advance, agreed to be bound by a majority decision, in particular by agreeing to “Collective Action Clauses” (CACs) in financing agreements or bond terms. The German Bond Act (Gesetz über Schuldverschreibungen aus Gesamtemissionen – Schuldverschreibungsgesetz – SchVG) provides some rules for majority decisions of bondholders in case the bond’s terms allow for such majority decisions (§§ 5-22 SchVG); cf. http://www.true-sale-international.de/fileadmin/tsi_downloads/Unternehmen/TSI_Partner/SchVG_2_spaltig_deutscher_Disclaimer.pdf (unofficial translation; all URLs in this report are valid as of 16 December 2018).

is an additional protection awarded to "bridge financing", however the terms allowed for that are generally short and the lenders often unwilling to provide it. The risk of later avoidance and of liability also and in particularly poses a considerable obstacle to pre-insolvency going-concern sales of distressed companies.

Despite these shortcomings of the legal framework regarding out-of-court restructurings, the interviewed experts mostly stated that the system is generally working and that the purely contractual approach is their preferred avenue towards restructuring. Unanimously, they stated that, wherever possible, the out-of-court restructuring is generally preferable to formal insolvency proceedings despite the superior toolbox available under insolvency legislation (e.g. with regards to executory contracts, clawback/avoidance and liability rules to add to the estate and undo mistakes of the past, plan proceedings allowing for majority decisions, etc.) and despite all improvements in recent years. The reasons given focused mostly around the still prevalent stigma of insolvency proceedings both for the business and for its managers and owners, the costs of insolvency proceedings (sheer costs as well as devaluation of assets), and the lack of predictability of insolvency proceedings (a restructuring can very quickly turn into a liquidation). The "wherever possible" refers back, in particular, to two reasons why contractual approaches may not be possible – neither of which is the "hold-out" scenario (which happens but is not usually perceived as a major problem) –: The first, factual, reason is the lack of funds to plan, negotiate and implement an out-of-court restructuring (mostly due to the debtor being too late in initiating negotiations), and the second, legal, reason is the obligation of the management of certain companies under § 15a InsO to file for formal insolvency proceedings once they are insolvent (zahlungsunfähig, § 17 InsO) or overindebted (überschuldet, § 19 InsO; cf. below, *sub* D.IV.1) – so again a question of being too late. The chapter 1 of CoDiRe's Final Report deals in detail with this issue and possible solutions.

Even though the contractual out-of-court approach mostly works in Germany (most likely for the lack of credible alternatives and supported by a commonly not *too* widely diversified borrowing structure of German debtors, incentivising the few big borrowers to cooperate, invest further and/or buy out problematic small creditors), the interviewed experts still stated that they supported and would welcome the introduction of pre-insolvency proceedings of some kind in Germany to add another tool to the toolbox and to address and overcome the hold-out problem where it may arise.

This – for the purposes of CoDiRe – unique legal landscape found in Germany today added to the problems of the German research team regarding quantitative results as purely contractual restructurings are not registered, they are, in most cases, not public, and there are thus no statistics on them other than very individual statistics creditors (like banks) may keep on their efforts and the outcomes. These statistics, however, were not accessible and/or made available to us. It also gives the German research the character of a "blind test" – CoDiRe in general focuses on just the semi-formal proceedings that the German system currently lacks, so the German research has taken on the function to show how a system without these proceedings can still work but also, more importantly, where its shortcomings are and which gap semi-formal proceedings can and should fill.

D. Overview of the German Insolvency Process

I. Legal Framework

The German insolvency process, which is described here in some detail for it being Germany's only available court proceeding for restructurings, is governed by the Insolvenzordnung (InsO – insolvency statute)[3] that came into force on 1 January 1999 and has been repeatedly amended since. A major reform took place in late 2011 (in force partly since 1 March 2012, partly since 1 January 2013) with the Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (ESUG – act to further facilitate the restructuring of enterprises). Another reform, addressing the insolvency of natural persons and the rules about discharges mostly, came into force in July 2014. Other, less fundamental, reforms have taken place since, including amendments of the avoidance provisions, the introduction of rules on group insolvencies and amendments in connection with the recast of the European Insolvency Regulation. All in all, the German insolvency legislation has proven to be very prolific recently.

Further rules concerning the insolvency process can be found in various statutes and regulations outside the InsO, in particular the introductory act to the InsO (EGInsO)[4] and the administrators' remuneration regulation (InsVV) as well as the Code of Civil Procedure (ZPO).[5]

II. Objective of Insolvency Proceedings

According to § 1 InsO, the insolvency proceedings shall serve the purpose of collective satisfaction of a debtor's creditors; honest debtors that are natural persons shall be given the opportunity to achieve discharge of residual debt (Restschuldbefreiung). The rule also mentions that these objectives can be achieved 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. It is a matter of debate whether restructuring of viable enterprises is or can be an objective of insolvency proceedings or – which is the prevalent view – whether it is always just a means to the end of achieving the creditors' satisfaction.

III. Types of Insolvency Proceedings in Germany

In theory, German law only knows one kind of insolvency proceedings (Insolvenzverfahren), starting with a uniform petition either by the debtor or its representatives or by a creditor (or, in case of banks or insurance companies, an authority overseeing the respective market, or, in

[3] German version online: http://www.gesetze-im-internet.de/inso/InsO.pdf. An English translation by Ute Reusch commissioned by the Federal Ministry of Justice can be found online at: http://www.gesetze-im-internet.de/englisch_inso/englisch_inso.pdf (the translated version was current until mid-2013; there have been several amendments since).

[4] An English translation can be found online at: http://www.gesetze-im-internet.de/englisch_eginso/englisch_eginso.pdf (not reflecting the latest changes regarding the EIR's recast).

[5] An English translation can be found online at: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.pdf.

case of secondary proceedings the administrator of the main proceedings, or, in case of an estate or joint marital property, among others also the heir[s], spouses)[6] and (mostly) concluding with a court order dismissing or terminating the proceedings.

However, the InsO does provide for certain variations of the standard proceedings (Regelinsolvenzverfahren), namely:

- specific proceedings mandatory for consumers and certain ex-business-owners [natural persons] (consumer proceedings – Verbraucherinsolvenzverfahren);
- special discharge proceedings (Restschuldbefreiungsverfahren) as an additional, optional component of the insolvency process in case of a natural person's insolvency (consumer or entrepreneur),
- plan proceedings (Insolvenzplanverfahren) allowing debtor, shareholders and (mostly) creditors to vote on a plan prescribing how to resolve the debtor's insolvency – in particular, but not necessarily in form of a restructuring plan –,
- an option for the debtor to administer their own insolvency in standard or plan proceedings, supervised by an insolvency monitor (debtor in possession [DIP] proceedings – Eigenverwaltung).

In practice, the plan and DIP proceedings (while encouraged by legislation) are the exception (2-3% of corporate insolvencies, respectively, with overlaps), the standard and consumer proceedings are the rule. However, the plan and DIP proceedings are particularly common and successfully practiced in "big" cases aiming at restructurings, as has recently been evidenced, too, by the thorough ESUG-evaluation report published in October 2018.[7]

In the case of the insolvency of a business/enterprise, both the standard and the plan proceedings can result either in the piecemeal liquidation of the business/enterprise and distribution of the proceeds (Zerschlagung – divestiture/asset stripping) or in the sale of the business as a whole to a new owner and distribution of the proceeds (übertragende Sanierung – "restructuring by transfer"/asset deal). A turnaround/restructuring of a business within its current corporate shell (Unternehmensträger), usually involving new investments and considerable hair-cuts and/or deferrals, ([unternehmensträgerwahrende] Sanierung/Restrukturierung) can be and often is the (intended) result of plan proceedings.

IV. Steps/Phases of Standard Proceedings

1. Opening Proceedings (Eröffnungsverfahren)

Upon receipt of a petition to open insolvency proceedings, the insolvency court has to consider the petition and determining whether it is admissible (zulässig) and founded/successful

[6] Subsequently, specifics of bank/insurance company insolvencies – of which there are many –, of cross-border insolvencies and of insolvencies of an estate or joint marital property won't be discussed in this report.

[7] The full official report, published only in German, is available online here: https://www.bmjv.de/SharedDocs/Downloads/DE/News/Artikel/101018_Gesamtbericht_Evaluierung_ESUG.pdf

(begründet). The admissibility mostly depends on formalities regarding the petition and the authority to file it (§§ 13-15 InsO), with certain additional (material) requirements – and the necessity of hearing the debtor – in case of a creditor's petition (§ 14 InsO).[8] Before opening insolvency proceedings as such, however, the court also has to establish that (a) a reason to open such proceedings exists (see § 16 InsO; possible reasons are insolvency, imminent insolvency [only in case of a petition by the debtor] and overindebtedness [only in case of corporations and similar entities], §§ 17-19 InsO) and that (b) the estate will probably be sufficient to cover the costs of the proceedings, a sufficient advance has been paid or the costs have been deferred (see § 26 I InsO). To determine the "insolvency reason" and the sufficiency of funds, the court commonly appoints an expert (who is commonly also [and often simultaneously] appointed provisional administrator[9]).

Regarding the "insolvency reasons", in practice (material) insolvency according to § 17 InsO (Zahlungsunfähigkeit) is by far the most important one – it applies regardless of the debtor's legal form and to petitions both filed by the debtor or by a creditor, and it is usually easier to ascertain than overindebtedness. Insolvency is defined in § 17 II 1 InsO as the debtor's inability to comply with obligations as they mature. However, case law eases this harsh sounding standard somewhat by requiring that the liquidity gap is not negligible (roughly < 10 %) or short-lived (less than 3 weeks) and by only considering obligations the payment of which has been demanded by the creditor; this demand can already be seen in sending an invoice, but it excludes obligations regarding which the creditor has – even silently and without formal rescheduling – agreed to late payment. According to § 17 II 2 InsO, the debtor is presumed to be insolvent once they stop payments (Zahlungseinstellung), which does not require a total stop of payments as long as considerable obligations are not met and the situation is perceived by relevant business partners as a stop of payments. Details are very controversial – mostly because material insolvency and the knowledge of the debtor's material insolvency are important elements of several avoidance provisions. Overindebtedness according to § 19 InsO (Überschuldung) only applies to certain debtor entities, namely legal persons (mostly, but not only, public / stock corporations [AG / KGaA] and limited liability companies [UG / GmbH]) and certain companies treated like legal persons for the lack of a natural person who is personally liable for the company's debts (in particular GmbH & Co. KG and similar company forms). A company is deemed overindebted if the assets do not cover the existing (not necessarily mature) obligations and it is not more probable than not that the enterprise will continue to exist regardless.[10] The determination of overindebtedness or balance-sheet insolvency is

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[8] Creditors have to make plausible not only their claim against the debtor but also the fact that the debtor is, indeed, currently insolvent (or overindebted). The courts are rather strict, and creditors other than banks, tax or social security authorities will rarely be in a position to successfully file an involuntary petition.

[9] The most important difference in this context between court-appointed expert and provisional administrator is that the expert is remunerated by the state even in case of an insufficient estate according to the Statute regarding the Remuneration of Experts and Translators and the Compensation of Lay Judges, Witnesses and Third Parties (JVEG), whereas the provisional administrator's remuneration follows the InsVV and is taken out of the estate (up to its depletion) as costs of the proceedings (unless those have been deferred according to § 4a InsO).

[10] The test has been modified and eased in the course of the global financial crisis 2008/2009 to prevent a number of generally viable businesses from being needlessly subjected to insolvency proceedings.

difficult – and near impossible for creditors –, also because the commercial or tax balances of the company are usually not realistically reflecting the relevant assets and obligations due to the applied accounting standards. The prognosis whether the company will continue to exist is usually considered to predominantly be a prognosis of future liquidity, usually for the current and subsequent business years; however, there is a point to be made that this element should rather (also to differentiate stronger between overindebtedness and imminent insolvency) be a test of viability / future rates of return. The third and final "insolvency reason" is the aforementioned "imminent insolvency" (drohende Zahlungsunfähigkeit) according to § 18 InsO; only the debtor can file a petition at this stage to enter formal proceedings early and make use of the special tools provided by insolvency law (insolvency plan, moratorium, avoidance powers, rules on executory contracts, etc.); a debtor filing this early gains access to certain privileges, in particular regarding the self-administration (Eigenverwaltung) of the estate. In practice, however, while many petitions are based on § 18 InsO, most debtors are far beyond this stage and at least long overindebted, if not materially insolvent, when filing; anecdotally, a seasoned insolvency administrator stated that in all her many proceedings not a single debtor had indeed only been imminently insolvent upon filing. A debtor is imminently insolvent if they are likely to be unable to meet their existing obligations on the date of their maturity, § 18 II InsO. This requires a liquidity prognosis, also including likely future obligations; the details are controversial – and, as mentioned, not of significant practical relevance (which may change should imminent insolvency become a prerequisite for a restructuring proceeding as envisaged by the EU directive proposal) –, e.g. which obligations and which period to consider (usually, the prognosis is supposed to extend to no more than the current and the next business year).

Filing a petition in itself, according to German law, does not trigger an automatic stay or similar mechanisms to protect the debtor and the estate. Since considering the petition's merits can take a considerable amount of time (in case of a going concern with employees, opening proceedings are frequently taking about three months,[11] in cases of natural persons as debtors the duration can be considerably longer) and an unprotected estate would be at considerable risk during this time, the insolvency court can and frequently does order provisional measures at its discretion (§§ 21ff. InsO) – among others and in particular the appointment of a provisional administrator, possibly also a provisional creditors' committee, a moratorium/stay of execution regarding moveables, limitations to the debtor's access to the estate and to their mail, and limitations to secured creditors' rights. The court can order these measures before hearing the debtor, but the debtor has to be granted an opportunity to be heard after the

[11] This is very likely to be connected with three months being the limit on employees' compensation in event of the employer's insolvency (Insolvenzgeld). Basically, in a [mandatory] social insurance mechanism, going concerns contribute to a fund administrated by the Federal Employment Agency (Bundesagentur für Arbeit) which, in an "insolvency event" (Insolvenzereignis – most importantly the opening of insolvency proceedings), covers back wages of the insolvent employer's employees. Thus, continuing business for up to three months during the opening proceedings effectively does not burden the estate with wages.

order pursuant to the constitutional entitlement to a hearing in Art. 103 I Basic Law (Grundgesetz, GG)[12] and the opportunity to appeal the order immediately (§ 21 I 2 InsO).

If the court appoints a provisional creditors' committee, the latter can participate in (i.a.) the selection of an administrator and a decision on the debtor's application for DIP proceedings.

2. Commencement/Opening Order (Eröffnungsbeschluss)

The opening proceedings end with either an order opening the insolvency proceedings (Eröffnungsbeschluss, § 27 InsO) or with its refusal by the insolvency court. The decision can be appealed according to § 34 InsO; the (immediate) appeal, however, is further restricted by the general requirement of a burden materially and formally imposed on the complaining party (materielle/formelle Beschwer). In particular, the Federal Court of Justice (Bundesgerichtshof, BGH) ruled[13] a debtor's appeal against an order opening the insolvency proceedings inadmissible when they themselves filed the petition – even if they never admitted being insolvent but only filed e.g. subsequently to a creditor's petition to avail themselves of the option of a later discharge or as a safeguard against possible prosecution according to § 15a IV InsO. In the opening order, the court appoints an administrator and requires the creditors to file their claims within a filing period and to inform the administrators of security interests they are claiming to have, and the debtor's debtors to no longer fulfil these obligations to the debtor personally, § 28 InsO. Further, the order shall fix dates for creditors' assemblies (a) deciding on the continuation of the insolvency proceedings (report meeting, Berichtstermin) and (b) verifying the filed claims (verification meeting, Prüfungstermin), § 29 InsO, unless the proceeding will be – wholly or in part – conducted as written proceedings according to § 5 II InsO. The order is published online (http://www.insolvenzbekanntmachungen.de), served on the debtor and their creditors and debtors, § 30 InsO, and it is sent to the Commerical Register (Handelsregister) or respective registers, § 31 InsO, and entered in the land registers, ship and aircraft registers should the debtor own land, ships, aircrafts or rights in those, §§ 32, 33 InsO. The court can appoint a creditors' committee, § 67 InsO; this mostly takes place in bigger cases and where the continuation/restructuring of the business appears to be a viable option.

The opening order has far-reaching material effects, laid out in §§ 80ff. InsO – most importantly, while the debtor remains legal owner of the estate, it vests the administrator with the exclusive right to manage the insolvency estate and dispose of it, § 80 InsO. Selected specific results of this are: Post-commencement dispositions by the debtor are void, § 81 InsO (with rare exceptions regarding immoveables). Executions by (unsecured) insolvency creditors are prohibited, § 89 InsO; certain pending measures of execution become void, § 88 InsO. Pending lawsuits concerning the insolvent estate are interrupted, § 240 ZPO, and can only be

[12] BGH, 14/7/2011, IX ZB 57/11, ZIP 2011, 1875 (recent cases of the BGH like this one can be accessed online with the file reference – here: IX ZB 57/11 – on: http://www.bundesgerichtshof.de). The debtor also must be given an opportunity to comment on the expert's report regarding the opening requirements, BGH, 9/2/2012, IX ZB 248/11, ZIP 2012, 998.

[13] BGH, 9/2/2012, IX ZB 248/11, ZIP 2012, 998.

resumed pursuant to §§ 85, 86, 180, 184 InsO. Rights in objects of the estate cannot generally be acquired with legal effect anymore unless through the administrator's dealings, § 91 InsO. Certain contracts, most notably mandates ordered by the debtor and management contracts for the debtor expire, §§ 115, 116 InsO; this also applies to proxies granted by the debtor, § 117 InsO. Certain security interests are to be realised by the administrator on behalf of the secured creditor, § 166 InsO.

3. Administering the Estate, Continuing the Business or Liquidating the Assets

The administrator assumes possession and management of the estate, § 148 InsO. They are supposed to continue the business of the debtor until the creditors' assembly (usually in the report meeting, §§ 156, 157 InsO) can decide whether to close the business down or continue it temporarily. The business can however be closed down or sold before the creditors' decision pursuant to § 158 InsO – in this case, the administrator is required to seek the creditors' committee's consent, if such a committee has been appointed; the debtor can petition the court to suspend the close-down or sale if it can be delayed until the report meeting without considerable harm for the estate. A sale without the required creditors' consent or against a court order would nonetheless be valid and only normally constitute a breach of duty likely to raise questions of the administrator's liability according to § 60 InsO and their dismissal according to § 59 InsO. The administrator secures and records/inventories the estate (§§ 149-151 InsO) and assumes the debtor's accounting duties, § 155 InsO.

In the report meeting, the administrator reports on the economic situation and its causes, assessing the prospects of maintaining the debtor's business as a whole or in part and the chances for a plan proceeding, describing the effects of each solution on the satisfaction of the insolvency creditors, § 156 I InsO. Certain other parties, in particular the debtor, the creditors' committee and the works council, shall be given the opportunity to comment on the report, § 156 II InsO, before the creditors take a vote on how to proceed, § 157 InsO, potentially commissioning the administrator to draft an insolvency plan with a specified objective.

Informed by the creditors' decision, supervised by the court and (if appointed by the court or the creditors' assembly, § 68 InsO) the creditors' committee, the administrator collects debts, decides whether to perform executory contracts (§§ 103ff. InsO), avoids/contests pre-commencement transactions (Insolvenzanfechtung, §§ 129ff. InsO), and continues, closes down or sells the debtor's business, drafts an insolvency plan or sells the estate piecemeal (see also § 159 InsO). Certain transactions of particular importance require the consent of the creditors' committee or even the creditors' assembly after hearing the debtor, §§ 160-163 InsO, but they, too, are valid even without such hearing or consent, § 164 InsO, with the lack of consent merely indicating a breach of duty by the administrator.

The avoidance powers of the administrator are of particular importance also regarding pre-insolvency restructurings, as they take place under the shadow of future insolvency and avoidance (also see above, *sub* C.). The German avoidance rules are extensive, in particular due to their interpretation by administrators and courts; even the recent reform in 2017, trying to limit their scope, will most likely fail to show the desired effects (at least for the most part). As a very brief overview,[14] according to § 129 InsO any actions of legal relevance (Rechtshandlungen) – as well as omissions – taking legal effect (§ 140 InsO) before the commencement of insolvency proceedings (or in certain cases thereafter, § 147 InsO) and resulting, directly or indirectly, in a detriment to the creditors as a whole may be avoided by the administrator under the circumstances laid out in §§ 130-136 InsO. The effect of successful avoidance is that whatever has been given away, transferred or relinquished from the estate has to be returned; if this is not possible due to the nature of said asset or due to subsequent developments, the recipient usually has to pay compensation, § 143 InsO. In return, claims may revive as insolvency claims and considerations still existent in the estate shall be refunded, § 144 InsO.

For a period of up to three months before the relevant petition to commence proceedings has been filed, actions granting or facilitating security or performance of a claim – other than certain cash transactions, § 142 InsO – may be avoided if the debtor was materially insolvent at the time and the creditor was aware of the insolvency (or relevant circumstances) or, after the petition had been filed, if the creditor was aware of the petition, § 130 InsO. In case the creditor was not entitled to the security or performance at all, at the time or of the kind he was granted, the avoidance is possible according to § 131 InsO – in months 2 and 3 before the petition has been filed, however, only if the debtor was materially insolvent at the time or the creditor was aware that the action causes a detriment to the other creditors. The scope of these two provisions, § 130 InsO and § 131 InsO, is widened, in particular, by two trends in case law: (a) the creditor's awareness of the debtor's insolvency is easily assumed also where the creditor has no in-depth knowledge of the financial situation of the debtor but only experiences irregularities (late payments, renegotiations, payment in instalments not originally agreed upon, unresponsiveness, and the like) of a certain degree, and (b) enforcement actions, the threat to enforce a debt or to file for the debtor's insolvency are regarded to turn the resulting payment into one the creditor was not entitled to so that it is avoidable even regardless of the creditor's awareness of the debtor's insolvency (§ 131 InsO).

Actions of the debtor – as opposed to those solely by third parties (including certain enforcement actions) – with the intention to cause a detriment to the (other) creditors may be avoided for up to ten years before the petition has been filed if the recipient had been aware of that intention; this awareness is presumed if the recipient was aware of the debtor's at least imminent insolvency at the time and the detriment caused, § 133 I InsO. While this reads as a very narrow standard, only applicable to almost criminal behaviour, the courts tend to construe it broadly: In particular, the debtor is deemed to act with the intention to cause a detriment already if they consider it merely possible that they will not be able in future to perform their obligations towards their (other) creditors to at least the same degree, in particular if they are aware of their own (imminent) insolvency. Restructuring efforts may render an action unavoidable under this rule, but usually only if the debtor is in the process of

[14] For a comprehensive discussion of the administrator's avoidance powers (in German), see *Zenker*, in: Bork/Hölzle (eds.), Handbuch Insolvenzrecht, 2014, chapter 9 (2nd ed. forthcoming).

implementing a restructuring concept drafted by an expert that attests the debtor's viability and the likelihood of a successful restructuring. The rule in § 133 InsO has been considerably amended in 2017 with the purpose of narrowing it – limiting the ten year period to four in case the debtor performs or secures an existing obligation (§ 133 II InsO) and adding language limiting the presumption in § 133 I 2 InsO and the avoidability of actions based on a payment plan (§ 133 III InsO) –, the practical effects, however, are doubtful. It is to be expected that the rule will continue to be applied to many transactions by the debtor outside the three-months-window of §§ 130-131 InsO.

According to § 134 InsO, gratuitous benefits beyond a very low threshold (§ 134 II InsO) are avoidable if they had been granted within four years before the filing by the debtor – without any further requirements. The courts are generally construing "gratuitous" broadly, and apply it also in certain three-person settings. Finally, according to § 135 InsO granting security for or the repayment of shareholder loans or – again: broadly interpreted – equivalent claims is avoidable if it had taken place at most ten years (security) or one year (repayment) before the petition has been filed. The other avoidance rules (§§ 132, 133 IV, 136 InsO) are of lesser practical importance. Certain modifications – generally extending the scope of avoidance provisions – apply to transactions with related parties, as defined in § 138 InsO.

Basically, this step/phase serves to maximize and monetize the estate available for distribution to eligible creditors.

4. Determining the Creditors Eligible for Distribution of the Estate's Proceeds

Simultaneously to administering the estate (see above, *sub* 3.), the administrator is the recipient of creditors' filing their claims, § 174 InsO, and of notifications regarding security interests. The administrator also is tasked with establishing a record of the creditors based on filings but also other information, § 152 InsO, and a survey of property balancing the estate with the debtor's obligation, § 153 InsO.

The filed insolvency claims are entered into a schedule which the administrator then deposits with the court for the inspection of interested parties, § 175 InsO. During the verification meeting of the creditors' assembly, the scheduled claims are to be verified – the administrator, any insolvency creditor and the debtor are free to contest claims which are then to be discussed individually, § 176 InsO. If the objection is not dropped, it will be entered into the schedule, and the claim is a contested claim. If the objection is dropped, there was no objection in the first place or only the debtor has contested the claim, the claim is determined and the creditor is eligible for distribution, § 178 InsO.

In the case of a contested claim, usually the creditor carries the burden to pursue it by initiating proceedings to determine the claim, § 179 I InsO; in case of an already executable claim, the contesting party has to follow up the objection, § 179 II InsO. The determination of the claim is not made by the insolvency court but in "ordinary" – usually, but not necessarily (§ 185 InsO): civil – proceedings according to the applicable provisions governing court proceedings (like the ZPO); in case of civil proceedings, there are special rules on jurisdiction, § 180 I InsO.

In case of a pending (interrupted) action concerning the claim, determination is pursued by joining/continuing this lawsuit, § 180 II InsO. The debtor's objections are of importance not for the immediate insolvency proceedings, but potentially for their discharge and in general for the claims' post-insolvency treatment, §§ 184, 201 II InsO.

5. Distribution of the Estate and Termination / Discontinuation of the Proceedings

The monetized estate, after satisfying secured creditors from the proceeds of their securities, covering the costs of the proceedings and other debts incumbent on the estate (Masseverbindlichkeiten), is distributed *pari passu* among the insolvency creditors. Should the estate be – which is exceedingly rare – sufficient to cover all regular insolvency claims completely, junior or lower-ranking insolvency creditors are to be satisfied according to their rank (and *pari passu* within each rank). Should the estate suffice to even satisfy all junior insolvency creditors, the surplus is rendered to the debtor or, in case of companies or corporations, to the shareholders, § 199 InsO. Due to the often long duration of insolvency proceedings (quite commonly several years; plan proceedings are usually considerably shorter), advance distributions of parts of the estate are possible and common. The distributions are governed by §§ 187ff. InsO.

In a final meeting of the creditors' assembly (Schlusstermin, § 197 InsO), convened after the court's consent to final distribution, the administrator's final account shall be discussed and objections may be brought. Subsequent to final meeting and final distribution, the court terminates the insolvency proceedings, § 200 InsO (to be entered into registers like the commencement order). Under certain circumstances, the court can order a delayed distribution (Nachtragsverteilung, § 203 InsO) if retained funds become available or additional funds or items of the insolvency estate are identified later.

Alternatively to a termination, insolvency proceedings can be discontinued by court order – most importantly (after hearing the administrator and the creditors) because of depletion of the estate that turns out to not even be sufficient to cover the costs of the proceedings (Masselosigkeit, § 207 InsO). If the estate turns out to be sufficient to cover the costs but not the other debts incumbent on the estate, the administrator has to notify the court of the insufficiency of assets (Masseunzulänglichkeit, § 208 InsO) and distribute the remaining assets among the creditors of the estate (preferential creditors, Massegläubiger), § 209 InsO. The insolvency proceedings is then discontinued, § 211 InsO. In both cases, the administrator faces potential liability according to § 61 InsO for entering into obligations on behalf of the estate unless it was unforeseeable that the estate would turn out to be insufficient; the interpretation of this liability by the courts, however, is rather narrow. Other reasons for discontinuing insolvency proceedings (subsequent lack of grounds to commence insolvency proceedings, § 212 InsO, and creditors' consent, § 213 InsO) are uncommon.

V. Discharge of Residual Debt

In case the debtor is a corporation, other legal person or a company without legal personality, it will regularly cease to exist legally at the end of insolvency proceedings and after distribution of all assets (it may, though, be revived or deemed still existing for the purposes of delayed distributions should assets be discovered later) unless a different outcome is the result of plan proceedings. The question of residual debt, thus, does not usually arise. In case the debtor is a natural person (consumer or current/ex business owner), however, the rule in § 201 InsO states that the creditors can freely pursue the remainder of their claims subsequent to the termination (even assisted by the entry of their determined claims into the schedule serving as a substitute for executable judgments on those claims unless the debtor had contested them, thus facilitating enforcement and delaying limitation by lapse of time – according to § 197 I no. 5 Civil Code [Bürgerliches Gesetzbuch – BGB][15] the limitation period is 30 years).

Natural persons can – together with a petition to open insolvency proceedings or within two weeks after having been advised of this opportunity according to § 20 II InsO – apply for a discharge of residual debt, § 287 I InsO. In any case, unless the court failed to issue such an advice, the debtor needs to also file a petition to open proceedings of their own, not just an isolated application for discharge subsequent to a creditor's petition.[16] To ensure the petition is not dismissed for insufficiency of assets, the poor debtor can apply for deferral of costs, §§4a-4c InsO. The application for a discharge has to include – *inter alia* – the assignment of the debtor's garnishable claims to wages and income replacing wages to a trustee (Treuhänder) to be appointed by the court[17] for a period of six years following the commencement of insolvency proceedings, § 287 II InsO.[18] Income from self-employment is not affected by this assignment; the debtor in this case has to make regular payments in the amount that would have been assigned to the trustee had they entered adequate employment instead of pursuing their self-employed activities, § 295 II InsO.

According to § 287a InsO, the court will, if the debtor's application was admissible, announce the debtor's future discharge should they comply with all legal requirements and should there be no other legal grounds for a refusal. The application is inadmissible, and will thus be dismissed and the announcement of future discharge refused, if the debtor had received a discharge within the last ten years before their application or discharge had been refused on

[15] An English translation can be found online at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.
[16] BGH, 17/2/2005, IX ZB 176/03, NZI 2005, 271.
[17] Commonly but not necessarily, the trustee is the (then: former) administrator in the insolvency proceedings. Only legal requirements are that the trustee has to be a natural person and their suitability for the individual case.
[18] While the *duration of the assignment* (Abtretungsfrist) is six years from commencement, overlapping the complete insolvency proceedings (unless a decision on the discharge application is reached during the course of the insolvency proceedings in which case the assignment remains non-effective), it only becomes effective with the termination or discontinuation (according to § 211 InsO) of the insolvency proceedings because until then the debtor's garnishable income is part of the estate and subject to the administrator's authorities. According to § 292 InsO, the trustee then collects the assigned wages or substitutes or payments by the self-employed debtor and distributes them – usually: once annually – *pari passu* to the creditors according to the final schedule; the trustee can also be instructed by the creditors' assembly to monitor the debtor's fulfilment of the legal requirements for a discharge.

certain grounds within the last ten, five or three years respectively (depending on the grounds). In this case, the debtor will be given an opportunity to withdraw their petition to open insolvency proceedings.

One of the mentioned legal requirements the debtor has to comply with for the duration of the assignment (regularly six years from commencement) is the obligation to seek and/or pursue adequate employment or self-employed activities, §§ 287b, 295 I no. 1 InsO. Others are to co-operate fully according to the InsO with the other participants, especially court, administrator and trustee and to provide proper information about assets and income. Other legal grounds for refusal include certain criminal convictions, the debtor having provided false information to receive a loan, receive benefits from or avoid payments to the state or social security, and the debtor having impaired the creditors' satisfaction by wasteful living, delaying the commencement of insolvency proceedings or entering inappropriate obligations, § 290 InsO. If the debtor has not complied with the requirements or if another ground for refusal exists, a creditor can move for refusal of discharge; in a standard case, this has to happen in or by the final meeting in the insolvency proceedings – there are however situations where (a) the motion can be brought subsequently, § 297a InsO, or (b) the discharge is to be granted before the final meeting in which case the creditor has to bring the motion by the hearing regarding the discharge order, § 300 InsO. After the final meeting and termination of the insolvency proceedings or discontinuation according to § 211 InsO respectively, should the duration of the assignment not have passed by that time and should discharge neither have been granted nor refused, the debtor has to keep to the terms of the assignment and seek/pursue adequate employment or business activity, share inheritances with their creditors equally, and provide court and trustee with certain information, § 295 InsO. The debtor must also not be convicted of certain crimes and make sure the trustee's remuneration[19] is covered (unless costs have been deferred) to maintain their chance for a discharge, §§ 297, 298 InsO. Otherwise, a creditor or in case of their remuneration not being covered the trustee can move for the refusal of the discharge, §§ 296-298 InsO.

The regular duration of the assignment is shortened from six to five years if the debtor is able to pay for the proceedings' costs, to three years if the debtor can satisfy at least 35% of the insolvency claims by this time and ends immediately when no insolvency claims have been filed or the debtor satisfied all insolvency claims. At the end of the duration of the assignment, the court hears the creditors, the administrator or trustee and the debtor and decides on the discharge, § 300 InsO; an immediate appeal against the order can be lodged by the debtor in case of a refusal or a creditor who without success moved for a refusal.

The consequence of a discharge of residual debt is the conversion of insolvency claims to imperfect obligations, leaving security rights intact, § 301 InsO. Claims exempt from discharge

[19] The trustee's remuneration follows §§ 14-16 InsVV. It is between 1% and 5% of the collected amounts (5% up to 25,000 Euro, then 3% up to 50,000 Euro, then 1% above 50,000 Euro), with a minimum of 100 Euro per year plus a premium of 50 Euro per five creditors in case the trustee's distribution is to more than five creditors. For monitoring the debtor, the trustee usually earns additional 35 Euro per hour, up to the same amount the trustee earns for the collections and distributions (see previous sentence).

are listed in § 302 InsO, most notably obligations from intentional torts that had been filed and scheduled as such (including past alimony intentionally unpaid and criminal tax evasion) and fines. In rare cases, the discharge can be revoked according to § 303 InsO.

VI. Specifics of Consumer Insolvency Proceedings

Even though CoDiRe focuses on enterprises and entrepreneurs, it seems appropriate to give a very short overview of consumer insolvency proceedings here because of their "contractualised" nature that might well inspire restructuring solutions in particular for small enterprises: If the debtor is a consumer or an ex business owner with uncomplicated financial circumstances (i.e. there are less than 20 creditors) and no debt from (past) contracts with employees, the special rules on consumer insolvency proceedings apply for the debtor's (but not for a creditor's) petition, § 304 InsO. As with the discharge, these rules have been amended effective 1 July 2014, basically abolishing the "simplified proceedings" and mostly aligning the consumer with the standard proceedings after the different entry stage (described in the following paragraphs). The most notable difference that has remained in place is that consumer insolvency proceedings can never be DIP proceedings; (full-blown) plan proceedings, however, are now an option in consumer insolvency proceedings as well.

Before filing a petition to open consumer insolvency proceedings, the debtor has to seek professional debt counseling and attempt an out-of-court settlement with their creditors. A certificate that such an attempt has failed within the last six months must be submitted with the petition along with a record and an overview of assets, a record of creditors and debts, an application for discharge (or the declaration that discharge is not sought) and a plan for the settlement of debts, § 305 I InsO. The debtor must make use of officially prescribed forms for their petitions, applications and schedules.

The court will not decide on the debtor's (complete) petition until a decision on the plan for the settlement of debts proposed by the debtor is reached or the court, after hearing the debtor, deems that the creditors will likely not accept the plan, § 306 InsO. Unless the latter is the case, according to § 307 InsO, the court serves the plan proposed by the debtor and the overview of assets to the named creditors and requests their comments and amendments to their recorded claims within one month; omission to comment is deemed acceptance of the settlement plan. The debtor can adjust the plan according to the creditors' comments and in the interest of reaching a settlement.

If no creditors objects to the settlement plan, or if the court after hearing the objecting (minority) creditors replaces their acceptance in accordance with § 309 InsO, the plan is deemed accepted which the court determines in an order according to § 308 InsO. It serves as an executable settlement agreement; petitions to open insolvency proceedings are in this case deemed withdrawn. The debtor must fully satisfy claims not included in the record of claims filed by the debtor and not taken into account subsequently unless the creditor failed to amend their claims despite the court's request. In case a majority of creditors (based either on the sum of claims or on a headcount) objects or the objecting minority's acceptance(s) cannot be (entirely) replaced, the settlement fails and the court decides on the petition to open insolvency proceedings, § 311 InsO.

VII. Plan Proceedings

As described above (*sub* III., IV.3.), plan proceedings are rather a variation of standard insolvency proceedings than an own kind of proceedings. However, because of the hugely different rules regarding mostly the proceedings' outcome and termination and because of the relevance of plan proceedings in restructurings, they deserve to be described here in some detail. The ESUG has introduced considerable changes to the plan proceedings effective March 2012 and January 2013 respectively. Most of these changes aim at (a) safeguarding the plan against subsequent claims, (b) allowing for modifications/measures to the debtor's corporate/company structure (e.g. a *debt-equity-swap*) by involving the shareholders, and (c) reducing hold-out potentials that put the debtor's restructuring at risk especially regarding the appeals system.

An insolvency plan can according to § 217 InsO regulate certain aspects of the proceedings – satisfaction of creditors, disposition of the estate, distribution to the parties concerned, debtor's liability subsequent to the termination of the proceedings and procedural questions as such – in a way deviating from the standard rules of the InsO; all other rules (among them those concerning the determination of eligible creditors[20]) are not subject to modification by way of an insolvency plan. A draft plan can be submitted either by the debtor or by the administrator (for the creditors commissioning the administrator to draft a plan, see above, *sub* IV.3.), § 218 InsO – the debtor can do so together with the petition to open proceedings, allowing for "pre-packaged" plans (in a continental meaning, not the specific and controversial "UK pre-pack") and planned insolvency proceedings. The plan divides the parties involved into different groups of secured, unsecured and junior creditors and – if their rights are affected by the plan – shareholders/members of the debtor, possibly dividing those rank categories further so that groups are formed of parties with the same rank and similar economic interests (§ 222 InsO) and prescribes how their members shall be treated post-confirmation and how their legal position shall be transformed; members of the same group, in principle, have to be treated equally (§ 226 InsO), unless disadvantaged members have agreed individually and explicitly. Regarding the shareholders/members of the debtor, the plan may set out any rule permissible under company law, including the enterprise's continuation, decrease or increase in capital or the transfer of shares and membership rights; such measures do not trigger change-of-control clauses, and leaving shareholders' rights to compensation are limited, § 225a InsO.

The court assesses a submitted plan, usually within two weeks, and can reject it *a limine*, mostly for formal reasons or evidently lacking prospect of success; the rejection can be appealed immediately by the submitter, § 231 InsO. Otherwise, the interested parties are invited to comment on the plan within a deadline of not more than two weeks and a meeting

[20] BGH, 5/2/2009, IX ZB 230/07, ZIP 2009, 480.

of the creditors is convened within (regularly) one month to discuss the plan and vote on it (discussion and voting meeting, § 235 InsO – there can be separate meetings for discussion and voting, or the discussion and voting meeting can be scheduled together with [but not prior to] the verification meeting). The discussion can lead to modifications of or amendments to the plan by the submitter, § 240 InsO.

The involved parties (creditors and shareholders/members whose rights are affected by the plan) vote on the plan within their respective groups, § 243 InsO. The plan is accepted if in all groups the majority of voting members (head count) and the majority of voting claims/rights (sum count) votes for the plan, § 244 InsO. If at least a majority of groups accepted the plan, each opposing group is deemed to have accepted the plan as well if the conditions laid out in § 245 InsO are met – namely, a standard proceeding would likely not result in a better result for the members of the group than the plan (best interests test) and that group's members participate to a reasonable extent in the economic value assigned to the parties by the plan. The reasonableness is further defined in a way that no higher ranking party can receive more than their original claim/right, no same ranking party can receive more than the opposing group's members and no lower ranking party (including the debtor) can receive anything under the plan unless the group's members are to be satisfied in full (this pretty much constitutes an absolute priority rule). The debtor is deemed to have accepted the plan unless they expressly oppose it in written form by the voting meeting; the debtor's opposition is irrelevant, if the debtor is not to be treated worse under the plan than in a hypothetical standard proceeding and no creditor will receive more than full satisfaction, § 247 InsO.

Subsequent to the voting and after hearing the administrator, the creditors' committee and the debtor, the court decides on the plan's approval. It denies the approval *ex officio* (§ 250 InsO) if formal rules were gravely and uncorrectably violated, or the voting had been interfered with improperly. Following a creditor's or a shareholder's/member's motion, the court denies the approval of the plan according to § 251 InsO if the moving party had opposed the plan by the end of the voting meeting and is likely to be treated less favourably under the plan than in hypothetical standard proceedings. The court shall, however, reject the motion if the plan provides for funds to compensate the party for such disadvantage; any claim for compensation is then not part of the insolvency proceedings but to be pursued in a regular court case.

The order denying approval of a plan or approving a plan can be immediately appealed by the debtor, creditors or shareholders/members of the debtor, § 253 I InsO. Since the plan only becomes effective when the order approving the plan is final, § 254 I InsO, the right to appeal the plan's approval creates the risk of hold-outs. For this reason, appeals against the approval have been limited in several ways – e.g. requiring significant disadvantages that cannot be compensated by funds provided for in the plan, requiring timely objections and actual voting against the plan and, in the absence of grave violations of the statute, allowing the appellate court upon the administrator's motion to dismiss the appeal on grounds alone of the disadvantages of delaying the plan's performance exceeding the disadvantages to the appellant. The appellant can then pursue a claim for monetary damages in a regular court case (under the exclusive jurisdiction of the court that dismissed the appeal as a court of first instance), § 253 II, IV InsO.

Upon the plan's approval becoming final, the plan's provisions become binding upon all the parties involved – including those who objected or did not participate in the proceedings, §§ 254 I, 254b InsO; claims (or claims' parts) that are waived under the plan become natural obligations. Declarations included in the plan to facilitate its performance are deemed to have been submitted in the proper statutory form, § 254a InsO. When the plan's approval is final and the debts incumbent on the estate have been settled or secured, the court regularly terminates the insolvency proceedings, § 258 InsO. The administrator can be commissioned in the plan to monitor its implementation, §§ 260ff. InsO. In case of non-performance of the plan, deferrals or hair-cuts under the plan can become void reviving the claim in its original form and extent, § 255 InsO.

After a plan proceeding, the debtor's financial situation commonly is vulnerable – also to creditors that did not participate in the proceedings and now demand performance of their original claim (as modified by the plan's general provisions, § 254b InsO). The plan is supposed to make provisions for all claims known to its author, § 229 InsO, but there may well exist claims so far unknown. A provision in the plan that claims not filed during the proceedings are deemed waived is now commonly regarded invalid and void.[21] The ESUG provided for a different kind of statutory relief: According to § 259a InsO the debtor can apply for a temporary (up to three years) moratorium on the execution of such claims if they jeopardize the enforcement of the plan. Additionally, § 259b InsO provides for a special period of limitation for unfiled claims of one year from either the day the claim becomes due or the plan's approval becomes final (whichever is later) unless the original period of limitations would end sooner. A different danger for the plan's success has its cause in the BGH allowing creditors to set-off their original claims (in full, regardless of the plan, even if they voted for a hair-cut) against claims of the debtor.[22]

VIII. DIP Proceedings / Self Administration (Eigenverwaltung)

Following the US example, the InsO first introduced the option to German insolvency proceedings to allow the debtor to administer their own insolvency under the supervision of a court-appointed monitor (Sachwalter). The potential advantages of this approach are a leaner, less costly process (though this can be doubted due to the debtor making use of advisors paid from the estate along with the monitor's fees), use of management know-how and knowledge of the debtor's business, less disruption to dealings with business partners and less disincentive to the debtor/the debtor's management regarding filing for insolvency proceedings at an early stage because they will/can remain (partly) in control and can plan the proceedings and their outcome better. Still, reservations especially among creditors but also courts were and are considerable – employing the rationale that most insolvencies are

[21] The landmark case (after previous debate) being BGH, 7/5/2015, IX ZB 75/14, NZI 2015, 697.

[22] BGH, 19/5/2011, IX ZR 222/08, ZIP 2011, 1271; critical case note *Zenker*, NJ 2011, 431.

supposed to be the result of management mistakes and that allowing the insolvent debtor's management to remain in charge would be putting the fox in charge of the henhouse. Thus, in past performance, DIP proceedings have been very rare and mostly limited to companies/corporations that hired expert help, mostly by adding a Chief Restructuring Officer (CRO) to their board or employing a Generalbevollmächtigten (general agent) who often are experienced insolvency practitioners, and to professionals who are the only ones able to continue running their business for legal reasons (solicitors, tax consultants, doctors, etc.).

The ESUG aimed at strengthening DIP proceedings and making them more common – and seems to have succeeded at that to a considerable degree (however, the ESUG evaluation still puts the Eigenverwaltung/DIP proceedings at only 2-3 % of the company insolvencies, however usually the bigger ones) – by making it more difficult for courts and creditors to deny or block them and by introducing a special kind of opening proceedings (the so-called protective shield proceeding – Schutzschirmverfahren, § 270b InsO) that grants the debtor who wants to restructure their business in self-administration by way of a plan proceeding certain protections and rights creating an incentive to file a petition at an early stage.

As a general rule, pursuant to the new §§ 270, 270c InsO, the court has to order DIP proceedings and appoint a monitor instead of an administrator with its commencement order if the debtor filed an accordant application and no circumstances are known which lead to the expectation that the order will cause detriments to the creditors. Should the provisional creditors' committee that (if it exists and the delay is not manifestly detrimental) has to be heard on the application by the court support the debtor's application unanimously, the order is deemed not detrimental so that the court is obliged to order DIP proceedings. Otherwise, according to a court case[23] and apparently general practice, important creditors' (e.g. suppliers needed to maintain the business activity) indication that they will not do business with the old management may be sufficient to constitute a detriment for the creditors as a whole and to deny the DIP proceedings – which basically gives certain key creditors the power to single-handedly torpedo the debtor's application. If not in the commencement order, the court orders DIP proceedings at a later stage based on a motion of the creditors' assembly with the debtor's consent, § 271 InsO; it revokes the DIP management and appoints an administrator according to § 272 InsO on the creditors' assembly's or the debtor's motion (and under certain, rare circumstances on the motion of a single creditor).

Before the ESUG, DIP proceedings frequently were made unfeasible by the court appointing a provisional administrator with far reaching authorities during the opening proceedings. According to ESUG's § 270a I InsO, as long as the debtor's application for DIP proceedings is not evidently without prospect of success, the court shall refrain from ordering limitations to the debtor's access to the estate (like a general prohibition to dispose of assets or the appointment of a provisional administrator whose consent is required for dispositions) and only appoint a provisional monitor. If the debtor applies for a protective shield under § 270b InsO – together with their petition to open insolvency proceedings and an application for DIP

[23] AG Köln, 1/7/2013, 72 IN 211/13, ZIP 2013, 1390 (AG = Amtsgericht, in this case the insolvency court).

proceedings – and submits a current certificate by a professional experienced in insolvencies showing that the debtor is not insolvent but overindebted and/or imminently insolvent and that the intended restructuring is not evidently lacking prospect of success, the court orders certain protective measures and gives the debtor a deadline of up to three months (which cannot be extended) to submit an insolvency plan. It also appoints a provisional monitor of the debtor's choosing unless the person suggested by the debtor is manifestly unsuitable. For the duration of the protective shield, the court will not decide on the debtor's (or a creditor's additional) petition to commence insolvency proceedings. In practice, petitions according to § 270b InsO (protective shield) have proven to be less common than those according to § 270a InsO, most likely due to the additional cost and duration to obtain the expert's certificate and the very limited advantages of the protective shield.

Whereas the debtor in DIP proceedings is basically in charge of managing their estate (subject to the creditors' participation and directions), the monitor has important authorities in overseeing the debtor and in handling insolvency-specific and procedural issues, e.g. monitoring the economic situation and the business dealings of the debtor and their spending and debt collection, advising the court and creditors of any irregularities or downturns, at the monitor's discretion also controlling the flow of monies (§ 275 II InsO), receiving the filings of claims (§ 270c InsO), claiming the debtor's members' personal liability under company law and contesting pre-commencement transactions (§ 280 InsO), drafting an insolvency plan commissioned by the creditors (they can, however, alternatively commission the debtor to draft a plan, § 284 InsO) and filing a notification of insufficiency of assets (§ 285 InsO). Upon the court's order according to § 277 InsO, certain transactions by the debtor are only valid with the monitor's consent. Many rules on the administrator in standard proceedings, especially regarding qualifications, selection (also regarding the creditors' participation), liability and remuneration,[24] apply to the monitor in DIP proceedings as well, § 274 I InsO.

E. Participants in the German insolvency process

One main focus of CoDiRe is on best practices for the participants in restructurings. To this end, it is of particular importance to understand the roles and the interactions of those participants in the restructuring (or, in Germany's case mostly, the insolvency) process.

I. Insolvency Court

1. Insolvency Courts in the Court System

Insolvency proceedings are dealt with by the "ordinary" courts (courts of justice dealing with criminal and civil matters as opposed to the special courts dealing with labor, administrative, social security, or taxation matters). There are four levels of "ordinary" courts in Germany's

[24] Due to the limited authorities and responsibilities, the remuneration, however, is under normal circumstances only 60% of an administrator's remuneration in an otherwise identical case, § 12 I InsVV. If the court extends the monitor's authorities and responsibilities, the remuneration should usually be higher than that, § 12 II InsVV.

court system, the local courts (Amtsgerichte, AG), the regional courts (Landgerichte, LG), the higher regional courts (Oberlandesgerichte, OLG) and the Federal Court of Justice (Bundesgerichtshof, BGH) in Karlsruhe. The insolvency court is a division[25] of the local courts. According to § 2 I InsO, there was supposed to be only one local court per regional court district with jurisdiction in insolvency matters as insolvency court; however, the Länder (16 federal States of Germany) were free to deviate from this rule and designate other or additional courts as insolvency courts and to determine different districts for these courts (the judiciary of the lower levels is administrated by the States), § 2 II InsO. Several States have made use of this opportunity and designated additional insolvency courts even though many of those only deal with a very limited amount of insolvency cases, raising questions of qualification of the respective court personnel (in some courts, the caseload is so limited that there are only one or two judges dealing with insolvency matters, and only with 10% or less of their time). A recent attempt to reach a further concentration (in accordance with the rule of § 2 I InsO) was stopped by the Bundesrat (German Parliament's second chamber comprised of the States' governments). Thus, currently, there are 193 different insolvency courts in Germany. The insolvency court has jurisdiction regardless of the case's dimensions. For group insolvencies, the new § 2 III InsO has started a new attempt at competence concentration but, apart from technical problems with this construct,[26] it is at least doubtful to which extent the Federal States will implement it.

Local jurisdiction of an insolvency court is determined by the debtor's general jurisdiction (according to §§ 13-17 ZPO) – basically their place of residence or registered seat – or in case of ongoing business activities the center of this activity (similar to Art. 3 EIR's center of main interests – COMI), § 3 I InsO.

2. Court Personnel – general distinction, competences and common requirements

Within the insolvency courts, orders and decisions are made by either judges (Richter) or (senior) judicial officers (Rechtspfleger). The division of competences between the two groups of court personnel is governed by the Act on Senior Judicial Officers (Rechtspflegergesetz, RPflG[27]), more specifically its § 3 no. 2e/g, § 5, §§ 18, 19a. Basically, according to § 3 no. 2e/g RPflG, the judicial officer handles insolvency proceedings unless (a) the subject matter is explicitly reserved to the judge in § 18 I or § 19a RPflG, (b) the judge declares a reservation (for the whole proceedings or parts thereof) according to § 18 II RPflG, or (c) the judicial officer submits a task to the judge according to § 5 RPflG and the judge agrees to deal with it. Also, the insolvency court's judge gets to decide on certain motions to set aside the judicial officer's

[25] The several different divisions of German local courts (they also serve as i.a. general civil courts, criminal courts, court in matters of claim enforcement, company register courts, family courts, probate courts, land registry) are often not strictly separated, meaning that the same court personnel can take different roles according to the court's organizational chart and size (e.g. many insolvency judges also adjudicate general civil matters or work as register or even family judges for a certain part of their time).

[26] See *Berner/Zenker*, Festschrift für Marie Luise Graf-Schlicker, 2018, 171.

[27] An English translation can be found online at: http://www.gesetze-im-internet.de/englisch_rpflg/englisch_rpflg.pdf.

decisions (§ 18 III RPflG) and on appeals ("reminders") against the judicial officer's decisions that are otherwise (according to the InsO) unappealable (§ 11 II RPflG).

The subject matters statutorily reserved to the judge in §§ 18 I, 19a InsO are: (a) the opening proceedings until and including the commencement order or the dismissal of the petition (including the settlement phase in consumer proceedings); (b) the plan proceedings as a whole;[28] (c) certain decisions regarding the concentration and co-ordination of insolvency proceedings within a corporate group, (d) the more important decisions regarding an application for discharge of residual debt, namely those granting, refusing or revoking a discharge, if a creditor moves for such refusal or revocation; and (d) certain decisions with regard to foreign or cross-border insolvency proceedings.

Both judges on probation and judicial officers on probation may not handle insolvency proceedings in the first year after their appointment, §§ 22 VI 1 Court Constitution Act (Gerichtsverfassungsgesetz, GVG[29]), 18 IV 1 RPflG. Effective 1 January 2013, both judges and judicial officers in insolvency matters are expected to have provable knowledge of insolvency law and provable basic knowledge of accounting and the areas of labour law, social security law and tax law relevant to insolvency proceedings; the judges also are expected to have provable knowledge in commercial and company law whereas judicial officers are only expected to have provable basic knowledge of the relevant areas of this field of law, §§ 22 VI 2 GVG, 18 IV 2 RPflG. As long as they do not have this knowledge, judges or judicial officers must not handle insolvency matters unless the acquisition of this knowledge is anticipated for the near future, §§ 22 VI 3 GVG, 18 IV 3 RPflG. Whether these provisions that were contested by the Bundesrat during legislative proceedings will have any measurable effect on the judges' and judicial officers' training, especially regarding on-the-job training and seminars for active judges and judicial officers, remains to be seen; the statutes do not provide for any sanctions, and it is not very likely that higher courts will look favourably on appeals based on the judicial personnel's lack of qualification alone unless it is reflected in appealable mistakes in handling the case.

3. Judges – Qualifications and Status

To become a judge, candidates must have passed two examinations – the first one at the end of university studies in law, consisting of a State governed and administered part in civil, criminal and public law and a university governed and administered part in a chosen field of specialization (the first examination being more or less equal to a regular law degree in other countries), and the second one at the end of a State governed and administered legal clerkship of two years, again in civil, criminal and public law and a chosen field of specialization but more

[28] This rule (§ 18 I no. 2 RPflG) is new (effective 1 January 2013). It leads to certain questions of when and how a plan proceeding exactly begins and how the (possibly repeated) shift of competence is to be dealt with. The rationale is that the plan proceedings can now involve complicated questions of company law and decisions resulting in the *de facto* expropriation of shareholders etc. that should be made by a judge.

[29] An English translation can be found online at: http://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.pdf.

practice and procedure oriented than the first examination. Stations of the legal clerkship mandatorily include (with differences between the States) a civil court, a prosecution authority, a government agency or local, State or Federal authority, and a lawyer, and one or more further stations of the trainee's choosing. Insolvency law is not a mandatory subject during legal studies or with regards to the clerkship or either examination; it can, however, at many universities form a considerable part of the students' specialization (usually mixed either with civil procedure or with commercial and company law). The exact procedure of judicial appointments and the involved public bodies vary from State to State – in several States, committees to elect judges (formed e.g. from judges and members of the State Parliament) vote on candidates proposed by the competent ministry whereas, in other States, the decision is made by the ministry alone. State judges are then appointed by the ministry; they are not civil servants (Beamte) but their legal status is approximated to civil servants' with exceptions in particular for judicial independence. Newly appointed judges are judges on probation for between 3 and 5 years, usually working in different courts (and sometimes prosecution authorities) during that period, before being appointed for life. The German Judiciary's qualifications and status are, in addition to State law, mostly governed by the German Judiciary Act (Deutsches Richtergesetz, DRiG[30]).

It is important to note, that German judges are usually appointed at a relatively young age (between 25 and 35 years of age) and, in most cases, without work experience as lawyers. Further, due to the training that demands and allows little specialization, judges are generally expected to be able to serve in any judicial capacity and field of law (even the rather soft requirements in § 22 VI GVG [see above, *sub* 2.] are quite unique limitations) and have little to no say in where they are placed (at least until their appointment for life but to a considerable degree even after that).

Judges start their careers at salary grade R 1, serving [if at "ordinary" courts] either at a local court or at a regional court. At the local courts, judges in civil matters always decide alone and form their own "section" or "division" (Abteilung). Promotion to a higher paygrade than R 1 requires taking on a different function either judicially (presiding judge at a regional court or judge at a higher regional court = R 2; presiding judge at a higher regional court = R 3) or administratively (e.g. [vice] director or [vice] president of a court or supervising judge, salary grade varies depending on the size of the court). Since the insolvency court always is a local court, there is little room for promotion – only in bigger courts through administrative functions, at the same time cutting into the workload the judge can handle in their function as a judge.

As for the status of insolvency judges in particular, while there are a small number of high profile, highly qualified and competent insolvency judges who publish frequently and are invited as speakers to public events etc., this clearly is the exception. Actually, due to the relative lack of career options in insolvency matters, the complexity of the subject matter (that for most judges is completely new when first assigned to insolvency cases), the urgency of

[30] An English translation can be found here: http://www.gesetze-im-internet.de/englisch_drig/englisch_drig.pdf.

many decisions, and other factors like the small numbers of cases in smaller insolvency courts, the placement as an insolvency judge is not usually very coveted.

4. Judicial Officers – Qualifications and Status

Judicial officers are civil servants (statutorily granted independence, § 9 RPflG). Even though persons with the qualifications for a judgeship (see above, *sub* 3.) can be appointed judicial officers, § 2 III RPflG, this is a rather rare exception. Most judicial officers have passed the (senior) judicial officer examination subsequent to a preparatory service of three years, § 2 I RPflG. The preparatory service includes studies at a college of higher education (Fachhochschule) or an equivalent course of studies of at least 18 months and vocational practical study periods of at least one year. This preparatory service is highly focused on the key areas comprised by the tasks of a judicial officer – one of those being insolvency proceedings.

While judges are supposed to be generally better qualified than judicial officers and have, to some extent, a superior role within the same court (see §§ 5 III, 6, 7, 8 I, 10, 11 II, 18 II RPflG), most judges unreservedly acknowledge the judicial officers' (sometimes: superior) expertise in their key areas. In some States in particular, judicial officers seem[31] to regularly draft orders even in those areas statutorily reserved to the judge who then basically signs those drafts.

5. Role of the Insolvency Court

The insolvency court's role in the German insolvency process is, for the most part, defined by its key competences and functions – (1) deciding on the parties' petitions and applications according to the InsO, mostly of a procedural nature (but including, e.g., the discharge), and ensuring orderly proceedings; (2) deciding on the insolvency proceedings' direction (e.g. allowing the provisional administrator to close-down the debtor's business), safeguarding creditors' prospects of satisfaction (e.g. protective measures before commencement) and making appointments (e.g. the original administrator, DIP proceedings, creditors' committee) before the creditors' assembly has first met; (3) safeguarding minority rights (e.g. when deciding on an insolvency plan's admissibility and approval, or when, according to § 78 InsO, setting aside a resolution of the creditors' assembly because it is against the common interests of the insolvency creditors); and (4) supervising the process and its participants, in particular the administrator (§§ 58, 59 InsO).

The insolvency court is administering the proceedings alone and – unlike in many other jurisdictions with a "*vis attractiva concursus*" – does not have jurisdiction over claims raised in connection with the insolvency proceedings, even if they are (like claims from the administrator contesting/avoiding pre-commencement transactions, from the directors breaching their duty to file a timely petition for insolvency proceedings or from the

[31] As described by *Lissner*, ZInsO 2012, 1881 – a judicial officer in the State of Baden-Württemberg.

administrator's liability) rooted in material insolvency law or (like the determination of contested insolvency claims) have an effect on voting rights and distribution of the estate.

Overall, the role of the insolvency court and the level of its activity are varying over the course of the proceedings:

The opening proceedings are rather court-dominated, as (a) the court has to determine whether it is legally acceptable to subject the debtor to insolvency proceedings [including the – discretionary – protective measures at this stage] and to a creditor-driven regime; and (b) the creditors as a whole are unable to reach decisions in this phase so the court has to look out for their best interests [though a provisional creditors' committee may be appointed and serve as a voice of the creditors to some extent]. Many, if not most of the decisions during the opening proceedings or in the commencement order are *ex officio* decisions (grounded, however, on an original petition to open proceedings); some of them – in particular the appointment of the administrator – are of particular importance for the whole proceedings.

After the commencement order – and more so after the first meeting of the creditors' assembly –, the court takes on a role that is mostly shaped by supervisory functions, ensuring the law is observed and the interests of (minority) creditors are adequately considered. Most court decisions during the actual insolvency proceedings are based on motions or appeals by other participants; the proceedings are dominated by the creditors on a macro-management and the administrator on a micro-management level. This is the result of the principles of market conformity and creditor autonomy pursued by the legislator of the InsO. The creditors even can reverse or alter some of the most important court decisions, namely the selection of the administrator (§ 57 InsO), the appointment of a creditors' committee (§ 68 InsO) or the decision on DIP proceedings (§§ 271, 272 InsO). The intensity of supervision varies from case to case, situation to situation, and surely from insolvency court to insolvency court.

The court then, again, becomes more active (though still mostly in procedural and supervisory capacities) towards the end of the insolvency proceedings and during discharge proceedings, making orders on possibly the approval of an insolvency plan, on distribution, termination of proceedings, and discharge, as well as examining the administrator's accounts and determining the court fees and the administrator's remuneration, etc.

6. Court Procedure

The InsO contains several provisions on the insolvency court's procedure, in particular the §§ 2-10 InsO. Most remarkable is § 4 InsO: Unless the InsO provides otherwise, the rules on civil proceedings of the ZPO are applicable also to insolvency proceedings, and thus the rules on contentious jurisdiction (streitige Gerichtsbarkeit), basically a mitigated adversarial system. This is despite a certain material proximity to non-contentious jurisdiction (Freiwillige Gerichtsbarkeit, regulated mostly in the Statute on Procedures in Family Cases and in Matters of Non-Contentious Jurisdiction, FamFG), especially where a petition by the debtor is concerned, and the lack of opposing parties in at least a formal sense (the insolvency proceedings are proceedings "regarding the estate of the debtor" not of "creditors vs.

debtor"). This can be explained, *inter alia*, with the insolvency proceedings being regarded as a form of claim enforcement/compulsory execution (Zwangsvollstreckung) ensuring collective satisfaction of the creditors (for this reason, insolvency proceedings are also called "Gesamtvollstreckung" – collective execution); the other form, the compulsory execution on an individual creditor's behalf ("Einzelzwangsvollstreckung" – individual compulsory execution), is frequently a part of (or an annex to) civil court proceedings and is regulated by the eighth book of the ZPO as a typically contentious matter between creditor and debtor.

However, there are elements of the rather inquisitorial system of non-contentious jurisdiction that apply to insolvency proceedings due to provisions in the InsO. Most notably, § 5 I InsO states the insolvency court's duty to investigate *ex officio* all circumstances relevant for the insolvency proceedings[32] and allows hearing witnesses and experts. The court can hear the debtor, demand their co-operation and reports and enforce these duties (§§ 20, 97, 98, 101 InsO); it supervises the administrator as it sees fit (mostly regardless of motions by the other participants), can request reports and enforce the administrator's duties *ex officio* (§§ 58, 59 InsO). Also, while the commencement of insolvency proceedings requires a petition, and this petition can be withdrawn until the commencement order or its refusal (§ 13 II InsO), once the proceedings are opened, their premature discontinuation basically takes the consensus of debtor and all registered creditors and is not immediate (§§ 213, 214 InsO). In small cases, the insolvency proceedings or parts thereof shall be conducted as written proceedings (§ 5 II InsO), decisions may be rendered without an oral hearing (§ 5 III InsO).

According to § 6 InsO, the insolvency court's decisions can only be appealed where the InsO provides for an immediate appeal (or immediate complaint – sofortige Beschwerde). The immediate complaint follows §§ 567-572 ZPO (modified by § 6 InsO), it has to be filed with the insolvency court (§ 6 I 2 InsO) within two weeks (§ 569 ZPO) from the pronouncement of the insolvency court's decision or, in lack thereof, its service (§ 6 II InsO). It can be filed without a lawyer's assistance (§§ 569 III Nr. 1, 78 III ZPO); should the appellate court – which rarely happens – schedule a hearing for oral argument, however, representation by a lawyer is compulsory (§ 78 I ZPO). The insolvency court can grant redress before referring the case to the appellate court, § 572 ZPO (sole exception: § 253 IV InsO in plan proceedings where immediate dismissal of a complaint against the plan's approval is sought).

Appellate court is the regional court, § 72 I 1 GVG. In the regional court, one judge decides as single judge unless the matter is particularly complicated in fact or law or the legal matter is of fundamental significance – in which case the single judge refers the case to the "chamber" they belong to which then decides with three judges, § 568 ZPO. In most cases, the immediate complaint has no suspensive effect unless so ordered by either the insolvency court or (in an interim order) the appellate court, § 570 ZPO.

[32] This duty, though, is only triggered if the court has "reason" to investigate – mostly provided by the facts submitted by debtor, creditors or the administrator; the court has a certain discretion as to the extent of its investigations, BGH, 19/7/2012, IX ZB 6/12, ZIP 2012, 1615.

Only if the appellate court grants leave for a further appeal, a complaint on points of law (Rechtsbeschwerde) can be filed with the BGH according to §§ 574-577 ZPO. Leave shall only be granted if the legal matter is of fundamental significance or a decision by the BGH is required to ensure uniform adjudication or to further develop the law. The complaint on points of law must be filed within a month from service of the appellate court's decision by a lawyer admitted to practice before the BGH (currently 42 lawyers). It can – obviously – only be based on (alleged) violations of (usually: federal) law, § 576 ZPO.

Where the InsO does not provide for an appeal, decisions by the judicial officer can – as has been mentioned above (*sub* 2.) – be contested with an appeal ("reminder") to the insolvency court's judge (§ 11 II RPflG) whose decision is then not further appealable. The judge also has to decide when an act by the insolvency court's records clerk (Urkundsbeamter der Geschäftsstelle) is contested according to §§ 4 InsO, 573 I ZPO – the judge's decision in this rather rare case can then be appealed further with the immediate complaint (§ 573 II ZPO). Also, regarding some questions non-specific to insolvency proceedings, § 6 InsO is not applicable and appeals are possible according to the general rules (mostly) of the ZPO.

Despite § 6 InsO, an appeal is supposed to be possible where the insolvency court exceeds the limits of its abstract competences and makes an order the content of which would not be permitted by the law in any possible circumstances and violates the complainant's basic (human) rights.[33] Further, § 321a ZPO provides for a remedy (within the insolvency court) against violations of the parties' right to be heard where no other remedies are granted by the law – if justified, the insolvency court continues the proceedings and decides again considering the complaining party's submissions. Regardless of this, the insolvency court can upon informal remonstrance or *ex officio* reconsider and amend most of its decisions (but not constitutive decisions like the commencement order and not where the statute expressly requires a motion to amend a decision, e.g. in § 77 II 3 InsO).

In certain cases, the insolvency court decides on questions of (individual) compulsory execution law – e.g. in case an insolvency creditor executes into the estate during insolvency proceedings (which is prohibited according to § 89 I InsO), the administrator can object according to the law of individual compulsory execution, in this case § 766 ZPO. According to § 89 III 1 InsO the insolvency court is to decide on these objections instead of the court in matters of claim enforcement (Vollstreckungsgericht, § 764 ZPO), a division of the local court where the execution took place. Here, the insolvency court decides "as court in matters of claim enforcement" and the regime of the ZPO applies directly – in particular with partially different rules on appeals.

As mentioned in § 5 I InsO (and § 22 I no. 3 InsO), the court can request experts' help with its investigations and determinations. The most common tasks for experts are to advise the court on the prerequisites to open insolvency proceedings (insolvency reason and sufficiency of assets) – the expert usually but not necessarily being the provisional administrator (see above,

[33] BGH, 4/3/2004, IX ZB 133/03, NZI 2004, 312: Court granting an expert permission to enter the debtor's domicile and business premises and investigate there.

sub D.IV.1.) –, on questions of foreign insolvency law in cross-border cases, and on the administrator's final account (including their remuneration). Regarding the latter, valid concerns have been raised whether the discretionary authority to appoint experts may be widely used to outsource statutory duties (on the creditors' expense) where in most cases the insolvency court should have all the necessary information and the competence to verify the account according to § 66 II 1 InsO; further and equally valid concerns are directed at the practice to appoint another insolvency practitioner as expert, allowing them to gain insight into their competitor's practices and standards and to potentially give a negative opinion to tarnish their reputation.[34] The insolvency court may – and frequently does – request the administrator with serving documents on its behalf according to § 8 III InsO.

7. Fees and Liability

Court fees follow the Statute on Court Fees (Gerichtskostengesetz, GKG). According to this statute, court fees are determined by multiplying a factor (listed in the statute's schedule 1) with a base fee depending on the case value.

The court's activity during the opening proceedings constitutes a factor of 0.5 (in case of a creditor's petition, the fees are at least 180 Euro), the court's activity during the opened proceedings adds either 2.5 (debtor's petition [also if a creditor also filed a petition]) or 3.0 (creditor's petition) – the factor is reduced to 0.5/1.0 (before the verification meeting) or 1.5/2.0 (after the verification meeting) if the proceedings are discontinued prematurely.[35] For immediate complaints against the commencement order or the petition's dismissal, the factor is 1.0 (for complaints on points of law an additional 2.0, reduced to 1.0 if withdrawn), for unsuccessful other complaints the costs are 60 Euro (or 120 Euro for complaints on points of law) unless according to other provisions no costs are charged.

The case value is determined according to § 58 GKG by the estate's value at the end of insolvency proceedings; deviating from this, for the opening proceedings (but not the opened proceedings) following a creditor's petition, the creditor's registered nominal claim determines the case value if it is less than the estate's value. The base fee for the respective case value is determined by § 34 GKG and can be taken from tables published as schedule 2 to the GKG (up to 500,000 Euro)[36] or e.g. by legal publishers. There are disputes whether the case

[34] See *Madaus*, NZI 2012, 119.
[35] There are extra costs for verifying late claims or applications to refuse or revoke a discharge. Also, expenses for photocopies, service of documents, remunerations of experts, witnesses, etc., according to the statute's schedule 1 are added to the fees according to the GKG.
[36] Online at: http://www.gesetze-im-internet.de/gkg_2004/anlage_2.html – for each further 50,000 Euro, the base fee is increased by 180 Euro.

value is limited at 30 Million Euro according to § 39 II GKG or not[37] and how the case value is determined when the debtor's business is continued.[38]

In case of a breach of official duties, judges and judicial officers are (in a first step) liable to damages according to § 839 BGB; because the decisions in the course of insolvency proceedings (including opening and discharge proceedings) are not regarded "judgments in a legal matter" according to § 839 II BGB their liability is not limited to breaches of duty consisting in a criminal offence but only requires negligence. However, (a) the injured party is under an obligation to avert the damage by appealing the order if possible; negligent or intentional failure to do so precludes the liability, and (b) in case of a negligent breach of official duties, the judge or officer may only be held liable if the injured person is not able to obtain compensation in another way (e.g. because of the administrator's concurrent breach of duty according to § 60 InsO). The personal liability of judges and judicial officers is (in a second step) transferred to the respective State by Art. 34 GG, though, so that injured parties must seek compensation from the State directly. The State's recourse against the individual judge or officer is limited to intentional wrongdoing or gross negligence.

II. Insolvency Administrator (Outside of DIP Administration)

1. Formal Status in Insolvency Proceedings

The administrator's formal status has been a matter of sheer endless debate already under the InsO's predecessor, the Konkursordnung (KO) – whether the administrator be an executive of the estate, a representative/agent of either the creditors as a whole, the debtor or both the creditors and the debtor, or the holder of a private office with statutory authorities. While there are still opposing statements by some academics, in practice and judicature the latter theory clearly prevailed: The estate belongs to the debtor and is not an entity of its own, but the administrator as officeholder has the sole authority to access, administer and dispose of it according to the statutory duties and the limitations of the administrator's (court-conferred and -supervised, yet private) office, (at least considering the validity of dispositions) regardless of the debtor's or the creditors' wishes, requests or demands. Party to contracts or lawsuits involving the estate is "<administor's name> in their capacity as insolvency administrator of the estate of <debtor's name>", thus the administrator acting as a party by virtue of the office ("Partei kraft Amtes").

Where not the estate but, e.g., the administrator's liability according to §§ 60, 61 InsO is concerned, the claim is directed against the administrator not in this capacity but personally. This differentiation is crucial as the administrator's personal creditors cannot access the estate but the administrator's personal assets, whereas the creditors with claims regarding the estate

[37] For a limit: LG Osnabrück, 5/8/2013, 8 T 452/13; *Schoppmeyer*, ZIP 2013, 811; against: *Nicht/Schildt*, NZI 2013, 64. This was of particular relevance in the case of Lehman Brothers Bankhaus AG (Lehman Bros. Inc.'s German subsidiary); the AG Frankfurt am Main received around 67 Million Euro in court fees from the estate based on its full value whereas limiting the case value would have resulted in court fees of "just" around 275,000 Euro.
[38] See *Schoppmeyer*, ZIP 2013, 811: Costs of running the business are to be subtracted from the revenue.

cannot access the administrator's personal assets but only the estate (and only within the limitations according to the InsO). It sometimes is difficult to discern which "hat" the administrator is wearing because they in some cases may decide or be requested to act personally – as a private trustee/fiduciary – on behalf of the creditors. Most prominently, this is a problem of account-keeping and payment transactions: Commonly, the administrator opens a new bank account to receive and make payments for the estate in the capacity as administrator (so called "Sonderkonto" – special or separate account); the balance on such an account is part of the estate, owner is the administrator acting as a party by virtue of the office. On occasion, though, the administrator opens a fiduciary/escrow account (so called "Treuhandkonto" or "Anderkonto");[39] legal owner in this case is the administrator personally, bound (only) by the fiduciary nature. This difference caused disputes in numerous cases involving misdirected payments and their clawback.

2. Role in Insolvency Proceedings

It seems to be fair to say that the administrator is the central figure of standard insolvency proceedings and plays a key role. While technically supervised by court and creditors (especially the creditors' committee if appointed), exposed to (theoretically) extensive liability, dutybound to follow the creditors' general directions and certain assignments, and in the middle of diverging interests of individual creditors and the debtor which the administrator has to take into account, the administrator still shapes the proceedings, and their skills, decisions "in the moment" and actions are crucial for the outcome of the proceedings for creditors and debtor.

The reasons for this are manifold. For example, the administrator is the "face" of insolvency proceedings, handling PR & communications with the creditors, employees and the media (unless outsourced to a PR agency – which becomes more and more frequent), leading negotiations with potential suppliers, customers and buyers/investors. Their skills in determining outstanding claims of the debtor or the estate and business opportunities, in examining and verifying the debts, in motivating employees, in convincing business partners to invest in or simply trust the insolvent business, in managing a business and in negotiating contracts are directly connected to the final value of the estate and thus the amount of money distributed among the creditors. Their superior knowledge of facts (from their hands-on experience and perspective) and often law commonly gives them a position of (necessary) trust with the court and creditors when deciding where the insolvency proceedings should be heading so that their advice usually is heeded. Many business decisions, especially in an insolvent going concern, are of the utmost urgency so that court and creditors can't be involved and the administrator decides on their own – often even explicitly empowered to do

[39] This can be of particular significance and usefulness during the opening proceedings (with regards to the provisional administrator) to separate assets from the (later) estate and allow the provisional administrator a certain leeway in giving preferences to creditors (e.g. suppliers) supporting the continuation of the debtor's business even though legally their claims are not incumbent on the (later) estate. This practice is controversial, though.

so in advance by the creditors' assembly. Finally, the court's and the creditors' committee's (if it even exists at all) supervision is not usually very close and many creditors do not participate in creditors' assemblies (there is even a rule in § 160 I 3 InsO for the case that no creditor at all participates – which apparently is not that rare especially in meetings outside the "named" ones [report, verification, discussion and voting, final]).

As shown in the proceedings' overview (above, *sub* D.IV.), the administrator takes care of the day-to-day business of managing the insolvency proceedings, the estate and, as part thereof, the debtor's business. From the commencement order, the administrator is the only person empowered and authorised to dispose of the estate, to claim assets for the estate, represent "the estate" in lawsuits or to enter into contracts binding for the estate or to implement other decisions regarding the estate (like closing the business down or making other strategic business decisions). The administrator's actions are usually valid (and only subject the administrator to liability and/or disciplinary action/dismissal) despite lack of statutorily required consent of the creditors' committee or creditors' assembly[40] and even where contravening decisions of these bodies or orders of the insolvency court, see § 164 InsO (the same is true, though, also beyond §§ 160-163 InsO). Exceptions are acts that are blatantly violating the insolvency proceedings' purpose (above, *sub* D.II.) of collective creditor satisfaction and/or collusive acts to the creditors' detriment – such acts are void.

The role of the provisional administrator – where appointed – is usually no less important and their actions are, on the contrary, often even particularly shaping and setting the course of the proceedings (especially where there is a going concern requiring urgent and competent strategic and management decisions). However, the authorities of the provisional administrator are (commonly: considerably) more limited than those of an administrator in opened proceedings and to a huge extent defined by the insolvency court in the order of appointment. There are three categories of provisional administrators – usually paraphrased as "strong", "weak" and "half-strong" –, the "strong" provisional administrator being the one described in § 22 I InsO, equipped with the right to manage and dispose of the debtor's property instead of the insofar divested debtor, the "weak" provisional administrator being the one described in § 22 II InsO whose powers and duties are determined by the court (commonly, they oversee the debtor's actions and their consent to the debtor's dispositions is required for the latter to become effective). The "half-strong" provisional administrator is a "weak" one that has been expressly authorized by the insolvency court to create certain specified obligations incumbent on the later estate (as provided for in § 55 II 1 InsO for the "strong" provisional administrator in general), thus facilitating keeping the debtor's business going during the commencement proceedings. In practice, the "strong" provisional administrator (contrary to the legislator's intentions) is the exception due to their increased responsibilities and liabilities, the threat of more or less automatic accumulation of considerable debts incumbent on the estate according to § 55 II 2 InsO and the imperative of commensurability the insolvency court must follow when ordering protective measures.

[40] To avoid repercussions in case of urgent measures, the administrator can (and often does) at their own discretion enter contracts conditional on the later consent of the creditors.

3. Professional rules, bodies and standards

Unlike in many other legal systems, German law does not provide for professional rules for insolvency practitioners, rules for their training or certification or indeed for a real profession of insolvency practitioners itself. There is no public or semi-public professional body of insolvency professionals as such, only private associations and organizations representing insolvency professionals' interests – most notably the VID (Verband Insolvenzverwalter Deutschlands e.V. – Registered Association of German Insolvency Administrators),[41] the NIVD (Neue Insolvenzverwaltervereinigung Deutschlands e.V. – New Registered Association of German Isolvency Administrators)[42] the ARGE Insolvenzrecht & Sanierung im Deutschen Anwaltverein (Working Group Insolvency Law & Restructuring of the German Bar Asscociation)[43] and – a very selective and closed group of leading supra-regional insolvency administrators – the Gravenbrucher Kreis (Circle of Gravenbruch).[44]

Some of these professional bodies compose/create and publish (private) professional standards of sorts, in particular the Professional Standards (Berufsgrundsätze)[45] and the more detailed Principles of Proper Insolvency Administration (Grundsätze ordnungsgemäßer Insolvenzverwaltung) of the VID.[46] Also, there are certain standards for quality management certificates for insolvency administrators' offices, like ISO:9001, InsO 9001 or InsOExcellence.

There is an ongoing, and recently (not least due to the EU directive proposal) quite intense debate whether the legislator should introduce a public Chamber of Insolvency Administrators (Insolvenzverwalterkammer), statutory rules of professional conduct and rules on basic and advances training, admission, etc. It is too soon to tell, however, whether and to which extent legislation in this regard will be forthcoming in the near(er) future.

4. Qualifications / Career Development

The statutory rules on insolvency administrators' qualifications[47] are exceptionally brief and vague: According to § 56 I 1 InsO the insolvency administrator must be (1) a natural person that is (2) suited to the case at hand and (3) willing to take on insolvency administration work. The all-important criterion "suitability" (2) is further substantiated by the following sub-criteria which are non-exhaustive: In particular, the insolvency administrator must be (a) knowledgeable and experienced in business affairs ("geschäftskundig") and (b) independent of the creditors and of the debtor.

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[41] Online: http://en.vid.de/.
[42] Online: http://www.nivd.de/ (German only).
[43] Online: http://www.arge-insolvenzrecht.de/ (German only).
[44] Online: https://www.gravenbrucher-kreis.de/english-1/.
[45] Online: https://www.vid.de/wp-content/uploads/2016/09/berufsgrundsaetze-03-05-2013.pdf (German only).
[46] Online in an English version at: https://www.vid.de/wp-content/uploads/2018/11/goi-1-2016-vom-22-4-2016-en.pdf.
[47] The same holds true for other professional functions in insolvency proceedings – i.e. monitor or trustee.

The requirement that the insolvency administrator must be a natural person is supposed to reflect their personal responsibility and liability and ensure the continuity of actions. It does not preclude the insolvency administrator from making use of a considerable back office (that is indispensable in bigger cases) and hiring outside help (see below, *sub* 6.), but it does imply certain restrictions on e.g. sending representatives to meetings of the creditors' assembly; in general, the administrator needs to handle the case (and its core elements) in person.[48] Still, there is an argument made that the restriction to natural persons may be a violation of the EU's Directive 2006/123 on services in the internal market[49] or even EU primary (treaty) law; also, international corporations handling insolvency cases abroad seem to be interested in entering the German market. However, to our knowledge, no legislation regarding this question is imminent.

The required knowledge of business affairs (at least in theory) involves at least basic knowledge of insolvency and tax law as well as management and accounting, for those managing businesses also company, labour and social security laws. For this reason, the overwhelming majority of administrators at least in enterprise insolvencies consists of legal, tax accounting, general accounting, and/or auditing professionals even though a degree, certification or admission/approbation in one of these fields is not a statutory requirement (of importance in particular for business consultants).

In practice, most administrators by far are lawyers that are admitted to the bar (Rechtsanwalt) and have the same educational backgrounds as judges (see above, *sub* I.3.), sometimes with additional degrees or certifications in accountancy, taxes or management,[50] but there are some practitioners with a diploma in business law from a college of higher education or a bachelor degree in business law from a university and some practitioners with a background and degree in economics that are chartered accountants (vereidigter Buchprüfer), tax accountants (Steuerberater)[51] and/or auditors (Wirtschaftsprüfer).

Lawyers admitted to the bar can also be granted an additional job title expressing their specialization in a certain area of law (Fachanwalt) – one of these specializations is insolvency law (Fachanwalt für Insolvenzrecht – FAInsR), other relevant ones are tax law (Fachanwalt für Steuerrecht – FAStR) and commercial and company law (Fachanwalt für Handels- und Gesellschaftsrecht – FAHuGR). To qualify, lawyers must attend a qualification course of 120 hours, pass an exam and prove to have sufficient practical experience in the field of their choice by filing a list of cases they worked on meeting certain criteria; they also need to attend

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[48] The extent of this is highly disputed – and it is well known and accepted by insolvency courts that insolvency administrators entrust employees (in particular those who are rather experienced already and aim at becoming insolvency administrators of their own or have actual experience as insolvency administrators) with unofficially handling part of the proceedings under their supervision ("Grauverwalter" – grey administrator).

[49] *Sabel/Wimmer*, ZIP 2008, 2097 [the authors are/were high-ranking civil servants in the Federal Ministry of Justice noless].

[50] There are also a number of rather recently introduced specific Master degrees in insolvency law and/or restructuring, e.g. at Heidelberg University.

[51] For tax accountants, the German Association of Tax Advisors issues a certificate called specialist advisor for restructuring and insolvency administration (Fachberater für Sanierung und Insolvenzverwaltung [DStV e.V.]) at the end of a course of 120 hours with exams.

a number of courses/seminars/lectures each year (or write scholarly articles etc.) to prove that their knowledge is still current.

In addition to the knowledge, the administrator needs experience in business affairs to be suitable – according to the judicature, this experience needs to relate to businesses in insolvency or even to insolvency administration as such. This, obviously, makes the initial access to administrator appointments difficult[52] but has been regarded as a generally valid requirement by the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG)[53] and higher regional courts,[54] as long as the experience can be gained other than by being appointed administrator in person – namely by working for an administrator in a responsible position (especially as Grauverwalter) or by, in a professional capacity, co-operating closely with an insolvency administrator.[55] Some courts appear to require less practical experience to be appointed in consumer insolvency proceedings (or possibly very simple business cases) – so that professionals can gain the experience for the standard cases there.

Still, this requirement of experience and the realities of appointments mean that most young administrators are either employees of another insolvency administrator (or partnership of insolvency administrators or corporation that employs professionals working as insolvency administrators[56]) or partners of an insolvency administrator or have worked for an insolvency administrator before going independent. The young professionals learn the ropes there, assisting one or more insolvency administrators, over time receiving more responsible assignments up to the (inofficial) status of Grauverwalter. During that time, they are introduced by administrators to the judges and judicial officers at insolvency courts (often in the same region as their home office) as potential future appointees and accompany the administrator to negotiations and meetings of the creditors' assembly or committee. Frequently, the first appointments then happen in consumer or in small business cases that are potentially not too demanding. Especially with the increased influence of creditors on administrator selection (see below, *sub* 5.), access to the particularly sought and lucrative big restructuring cases will probably get even more difficult for young professionals without considerable prior experience in similarly complex and challenging cases.

Bearing in mind that the administrator has to serve the common best interests of the creditors, taking into account the rights of the debtor, the independence of creditors and debtor is of

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[52] All the more so when the insolvency court requires – like the AG Düsseldorf did at one time – five years of experience in the independent processing of insolvencies (regarded as rather too high a bar by OLG Düsseldorf, 15/8/2008, 3 VA 4/07, ZIP 2008, 2129).
[53] BVerfG, 19/7/2006, 1 BvR 1351/06, ZIP 2006, 1541.
[54] OLG Düsseldorf, 15/8/2008, 3 VA 4/07, ZIP 2008, 2129; OLG Köln, 27/9/2006, 7 VA 9/05, NZI 2007, 105; OLG Nürnberg, 5/9/2006, 4 VA 276/06.
[55] OLG Köln, 27/9/2006, 7 VA 9/05, NZI 2007, 105, however, seems to demand a loophole where such experience in an administrator's office or a co-operation could not be feasibly gained and experience in other cases (in commercial matters) makes up for it. – *Graeber*, in: Münchener Kommentar, InsO, § 56 n. 19a, 19b, stresses the importance of experience in the interests of creditors and debtor that must not be made suffer from "their" administrator's inexperience and learning curve.
[56] While the insolvency administrator has to be a natural person, they can still be employee or partner of a firm of professionals; in big cases, this is the rule because of the necessary back-office.

particular importance for the suitability and thus the appointment.[57] The exact extent of this requirement can be difficult to determine, though[58] – the legislator merely introduced two clarifications with the ESUG (§ 56 I 3 InsO): Nominations alone of a particular person by the debtor or a creditor do not call the independence of such person in question but are neutral; only tangible indications of a relationship or a connection that might cause a conflict of interest during the insolvency proceedings can disqualify the nominated person. And a candidate may still be considered independent from the debtor after giving them pre-petition advice on the course and consequences of insolvency proceedings; this advice must not, however, involve an assessment of the case at hand or the debtor's business but has to be of a general nature (e.g. how and where to file a petition, etc.), the candidate must not be considered the debtor's lawyer or advisor.

The ESUG introduced the formal creditors' participation in selecting the insolvency administrator (see below, *sub* 5.) as well as the monitor in DIP proceedings. There is an ongoing debate whether the creditors can waive the requirement of the administrator's/monitor's independence of the debtor, in particular to allow former advisors of the debtor with already existing knowledge of the case to be appointed administrator/monitor;[59] most authors disapprove and have the statute and its purpose to avoid conflicts of interests on their side.[60]

The criterion of independence poses a challenge where insolvency professionals work in the same firm with restructuring or creditor advisors or even work in those fields themselves. Commonly, the fact that the administrator or a colleague has advised a creditor before in a different matter (e.g. regarding another insolvency proceedings) will not preclude them from being appointed unless the creditor-client is of particular importance. Representing a creditor in the same case, however, even if the representation is handled by another member of the firm and even though not the firm is appointed administrator but one of its partners or associates will usually cast a shadow on the candidate's independence, as will the candidate's or their colleague's previous activity on behalf of the debtor. Even "chinese walls" between different divisions of one firm, making sure that information is not shared will not usually cure this potential conflict of interest. Despite this, most if not all of the leading insolvency administrator firms are increasingly branching out into counseling and advising creditors and struggling companies.[61]

Other possible elements of the candidates' suitability to handle the case at hand are manifold, they may involve their current case-load, social skills, lack of criminal convictions, reliability and financial stability, experience in a certain industry sector (e.g. automotive companies or

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[57] However, in certain cases (especially where liability claims against the administrator are concerned or where one administrator is appointed in several proceedings of companies belonging to a group) it can be feasible to solve conflicts of interest by appointing a special administrator (Sonderverwalter) with authorities limited to certain tasks or areas of tasks.

[58] For an extensive discussion in the light of the ESUG see *Kebekus/Zenker*, Festschrift für S. Beck, 2016, 285.

[59] *A. Schmidt/Hölzle*, ZIP 2012, 2238; *Hölzle*, ZIP 2013, 447.

[60] E.g. *Bork*, ZIP 2013, 145; *Vallender/Zipperer*, ZIP 2013, 149. According to *Graeber*, in: Münchener Kommentar, InsO, § 56 n. 28-30, the court may (regardless of the creditors' vote, though) appoint former advisors of the debtor in rare cases if they are well-known to the judge and obviously trustworthy and reliable.

[61] Critical *Graeber*, in: Münchener Kommentar, InsO, § 56 n. 33.

companies producing photovoltaic cells) – which may be helpful by knowing the suppliers, customers and potential buyers, the standards and usances of a sector or specific legal regulations of a market –, experiences either with selling or managing a company depending on the projected outcome of the proceedings or with pursuing claims against former management or creditors who received pre-commencement preferences (a good manager is not necessarily a good seller or litigator and vice versa), experiences with cross-border insolvencies, language skills or foreign connections, sufficient insurance in case of the administrator's liability, pledging to handle the case to certain professional and quality management standards (usually verified by a certification), and a back-office of a sufficient size to handle the case (in particular with the big cases).

Some insolvency courts also openly consider the candidate's age a factor – candidates close to common retirement age should not be entrusted with complex proceedings likely to stretch over years to come –; it is doubtful and disputed, though, whether this is a valid criterion according to the General Equal Treatment Statute (Allgemeines Gleichbehandlungsgesetz, AGG) and/or the spirit of anti-discrimination legislation. While the candidate's reachability during office hours and their ability to handle the case (more or less) in person are valid criteria, this is at least questionable for the nonetheless rather common requirement of local proximity of the candidate's office to the insolvency court and the debtor, also with regard to modern means of communication and the EU-wide freedoms of establishment and services.

The candidate must be willing and prepared to take on insolvency administration work; this willingness can, according to § 56 I 2 InsO, be restricted to certain proceedings (e.g. consumer proceedings). In most cases, the willingness is expressed by the candidate's request to be considered for insolvency administrations by the insolvency court and thus to be entered into the court's (or the individual judge's) list of generally suitable candidates (see below, *sub* 5.).

5. Selection process

Ernst Jaeger, one of the most influential and renowned academics in the field of German insolvency law in the first half of the 20th century, once dubbed the selection of the administrator the "Schicksalsfrage" (vital question, literally: question of fate/destiny) of insolvency proceedings. This, obviously, relates to the importance of the administrator for the outcome (see above, *sub* 2.) and to the difficulty of matching the right person to the specific proceedings at hand. In principle, the insolvency court selects the administrator (as well as the provisional administrator, the monitor and the provisional monitor) at its discretion but this discretion – initially perceived as almost limitless – has over time come under a lot of scrutiny and has also, with the ESUG, been limited by the introduction of the provisional creditors' committee with its main function of giving the creditors a voice in the selection process and by allowing the debtor to select and bring their own provisional monitor to opening proceedings according to § 270b InsO (protective shield proceedings, see above, *sub* D.VIII.).

Firstly, some insolvency judges (and indeed courts in a co-ordinated approach)[62] tended to use their wide discretion to only appoint a small number of insolvency professionals over and over again, basically not allowing outside applications unless supported by one of "their" administrators. This "closed shop" or "closed list" approach made handling proceedings easier for the court as the small number of administrators were familiar with the court's customs, requirements, forms, etc., and the court knew what to expect from those administrators – the argument that this kind of collaboration or teamwork is also in the best interest of creditors has some validity, though it also might make supervision less effective. However, seeing that the position of insolvency administrator is coveted (probably mostly for the prospect of very lucrative cases) and that a strictly closed list leads to frustration with candidates not on that list, it is not entirely surprising that higher courts (namely the higher regional courts that have jurisdiction to decide on appeals against refusals to consider a person for appointments as administrator, § 23 of the introductory act to the GVG [EGGVG], the BGH and in particular the BVerfG) had to decide a number of times on candidates' complaints regarding the selection process and the limits of the court's discretion. The BVerfG acknowledged that this is a constitutional issue because a closed list approach, refusing to even consider outside candidates, violates the candidates' basic or human right freely to choose their occupation or profession, Art. 12 GG (thus more or less acknowledging in passing that insolvency administrator is a profession of its own) and their right to equal treatment according to Art. 3 I GG; the same is true for other grave misuses of the court's discretion. However, both the BVerfG and the civil courts agree that the selection itself commonly is a time-sensitive decision often to be made with limited knowledge of the facts and taking into account various specifics of the individual case, and that the rights and interests of the creditors here basically take precedence over the rights of the candidates. The courts thus still have wide discretion regarding the actual selection of an administrator that cannot usually be subject to scrutiny by higher courts or the BVerfG – no appeal aiming at preventing an appointment can be successfully filed either by another candidate or by the debtor or a creditor against the selection of the administrator for a specific case.

So in accordance with the BVerfG's and BGH's requirements,[63] the usual process of selection (hinted at in § 56 I 1 InsO) is a two-step-approach: In a first step, each insolvency court judge – or the insolvency judges of a court collectively – receives applications for appointments[64] and compiles a list[65] of generally suitable candidates meeting the judge's criteria (within the frame of valid requirements as mentioned above, *sub* 4.). Candidates that are generally suitable must not be denied access to this "open pre-selection list"[66] and, if they were, can

[62] One court notorious for its "closed list" was the AG Charlottenburg in Berlin, Germany's biggest insolvency court.

[63] See e.g. BVerfG, 3/8/2004, 1 BvR 135/00 and 1 BvR 1086/01, ZIP 2004, 1649; BVerfG, 23/5/2006, 1 BvR 2530/04, BVerfGE 116, 1; BVerfG, 12/7/2006, 1 BvR 1469/05, ZIP 2006, 1954; BGH, 19/12/2007, IV AR (VZ) 6/07, ZIP 2008, 515.

[64] Many judges/courts use extensive questionnaires.

[65] Or frequently sub-lists for different kinds of proceedings.

[66] There is a discussion whether the list can be limited by some means for a too long list would not be helpful in the actual selection process (step 2). A suggested, but vulnerable solution is creating a number of sub-lists not

appeal the judge's decision with the Higher Regional Court (eventually the BGH and the BVerfG). In a second step, the judge then selects the most suitable (provisional) administrator for the case at hand from this pre-selection list. Appeals against this decision are very limited and cannot lead to reversing or halting the appointment but only, if anything, to a determination that the decision was beyond the (very wide) scope of the judge's discretion.[67] Candidates on the judge's list are not guaranteed a certain number or ratio of appointments, they do not have a subjective right to be appointed in specific cases, only to be considered appropriately according to their qualifications. However, if a pattern shows that a certain listed candidate has constantly been denied appointment even where they were suitable, this may be considered a *de facto* de-listing and give rise to an appeal.[68]

Seeing that the insolvency proceedings are mainly serving the creditors' interests (§ 1 InsO), the importance of the administrator's selection´, the insight that the creditors often know better than the judge where the proceedings might go and which administrator might be particularly suitable (especially for a restructuring) and finally the fact that, ultimately, the creditors can replace the court-appointed administrator by majority vote of the first creditors' assembly (within the legal requirements of § 56 I InsO) according to § 57 InsO,[69] some courts started to involve key creditors before appointing the (provisional) administrator at least in potentially big restructuring cases and to seek their input even though the InsO did not provide for this kind of creditor participation.[70]

With the ESUG, the legislator introduced a formal and (in certain cases) mandatory model of creditor participation: During the opening proceedings, the insolvency court can – according to its discretion – appoint a provisional creditors' committee (§ 21 II 1 no. 1a InsO). In certain cases, it is under an obligation to do so (§ 22a I, III InsO), namely where the debtor's business exceeds a certain size (§ 22a I InsO) and is still open and running, the appointment and its costs do not appear to be disproportionate to the expected estate value and the delay of proceedings caused by the appointment will not be detrimental to the debtor's financial situation (§ 22a III InsO). If the latter three requirements are met but the business is smaller than required by § 22a I InsO, the court is urged to appoint a provisional creditors' committee if the debtor, the already appointed provisional administrator or a creditor files a request and suggests suitable candidates who have agreed in writing to serve on such a committee. The court can seek suggestions also in other cases, § 22a IV InsO, but is in no case bound by any suggestions regarding the candidates for a provisional creditors' committee. In practice, however, well-advised and -prepared debtors regularly suggest candidates and prime them, and courts regularly follow the debtors' suggestions to speed up proceedings, avoid delays and

just by kind of proceedings but also by the candidates' experience and degree of suitability.

[67] In theory, a candidate could also have a claim for damages – this, however, would require them proving that their appointment would have been the only legitimate discretionary decision (which is next to impossible).

[68] See OLG Hamm, 7/1/2013, 27 VA 3/11.

[69] This is uncommon in practice, though, because the first creditors' assembly happens at a time when the court-appointed administrator usually has been in office for months (at least if also appointed provisional administrator during the opening proceedings) and made crucial decisions that are often impossible or too expensive to reverse.

[70] One of these approaches of creditor participation before appointing the provisional administrator was practiced by the AG Detmold and was hence known as the "Detmold model" (see *Busch*, DZWIR 2004, 353).

extra work. Thus, the debtor and the debtor's advisors (sometimes) can indirectly influence the selection of the (provisional and final) administrator.

The provisional creditors' committee commonly consists of 3 or 5 members though the InsO does not regulate the size; the members must in principle be actual creditors or future creditors[71] and are supposed to mirror representatively the major groups of creditors (§ 67 II InsO: secured creditors, major unsecured creditors, unsecured small claims creditors and employees), thus also providing for representation of commonly diverging interests.

In addition to a general assignment – shared with the creditors' committee in opened proceedings with regard to the administrator – to supervise the provisional administrator (and the debtor) during the opening proceedings, §§ 21 II 1 no. 1a, 69 InsO, the provisional creditors' committee is specifically assigned to assist the court with its decisions on appointing a provisional administrator and an administrator (or a [provisional] monitor) and on the debtor's application for DIP proceedings (see above, *sub* D.VIII.). Unless the inevitable delay (taking into account all feasible options of speeding the process up) would manifestly cause a detriment to the debtor's financial situation, the court has to hear the provisional creditors' committee on the required profile and on the person of the (provisional) administrator before making an appointment, § 56a I InsO. If the provisional creditors' committee returns a unanimous suggestion of a person who meets the general requirements of § 56 I InsO ("suitable"), the court has to appoint this person (even if the person is not a candidate so far listed by the insolvency court); if, by majority vote, the provisional creditors' committee decides on a required profile (e.g. experiences in the industry sector of the debtor, restructuring experience, etc.), the court has to take this profile into consideration and generally observe it, if possible, when selecting a suitable person from its pre-selection list, § 56a II InsO. In case the court had, considering the delay, not heard the committee before appointing a provisional liquidator, the provisional creditors' committee can, in its first meeting, request that the court replaces its appointee with a specific (suitable) person elected by unanimous committee vote, § 56a III InsO.

As mentioned above, the creditors' assembly can in their first meeting (usually, but not necessarily the report meeting) by majority vote (majority of claims and heads) replace the administrator with another suitable person, § 57 InsO. Also, the insolvency court can dismiss the administrator for cause and appoint a new administrator, § 59 InsO.

6. Employing or contracting other professionals or staff

[71] According to § 67 III InsO, the members of the creditors' committee in opened proceedings need not be creditors. This provision is, as a consequence of a conscious choice of the legislator, not applicable to the provisional creditors' committee in opening proceedings (see § 21 II 1 no. 1a InsO). The extent of this rule, however, is unclear since the legislator mentioned in the legislative proceedings (in particular in the report of the committee of legal affairs of the Bundestag [German Parliament's first chamber consisting of elected representatives], BT-Drs 17/7511, 33) that creditors' representatives can be appointed. This is of particular importance for the question whether unions can be appointed to represent the employee's interests.

Even though the administrator needs to personally have a grasp of the common legal, economic and accountancy issues of insolvency proceedings and needs to handle the proceedings in person to at least some extent (see above, *sub* 4.), they usually – at least in all but very small and simple cases – have to and do avail themselves of professional help[72] with e.g. accounting, tax accounting, litigation, drafting contracts, searching for buyers or investors.[73] They also need a back-office for clerical activity, handling the service of documents, keeping track of claim registrations, etc., and often need to make use of the debtor's employees or hire outside (non-professional) help for keeping up the debtor's business, taking inventory or disposing of the estate.

When the administrator enters into a contract on behalf of the estate, the obligations under that contract are debts incumbent on the estate (with priority over insolvency claims, see below, *sub* III.1.) according to § 55 I no. 1 InsO. If the contract was not necessary (e.g. because the administrator could and should have taken care of the outsourced activity themselves and this activity is covered by their basic remuneration), entering into it on the estate's expense is a breach of the administrator's duties and can lead to their liability according to § 60 InsO.

7. Remuneration

The (provisional) insolvency administrator's remuneration is determined according to §§ 26a, 63-65 InsO and the InsVV. The court makes the determination by way of an order according to § 64 InsO (or, regarding the provisional administrator in case the proceedings were not opened, according to § 26a InsO) on the basis of a calculation and application submitted by the administrator (§ 8 InsVV); the order can be appealed immediately by the administrator, the debtor or any insolvency creditor, § 64 III InsO (in the case of § 26a InsO: by the provisional administrator or the participant burdened with the costs, § 26a III InsO – usually the debtor, in certain cases the creditor who filed the petition, § 26a II InsO). According to § 63 I 2 InsO, the basic remuneration for the administrator is based on the value of the estate at the end of the proceedings. The provisional administrator according to § 63 III InsO[74] receives 25% of a hypothetical administrator's remuneration based on the estate handled during the opening proceedings, taking into account objects surrendered to secured creditors or creditors with a right to separation. The determined remuneration can deviate from the basic remuneration by way of supplements or reductions, taking into consideration the specific scope of the administrator's duties and the case's complexity, § 63 I 3 InsO.

More detailed provisions on the calculation can be found in the InsVV: § 1 InsVV states how the estate's value is to be determined. According to § 2 I InsVV, the basic remuneration for an administrator is 40% of the first 25,000 Euro of the estate, 25% of the surplus amount up to 50,000 Euro, 7% of the surplus amount up to 250,000 Euro, 3% of the surplus amount up to

[72] In the case of Lehman Bros. Bankhaus AG, the administrator employed around 70 lawyers and 30 insolvency experts from his own office full time for the duration of the proceedings.
[73] Also see the list *sub* II.2. of the GOI at: https://www.vid.de/wp-content/uploads/2018/11/goi-1-2016-vom-22-4-2016-en.pdf (in English).
[74] The rule in § 63 III InsO on the provisional administrator's remuneration came into force on 19 July 2013.

500,000 Euro, 2% of the surplus amount up to 25,000,000 Euro, 1% of the surplus amount up to 50,000,000 Euro, and 0.5% of any surplus amount over that. Minimal amounts of the basic remuneration in case of small estates are provided for in § 2 II InsVV: 1,000 Euro[75] if not more than ten creditors registered a claim, then 150 more Euro per step of (up to) 5 more creditors up to 30 creditors, then 100 more Euro per step of (up to) 5 more creditors. The rule of § 3 InsVV lists examples for circumstances that justify a supplement to or reduction of the basic remuneration – the determination of these supplements and reductions is the most ambiguous and flexible part of the process, often causing a huge spread of legally justifiable remunerations.[76] The applicable VAT (currently 19%) is added to the remuneration, § 7 InsVV.

In addition to the remuneration, the administrator can recoup expenses exceeding the general costs of business, § 4 II InsVV (naming travel expenses as an example); the costs of a professional liability insurance are not recoupable unless the risk of liability for a specific case exceeds the common risk for insolvency administrators in which case the costs of a supplemental insurance can be recouped, § 4 III InsVV. According to § 8 III InsVV, the administrator can claim a blanket allowance for expenses of not more than 250 Euro per month (less in small cases) instead of substantiating actual expenses. The administrator can claim separate remunerations for delayed distributions and monitoring a plan's implementation, § 6 InsVV.

The administrator can recoup their remuneration from the estate – together with the court and the members of the creditors' committee – with priority over all creditors of other debts incumbent on the estate and all insolvency creditors, §§ 53, 54 no. 2, 209 I no. 1 InsO. However, if the estate is not even sufficient to cover the costs of the proceedings in full, the administrator only has a claim for the remuneration against the State if the costs had been deferred according to § 4a InsO, § 63 II InsO. Under certain circumstances, the court can allow the administrator to withdraw an advance on their remuneration from the estate or order an advance payment by the State in case of deferred costs, § 9 InsVV.

Overall, the insolvency administrator's remuneration in Germany is particularly lucrative in cases with a huge estate,[77] especially if they involve running the debtor's business and a plan proceeding, because there is no ceiling taking into consideration the amount of time spent on the case etc. In cases with small estates, however, remunerations can be rather minuscule regarding the necessary amount of work and time spent on an individual case.

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[75] In consumer proceedings, this amount is reduced to 800 Euro in most cases, future § 13 InsVV.

[76] In a case ("Bohlen & Doyen") that attracted considerable media attention, the provisional administrator requested and at first received a remuneration of roughly 14.5 million Euro for a period of roughly ten weeks; after prolonged court battles, the appellate court (partly on direction by the BGH) found that "only" around 3 million Euro were justified. Arguably, though, the request and the first determination were grossly inflated and not compatible with the legal foundations – the judicial officer in charge even had since been indicted, but the charges were dropped eventually.

[77] In the case of Lehman Bros. Bankhaus AG, the administrator claimed (on the basis of an expert opinion) that he was entitled to up to 834 million Euro; the court determined fee is confidential but is expected to be in the vicinity of 500 million Euro.

8. Liability

The administrator's personal liability is (mostly[78]) governed by §§ 60, 61 InsO. According to the general rule in § 60 I 1 InsO, the administrator (and according to § 21 II 1 no. 1 InsO the provisional administrator) can be held liable to damages by all participants of the proceedings for negligent or intentional violations of duties under the InsO. The standard of care is that of a proper and diligent insolvency administrator, § 60 I 2 InsO. The burden of proof for all requirements of a liability is on the claimant. Participants of the proceedings in the sense of § 60 InsO are not just the debtor and the insolvency creditors but every person whose position is regulated by the InsO, e.g. secured creditors, creditors with debts incumbent on the estate and creditors with a separation right, but also the debtor's shareholders or members, the State regarding the court fees, the bank in charge of the estate's account, but usually not general business partners and debtors of the debtor or the debtor's director.

The breach of duty can lead to a damage with one specific participant (or a group of participants with similar positions) [singular damage] or to a reduction of the estate distributable to all the insolvency creditors [collective damage]. In the latter case, the individual creditors are barred from claiming damages for the duration of the proceedings by § 92 InsO – collective damages must be pursued by "the administrator"; in the case of an administrator's liability, this can either be a new administrator after the liable one's dismissal or a special administrator appointed with the specific assignment to enforce the "general" administrator's liability.

In the course of insolvency proceedings – especially where an active business is concerned –, the administrator has to make many discretionary (entrepreneurial) decisions that are risky and can prove either "right" or "wrong" with hindsight. To avoid courts holding the administrator liable in these circumstances, ruling with hindsight bias that the administrator has negligently violated their duties, many authors[79] resort to German company law's version of the "Business Judgment Rule" (§ 93 I 2 Statute on Stock Corporations [Aktiengesetz, AktG]) according to which a stock corporation's board member (i.e. here: the administrator) must not be held liable if they made a discretionary decision without bias and on the basis of reasonable information and they could reasonably assume to act in the best interest of the corporation (i.e. here: estate).

As mentioned before, the administrator requires the court's or (mostly) the creditors' committee's or creditors' assembly's consent for certain actions. However, the administrator's actions are valid even without the creditors' consent, § 164 InsO, or against their rejection, and the administrator is not strictly bound by the creditors' decisions – i.a. because the circumstances can change and because the administrator is dutybound also to other participants that have no vote in the creditors' bodies. While the administrator cannot be held

[78] General rules of liability (e.g. under contract or tort law) are applicable, as well; however, most of these lead to a liability of the estate (and via the detriment to the estate possibly to claims of the damaged creditors according to § 60 InsO) and only under rare circumstances to a direct and personal liability of the administrator.

[79] E.g. *Berger/Frege/Nicht* NZI 2010, 321; *Kebekus/Zenker*, FS Maier-Reimer, 2010, 319; opposed by *Jungmann*, NZI 2009, 80; *Brandes/Schoppmeyer*, in: Münchener Kommentar, InsO, § 60 n. 90a.

liable for observing the court's final decision (if reached on basis of proper information by the administrator and possibly appealed without success),[80] the creditors' decisions do not have this effect *per se*. And still, if the creditors' assembly had agreed with the administrator's planned action, had been informed properly and the circumstances had not changed since the consent, the administrator by acting normally did not violate their duties to the secured and insolvency creditors (or at least did not do so negligently); if the assembly refused to consent, the administrator should – to reduce the risk of liability – try to overturn the decision by contesting it according to § 78 InsO. The creditors' committee's consent has a similar effect but to a lesser extent (in some [rare] such cases, both the administrator and the members of the creditors' committee may be violating their duties). Whether this – more or less – exculpating effect is also connected to creditors' decisions that are not required by the InsO is a matter of dispute; despite this, administrators frequently seek the creditors' consent even where it is not explicitly prescribed to learn the creditors' opinions, and to base the decision on a wider foundation (also reducing the risk of creditors perceiving a breach of duty and of a later court finding negligence).

The administrator is responsible for their own employees according to § 278 BGB. For employees of the debtor employed by the administrator within the scope of their former activities, the liability is limited to their selection, their supervision and decisions of particular importance that the administrator has to make themselves, § 60 II InsO. For third party contractors of the estate according to § 4 I 3 InsVV, the administrator is commonly not responsible as long as the selection process was faultless.

According to § 61 InsO, the administrator owes damages to the creditor of a contractual post-commencement debt incumbent on the estate if the estate is insufficient to fully perform and this outcome had been foreseeable for the administrator when entering into that contract; the insufficiency of assets is deemed to have been foreseeable unless the administrator proves otherwise. This liability is construed rather narrowly by the courts; in practice, some creditors thus tend to ask the administrator for a personal (contractual) guarantee of performance or at least attempt to interpret statements of the administrator in this way.

The limitation period for claims according to §§ 60, 61 InsO is the regular one according to the BGB (three years from the end of the year in which the claim became due and the creditor learned or would have learned of the claim and the person of the debtor if they had not behaved grossly negligently), further limited at three years from the termination or discontinuation of the proceedings, § 62 InsO. Courts usually require administrators to have a professional liability insurance (see above, 4. and 7.); a problem common in (rare) cases with huge estates, however, in addition to the administrator's excess agreed upon with the insurance company, appears to be the exorbitant risk that is basically uninsurable (even with supplemental insurances).

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[80] Liability can rise however from further actions in the consequence of the court's decision – e.g. if the court directs the administrator not to close the business until the creditors' vote, this does not relieve the administrator of their duty to advise future contractual partners of the perceived risk of insufficient assets to perform the contract.

III. Creditors[81]

1. Categories of Creditors

a) Insolvency Creditors, § 38 InsO

The insolvency proceedings mainly revolve around the general insolvency creditors who have a personal claim to assets against the debtor that had been founded[82] by the time of the proceedings' commencement. These are the creditors whose collective satisfaction is the purpose of insolvency proceedings (§ 1 InsO), the estate serves to satisfy them (§ 38 InsO), and they are eligible for *pari passu* distributions from the estate. During the proceedings (in case of a protective measure also during the opening proceedings, and in case of subsequent discharge proceedings also during the assignment period) they are barred from enforcing their claims outside the proceedings, § 87 InsO. They can participate and vote in the creditors' assembly. For the purposes of the insolvency proceedings, claims that are not due are deemed due (possibly at a reduced amount), § 41 InsO, and claims not aimed at payment (but delivery of goods, rendering of services, etc.) are to be filed at their estimated monetary value, § 45 InsO.

b) Junior Insolvency Creditors, § 39 InsO

While the general insolvency claims according to § 38 InsO share a rank and are treated equally regardless of their legal foundation, their maturity or the person of the creditor, certain claims listed in § 39 I InsO are treated as junior or lower-ranking claims – namely (in descending order): post-commencement interest payments; costs of a creditor's participation in the proceedings; fines; claims to gratuitous performances; claims to the repayment of certain shareholder loans. Furthermore, the parties can agree contractually on any rank below that of § 38 InsO for a claim; if they do not specify the rank, according to § 39 II InsO the contractually subordinated claim ranks behind all other insolvency claims, including those listed in § 39 I InsO.

In the overwhelming majority of cases, the claims of § 39 InsO are not eligible to any distribution of assets because the estate is (usually by far) not sufficient to satisfy in full the general insolvency claims of § 38 InsO. The creditors of these claims can still participate but not vote in the creditors' assembly or contest its decisions (unless under certain circumstances on an insolvency plan); they cannot usually file their claims unless specifically instructed to do so by the court, § 174 III InsO. The junior creditors can file an insolvency petition regardless of their prospect to receive any kind of payment as the result of insolvency proceedings.[83]

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[81] Regarding the role of creditors (and creditor organs) especially in restructurings, see also *Kebekus/Zenker*, in: Mönning, Betriebsfortführung in Restrukturierung und Insolvenz, 3rd ed. 2016, § 10.
[82] The claim does not have to be due or even fully valid yet but its legal foundation must have been established. This criterion is the cause for several disputes, particularly regarding tax claims and the time of their foundation.
[83] BGH, 23.9.2010, IX ZB 282/09, ZIP 2010, 2055.

c) Secured Creditors / Rights to Separation or Separate Satisfaction

Not actually creditor of the estate and participant of the insolvency proceedings is who is entitled to separate an object from the estate and demand its surrender under a right *in rem* or *in personam* (right to separation – Aussonderungsrecht, § 47 InsO). Prototypical example of a right to separation *in rem* is the proprietor's claim against the unauthorized possessor according to § 985 BGB, unless fiduciary property [Sicherungseigentum / Treuhandeigentum] is concerned (retained property [Vorbehaltseigentum] results in a right to separation unless the administrator decides to perform in accordance with §§ 103, 107 II InsO). An example for a right to separation *in personam* is the contractual claim (§ 546 BGB) of the landlord against the tenant for vacation of the premises at the end of the rental period even if a third party was proprietor. The position of such a separation claims creditor is only marginally affected by the insolvency proceedings – namely where, in the opening proceedings, the insolvency court orders that specific objects are not to be separated because they are indispensable for continuation of the debtor's business (§ 21 II 1 no. 5 InsO) and where the administrator can refuse for up to one year to return objects crucial for running the business that the debtor had leased from a shareholder/member or equivalent third party (§ 135 III InsO). In both cases, the creditors have a (limited) claim for compensation. In case of an unlawful disposition regarding the object by the debtor or the administrator that prevents separation, the creditor can separate the claim to consideration or the consideration itself as a substitute as far as the consideration can be distinguished from the estate, § 48 InsO.

These creditors entitled to separate the object of their claim from the estate – and thus not taking part in the proceedings – must be distinguished from the creditors entitled to separate satisfaction (with priority) of a claim from an object that is part of the estate (right to separate satisfaction – Absonderungsrecht, §§ 49-51 InsO). The right to separate satisfaction is a security interest; its object remains part of the estate, and any surplus after realising the objects value and satisfying the secured creditor(s) regarding this object is available for distribution to the insolvency creditors. Prototypical rights to separate satisfaction are pledges and mortgages, §§ 49, 50 InsO, but also fiduciary property or entitlement, § 51 no. 1 InsO.

The secured claim can be directed against the debtor – in this case the secured creditor takes a twin role as secured creditor and insolvency creditor, § 52 s. 1 InsO, but are entitled to participate in general distributions to insolvency creditors only insofar as they waive their security right or the proceeds of the security are insufficient, § 52 s. 2 InsO. The claim can, however, also be directed against a third party so that the secured creditor is not also insolvency creditor (for lack of a personal claim against the debtor) but participant only regarding their security right. In both cases, the secured creditor has an obligation to advise the administrator of their right to separate satisfaction (§ 28 II InsO), in the former case, additionally, the personal insolvency claim has to be filed according to the general rules for insolvency creditors. Secured creditors can take part in the creditors' assembly and vote even where the security right is not backed by a personal insolvency claim (regarding the voting right see § 77 II, III InsO). Their interests are often different from those of unsecured creditors insofar as the secured creditors are less invested in the general outcome of the proceedings and tend to be more interested in a speedy realisation of the securities than in a prolonged continuation of the business even where it may yield higher dividends for insolvency creditors. Most common creditors in this group are banks and insurance companies.

The competence to realise the security (mostly by selling the object, but also e.g. by renting it out or, in the case of claims against third parties pledged or fiduciarily assigned to a creditor, by collecting it) is determined according to §§ 165, 166, 173 InsO. For immoveables, both the secured creditor and the administrator can (individually) seek the sale or the administration of the real estate according to the Statute on Forced Auctions and Forced Administrations (Gesetz über die Zwangsversteigerung und die Zwangsverwaltung, ZVG). For moveable things, the administrator is entitled to realise the security if the thing is in their possession (typical with fiduciary property), otherwise the creditor is entitled (typical with pledges), §§ 166 I, 173 InsO. The administrator is entitled to realise a right or a claim if it had been fiduciarily assigned to a secured creditor, otherwise the creditor is entitled (mostly if the right had been pledged to the creditor), §§ 166 II, 173 InsO. Where the administrator is competent according to § 166 InsO, the court may order in the opening proceedings that the secured creditors are not entitled to realise the security before commencement if the security is crucial for continuing the debtor's business, § 21 II 1 no. 5 InsO.

For moveables, rights or claims, the insolvency administrator can – within their competence according to § 166 InsO – generally decide on how and when to realise the security, including freehand sale or leasing instead of auction; the authority to decide about the "when" allows using the security's object temporarily for the debtor's business. The secured creditors have to be compensated for loss of value and delays according to §§ 169, 172 InsO. From the proceeds, the administrator retains for the estate the costs of determining the security right and of disposing of its object – the former are generally deemed 4% of the proceeds, the latter in principle additional 5% of the proceeds plus VAT (where applicable) unless the actual costs were considerably higher or considerably lower, § 171 InsO. From the remaining proceeds, creditors with a security right in this object entitling them to separate satisfaction are satisfied according to their ranking; the surplus (if any) is part of the estate available for distribution.

d) Debts Incumbent on the Estate

Debts incumbent on the estate (Masseverbindlichkeiten) are the costs of the proceedings, namely court fees and remunerations for (provisional) administrators and monitors as well as for the members of a (provisional) creditors' committee, § 54 InsO, and other debts incumbent on the estate according to § 55 InsO. These claims take absolute priority over insolvency claims and are to be settled from the estate in advance, § 53 InsO. The creditors of "other debts incumbent on the estate" (§ 55 InsO) are – under normal circumstances – mostly unaffected by the proceedings and can demand and enforce payment in full; limitations to executions on behalf of priority creditors are stated in §§ 90, 123 III 2 InsO. They are not normally allowed to attend the creditors' assembly or vote.

The situation changes when the estate is (prospectively) insufficient to satisfy the other debts incumbent on the estate and the administrator notifies the court of this fact, §§ 208-211 InsO. This notification is published and served on the priority creditors; it triggers (according to a common expression – "Konkurs im Konkurs") insolvency proceedings within insolvency proceedings: The priority creditors whose claims date before the notification are no longer allowed to enforce their claims, § 210 InsO, and the administrator has to distribute the insufficient estate according to the ranking of § 209 I InsO and *pari passu* within the ranks: (1) costs, (2) other debts incumbent on the estate dating after the notification (new priority claims, Neumasseverbindlichkeiten; extent clarified by § 209 II InsO), (3) other debts incumbent on the estate dating before the notification (old priority claims, Altmasseverbindlichkeiten). According to § 210a InsO, an insolvency plan is possible for this very situation, and in this case, the priority creditors are (obviously) allowed to attend the discussion and voting meeting and vote on the plan. Unless an approved insolvency plan provides otherwise, the court orders the discontinuation of the proceedings after the distribution of the insufficient estate, § 211 InsO. If not even the costs are covered in full, the proceedings are to be discontinued immediately, § 207 InsO.

The other debts incumbent on the estate according to § 55 InsO mostly consist of debts from actions by the administrator or the "strong" or "half-strong" provisional administrator (see above, *sub* II.2.), e.g. entering into new contracts or choosing to perform old executory contracts, or from pre-petition or pre-commencement contracts that according to the InsO have to be performed. A relatively new provision extends the scope to certain tax debts from the opening proceedings, § 55 IV InsO. Employees' claims for wages for the time of the opening proceedings may be other debts incumbent on the estate according to § 55 II InsO depending on the provisional administrators authority and actions; however, where they are covered as "Insolvenzgeld" (see above, fn. 10) by the Federal Employment Agency and where this agency thus becomes creditor by way of *cessio legis*, the Federal Employment Agency is only deemed general insolvency creditor, § 55 III InsO.

e) New Creditors

The estate only serves to satisfy creditors whose claims had been founded by the commencement of the proceedings (= insolvency creditors, § 38 InsO, see above, *sub* a). Creditors who are neither insolvency creditors nor priority creditors of the estate (see above, *sub* d) – i.e. mostly creditors from post-commencement activities of the debtor (new creditors, Neugläubiger) – are not participants of the proceedings. However, they are affected by the proceedings insofar as they are not allowed to access the estate during the proceedings. The remaining personal property of the debtor is usually not subject to execution (see § 36 InsO) – especially since § 35 I InsO states (other than its predecessor, § 1 KO) that assets acquired by the debtor during the proceedings (Neuerwerb) form part of the estate. Apart from voluntary payments by the debtor from exempt assets, new creditors can only access assets the administrator has released to the debtor – according to § 35 II InsO or based on their general authority.

2. Bodies Representing Creditors' Interests during Insolvency Proceedings

As mentioned before (above, *sub* I.5.), the InsO stresses the principles of market conformity of proceedings and of creditor autonomy. The creditors exercise their collective autonomy through the bodies of the creditors' assembly as general body representing all secured and insolvency creditors, discussing and voting on the core decisions of proceedings and, in some cases, the (provisional) creditors' committee, appointed either by the court or by the creditors' assembly mainly with the assignments to supervise, advise and support the administrator and, in case of the provisional committee, to assist the court in the selection of the (provisional) administrator or monitor (see above, *sub* II.5.) and the decision on an application to order DIP proceedings.

a) Creditors' Assembly

The creditors' assembly is the main body representing the creditors – it is convened by the court either *ex officio* or on request[84] by the administrator, the creditors' committee (if it exists), or a certain quorum of creditors according to §§ 74, 75 InsO.[85] Certain meetings are prescribed by law (e.g. report meeting, verification meeting, final meeting, discussion and voting meeting, see above, e.g. *sub* D.IV.2., 5.; D.VII.), others can be convened as the court or participants who can file a request see fit. The court presides the meetings and decides on the voting rights according to § 77 InsO, unless claims are undisputed or the administrator and present creditors agree on the voting rights. The decision is in principle unappealable – even with regard to § 11 II RPflG –, unless the decision affected the outcome of a ballot in which case the judge may on a motion overrule a judicial officer's decision and order a new ballot, § 18 III 2 RPflG,[86] but the court can change its decision upon a motion to do so.

Participants with a vote are insolvency creditors and secured creditors, junior insolvency creditors may attend and join the discussion but not vote. The administrator is obliged to attend the meetings – usually: in person (though exceptions are discussed for the verification meeting and are made when the administrator has a sufficient excuse) –, the creditors' committee's members may attend (even where they are not creditors themselves), as may the debtor (or its directors or board members) – the court can issue an order requesting the debtor's presence according to § 97 I 1, III InsO to report and answer questions. Other than that or in cases of statutory rules broadening the circle of participants,[87] the meetings are

[84] The request must also contain the core agenda for the meeting, and the court is in principle bound to convene the creditors' assembly with these requested agenda items. The agenda in addition to time and place must be published and stuck to; ballots on subjects not on the agenda are void.

[85] It is a matter of dispute whether the court may refuse to convene a meeting upon request if the request was made in bad faith or if the requested agenda fell outside the creditors' assembly's competences. In any case, the refusal gives rise to an immediate appeal, § 75 III InsO.

[86] This rule was accepted as constitutional by BVerfG, 26.11.2009, 1 BvR 339/09, ZIP 2010, 237.

[87] Shareholders in plan proceedings where their rights are concerned, priority creditors in plan proceedings according to § 210a InsO, work council members, spokespersons of officers, representatives of official professional bodies of industrie, trade, craft or agriculture in the report meeting, § 156 II InsO.

closed to the public (including media),[88] though the court can allow exceptions according to § 175 II 1 GVG.[89] Decisions are usually made by a simple majority of the cast votes (according to sums of voting rights), § 76 II InsO – however, in certain cases a combined majority of heads of voters and sums of voting rights is required (e.g. replacement of the administrator according to § 57 InsO) and the vote on the insolvency plan follows different rules altogether (see above, *sub* D.VII.). Unless the proceedings are conducted as written proceedings, § 5 II InsO, votes can only be cast by persons present in the meeting[90] – absent creditors can in principle send representatives to participate and vote in their stead.

There is a dispute, though, who can be such a representative – in particular, if (a) the administrator can represent individual creditors according to their directions, (b) lawyers can represent multiple parties without breach of their professional duties, and (c) if the representatives must meet the criteria of § 79 II ZPO[91] (via § 4 ZPO) – namely be lawyers admitted to the bar, employees of the creditor, family members, qualified lawyers not admitted to the bar, joined parties, consumer associations. Since other creditors are regarded as joint parties, they can be authorized to represent a creditor; and for registered persons providing debt collection services (Inkassounternehmen), § 174 I 3 InsO allows the representation of creditors at least in the verification meeting. In practice, representatives commonly appear to be employees, co-creditors or lawyers so that this dispute probably is of little practical relevance.

The competences of the creditors' assembly have been described before – it receives information about the progress of the proceedings, makes decisions mainly on the direction of the proceedings and on particularly important activities by the administrator, decides whether to replace the administrator and a court appointed creditors' committee or – if there is none yet – whether to appoint a creditors' committee, decides – together with the debtor – on the continuation or post-commencement start of DIP proceedings, examines and verifies registered claims, votes on an insolvency plan, etc. The creditors' assembly is not, however, involved in the day-to-day management of the estate. Convening a creditors' assembly is a costly[92] and lengthy[93] process, and participation is often meagre so that certain (mostly

[88] A common strategy of media and other interested members of the public (e.g. in case of insolvencies of football clubs, etc.) is to become a creditor by doing business with the debtor during the opening proceedings or by buying a small claim against the debtor from a third-party creditor.
[89] Commonly, the shareholders or members of the debtor are granted the right to attend (though some authors already take that from the right of the debtor as such to attend).
[90] Video conferences appear to be a valid option according to § 4 InsO, § 128a ZPO.
[91] Background of this rule for court proceedings that do not *per se* require representation by a lawyer is the legislator's attempt to limit the rendering of legal services (Rechtsdienstleistungen) to qualified persons or those with close proximity to the party. On the one hand, the creditors' assembly – presided by the court and within the realm of § 4 InsO – could be considered a court hearing, but on the other hand, attending the creditors' assembly and voting for a creditor there is hardly a legal service provided by the representative and follows rather economical than legal considerations. As a compromise, treating the representation at a creditors' assembly as part of the effort of collecting a claim would allow registered persons providing debt collection services access to creditors' representation in addition to lawyers, employees, family members, etc. (see also § 79 II 1 no. 4 ZPO).
[92] In particular in proceedings with several thousand creditors – here, the administrator commonly has to rent a more spacious venue than the courthouse.
[93] Theoretically, the minimum period of time between convening a meeting and the actual meeting is just six days

institutional) creditors may dominate the votes far more than their claim would suggest. It is, thus, mostly reserved to the most important decisions and steps of the proceedings.

b) Creditors' Committee

The creditors' committee, however, is rather involved in the day-to-day management of the estate insofar as its major tasks are to supervise, advise and support the administrator, § 69 InsO. Its members – or at least some of them – are often well versed in business affairs and frequently also experienced in the debtor's line of business and knowledgeable regarding past dealings and customs of the debtor.

For the provisional creditors' committee, see already above, *sub* II.5.; the provisional creditors' committee's office ends automatically with the commencement order (disputed) – the court can and frequently does, however, appoint a creditors' committee with the same members as the provisional committee in the commencement order.

According to § 67 InsO the court may until the first meeting of the creditors' assembly (at its discretion) appoint a creditors' committee; its members (different than from those of the provisional committee) need not be creditors[94] but should adequately represent the major groups of creditors with typically diverging interests (big creditors, small creditors, employees and secured creditors); the selection of members as well as their number (of at least two) are not appealable. Members can be natural persons but also companies or corporations that are then represented, usually by directors or employees in a responsible position. The statute does not explicitly state necessary qualifications/requirements but the court (other than necessarily the assembly) obviously has to use its discretion in a way that ensures the suitability of the candidates.

From the first meeting of the creditors' assembly, the latter decides whether to keep, replace or dissolve the court-appointed committee or to appoint one for the first time, § 68 InsO. With regard to the additional costs, a creditors' committee is commonly only appointed in bigger cases and/or where the debtor's business is still open and a possible result of the proceedings is a restructuring (which usually requires the creditors' co-operation).

The creditors' committee can decide on its own rules of order, including rules on how to convene a meeting, places, dates and forms of meetings (video or phone conference, etc.), written votes and proceedings, confidentiality, rules on representation of members, etc. The creditors' committee's meetings are not open to the public but the court and the administrator are commonly invited to attend (the administrator is often actually authorized to convene meetings and acts as keeper of the minutes of the meetings), the debtor can be required to provide information, § 97 I InsO, and can be invited, and the committee can decide on further invitations/permissions to attend. The rules of order cannot deviate from the statutory

(§ 9 I 3 InsO, §§ 4 InsO, 217 ZPO). This is unrealistic and impracticable, though.

[94] This is of particular importance where the court decides to appoint suppliers or insolvency professionals without direct connection to the case. Seeing the often preferable continuity, though, the rule that members of the provisional committee must be creditors is *de facto* more or less extended into the opened proceedings.

framework, though, including the rule of § 72 InsO that a decision is reached if more than half of the committee's members participate in the ballot and a majority of the voting members votes for the decision (unless the statute requires unanimity as with the nomination of an administrator according to § 56a II InsO). Representation of absent members is generally possible also for members who are natural persons but rather frowned upon by academics as the office of committee member is a personal one and should – as far as possible – be exercised in person.

The committee members owe a duty of care to all participants of the proceedings, in particular to the community of creditors. Thus, they are not allowed to simply follow their own particular interests but must do what is best for the creditors as a whole. The members are personally responsible and potentially liable for their representatives just as they are responsible and potentially liable under § 71 InsO for their own behavior (where the committee has discretion, the considerations regarding the Business Judgment Rule apply like for the administrator, see above, *sub* II.8.). Commonly, members of creditors' committees procure personal professional liability insurance for the costs of which they are reimbursed from the estate as expenses (or the cost of which is directly paid from the estate); when such insurance is not available to them or its costs are not covered, they can request their dismissal from office for cause according to § 70 InsO.[95]

Regarding some of their duties, the committee can seek the help of professional experts – this is particularly true for auditing the administrator's activities, financial dealings and the estate's condition according to § 69 s. 2 InsO which is frequently (especially in large proceedings) taken care of by a professional auditor reporting to the committee that then only checks the auditor's report for plausibility and is responsible mainly for choosing a competent and neutral auditor and spotting grave and obvious mistakes in the auditor's report. The auditor's remuneration is a debt incumbent on the estate according to § 55 I no. 1 InsO and paid directly from the estate.

The members of the (provisional) creditors' committee are remunerated according to §§ 17, 18 InsVV. Each member is regularly paid between 35 and 95 Euro per hour taking into account the scope of their responsibilities – but also, even though not mentioned in § 17 I InsVV – their qualifications and professional position and standing; in practice, this range is frequently exceeded.[96] For their participation in selecting an administrator and regarding a DIP application, members of a provisional creditors' committee are compensated with a lump sum payment of 300 Euro; further activities supervising, advising and supporting the provisional administrator are then remunerated with the hourly rate, § 17 II InsVV.[97] In addition to this remuneration, committee members can recover expenses and VAT paid.

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[95] BGH, 29/3/2012, IX ZB 310/11, ZIP 2012, 876.
[96] E.g. AG Detmold, 6/3/2008, 10 IN 214/07, NZI 2008, 505: 300 Euro per hour.
[97] This leads to problems of separating the two areas of activity. § 17 II 2 InsVV seems to suggest a chronological separation – all time spent before the appointment of a provisional administrator or monitor is covered by the lump sum, all time spent thereafter is to be remunerated with the hourly rate. This can lead to rather arbitrary results, though, in particular where the provisional committee is only appointed after the provisional administrator.

c) Creditors' Advisory Panel

In some cases, the administrator or the creditors' assembly may decide to form a creditors' advisory panel (Gläubigerbeirat) to advise the administrator on certain matters specifically, to discuss points of interest to certain groups of creditors or to better disseminate information etc. Whether this is a legitimate procedure is disputed, but the legislator of the InsO appears to have implied this option.[98] In any case, such a panel has no statutory position, duties or authorities; its members receive no remuneration from the estate and cannot be held liable in any way different from other creditors or third parties.

3. Creditors' Representative / Creditor Protection Associations

The InsO does not provide for any role of persons or professional bodies representing collective creditors' interests or for any collective exercise of individual creditor rights. Such a position, a joint creditors' representative, can be created regarding the creditors of certain bonds by the creditors or contractually in the terms and conditions of the bonds under §§ 5, 7, 8 SchVG. For insolvency proceedings, however, this has currently no bearing.

However, there are currently at least two private associations (in addition to several general professional bodies for industry, trade, craft, etc., not focused on insolvency) lobbying for creditors' rights in insolvency proceedings and offering creditors assistance in insolvency proceedings by representing them or – mostly – arranging for their representation by co-operating lawyers. It is also conceivable that they are appointed as members of creditors' committees.[99]

These two associations are the KSI – Internationaler Verein für Kreditschutz und Insolvenzrecht and the GSV e. V. – Gläubigerschutzvereinigung Deutschland.[100] The latter has been founded with a sizable (financial and logistical) contribution from the (in contrast far more important) Austrian KSV 1870[101] (which has since withdrawn its support and participation). Both organisations do not play a significant role in German insolvency proceedings. So it seems to be fair to say that the concept of Creditor Protection Associations had a rocky start in Germany. It is difficult to pinpoint the main causes for the (perceived) failure of Creditor Protection Associations so far – lack of acceptance, by creditors as well as courts and the legislator, and costs have certainly been two factors. Another one might lie in Germany's regulations regarding the legal profession and the provision of legal services which limits the possible activities of these associations.

[98] See Government's InsO draft proposal (Regierungsentwurf InsO), BT-Drs. 12/2443, 99.
[99] Because the associations are not creditors, however, they cannot be appointed as members of provisional committees (unless possibly as a representative of one specific creditor); possibly this was one reason for the restriction of membership to (future) creditors.
[100] Online: http://www.gsv.eu/ (German only).
[101] Online: https://www.ksv.at/ (German only).

4. Professionals Representing Individual Creditors

No specific questions relating to insolvency proceedings and insolvency law arise from individual creditors mandating lawyers admitted to the bar with representing them during insolvency proceedings – from filing a petition over filing a claim, filing motions and appeals to representing them in creditors' assembly meetings and possibly a creditors' committee and opposing the debtor's application for discharge. This obviously is particularly relevant for creditors with considerable claims as the probable gain would else often not be worth the lawyer's remuneration. Due to the remuneration's connection to the case value,[102] even in big cases, mandating a lawyer to represent a creditor throughout is often a questionable decision.[103] More common and sensible, however, and in many cases obligatory (§ 78 I InsO) is to hire a lawyer for specific lawsuits in the context of insolvency proceedings (e.g. regarding the administrator contesting a pre-commencement payment the creditor received or the administrator contesting the creditor's claim).

IV. Debtor

1. Persons or Entities Subject to Insolvency Proceedings

According to § 11 InsO, natural and legal persons as well as companies without legal personality, estates of deceased persons and joint marital property can be subjected to insolvency proceedings under the InsO. As has been pointed out before (above, *sub* D.III.), specific rules apply in addition to the standard rules of the InsO regarding banks and insurance companies, estates and joint marital property, and in cross-border settings. The nationality, legal form or applicable law of incorporation are irrelevant as long as German courts have jurisdiction according to the EIR or § 3 InsO. Even though § 11 II no. 1 InsO lists certain legal forms for companies, this list is not exhaustive; foreign companies without legal personality not mentioned can still be subjected to German insolvency proceedings. Thus, insolvency proceedings according to the InsO basically can take place regarding any private person or entity with a place of general jurisdiction or COMI in Germany that can legally be (or is legally regarded or treated like the) owner of assets and debtor of claims.

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[102] According to the Statute on Admitted Lawyers' Remuneration (Rechtsanwaltsvergütungsgesetz, RVG), the case value when representing a creditor is determined by the nominal claim (§ 28 II RVG) or the economical interest (§ 28 III RVG). The fees are determined similar to the court's fees (see above, *sub* I.7.) by multiplying a base fee (§ 13 RVG and tables, e.g. official schedule 2 to the RVG) according to the case value with a factor – this factor is determined by schedule 1 to the RVG, no. 3314 (representation in opening proceedings – 0.5), no. 3316 (instead of no. 3314 if also including representation regarding settlement plan in consumer proceedings – 1.0), no. 3317 (representation in opened proceedings – 1.0), no. 3318 (in plan proceedings additionally – 1.0), no. 3320 (instead of no. 3317 if representation only involves filing a claim – 0.5), no. 3321 (representation regarding a motion to deny or revoke discharge – 0.5). The client also has to pay for expenses and VAT.

[103] The creditor often will have a claim for damages against the defaulting debtor including the costs for legal representation. But this claim is a junior insolvency claim according to § 39 I no. 2 InsO so that in the huge majority of cases it will not entitle the creditor to any additional distribution.

As for public bodies, § 12 I no. 1 InsO clarifies that insolvency proceedings according to the InsO cannot take place regarding the Federal Republic of Germany as such or a federal State – notwithstanding possible other (future) mechanisms of Sovereign Debts Restructuring. Other legally discrete public bodies (like public corporations) can be subjected to insolvency proceedings according to the InsO unless a federal statute or a State statute (together with § 12 I no. 2 InsO) provides otherwise. Such provisions, however, are common, and thus the InsO does apply to hardly any public body – with the exceptions of most importantly and notoriously public health care insurance corporations (§ 171b Social Security Code V [Sozialgesetzbuch V, SGB V]) and trustee savings banks (Sparkassen).

2. Role and Main Obligations in Insolvency Proceedings

The debtor, the insufficiency of their (liquid) assets and the existing assets and business chances are the focal point of the insolvency proceedings. Insolvency proceedings address, on the one hand, the common pool problem of the debtor's creditors, appease and mollify those creditors, prevent a grab race for the debtor's assets, aim at overall reducing transaction costs and determine the modes of realising the debtor's assets on the creditors' behalf and distributing them (also setting out priorities in public or private interest, etc.); they, at the same time, protect the debtor from the creditors, granting respite and thus often the only remaining chance at restructuring the debtor's finances and/or business, and opening a path to a discharge of residual debt. Where debtors seek these aspects of insolvency proceedings beneficial to them, they will most likely take a more active and involved role in the insolvency proceedings – and in some respects have to (the discharge e.g. requires diligent information and co-operation as well as pursuing adequate employment where possible; see above, *sub* D.V.).

In most cases, insolvency proceedings begin with the debtor's petition – possibly filed under the pressure of § 15a InsO (duty to file a petition; for corporations mostly), to attempt a restructuring (e.g. via the protective shield and DIP and plan proceedings, see above, *sub* D.VII., VIII.), or to go for a discharge. The debtor has to file the petition according to § 13 InsO, including several further documents (list of creditors and claims, certain statements regarding the business and its size – partly mirroring the criteria for the mandatory appointment of a provisional creditors' committee –, etc.); in case of consumer proceedings, the petition must meet the criteria of § 305 InsO, including a certificate regarding debt counseling and a failed out-of-court settlement (see above, *sub* D.VI.). Duties to co-operate and to provide the court or the provisional administrator with further information and with suggestions for members of a provisional creditors' committee (of particular importance following a creditor's petition) are stated by §§ 20 I, 22 III, 22a IV InsO. The provisional administrator can search the debtor's business premises, § 22 III 1 InsO, and the court can order protective measures that involve further severe restrictions of the debtor's autonomy and even civil liberties (e.g. diverting the debtor's mail to the provisional administrator, § 21 II 1 no. 4 InsO, see § 102 InsO expressly stating that Art. 10 GG – the privacy of correspondence – is thus restricted). Similar duties – also towards the creditors' committee and creditors' assembly – and restrictions apply during the opened proceedings, see §§ 97-101 InsO. The debtor even has to provide the other participants with information and disclose facts that could put them at danger of criminal prosecution; this information can, however, not be used against the debtor or relatives in court, § 97 I InsO. The debtor's duties can be enforced by the court ordering affidavits, issuing subpoenas or even (after hearing the debtor) ordering detention, § 98 InsO. In case of companies and corporations, the duties and restrictions apply to the debtor's directors, board members and partners entitled to represent the debtor, § 101 InsO. Outside of DIP proceedings, the debtor – beyond the duties to co-operate and provide information – takes on a rather passive role but can attend the creditors' assembly's meetings, is to be heard before some decisions, and can contest registered claims in the verification meeting, file certain motions with the court (e.g. regarding the provisional prohibition of activities by the administrator, § 161 InsO) and appeal certain decisions. The debtor's consent is (in theory) necessary for the approval of an insolvency plan, but is relatively easily deemed granted, § 247 InsO. At the end of the proceedings, the debtor receives the surplus after distribution (if any – such cases are almost unheard-of), § 199 s. 1 InsO; if on the other hand – which is the rule – not all creditors were satisfied in full, they can pursue their remaining claims against the debtor notwithstanding a discharge proceeding and eventually discharge of residual debt. A far more active role, obviously, has the debtor managing the estate in DIP proceedings.

During the proceedings, the debtor's income becomes part of the estate insofar as it is not exempt from execution; the debtor can freely dispose of exempt property (limited only during discharge proceedings by § 294 II InsO) but will need most of it for living expenses and alimony or child support. The creditors can grant the debtor and their family maintenance payments from the estate according to § 100 InsO; if at all, this rule has relevance mainly for self-employed debtors who usually cannot automatically retain part of their income as exempt from execution. Alternatively to claiming income from self-employed activity for the estate, the administrator can release it (as they can release other specific objects) from the estate for a regular compensation payment according to § 35 II InsO.

If the debtor is a corporation or company, the shareholders or partners are also affected by the bankruptcy; as explained above (*sub* D.VII.), their rights are subject to an insolvency plan. The debtor's internal organization remains, in principle, unaffected by insolvency proceedings, only the authorities to lead the business or make operational changes are hugely restricted (or basically substituted) by the authorities of the administrator and the other participants. Structural decisions to the membership without operational effects, however, can still be made. For DIP proceedings, § 276a InsO states that the partners, shareholders and supervisory bodies of the debtor have no influence on the directors' operational decisions (the directors have to act in the interest and – as provided for by the InsO – on direction of the creditors). They can replace the directors, though, with the monitor's consent.

In German culture, insolvency proceedings still have a hugely negative impact on the debtor's (and possibly the debtor's management's) social standing (so called flaw/stigma of insolvency – Makel der Insolvenz) and credit ratings. This can severely impede the debtor's fresh start even after a discharge of residual debt. Even though only the dismissal of an insolvency petition for insufficiency of the estate will be entered into the public record of debtors, § 26 II InsO, the information on former insolvency proceedings and discharges is available online on the publication website http://www.insolvenzbekanntmachungen.de (though deleted after some time) and will be kept by private credit protection and rating agencies for a considerable period of time.

3. Professionals Representing or Advising the Debtor

Frequently, business debtors of a certain size, before filing a petition, are (extensively) advised by professionals (commonly [in addition to business consultants] professionals – often but not necessarily admitted lawyers – with a similar background as insolvency administrators, professionals with actual experience as insolvency administrators or professionals working in one firm with insolvency administrators), who try to avoid insolvency proceedings by out-of-court restructuring, monitor the insolvency reasons, and prepare the petition – and possibly a pre-packaged insolvency plan and/or a DIP application to file together with the petition. In preparation of DIP proceedings, it is quite common for debtors to appoint professionals well-versed in insolvency law (thus often professionals experienced as insolvency administrators) as CROs (see above, *sub* D.VIII.) or fully authorized representatives / general agents (Generalbevollmächtigte) to make use of their experience and to gain the creditors' trust in competent DIP management.

The biggest issue in these cases probably is the payment of the remuneration even though both parties knew that the debtor was threatened by insolvency or was actually insolvent. Pre-commencement payments under these circumstances can often be contested and retrieved by the later administrator according to §§ 130, 133, 143 InsO. To safeguard the payments of remuneration for advice, counseling and representation in a financial crisis, the parties have to rely on § 142 InsO exempting payments from avoidance according to § 130 InsO if both parties exchange equivalent benefits within a short period of time – the duration of which the BGH limits at 30 days for cases as these.[104] Thus, professionals in this situation commonly insist on at least monthly advance payments for the services rendered over either the past or the next 30 days. In theory, an avoidance according to § 133 I InsO for intentionally caused detriments to the estate with knowledge of the other party is still conceivable as § 142 InsO is only barring this rule to a limited extent; however, at least as long as the services rendered aimed at restructuring the business and were not manifestly hopeless, the administrator will hardly be able to establish a case of § 133 I InsO.

The remuneration of CRO/fully authorized representative as well as such of legal or business advisors during opened DIP proceedings is a debt incumbent on the estate and can thus (unless excessive or unnecessary and thus a breach of duty) be paid from the estate; the same often but not necessarily holds true for the duration of protective shield opening proceedings and potentially other DIP management opening proceedings. In standard proceedings, however, the debtor cannot use the estate for payment of remunerations during the opened

[104] BGH, 13/4/2006, IX ZR 158/05, BGHZ 167, 190 = ZIP 2006, 1261.

proceedings[105] nor commonly during the opening proceedings; corporate or company debtors also regularly have no access to financial aid from the State for representation during the proceedings.[106] Legal or other professional advice and representation of the company debtor in these (non-DIP) cases is also of less importance.

Consumer debtors have to consult a "suitable person or agency" (§ 305 I no. 1 InsO) before filing a petition to open insolvency proceedings. This suitable person or agency can be a lawyer but more frequently is a debt counseling agency. Regarding the costs of this preparatory stage, the debtor can make use of the Statute on Legal Advice and Representation for Citizens with Low Income (Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen – Beratungshilfegesetz, BerHG) which provides for the State paying the bulk of the (reduced) costs of legal advice, and the citizen only paying the lawyer a fixed amount of 15 Euro (which can also be waived).

In standard proceedings or after this preparatory stage of consumer proceedings, natural persons (business owners or consumers) can apply for a deferral of the costs according to § 4a InsO. Upon their request, the court then will also appoint a lawyer to represent them if representation by counsel appears to be necessary in spite of the court's duty to assist the debtor in navigating the proceedings, § 4a II 1 InsO – this seems to be considered rather the exception than the rule at least in consumer proceedings.[107] The debtor's intention to draft an insolvency plan is no reason for the court to appoint a lawyer because this is the debtor's decision alone and not part of their duties.[108] Other than that, debtors can cover the lawyer's costs from their exempt property or from loans granted by relatives, etc.

F. Quantitative Pointers

As initially (*sub* A., B.) mentioned, sources of quantitative data regarding insolvency proceedings (let alone regarding pre-insolvency restructurings – those are literally non-existent) are few and far between. The most authoritative source are the publications of the Statistisches Bundesamt (Federal Statistical Office) on insolvencies.[109] Until 2016, the only information available concerned the number of insolvencies (subdivided by industrial sectors, federal states, prospective amount of claims, number of employees, debtor's age, form of incorporation, and whether the insolvency proceedings were opened or whether the petition was rejected due to the lack of funds), but did not provide any indication about the outcome of the proceedings.[110] It is only since 2017, with the first information provided under the

[105] See BGH, 6/12/2007, IX ZR 113/06, ZIP 2008, 232: debtor cannot request compensation of costs for representative to draft insolvency plan from the estate.
[106] *Ganter/Lohmann*, in: Münchener Kommentar, InsO, § 4 n. 17a.
[107] Though BGH, 18/9/2003, IX ZB 44/03, NZI 2004, 39, acknowledges the debtor's right to counsel where the decision whether to contest a claim that would be exempt from a discharge is complicated.
[108] LG Bochum, 30.12.2002, 10 T 33/02, ZInsO 2003, 91.
[109] English website: https://www.destatis.de/EN/Homepage.html.
[110] The latest dataset / publication can be found here (as of 16 December 2018): https://www.destatis.de/DE/Publikationen/Thematisch/UnternehmenHandwerk/Insolvenzen/Insolvenzen2020410181094.pdf?__blob=publicationFile.

Insolvenzstatistikgesetz having been processed, that also slightly more interesting figures are being published regarding concluded insolvency proceedings and their outcome – but they, too, are on a highly aggregated level and not particularly helpful in gathering a clear understanding of connections, etc.[111]

The latter statistics show – limited to insolvency proceedings opened in the course of 2012, and concluded by 31 December 2016 – that unsecured general creditors of enterprises received approximately 4.1 % of their claims, and secured and unsecured creditors together received approximately 8.9 % of their claims. They also show that creditors of bigger enterprises (in particular when measured by number of employees, to a lesser degree when measured by total claims) tend to see bigger returns than creditors of smaller enterprises (e.g. enterprises with 1 employee show returns of 0.5 % and 0.7 % respectively, enterprises with 2-5 employees returned 4.1 % and 7.7 % respectively, whereas enterprises with 11-100 employees returned 16.2 % and 24.8 % respectively). This fits into the picture painted by the qualitative research and mirrored in other jurisdictions that bigger enterprises tend to address distress sooner and with better outcomes than MSMEs. Accordingly, stock corporations (Aktiengesellschaften – AG) show far better returns (29.1 % and 37.5 %) than – usually smaller and less sophisticated – private limited liability corporations (Gesellschaften mit beschränkter Haftung – GmbH) with 3.2 % and 8.4 % respectively.

Looking at the procedural outcome of said proceedings, of 12,288 proceedings regarding enterprises, 235 (1.91 %) ended with a confirmed insolvency plan. Again – and again hardly surprisingly –, the plan proceeding appears to be more likely with bigger and more sophisticed enterprises. The quota with stock corporations is 12.77 %. Looking only at enterprises with more than 100 employees, it is even 48.89 % [22 of 45 proceedings].

According to this dataset, out of 10,078 proceedings in which it was possible to determine whether a restructuring was undertaken or not, 521 (5.17 %) reported a successful restructuring of the business, 262 by restructuring at the debtor entity, and 259 by going-concern sales. With stock corporations, the ratio is 20.00 %; looking only at cases with filed claims of more than 5 million EUR, the ratio is even 39.76 %.

However, due to the many limitations of the basis of this dataset and of the level of data aggregation, the conclusions from the statistical analysis are equally limited, and the statistics merely serve as tentatively confirming the results of the (more subjective) qualitative research.

Other quantitative sources are even more limited. This holds true for the data reported in the ESUG evaluation[112] – it stems from a dataset provided by the WBDat Wirtschafts- und Branchendaten GmbH and focuses on DIP proceedings. However, the processed data is incomplete, and thus makes any analysis difficult to impossible. It does indicate, though, again hardly surprising, that DIP-proceedings – like plan proceedings and restructurings, these

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[111] The latest dataset / publication can be found here (as of 16 December 2018): https://www.destatis.de/DE/Publikationen/Thematisch/UnternehmenHandwerk/Insolvenzen/BeendeteInsolvenzverfahren2020411167004.pdf?__blob=publicationFile.

[112] https://www.bmjv.de/SharedDocs/Downloads/DE/News/Artikel/101018_Gesamtbericht_Evaluierung_ESUG.pdf.

categories being often connected – are far more frequent in "bigger" cases than in smaller ones. According to this dataset, around 3.46% of enterprise insolvency proceedings between March 2012 and February 2017 were DIP-proceedings, but the figure is only 0.75 % with the smallest enterprises (< 10 employees and < 2 million EUR turnover), whereas it is 31.03 % with the biggest enterprises (>= 500 employees or > 149 million EUR turnover).

Other quantitative or pseudo-quantitative data comes from studies by, e.g. the Boston Consulting Group[113] – showing an increase of big DIP-proceedings, confirm that most big enterprises make use of CROs and general agents in DIP-proceedings, and put the latest average of DIP-proceedings at around 2.7 % – and Roland Berger Strategy Consultants and the Heidelberger gemeinnützige Gesellschaft für Unternehmensrestrukturierung mbH (HgGUR).[114] Interesting studies, if rather narrow in scope, also come from the Institut für Mittelstandsforschung (IfM – Institute for SME-research); the latest one more or less confirming the mentioned figures regarding DIP-proceedings and the relation to enterprise size, also highlighting the deficiencies and limitations of available statistics.[115]

G. Conclusion

The restructuring landscape in Germany is – currently – characterised by a sharp split between purely contractual out-of-court restructurings and formal insolvency proceedings, initiated by a uniform petition that may lead to piecemeal liquidation, going-concern sale or a restructuring plan with only limited control of the debtor which way it will go. Experts state that the system works – to some extent – but, at the same time, welcome the EU-initiative of a directive requiring the member states to introduce pre-insolvency proceedings.

The – sparse and limited – quantitative data as well as the qualitative data gathered from highly illuminating expert interviews do confirm general findings of CoDiRe: Restructurings are more likely to succeed with bigger and more sophisticated debtor enterprises than with MSMEs, they are more likely to succeed when initiated in a time manner and under expert guidance. Out-of-court restructurings – despite their shortcomings – are perceived as generally preferable over formal insolvency proceedings in particular by debtors but also by many a creditor. Co-operation of stakeholders – including the debtor – throughout the process (including the stage of crisis detection and early warning) is beneficial with regards to restructuring prospects and returns. Many restructurings – whether out-of-court or in the course of insolvency proceedings – are not sustainable and make further "rounds" of restructuring necessary or lead to a subsequent insolvent liquidation.

These results as well as the preceding observations of the roles of the participants of insolvency proceedings, their duties, obligations, interests and interdependence are reflected

[113] The latest studies are these: http://media-publications.bcg.com/Focus-ESUG-Studie-16May17.pdf and http://image-src.bcg.com/Images/Focus-ESUG-study_tcm108-190947.pdf.
[114] https://www.rolandberger.com/publications/publication_pdf/roland_berger_five_years_esug.pdf.
[115] https://www.ifm-bonn.org//uploads/tx_ifmstudies/Daten-und-Fakten-19_2018.pdf.

in CoDiRe's Final Report and the Policy Recommendations and Guidelines (best practices) formulated therein.

Annex A: Summary of German National Findings as submitted in July 2018

"Contractualised Distress Resolution in the Shadow of the Law"(*)

GERMAN NATIONAL FINDINGS (SUMMARY)

INITIAL REMARKS

The German team faced a peculiar situation for research on Contractualised Distress Resolution – in particular through semi-formal proceedings outside and ahead of insolvency and with the aim to avoid it: German law, currently, does not provide for such semi-formal proceedings. Restructuring either takes place through informal (bilateral or collective but requiring unanimity) agreements between debtor and creditors [and potentially shareholders and investors], an informal going concern sale which is not facilitated by legal provisions, e.g. regarding the transfer of contracts or licenses, or in full-blown and formal insolvency proceedings. The latter may result in liquidation (standard scenario), either piece-meal or going concern, or in a restructuring according to an "*Insolvenzplan*" (insolvency plan) voted on and adopted by the stakeholders (creditors and shareholders) and confirmed by the court. This turns the German research into a "blind test", showing how a system works, and where are its shortcomings, without a preventive restructuring framework.

Another, connected issue regarding the German research is the relative lack of quantitative data: Restructurings by purely contractual agreements out-of-court usually take place in secrecy and their terms are confidential. Regarding insolvency proceedings, there are both official and inofficial statistics on their outcomes but these statistics are, for the most part, very limited, highly aggregated and do not allow for many conclusions at even remotely the level of granularity achieved in the other jurisdictions. The insolvency proceedings themselves and their files are also not publicly accessible. The (small) German team thus hugely relied on qualitative research in the form of extensive and structured interviews with pre-eminent

(*) The project "Contractualised distress resolution in the shadow of the law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings" is carried out by a partnership of several universities: Università degli Studi di Firenze (Project Coordinator), Humboldt-Universität zu Berlin (Partner) and Universidad Autónoma de Madrid (Partner), supported by the Consejo General del Poder Judicial (Associate Partner), Banca d'Italia (Associate Partner) and Entrepreneurship Lab Research Center (Associate Partner).

The project addresses several key issues highlighted in the Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU). It also considers the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM(2016) 723 final), published on November 22, 2016.

This project is funded by the European Union

restructuring experts, advising debtors, creditors, shareholders and investors, big or small, outside and during insolvency proceedings.

The following findings, to a large degree, mirror the Italian National Findings in structure and, at times, even wording, showing many similarities but also some differences.

GENERAL FINDINGS

A) No clear trend regarding the contractual resolution of business distress.

While the Italian team reports a retreat of contractual resolutions of business distress, German qualitative research does not – or not clearly – echo such a trend. Only one expert, advising mostly smaller and regional banks as creditors, related that his clients have lately shown rather more reluctance to negotiate contractual out-of-court solutions than before 2013 and rather have debtors go through insolvency proceedings (with the restructuring option that has been strengthened by legislation in 2012). The other interviewees did not confirm such a trend but, when asked, saw out-of-court restructurings in a similar spot today than before 2013.

Regarding insolvency proceedings, the law reform of 2012 (*ESUG* – Act to further facilitate the restructuring of enterprises) introduced new tools – in particular the *Schutzschirmverfahren* (protective shield proceeding) – and strengthened others – in particular the *Eigenverwaltung* (*self or DIP administration*) –, and while these tools have seen several use cases (of varying success) during the past five years, there has not been a significant surge in successful insolvency restructurings – or so it has been perceived. A study / evaluation of the ESUG's success and possible shortcomings has been conducted by an expert group on behalf of the Federal Ministry of Justice, and the publication of the results will be forthcoming shortly, hopefully in time to be considered in the German National Report.

B) Additional rounds of restructuring are not uncommon.

Both contractual restructurings outside and inside of insolvency proceedings may require follow-ups. The assessment of the interviewees as to the frequency / ratio of sustainable restructurings and those requiring second or third rounds or ending up in liquidation varied hugely but it is undisputed that in a significant number of cases, a single restructuring agreement (be it a bilateral, multilateral or collective solution [including *Insolvenzplan*]) proves not to be sufficient in the longer run (or was never intended to be sufficient in the first place). A reason may be seen – on top of unpredicted changes in economic climate and markets or plain management mistakes – in too optimistic prognoses and plans/agreements not allowing for much latitude, thus offering stakeholders higher distributions and ensuring the necessary approval.

1. TIMELY ACCESS TO RESTRUCTURING

1.1) In the vast majority of cases, debtors undertake serious restructuring efforts long after they should have to effectively tackle the distress.

An old (but still perceived to be indicative for the present) study[1] finds that the petition to commence insolvency proceedings has been filed, on average, 10.28 months, and in 70% of the cases more than six months too late (i.e. after the directors' duty to do so arose). The expert interviews suggest that the same is true for restructuring efforts ahead of an insolvency proceeding. Debtors usually start negotiations or seek expert advice too late – either unaware of the crisis or its extent, afraid of its consequences for their livelihood or reputation, or hoping for an (often no short of miraculous) solution without the other stakeholders' contribution. Quite frequently, experts have to advise clients to file for insolvency immediately upon being hired. In many other cases, restructuring options have been limited by time gone by before professional help is sought.

1.2) The governance structure of the firm is relevant in determining timeliness in addressing distress.

Experts unanimously agree that directors (usually co-owners) of (in particular: smaller) family businesses often close their eyes to a crisis and the need for restructuring but rather rely on objectively unlikely events to improve the situation. Even if the directors are aware of the crisis, they will sometimes be directed by the owners to not consider insolvency or measures that may lead to insolvency. Experts relay that they have been let go or threatened to be fired if they even present insolvency as an option or consideration.

1.3) Smaller businesses often have an inadequate accounting and reporting system, which does not allow early detection of distress and/or makes assessing and addressing it more cumbersome.

Experts agree that smaller businesses are – often – facing a number of different challenges where detecting a crisis and effecting a timely restructuring are concerned. Directors and key employees often lack professionality and training; accounting, reporting and compliance systems and mechanisms are lacking and by far less sophisticated than in bigger enterprises; costs for seeking professional advice are proportionally higher (as compared to the available funds); owners / shareholders tend to interfere more with the management's decision-making process.

1.4) The key trigger for restructuring are liquidity constraints.

Experts confirm that many debtors seeking their advice (in particular smaller businesses, see *supra*, 1.3) are already insolvent or face severe liquidity issues. Due also to the directors' duty to file for insolvency proceedings in (in particular) limited liability corporations in case of

[1] *Kirstein*, ZInsO 2006, 966.

illiquidity/insolvency (or over-indebtedness), out-of-court solutions cannot be successfully pursued in many cases.

1.5) Financial covenants can play an important role as an early-warning mechanism.

Experts pointed out that, in particular with small and medium sized businesses, the initial impulse to seek advice, to assess the business's situation further, and to enter into negotiations with creditors, often comes from one of two external players: tax advisors hired by the company or banks. Regarding banks, the various reporting obligations under financial covenants appear to be of particular importance because these reports (or in case of regular reporting duties also their absence) may alert the bank to the fact that their client/debtor may face a crisis which, in turn, may lead to the bank approaching the debtor. Just like for Italy, it is true for Germany as well, however, that banks do not tend to enforce the covenants by accelerating loans but usually waive them or just renegotiate; covenants are not perceived to be used opportunistically.

1.6) The stigma of insolvency is still regarded as very high and is – to only a marginally lesser extent – also attached to *Schutzschirmverfahren* and subsequent insolvency proceedings in *Eigenverwaltung*.

Thus, for many directors / owners, "insolvency" is not an option to be considered unless (more than) unavoidable. This is also one reason, among others, why experts tend to hugely favour – where viable – out-of-court solutions over insolvency proceedings even though some restructuring tools are only or more easily accessible during insolvency proceedings.

1.7) The earlier the restructuring, the better the outcome.

While lacking quantitative evidence for this, German qualitative research suggests – hardly surprising – that any kind of restructuring (out-of-court or in insolvency) benefits hugely from an early start. Two main reasons: (a) there tend to be more assets available to use for restructuring measures and/or distributions, (b) it is usually easier to gain creditors' trust when approaching restructurings soon and proactively.

2. TYPE OF PROCEDURE

2.1) When an out-of-court restructuring seems possible, advisors usually advise against formal insolvency proceedings.

See already *supra*, 1.6. Advisors in the huge majority of cases advise against formal insolvency proceedings where a (purely contractual) out-of-court solution is a viable option – while insolvency law offers some restructuring tools unavailable outside insolvency, the downsides (both legal and economical) are usually perceived as outweighing them by far.

2.2) Businesses involved in a restructuring are usually larger (when size is measured by total assets) than those liquidated during insolvency proceedings.

Bigger companies are more likely to pull off both complicated out-of-court restructurings and restructurings in insolvency plan proceedings. Three main reasons: (a) timelier start, (b) bigger concern to creditors increases their willingness to cooperate and put in the effort, (c) more assets to hire advisors and finance the restructuring.

2.3) Especially in the biggest cases, advisors may consider forum shopping / COMI- or choice of law-shifts to access foreign restructuring proceedings (in particular the English Scheme of Arrangement, but also the French *procedure de sauvegarde* or the US-American chapter-11-proceeding). Actual use cases are rare, however.

Most advisors to large-sized debtors or else closely involved in large restructurings confirm that they consider whether a foreign legal system would be more suited for a successful restructuring and, if so, whether and how to move the forum abroad. This becomes particularly relevant when faced with a (potential) strong hold-out position since German law does not normally offer any cram-down / majority rule mechanisms outside of formal insolvency proceedings. In most cases, costs, difficulties and uncertainties outweigh the potential benefits, though, so that cases in which German enterprises avail themselves of foreign proceedings (do exist but) remain rare.

However, interviewed advisors universally advocated (more or less strongly) the introduction of a pre-insolvency restructuring proceedings in Germany. It would be a valuable addition to the tool box – regardless of how often it would actually (have to) be used. The threat alone would keep hold-out stakeholders in line and willing to compromise.

2.4) Do professionals not exert sufficient pressure to filter out bad cases from viable restructuring candidates?

Interviews with German experts have not positively confirmed this Italian finding. However, it is likely – to some extent – true in Germany as well: Advisors will usually take the money available to them in fees. They will advise (or try to advise) the debtor on the available avenues and suggest liquidation (inside or outside of insolvency procedures) if the company does not appear to be viable – but upon being directed to still pursue restructuring negotiations, they will not likely refuse – and are under no obligation to do so.

3. RESTRUCTURING COSTS FOR PROFESSIONALS AND ADVISORS

3) Restructuring costs for professionals and advisors are regarded as high and may be particularly burdensome for MSMEs.

Costs for professionals and advisors in Germany are regarded as high and a significant obstacle, especially for MSMEs. In addition to the complexities of the subject matter and the highly specialised, yet at the same time broad expertise required, a main concern is the number of experts working on a "case" – sequentially, for different stakeholders (esp. banks hiring experts at debtor's expense), and for different tasks (taxes, workforce, creditors, etc., possibly in different jurisdictions). Also, not only the law is complex but also the cases, requiring a considerable amount of time (usually the basis of fee calculation outside of insolvency where IP fees are based on the estate size).

4. NEGOTIATING THE PLAN

4.1) Core actors in restructurings of companies reflect the ownership structure.

The central role in negotiating restructurings is played by the debtor. This is due to the (commonly) superior knowledge regarding the financial and economic details and to legal and factual obstacles other stakeholders face. Key creditors can, however, take on important parts.

Within the debtor organisation, the directors are the pre-eminent actors, with legal, accounting, compliance and similar departments usually acting in the background (if at all). The involvement of owners/shareholders varies hugely depending on the ownership structure – in family businesses, in particular, the directors are usually co-owners / shareholders themselves and/or the owners are heavily and closely involved in the decision-making and negotiations.

4.2) Banks' internal decisional processes have an impact on negotiations.

Banks are sometimes perceived to drag their feet due to internal procedures. Even in case of bank pools with a pool leader and where steering committees exist (which is rather uncommon), individual banks often seem to reserve the final say on restructuring plans or other key decisions.

4.3) Tax regulations and issues can pose significant obstacles to restructurings.

Almost universally, tax regulations (in particular regarding taxation of gains in restructuring) and their reach, vagueness and uncertainty are perceived an obstacle. The laws regarding taxation of restructurings and insolvency are notoriously unclear and in (almost universally acknowledged) desperate need of reform.

Evidence regarding the role of the tax authorities – in particular in their role of institutional creditors – is more ambiguous, though. Some experts relate that they are cooperative enough, in particular concerning standstills and extensions and in particular in bigger cases, whereas the majority of experts state that it is very difficult to negotiate with tax authorities due to their general reluctance to discount, reschedule or forgive claims. One reason for this can be seen in the role of public auditing / accounting bodies such as the *Bundesrechnungshof* and the *Landesrechnungshöfe*. The federal system with taxes being administered on federal, state and municipal levels adds a layer of complexity.

4.4) The involvement of mediators is exceedingly rare, if not unheard of.

None of the interviewed experts has ever seen a mediator involved as such to facilitate negotiations on a restructuring plan.

5. CONTENT OF THE RESTRUCTURING PLAN

5.1) Restructuring attempts usually aim at a turn-around of the business and often also at maintaining the debtor entity; going-concern sales are a common alternative mostly in insolvency proceedings. Restructuring with the aim of orderly business liquidation is rare.

If a crisis is severe enough or a business model of a distressed debtor is not viable, liquidation usually will take place as a result of "normal" formal insolvency proceedings. While it is possible to draft a liquidation plan as *Insolvenzplan*, this option is rarely – if ever – used. Out-of-court restructurings usually aim at a turn-around of the business and the debtor entity, going-concern sales at this stage of a distressed business are – according to most interviewees – not too common because of potential avoidance and liability risks. During insolvency proceedings, however, a going-concern sale with or without an *Insolvenzplan* is a valid and common measure.

5.2) Operative measures are frequently an integral part of restructuring efforts.

According to the interviewed experts, purely financial restructurings happen – in particular as a consequence of exogenous shocks, e. g. to the financial markets – but the majority of business restructurings require operative measures to be effective and sustainable because the crises usually have their roots in operational, strategical or leadership issues. Changes to the management, introducing restructuring experts as CROs or general representatives, are common especially in larger cases, as are changes to production, workforce, strategies, etc.

These operative measures, however, are not necessarily reflected in the actual restructuring plan / *Insolvenzplan* approved by the creditors or only as part of the descriptive / declaratory section or as milestones.

5.3) The most common financial restructuring tools are standstills, reschedulings and prolongations. Ambiguous evidence regarding subordination, hair-cuts, compensation from future profits, and fresh money/new financing.

Experts agree that the most common financial measures agreed upon by far are such delaying payments but not outright reducing the debt. The delays accepted vary hugely but will often reach time spans of 1-2 years, allowing operative measures to take effect.

While standstill, rescheduling etc. can address some liquidity issues, they will not improve the debtor's balance sheet and might not provide enough free liquidity to finance the restructuring efforts. Measures to relieve the balance sheet (e.g. subordination, hair-cuts, debt-equity-swap [see *ultra* 5.4]) and to provide additional liquidity (e.g. fresh money) are not quite as common. However, experts' statements as to the prevalence and volume of these financial restructuring tolls varied significantly; they seem to be very case-dependent. The same applies to the question whether the debtor will be asked to agree to a compensation from future profits (*Besserungsabrede*) in case of hair-cuts.

Regarding hair-cuts, while some experts said that creditors tend to not accept hair-cuts in out-of-court restructurings, or if they did only to a rather nominal degree (up to 10-20%), other experts related that significant hair-cuts (up to 80% and more) do happen. Compensation agreements appear to be rather common but not universally requested.

Concerning fresh money, several experts pointed out that creditors (in particular banks) usually expect shareholders and/or external investors to provide fresh money needed or good securities even though the shareholders' claims would regularly be subordinated by law. Uncertainties regarding the avoidance of bridge loan and restructuring loan repayments in subsequent insolvency proceedings as well as the (often rather theoretical) risk of lenders' liability act as a further deterrent to lenders of fresh money outside of formal insolvency proceedings. All this makes distressed equity investors an altogether interesting and important source of fresh money but often difficult to find.

5.4) Debt-for-equity swaps and conversion of debt into "hybrid" financial instruments are rare and virtually absent for small businesses.

The high costs and small market are rather prohibitive for small businesses. Debt-for-equity swaps or the swap into new hybrid instruments are more common for large businesses, but still mostly avoided by bank creditors due to their prudential and capital requirements.

6. CIRCUMSTANCES AFFECTING THE OUTCOME OF THE RESTRUCTURING ATTEMPT

6.1) Family-owned businesses are more difficult to restructure than other businesses.

Experts universally confirmed that dealing with family businesses poses specific (additional) challenges. Not only are the owners' reputations and fortunes dependent on the business, and do they require counsel and shielding against liability of their own which creates conflicts of interests, the owners often are not as amenable to changes of strategy or – even worse – leadership. The upside, however, is that it appears easier to solicit fresh money from owners/shareholders where needed than with non-family owned businesses – unless, which is common, all personal reserves have already been invested into the business or used as a security for business debt before seeking professional restructuring advice – far too late.

6.2) The probability of achieving a restructuring is likely increased by a high degree of debt concentration.

Hardly surprising, anecdotal evidence suggests that negotiations are easier with fewer but highly engaged, interested and committed creditors.

6.3) The lack of adequate specialisation and/or competence by judges likely undermines the efficiency of insolvency restructurings.

Echoing a frequent criticism, several experts suggested that insolvency judges and judicial officers (*Rechtspfleger*) – with few notable exceptions – are not competent, experienced and equipped enough to conduct or facilitate insolvency restructurings. The provisions introduced by ESUG that judges and judicial officers in insolvency matters are required to show sufficient knowledge of certain subject matters (including accounting) have not yet shown significant results (and are unlikely to do so).

Questionnaire for Lawyers/Advisors

Part I: The Context of the Interviewee

1) Please describe briefly the clients you most often work with. In the description, refer to, for example: a) The type of client (debtor/creditor); b) the size of the client (medium/large/very large); c) the territorial scope of the client (regional/national/international); d) the type of activity (sector of activity: ie, services, industrial, financial, etc.).

2) In which capacity would you normally act? in-house lawyer/seconded lawyer from a firm; general legal counselor; barrister/litigator; financial advisor; tax advisor; business consultant; auditor.

3) In case of debtor clients, do you/does your firm normally also provide legal advice in areas different to business/debt restructuring? (corporate law/tax/labour, etc.)

4) Experience: how long have you been advising debtors/creditors in debt/business restructuring?

Part II: Lawyers/advisors mainly advising debtors

5) At what stage of distress do debtors come for advice? Please specify if there is a difference depending on the type of debtor (eg industry, the type of debt mainly owed – financial/tax/employees/suppliers–, or the structure of shareholding and type of management etc.). Also, **have creditors already foreclosed on the debtors or started other judicial initiatives? How often have creditors already filed a petition for an involuntary bankruptcy?**

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6) When debtors come for advice, have they normally already started some form of negotiation or held discussions on a restructuring attempt?

7) In your opinion, who are the players, within the debtor´s organization, most active in the process (both in the decision to take action and in the definition of the strategy)? (financial directors/accounting department; executive director; board of directors; legal department; controlling shareholders, statutory auditors etc.)

8) Are often other advisors involved? (ie, consultancy firms, experts from investment banks, experts from private equity firms) **On average, how many cases do involve other advisors? Of those cases, how many approximately are hired after consulting with you?**

9) Please briefly describe, in your experience, the most common initial approach by debtors. (ie, are they fully aware of the degree of distress? Do they convey it to you or it is apparent at a later stage that the situation was misrepresented to you? Why, in your opinion, would that happen?)

10) Do debtors normally have a pre-defined idea of the type of strategy to pursue and even of the type of legal channel to use?

11) Why are debtors usually seeking your advice (i.e. the most common triggers), e.g. intra-organisational conflicts; bad results; overindebtedness; liquidity issues; foreclosures; threats or filing of involuntary petitions**) and what are typically their most urgent concerns? What measures do you advise to take at the initial stage to tackle the urgent concerns** (illiquidity, civil and criminal liability, asset shielding)**?**

12) Please describe the information you request from the debtor (do you have a checklist? Would you make it available?**). What information do creditors normally demand from the debtor?**

13) Are household/family ties an issue in restructuring operations? Please elaborate.

14) In what circumstances do you suggest rescuing the business? In what circumstances do you suggest liquidating the business on a break-up basis (piece-meal)? Do you have a preferred strategy between these options? Approximately, in what percentage of cases do you advise rescuing (e.g., 0-25%; 26-50%; 51-75%; 76-100%)?

15) In case the debtor company appears rescue-worthy in principle, is your preferred strategy to try to rescue the company out of court (ie, through an agreement outside formal, fully in-court proceedings) or do you – in general or in particular cases – regard formal insolvency proceedings as an adequate and preferable tool? Why? Please kindly elaborate.

16) In what circumstances do you suggest the use of formal insolvency proceedings? In what circumstances do you suggest out-of-court solutions? Do you have a preferred strategy between these options? Approximately, in what percentage of cases do you advise an out-of-court solution (e.g., 0-25%; 26-50%; 51-75%; 76-100%)**?**

17) What percentage of success does an out-of-court solution have in your experience (e.g., 0-25%; 26-50%; 51-75%; 76-100%)**? What are the most common reasons of failure?**

18) Are financial creditors (or indeed any other kind) reluctant to use non-regulated, purely contractual solutions? If so, what is their main concern?

19) In what circumstances, if any, do you consider advising debtors to make use of foreign restructuring proceedings or tools? In roughly how many cases, percentage-wise, do you offer such advice? Which foreign proceedings or tools do you most commonly suggest?

20) Which are the main deficiencies of German law that lead you to advise debtors on foreign proceedings or tools? Do you expect a European Directive as currently proposed to address and cure these shortcomings? At what cost, if any?

21) If you suggest the use of formal insolvency proceedings with the aim of restructuring the debtor's company and/or business, in what circumstances and in roughly how many cases, percentage-wise, do you recommend to pursue self-administration (*Eigenverwaltung*)?

22) In roughly how many of the cases mentioned in question 21, percentage-wise, do you recommend to pursue a protective-shied proceeding (*Schutzschirmverfahren*)? What are, in your opinion, the main advantages of the *Schutzschirmverfahren* as compared to the standard *vorläufige Eigenverwaltung*, what are its main disadvantages?

23) Please briefly describe the procedure (steps), in practice, to negotiate an out-of-court agreement in your jurisdiction? (what do you do once you have accepted the case? who do you contact? what do you start with? Are creditors approached on a targeted basis (i.e., only certain creditors) or all creditors at the same time? Describe the approach used to negotiate with creditors (informal or pursuant to established procedures such as mediation, ADR)?)

24) In which cases are steering committees set up (by Steering Committee we are referring to meetings of the most relevant creditors out of court –not to be confused with the in-court creditors´ committee)**? Does the debtor have a say in this regard? Does it have any influence as to the type of steering committee and what would normally be your advice in this regard?** (a SC with an agent bank to negotiate/binding-non binding decision making process, etc.).

25) How often do you engage in negotiations with the representatives of the employees (i.e., when it is not mandatory to do so)? Is your experience in this regard positive? Why? Why not? Is there anything in the legal framework that makes these negotiations particularly burdensome? Does this type of creditor in your opinion constitute a problem for the restructuring process?

26) How often do you engage in negotiations with the tax authorities? Is your experience in this regard positive? Why? Why not? Is there anything in the legal framework that makes these negotiations particularly burdensome? Does this type of creditor in your opinion constitute a problem for the restructuring process?

27) How often do you engage in negotiations with key suppliers/contractual counterparties? Is there anything in the legal framework that makes these negotiations particularly burdensome?

28) When the debtor is a company, how often do you engage in negotiations with the shareholders and/or their representatives? Do you think that the directors' interest is usually aligned to that of the major shareholders? How open or reluctant shareholders generally are to go along with restructurings and/or to contribute further to the restructuring effort, or is there a big hold-out potential?

29) In most jurisdictions, financial contracts with banks will include detailed, strict covenants, some of which are likely to have been breached by the time your client approaches you (insolvency/liquidity ratios, information duties, negative pledges, etc.). **In your opinion, is the breach of those covenants enough to trigger early termination of the financial contracts? Do banks ever rely on them to terminate contracts early** (do you ever perceive banks as using covenants opportunistically in this context)**? Do they use them as leverage to gain a superior bargaining position? Do these covenants, in your opinion, constitute a hurdle to business restructuring?**

30) How often are financial institutions (or key suppliers, if involved in the negotiation) willing to provide additional financing? Is there any relevant hurdle in the legal system? (ie, lack of sufficient priority, risk of avoidance, risk of criminal liability, etc.) **Especially which aspects of the plan or of the business/company do financial institutions look at when deciding whether to provide additional financing?** (e.g., rescue plan vs. a liquidation plan; operating revenues greater than operating costs; financial institutions or key suppliers over-exposed to the debtor). **Which quality/detail/author of the plan will financial institutions typically require?**

31) Do avoidance actions in case of a subsequent insolvency constitute a hurdle to an agreement out of court? Why?

32) Does the risk of civil or criminal liability in case of a subsequent insolvency constitute a hurdle to an agreement out of court? Why?

33) What is the most common content of the out-of-court agreements that you have participated in? Please kindly provide a brief general description of the more standard agreement.

> **33.1) How often is debt rescheduling part of the agreement? How long is the roll over on average (approx.)?** Please elaborate. **Is there any limitation to the application of debt rescheduling for any particular creditor?**
>
> **33.2) How often are debt write downs part of the agreement? What percentages are accepted?** Please elaborate. **Is there any limitation to the application of debt write downs for any particular creditor?**
>
> **33.3) How often do they include a restructuring of the business?** (ie, change in corporate form, closing down of activities, opening new activities, enhancing viable parts of the business, laying off workers, changing distribution channels, changing management, etc.). **Does the legislation pose any particular hurdles to business restructuring operations?**
>
> **33.4) How often do they include a change in the structure of the shareholders?** (e.g., a debt for equity swap to the effect of diluting the "old" shareholders; debt for equity swap to the effect of cancelling the interest of all the "old" shareholders; the arrival of a new investor; etc.) **Are the "old" shareholders entitled to a preemption right? How often?** Please elaborate. Please, comment on any hurdles posed by the legal

framework to conduct these operations and on whether the law adequately protects the interests of creditors vis-à-vis shareholders and minority shareholders vis-à-vis majority shareholders – and vice versa.

33.5) How often do these agreements include a total or partial sale of the business? Does the legislation allow for going concern sales? Does it include special rules that facilitate the business sales (in particular, transfer of contracts/licenses without the counterparty´s consent)?

33.6) How often is the sale of an important asset or of part or all of the business made to a directly or indirectly related party? In this case, how is the sale price determined? In this respect, do you think that the interests of creditors are adequately protected under the law?

33.7) Are there clear and neutral or favourable rules regarding the taxation of these restructuring operations? If not, does taxation, in your opinion, constitute a hurdle to restructuring operations?

34) In your opinion, what are the main problems for the approval of an out-of-court restructuring plan? (for example, certain crucial creditors refuse to participate, the information duties are too burdensome, expenses of mediators/auditors/etc. too high/taxes, etc.)

35) Roughly, which percentage of the agreements end in formal insolvency proceedings following failure to implement them (e.g., 0-25%; 26-50%; 51-75%; 76-100%)**?**

36) Do you think there should be rules on possible court or authority assistance / involvement regarding (otherwise) out of court negotiations? (e.g. regarding a stay, neutral and expert advice or mediation, a confirmation of a plan protecting its participants from the consequences of later insolvency proceedings, etc.)

37) Do you advise the use of pre-packaged agreements, i.e. plans prepared and negotiated with key creditors and/or investors and introduced in full insolvency proceedings looking at a speedy adoption and, if necessary, cram-down of dissenters**? What are their main pros and cons in your opinion?**

Part III: Lawyers/advisors mainly advising creditors

1. General questions regarding the restructuring process and framework

5A) At what stage of the debtor's distress do creditors usually seek your advice? Please specify if there is a difference depending on the type of creditor (eg industry, the type of claims –financial/tax/suppliers–, etc.). Also, **have creditors (the one seeking your advice or others) already foreclosed on the debtors or started other judicial initiatives? How often have creditors already filed a petition for an involuntary bankruptcy?**

6A) When creditors come for advice, are they normally already in some form of negotiation or discussion with the debtor regarding a restructuring attempt? Are the debtors usually, at this stage, represented or supported adequately by professional advisors?

7A) In your opinion, who are the players, within the debtor´s as well as the creditor's organization, most active in the process (both in the decision to take action and in the definition of the strategy)? (financial directors/accounting department; executive director; board of directors; legal department; controlling shareholders, statutory auditors etc.)

8A) Are often other advisors involved? (ie, consultancy firms, experts from investment banks, experts from private equity firms) **On average, how many cases do involve other advisors? Of those cases, how many approximately are hired after consulting with you?**

9A) Entering negotiations with debtors, do they normally have a pre-defined idea of the outcome? How flexible are they to adjust to the creditors' ideas, requests and demands? – Who is normally the driving and determining force in negotiations, the debtor or the creditor side?

10A) How close is your contact with other creditors or their representatives? Do you usually / often co-ordinate strategies or form pool organisations or creditor / steering committees (outside of insolvency proceedings)? In which cases are steering committees set up and which powers do they usually have? Does the debtor have a say in this regard?

11A) From your perception, what are the most common triggers for debtors to start negotiations with creditors regarding a restructuring (e.g. intra-organisational conflicts; bad results; overindebtedness; liquidity issues; foreclosures; threats or filing of involuntary petitions**) and what are typically their most urgent concerns? What measures do you usually advise the creditors to take at the initial stage to safeguard their interests** (regarding i.a. possible insolvency, civil and criminal liability, avoidance risks, securities)**?**

12A) Please describe the information you request from the creditor (do you have a checklist? Would you make it available?**). What information do you normally demand from the debtor?**

13A) Are household/family ties an issue in restructuring operations? Please elaborate.

14A) In what circumstances do you advise creditors to work with the debtor with the aim of rescuing the business? In what circumstances do you advise against rescue and for pursuing claims and securities regardless of the risk of insolvency and / or liquidation? Do you have a preferred strategy between these options? Approximately, in what percentage of cases do you advise rescuing (e.g., 0-25%; 26-50%; 51-75%; 76-100%)?

15A) In case the debtor company appears rescue-worthy in principle, is your preferred strategy to try to help rescue the company out of court (ie, through an agreement outside formal, fully in-court proceedings) or do you – in general or in particular cases – regard formal insolvency proceedings as an adequate and preferable tool from the creditors' perspective? Why? Please kindly elaborate.

16A) In what circumstances do you suggest the use of formal insolvency proceedings – and filing an involuntary petition? In what circumstances do you suggest out-of-court solutions? Do you have a preferred strategy between these options? Approximately, in what percentage of cases do you advise an out-of-court solution (e.g., 0-25%; 26-50%; 51-75%; 76-100%)**?**

17A) What percentage of success does an out-of-court solution have in your experience (e.g., 0-25%; 26-50%; 51-75%; 76-100%)**? What are the most common reasons of failure?**

18A) Are financial creditors (or indeed any other kind) reluctant to use non-regulated, purely contractual solutions? If so, what is their main concern?

19A) Have you been involved in cases where debtors tried to make use of foreign restructuring proceedings or tools? If so, in roughly how many cases, percentage-wise, does this occur and is it successful? Which foreign proceedings or tools? Do you tend to oppose or support this strategy?

20A) Which, from a debtor's perspective, are the perceived deficiencies of German law that leads debtors to pursuing foreign proceedings or tools? Do you expect a European Directive as currently proposed to address and cure these shortcomings? At what cost, if any?

21A) In case the debtor pursues formal (German) insolvency proceedings with self-administration (*Eigenverwaltung*), what are your main considerations when advising the creditor whether to go along with or oppose *Eigenverwaltung*? In roughly how many of the insolvency cases, percentage-wise, does the debtor apply for Eigenverwaltung and how often do you oppose it?

22A) In roughly how many of the cases mentioned in question 21A, percentage-wise, does the debtor pursue a protective-shied proceeding (*Schutzschirmverfahren*)? What are, in your opinion, the main advantages of the *Schutzschirmverfahren* as compared to the standard *vorläufige Eigenverwaltung*, what are its main disadvantages?

23A) Please briefly describe the procedure (steps), in practice, to negotiate an out-of-court agreement. (i.a.: Are creditors approached on a targeted basis, i.e., only certain creditors, or all creditors at the same time? Are the negotiations typically informal or guided, is use being made of ADR or mediation methods and procedures? Do the negotiations take place in big rounds of all involved creditors or in numerous smaller or even four-eye settings?)

24A) How often are the employees or their representatives (*Betriebsrat*, *Gewerkschaften*, etc.) involved in negotiations regarding out-of-court restructurings? Is your experience in this regard positive? Why? Why not? Is there anything in the legal framework that makes these negotiations particularly burdensome? Does this type of creditor in your opinion constitute a problem for the restructuring process?

25A) How often are the tax authorities involved in negotiations regarding out-of-court restructurings? Is your experience in this regard positive? Why? Why not? Is there anything in the legal framework that makes these negotiations particularly burdensome? Does this type of creditor in your opinion constitute a problem for the restructuring process?

26A) How often are key suppliers/contractual counterparties involved in negotiations regarding out-of-court restructurings? Is there anything in the legal framework that makes these negotiations particularly burdensome?

27A) When the debtor is a company, how often are the shareholders and/or their representatives involved in negotiations regarding out-of-court restructurings? Do you think that the directors' interest is usually aligned to that of the major shareholders? How open or reluctant shareholders generally are to go along with restructurings and/or to contribute further to the restructuring effort, or is there a big hold-out potential?

28A) In most jurisdictions, financial contracts with banks will include detailed, strict covenants, some of which are likely to have been breached by the time restructuring negotiations are started (insolvency/liquidity ratios, information duties, negative pledges, etc.). **In your opinion, is the breach of those covenants enough to trigger early termination of the financial contracts? Do banks ever rely on them to terminate contracts early** (do you ever perceive banks as using covenants opportunistically in this context)**? Do they use them as leverage to gain a superior bargaining position? Do these covenants, in your opinion, constitute a hurdle to business restructuring?**

29A) How often are financial institutions (or key suppliers, if involved in the negotiation) willing to provide additional financing? Is there any relevant hurdle in the legal system? (ie, lack of sufficient priority, risk of avoidance, risk of criminal liability, etc.) **Especially which aspects of the plan or of the business/company do financial institutions look at when deciding whether to provide additional financing?** (e.g., rescue plan vs. a liquidation plan; operating revenues greater than operating costs; financial institutions or key suppliers over-exposed to the debtor). **Which quality/detail/author of the plan will financial institutions typically require?**

30A) Do avoidance actions in case of a subsequent insolvency constitute a hurdle to an agreement out of court? Why?

31A) Does the risk of civil or criminal liability in case of a subsequent insolvency constitute a hurdle to an agreement out of court? Why?

32A) What is the most common content of the out-of-court agreements that you have participated in? Please kindly provide a brief general description of the more standard agreement.

> **32.1A) How often is debt rescheduling part of the agreement? How long is the roll over on average (approx.)?** Please elaborate. **Is there any limitation to the application of debt rescheduling for any particular creditor?**

32.2A) How often are debt write downs part of the agreement? What percentages are accepted? Please elaborate. **Is there any limitation to the application of debt write downs for any particular creditor?**

32.3A) How often do they include a restructuring of the business? (ie, change in corporate form, closing down of activities, opening new activities, enhancing viable parts of the business, laying off workers, changing distribution channels, changing management, etc.). **Does the legislation pose any particular hurdles to business restructuring operations?**

32.4A) How often do they include a change in the structure of the shareholders? (e.g., a debt for equity swap to the effect of diluting the "old" shareholders; debt for equity swap to the effect of cancelling the interest of all the "old" shareholders; the arrival of a new investor; etc.) **Are the "old" shareholders entitled to a preemption right? How often?** Please elaborate. Please, comment on any hurdles posed by the legal framework to conduct these operations and on whether the law adequately protects the interests of creditors vis-à-vis shareholders and minority shareholders vis-à-vis majority shareholders – and vice versa.

32.5A) How often do these agreements include a total or partial sale of the business? Does the legislation allow for going concern sales? Does it include special rules that facilitate the business sales (in particular, transfer of contracts/licenses without the counterparty´s consent)?

32.6A) How often is the sale of an important asset or of part or all of the business made to a directly or indirectly related party? In this case, how is the sale price determined? In this respect, do you think that the interests of creditors are adequately protected under the law?

32.7A) Are there clear and neutral or favourable rules regarding the taxation of these restructuring operations? If not, does taxation, in your opinion, constitute a hurdle to restructuring operations?

33A) In your opinion, what are the main problems for the approval of an out-of-court restructuring plan? (for example, certain crucial creditors refuse to participate, the information duties are too burdensome, expenses of mediators/auditors/etc. too high/taxes, etc.)

34A) Roughly, which percentage of the agreements end in formal insolvency proceedings following failure to implement them (e.g., 0-25%; 26-50%; 51-75%; 76-100%)**?**

35A) Do you think there should be rules on possible court or authority assistance / involvement regarding (otherwise) out of court negotiations? (e.g. regarding a stay, neutral and expert advice or mediation, a confirmation of a plan protecting its participants from the consequences of later insolvency proceedings, etc.)

36A) Do you advise the use of pre-packaged agreements, i.e. plans prepared and negotiated with key creditors and/or investors and introduced in full insolvency proceedings looking at a speedy adoption and, if necessary, cram-down of dissenters**? What are their main pros and cons in your opinion?**

2. Questions specific to creditors' advisors

37A) Please provide an overview of the type of lending your clients normally have with large debtors: secured vs unsecured; types of security; types of assets covered; types of clauses (cross-default, negative pledge, etc.). **Are personal guarantees also included (of shareholders/managers)?**

38A) How does the type of lending/security influence the creditor's behavior towards restructuring agreements? In particular, when creditors have a large percentage of their debt covered with fixed security (e.g., mortgage over real estate), **are they willing to enter into out of court agreements anyway? Why or why not?**

39A) Do creditors accelerate loans or terminate early financial contracts based merely on the breach of covenants? If yes, please state which covenants (insolvency/liquidity ratios, information duties, negative pledges, etc.)**.**

40A) Are creditors normally willing to engage in the negotiation of out-of-court agreements? How long does negotiation with creditors usually last (e.g. how long does it take for creditors to formally accept what has been informally agreed with the negotiator? Do creditors tend to stick to their negotiator's decision)**? Which factors are more likely to affect length of negotiations** (financial complexity, size of credit, size or nationality of creditor, kind of creditor [e.g. bank vs. non-bank financial institution], etc.)**?**

41A) When creditors negotiate bilaterally to restructure the loans, do they require additional security for previously unsecured loans? Since this practice may prove risky (e.g. criminal and civil liability, avoidance etc.), and detrimental for the creditor in case the debtor ends up in insolvency, **what measures does the creditor adopt to protect the restructuring operation?**

42A) Is fresh money sufficiently protected? Please elaborate the answer, separating the different cases.

43A) Do creditors only restructure their loans against a viability analysis? If so, how is it conducted and who pays for it?

44A) In case of bank creditors: In your opinion, does the banking regulatory framework (i.e., provisioning rules, limitations to the acquisition of shares, limitation of types of activity, etc.) influence the bank´s behaviour?

45A) How often do creditors enter into a debt-for-equity swap? What is a creditor's typical strategy after acquiring ownership of the entity?

46A) Are restructuring processes any different in cases of syndicated loans? How?

47A) Not uncommonly, the solutions to the distress of viable businesses is thwarted by the bad personal relationship between the main creditors and the people controlling the company. How often is the relationship between the creditor and the main shareholder/directors a hurdle to achieve an out-of-court agreement? Are there legal tools to overcome this hurdle?

48A) How often is a third party involved in the restructuring agreement? (ie, an equity investor, a fund buying the debt, a new bank financing the operation, etc.). Are there any significant legal hurdles to these operations?

49A) From the creditor's perspective, what are the main problems of the legal framework to achieve out-of-court agreements? Do you think that insolvency law is too harsh or too lenient on debtors, or do you think it strikes the right balance?

Additional Questions for Lawyers/Advisors typically dealing with SME debtors

1) What information is most often requested by creditors?

2) Do debtors usually have their financial statements in order?

3) How often does financial information have to be reconstructed and prepared specifically for the restructuring process?

4) Does the lack of adequate financial/corporate information influence the debtor´s choice of mechanism to tackle the business´ crisis? (ie., if the reconstruction is not feasible, the debtor may be more inclined to an –unregulated- out of court agreement).

5) In your opinion, would measures need to be adopted to tackle the legal mismatch between legal requirements for financial information and reality? (for example, by lowering the requirements of mandatory information in formal insolvency proceedings; or by lowering the requirements for the smallest sector of the business spectrum (Micro SMEs); or by the ex ante introduction of templates for debtors, etc.).

6) Do small debtors find it difficult to negotiate with their creditors (in other words, is there a passivity or lack of interest on behalf of creditors)? Please elaborate concerning the different types of creditors (at least banks/Tax/suppliers/employees)

7) Assuming your client only has one bank as financial creditor, please describe the negotiation process and the bank´s behavior: is new collateral requested? Additional/new personal guarantees? From whom? How often is new money available? Etc.

8) Are labour-related issues a particular problem in restructuring operations? Please elaborate

Annex C: Named Interviewed Experts

The German CoDiRe research team spoke to a considerable number of experts and invited their feedback and discussion in different settings, including workshops, seminars and a conference in Berlin as well as four-eye meetings. Among these experts were policy/law makers from two federal ministries, pre-eminent insolvency judges, representatives of professional associations, insolvency practitioners, academics, business and tax consultants, auditors, debtor, creditor and investor representatives and others.

The following experts, however, are those who provided a particularly important input, sacrificed a considerable amount of their time (between approx. 90 minutes and 4 hours), and shared their vast expertise in extensive interviews, and who agreed to be named in this report. For the most part, they are advisors in the field of restructuring, advising – with different focuses – debtors, creditors and/or investors. In alphabetical order:

- Dr. Volker Beissenhirtz, LL. M., Berlin,
- Dr. Martin Dietrich, Herbst Bröcker Rechtsanwälte, Berlin,
- Dr. Holger Ellers, Baker & MacKenzie, Berlin,
- Dr. Arne Friel, Dentons, Berlin,
- Dr. Thomas Knecht, Hellmann Worldwide Logistics SE & Co. KG, Osnabrück,
- Dr. Jörn Kowalewski, Latham & Watkins, Hamburg,
- Dr. Christopher Kranz, LL. M., Allen & Overy, Frankfurt am Main,
- Sebastian Philipp, MBA, Andersch AG, Frankfurt am Main,
- Dr. Stefan Proske, Heuking Kühn Lüer Wojtek, Berlin,
- Dr. Stefan Sax, LL. M., Clifford Chance, Frankfurt am Main,
- Dr. Andreas Spahlinger, Gleiss Lutz, Stuttgart.