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INTRODUCTION

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1.05 It will already be apparent that this investigation springs from an acute need. The current impetus for testing the legal framework for rescuing companies—and especially for a comparison of the English and German legal frameworks in particular—comes from several sources (Section A). The investigation takes into consideration the fact that restructuring is typically done through legal processes, requiring a precise formulation of the legal questions to be answered (Section B) as well as clarity about the subject of the investigation and its methods (Section C).

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A. Impetus

1.06 The various reasons for the particular attention devoted of late to insolvency law span headline-grabbing cases of 'restructuring migration' (I), a marked and worldwide increase in restructuring demand (II), reform initiatives pending in England and Germany (III), and, increasingly, direct competition between legal systems (IV).

I. 'Restructuring migration'

1.07 The uproar over the so-called *Schefenacker case*[6] began in Spring 2007 and quickly spread across Germany and England. The Swabian automotive parts

[6] Discussed instructively alongside other cases by Carsten Rumberg, 'Entwicklungen der "Rescue Culture" im englischen Insolvenzrecht', RIW 2010, 358, 359 ff; on the case of Hans Brochier Holdings Ltd, see Dirk Andres and Andreas Grund, 'Die Flucht vor deutschen Insolvenzgerichten nach England—Die Entscheidungen in dem Insolvenzverfahren Hans Brochier Holdings Ltd.',

manufacturer Schefenacker AG was teetering on the brink of insolvency, and its legal advisors considered rescue of the company under German insolvency proceedings impossible. The company thus decided, following the example set by the smaller firm Deutsche Nickel,[7] to convert itself into an English company and move its centre of main interests to England. With this process completed, Schefenacker proceeded to enter into the more favourable structure of a company voluntary arrangement, or CVA.[8]

1.08 The move was highly controversial both in business and in the legal profession.[9] Analysts argued that Schefenacker had undertaken the 'migration' because German law was insufficiently restructuring-friendly, and a rescue of the company under English law was much easier and more efficient. These arguments must be seen against the background of German law, which does not foresee restructuring outside of or separate from insolvency proceedings.[10] In the debate surrounding the *Schefenacker case*, German law came under fire[11] on a number of points:

- the mandatory insolvency application;
- the parties' lack of influence over the appointment of insolvency practitioners;
- the inflexible, courtroom-centred procedure;
- inadequacies in the law governing the insolvency plan, especially concerning the confusing multiplicity of remedies and the lack of mechanisms for intervention in the rights of shareholders;
- the subordination of shareholder-creditors;

NZI 2007, 137 ff. International perspectives on the case are also interesting: for example Anthony Aarons and Karin Matussek, 'Schefenacker seeking Bankruptcy, Flees Germany for U.K. Courts', <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aoOp2euiFKzI>, accessed 27 October 2011; Ken Baird and Paul Sidle 'Flitting boom', The Lawyer, 2.7.2007, <http://www.thelawyer.com/flitting-boom/126925.article>, accessed 27 October 2011; Georgia Quenby, 'Moving with the times', The Lawyer 24.9.2007, available online at: <http://www.thelawyer.com/moving-with-the-times/128925.article>, accessed 27 November 2011.

[7] See Bernd Johann, 'Wende im Stillen, Focus-Money v. 6.8.2008', available online at: <http://www.focus.de/finanzen/boerse/deutsche-nickel-wende-im-stillen_aid_322663.html>, accessed 27 October 2011.

[8] See further para 6.05 below.

[9] For example, see Horst Eidenmüller, Finanzkrise, Wirtschaftskrise und das deutsche Insolvenzrecht (Berlin, 2009), *passim*; Michael Jaffé, 'Insolvenzplan versus außergerichtliche Sanierung' in Arbeitskreis für Insolvenzwesen Köln e.V. (ed), *Kölner Schrift zur Insolvenzordnung* (3rd edn, Münster, 2009), 743 ff; Sven-Holger Undritz, 'Möglichkeiten und Grenzen vorinsolvenzlicher Unternehmenssanierung', in Arbeitskreis für Insolvenzwesen Köln e.V. (ed), *Kölner Schrift zur Insolvenzordnung* (3rd edn, Münster, 2009), 932, para 1 ff; Heinz Vallender, 'Gefahren für den Insolvenzstandort Deutschland', NZI 2007, 129 ff; Lars Westpfahl and Riaz K. Janjuah, 'Zur Modernisierung des deutschen Sanierungsrechts—Ein Beitrag zur aktuellen Diskussion über die Reformbedürftigkeit des deutschen Insolvenzrechts', Supplement to ZIP 3/2008.

[10] Discussed in further detail at para 5.02.

[11] For example, see Lars Westpfahl, 'Vorinsolvenzliches Sanierungsverfahren', ZGR 2010, 385, 389 ff; Westpfahl and Janjuah (n 9 above), 3 ff; see also Horst Eidenmüller, Tilmann Frobenius, and Wolfram Prusko, 'Regulierungswettbewerb im Unternehmensinsolvenzrecht: Ergebnisse einer empirischen Untersuchung', NZI 2010, 545, 549 ff.

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- conflicts between insolvency law and company law;
- the lack of the possibility to convert debt to equity (debt-equity swap);
- the lack of specific regulation of enterprise group insolvency; and
- taxes on balance-sheet gains from restructuring.

1.09 International consulting firms do not tire of pointing out these deficiencies. Neither do they shy away from the conclusion that German insolvency law, particularly in comparison with its English equivalent, is considerably weaker, and that larger, more complex restructuring ought to be undertaken within the English jurisdiction. Whether these criticisms are justified should remain an open question at this point, as should the question of whether the steps taken by Schefenacker resulted in the best solution for its creditors[12] and whether it set off a wave of similar migrations. The conversion from one company structure to another and the relocation of a business' core abroad are complicated undertakings that often collapse in the face of immense costs.[13] Practitioners therefore usually reach for foreign instruments or processes that do not require relocating the company's registered office.[14] But whatever the reason, the examples given above provide good reason to scrutinize the suitability of German law for rescuing companies.

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II. The worldwide increase in demand for restructuring

1.10 This entire discussion takes place in the context of a surge[15] in many countries in insolvencies and restructurings. The widely offered and gratefully accepted mezzanine financing of the years 2004 to 2007—in Germany alone some 4.6 billion Euro—has run its course, and further injections of capital are difficult to obtain in a market that is now fundamentally different. The situation is the same for leveraged buyouts across the board: by one estimate, the market will need 72.61 billion

[12] According to information published in the media, unsecured creditors received a 3.75% quota plus 5% of the capital with an option for a further 10%; consultant and restructuring costs exceeded €40m. See Martin W. Buchenau, 'Schefenacker trickst Insolvenzrecht aus', Handelsblatt v. 3.5.2007, available online at <http://www.handelsblatt.com/unternehmen/industrie/schefenacker-trickst-insolvenzrecht-aus;1262943>, accessed 27 October 2011. The remaining creditors, particularly suppliers and employees, were paid in full.

[13] See n 12 above. Economic critiques of law make the salient point that forum shopping is only a viable solution for a very small group of businesses: see Robert D. Cooter and Hans-Bernd Schäfer, 'Solomon's Knot: Law's role in ending the poverty of nations', Kapitel 8, German Working Papers in Law and Economics: Vol. 2010: Article 7, p 16; available online at <http://www.bepress.com/cgi/viewcontent.cgi?article=1269&context=gwp; ferner Princeton University Press>, accessed 27 October 2011. Practitioners also consider 'restructuring migration' to be outside the arsenal of standard instruments. cf Eidenmüller, Frobenius, and Prusko (n 11 above), 548.

[14] In England this refers primarily to the scheme of arrangement; see para 19.07 and the High Court's decision in *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch).

[15] A point made forcefully by Gerrit Hölzle and Andreas Pink, 'Mezzanine-Programme und Gestaltungspotential der Sanierungseigenverwaltung im ESUG', ZIP 2011, 360, 361 ff; see also Matthias Budde, 'Finanzielle Restrukturierung von Private Equity-Portofoliounternehmen', ZInsO 2010, 2251 ff; from the English perspective, Diederick van der Plas, Naveen Sabharwal, and Mike Seaton, 'Financial Restructuring in Germany: Issues, Options, and Innovations', ICR 2010, 369 ff.

US dollars[16] in refinancing assistance before 2016. The result is a spike in demand for credit, demand that can only be met through significant restructuring efforts, if at all. In both England[17] and Germany,[18] legislators have been continually beset by anxiety that existing legal structures may not be able to support restructuring on this scale.

III. Reform considerations

1.11 In both countries, on-going reform efforts are intensive, and in some cases have progressed quite far.

1. Germany

1.12 The cases discussed above have already set off activity in a German legislature worried about the competitiveness of its jurisdiction. These concerns have only intensified[19] since the onset of the financial and economic crisis of 2008 and 2009. One aspect of the discussion deals with the question of how German insolvency law can be made more friendly towards the idea of restructuring; another has focused on the question of whether there is a place for a Restructuring Procedure Act—a *Sanierungsverfahrensgesetz*—outside, or as a prelude to, the current insolvency procedure.

1.13 The Debt Securities Act (*Schuldverschreibungsgesetz*, SchVG) has already been amended to allow for the suppression of dissenting creditors against decisions taken by the majority of creditors.[20] Simultaneously, the Federal Ministry of Justice (BMJ) established two commissions to report on possibilities for improving German insolvency and restructuring law. The work of these commissions was rendered obsolete by further developments: in Summer 2009, the BMJ published a Green Paper on 'introducing a reorganization plan procedure for systematically significant financial institutions and protecting against threats to the stability of the financial system',[21] which by 26 July 2010 had evolved into a further proposal on

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[16] These figures have been taken from a brochure published by Freshfields Bruckhaus Deringer: 'The new normal: the outlook for the global private equity industry', 2011, p 8.

[17] See Insolvency Service, *Proposals for a Restructuring Moratorium—a consultation, 2010*, available online at: <http://www.bis.gov.uk/insolvency/Consultations/Restructuring?cat=closedwithresponse>, accessed 9 November 2011, p 8 ff and para 1.17 below.

[18] See n 17 above.

[19] On the taxation of balance-sheet gains through restructuring see the *Sanierungserlass* of the BMF of 27.3.2003 (BStBl I, 240), most recently amended through a notice of the BMF dated 22 December 2009, BStBl I, 2010, 18; commented by Michael Dahms, 'Anmerkung zum Schreiben des BMF v. 22. 12. 2009', ZInsO 2010, 223 ff.

[20] Statute of 31 July 2009; BGBl 2009 I, 2512; commented by Friedrich L Cranshaw, 'Internationalisierung und Modernisierung—Bemerkungen zum geltenden und zum Referentenentwurf eines neuen Schuldverschreibungsgesetzes (SchVG)', BKR 2008, 504 ff; Dieter Leuering, 'Das neue Schuldverschreibungsgesetz', NZI 2009, 638 ff; Heiko Tschauner and Wolfram Desch, 'Revision of German Bond Act: New Restructuring Options for German Bonds', ICR 2010, 40 ff.

[21] Accessible at <http://zip-online.de/volltext.html?offset=&id=6ea9ab1baa0efb9e19094440c317e21b>.

'the restructuring and orderly liquidation of financial institutions, the establishment of a restructuring fund for financial institutions, and the extension of the limitation period for securities-law liabilities' (*Restrukturierungsgesetz*).[22] Article 1 of that paper contained a draft Financial Institutions Restructuring Act (*Kreditinstitute-Reorganisationsgesetz*, KredReorgG). A White Paper[23] soon followed, and the KredReorgG was passed by the Bundestag on 28 October 2010. It was published in the Bundesgesetzblatt[24] and has, pursuant to its own Art 17, been in force since 1 January 2011. The statute offers two interesting possibilities for the current context, both of them restructuring-oriented procedures: the restructuring procedure in §§ 2 ff, intended to be undertaken 'long before'[25] insolvency is on the table; and the insolvency-avoidance reorganization procedure in §§ 7 ff. The essential difference between the two is that while the restructuring procedure generally does not permit the rights of third parties to be curtailed, the reorganization procedure is modelled on the insolvency plan procedure in §§ 217 ff of the Insolvency Regulations (InsO).[26]

1.14 The KredReorgG was a special statute for financial institutions, but a much more general draft bill was soon to follow, spurred on following the federal elections of 2009 by the coalition agreement of 26 October 2009. The coalition agreement had the simplification of restructuring law as one of its central planks,[27] and the new justice minister, Sabine Leutheusser-Schnarrenberger, presented a three-point plan to that end in early 2010.[28] The first phase was to immediately set to work on a reform of the law on insolvency plans and self-administration (debtor-in-possession insolvency), resulting in a draft bill within a few months. The second phase focused on individual bankruptcy and pre-insolvency restructuring.[29] A third phase for the

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[22] Reprinted in NZI 2010, Supplement to issue 17, 25 ff.
[23] BT-Drs 17/3024 of 27 September 2010.
[24] BGBl 2010 I, 1900.
[25] General explanation, RegE RestruktG, BT-Drs 17/3024, p 40.
[26] See 'General explanation, RegE RestruktG', BT-Drs 17/3024, p 40; details will be discussed further below.
[27] The following passage is relevant here: 'We will make it easier to restructure and rescue viable businesses, thereby preventing the loss of jobs. Part of doing so is improving the legal regulations for out-of-court restructuring of companies at the pre-insolvency stage. The insolvency plan procedure must be simplified and, in the interest of restructuring law, be oriented more toward the early restructuring of companies at the pre-insolvency stage.' See ZIP 2009, A 86.
[28] See the report of the German Insolvency Law Congress of 18 March 2010 by Reuter, INDat-Report 3/2010, 42 ff.
[29] Further comments on this can be found in: Volker Beissenhirtz, 'Plädoyer für ein Gesetz zur vorinsolvenzlichen Sanierung von Unternehmen', ZInsO 2011, 57 ff; Reinhard Bork, 'Grundfragen des Restrukturierungsrechts', ZIP 2010, 397 ff; Frank Frind, 'Vorinsolvenzliche Sanierungsregelungen oder Relaunch des Insolvenzplanverfahrens?', ZInsO 2010, 1426 ff; Christoph Geldmacher, 'Das präventive Sanierungsverfahren: Ein detaillierter Vorschlag', ZInsO 2011, 353 ff; ZInsO 2010, 696 ff; Gerrit Hölzle, 'Unternehmenssanierung außerhalb der Insolvenz—Überlegungen zu einem Sanierungsvergleichsgesetz', NZI 2010, 207 ff; Florian Jacoby, 'Vorinsolvenzliches Sanierungsverfahren', ZGR 2010, 359 ff; Stephan Madaus, Der Insolvenzplan (Tübingen, 2011), 559 ff; Stephan Madaus, 'Möglichkeiten und Grenzen einer Reform der Rechtsmittel gegen den

'longer term' would focus on group insolvency and the legal position of insolvency practitioners.

1.15 A joint colloquium, 'Pre-Insolvency Restructuring', hosted by the BMJ and the Federal Trade Ministry on 8 June 2010,[30] was followed just one month later by a 'Discussion Draft of a Bill for the Further Simplification of Company Restructuring (ESUG)' of 8 July 2010.[31] It was both a collection of individual measures, such as ones dealing with the application for insolvency proceedings, and a reform of the law on insolvency plans, self-administration, and even on the appointment of insolvency practitioners. The BMJ followed with a Green Paper regarding a 'Bill for the Further Simplification of Company Restructuring (ESUG)'[32] of 25 January 2011, and a corresponding White Paper was presented on 4 March 2011.[33] The Bundesrat raised a number of objections to the draft, both in its committees[34] and as a whole,[35] but these were largely rejected by the government.[36] After a first reading in the Bundestag on 30 June 2011, the bill was adopted by the Bundestag on 27 October 2011 and in the Bundesrat 25 November 2011. It will come into force on 1 April 2012.

1.16 This is not the place for detailed discussion of the content of these initiatives—that will come in the following chapters. It suffices to reiterate that the KredReorgG,[37]

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Beschluss über die Insolvenzplanbestätigung', NZI 2010, 430, 622 ff; Jürgen D. Spliedt, 'Ist die außergerichtliche Sanierung pleite?—Ein Vergleich zur Sanierung im Insolvenzverfahren', InsVZ 2010, 27 ff; Westpfahl (n 11 above); and also Heinz Vallender, 'Increasing the chances of restructuring through an extrajudicial restructuring procedure?', IILR 2010, 13 ff; a more polemical take is Gerhard Pape, 'Erleichterung der Sanierung von Unternehmen durch Stärkung der Eigenverwaltung', ZInsO 2010, 1582, 1583 ff, who does not do justice to a discussion that has meanwhile become quite nuanced; rejection also from Wilhelm Uhlenbruck, 'Von der Notwendigkeit eines eigenständigen Sanierungsgesetzes', NZI 2008, 201 ff; and Peter A. Windel, 'Der Grundsatz der Selbstverantwortung und das Insolvenzrecht', in Karl Riesenhuber (ed), *Das Prinzip der Selbstverantwortung* (Tübingen, 2011), 449, 485 ff.

[30] Conference report of Christoph Paulus et al, 'Sanierung im Vorfeld von Insolvenzverfahren', WM 2010, 1337 ff.

[31] Reprinted in NZI 2010, Supplement to issue 16, 1 ff; an overview in English is available from Stefan Sax, 'Consultation paper on German insolvency law reform—the key points', CRI 2010, 235 ff; Tschauner and Desch (n 20 above).

[32] Reprinted as Supplement 1 to ZIP 2011 issue 6 (with the synopsis on RefE).

[33] BR-Drs 127/11 of 4 March 2011 = BT-Drs 17/5712 of 4 May 2011.

[34] BR-Drs 127/1/11 of 5 April 2011.

[35] BR-Drs 127/11 (Beschluss) of 15 April 2011 = BT-Drs 17/5712, Anl 3.

[36] BT-Drs 17/5712, Anl 4; final version (with synopsis) in BT-Drs 17/7511.

[37] The draft is discussed by Frank Frind, 'Restrukturierungsgesetz-Entwurf: Weniger wäre manchmal mehr', ZInsO 2010, 1921; Horst Eidenmüller, 'Restrukturierung systemrelevanter Finanzinstitute', in *Festschrift für Klaus J. Hopt* (Berlin, 2010), 1713 ff; Hans-Friedrich Müller, 'Reorganisation systemrelevanter Banken', KTS 2011, 1 ff; Björn Otto and Patrick Mückl, 'Arbeitsrechtliche Aspekte des Restrukturierungsgesetzes', NZI 2011, 91 ff; Klaus Pannen, 'Der Sanierungs- und Reorganisationsberater im geplanten Kreditinstitute-Reorganisationsgesetz', INDat-Report 6/2010, 36 ff and 'Das geplante Restrukturierungsgesetz für Kreditinstitute', ZInsO 2010, 2026 ff; Gunnar Schuster, 'Zur Stellung der Anteilseigner in der Sanierung', ZGR 2010, 325, 345 ff; Sophie Spetzler, 'Insolvenzrechtsreform und Bankenreorganisation', KTS 2010, 433, 453 ff; see also Wolfgang Marotzke, 'Das deutsche Insolvenzrecht in systemischen Krisen', JZ 2009, 763 ff.

already in force,[38] and the draft ESUG[39] have ignited a lively debate in Germany, drawing the professional community's attention beyond larger policy themes into the details of the regulatory environment.[40]

[38] On the statute, see Thorsten Höche, 'Das Restrukturierungsgesetz—Neue Wege in der Bankenaufsicht (mit Seitenblicken auf die Schweiz und das Vereinigte Königreich)', WM 2011, 49, 52 ff; Manfred Obermüller, 'Das Bankenrestrukturierungsgesetz—ein kurzer Überblick über ein langes Gesetz', NZI 2011, 81 ff; Tobias C. Riethmüller, 'Das Restrukturierungsgesetz im ökonomischen und internationalen Kontext', WM 2010, 2295 ff; Sven Schelo, 'Neue Restrukturierungsregeln für Banken', NJW 2011, 186 ff; Gunnar Schuster and Lars Westpfahl, 'Neue Wege zur Bankensanierung—Ein Beitrag zum Restrukturierungsgesetz', Teil 1: DB 2011, 221 ff; Teil 2: DB 2011, 282 ff; Benedikt Wolfers and Thomas Voland, 'Der Weg aus der Krise?', WM 2011, 1159 ff and in English, Martin Prager and Christoph Keller, 'Germany's Special Resolution Regime for Failing Banks', ICR 2011, 167 ff.

[39] In more detail, Klaus Bartels, 'Gemeinschaftliche Befriedigung durch Verfahren—Zur Gläubigerakzeptanz bei Eigen-verwaltung', KTS 2010, 259 ff; Moritz Brinkmann, 'Wege aus der Insolvenz eines Unternehmens—oder: Die Gesellschafter als Sanierungshindernis', WM 2011, 97 ff; Achim Frank and Jens Heinrich, 'Ein Plädoyer für einen wirksamen Beitrag zur Gläubigerautonomie im Insolvenzplanverfahren', ZInsO 2011, 858 ff; Frank Frind, 'Problemanalyse zum RefE "ESUG"'—Teil 1, ZInsO 2011, 373 ff, Teil 2, ZInsO 2011, 656ff, 'Vom Insolvenzverwalter zum Insolvenzberater?', ZInsO 2010, 1966 ff; Frank Frind, 'Zum Diskussionsentwurf für ein "Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen"', ZInsO 2010, 1473 (Teil 1)/1524 (Teil 2); Frank Frind, 'Unabhängigkeit—kein Wert mehr an sich?', NZI 2010, 705 ff; Gravenbrucher Kreis, VID e.V., BAKinso e.V., 'Gemeinsame Stellungnahme zum Gesetzesentwurf der Bundesregierung für ein Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (ESUG) v. 4.3.2011', ZInsO 2011, 913 f; Gläubigerschutzvereinigung Deutschland e.V. (GSV), 'Stellungnahme zum Gesetzesentwurf der Bundesregierung für ein Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen', ZInsO 2011, 909 ff (but criticism by Beate Schmidberger, 'Zur Stellungnahme der Gläubigerschutzvereinigung Deutschland e.V. (GSV) zum ESUG—eine Replik aus der Praxis', ZInsO 2011, 1407 ff); Norbert Hill, 'Das Eigenverwaltungsverfahren des Diskussionsentwurfs des BMJ im Spannungsfeld zwischen Sanierungsinteresse und Gläubigerschutz', ZInsO 2010, 1825 ff; Heribert Hirte, 'Anmerkungen zum von § 270b RefE-InsO ESUG vorgeschlagenen "Schutzschirm"', ZInsO 2011, 401 ff; Gerrit Hölzle, 'Die "erleichterte Sanierung von Unternehmen" in der Nomenklatur der InsO—ein hehres Regelungsziel des RefE-ESUG', NZI 2011, 124 ff; Hölzle and Pink (n 15 above), 364 ff; Matthias Hofmann, 'Die Vorschläge des DiskE-ESUG zur Eigenverwaltung und zur Auswahl des Sachwalters—Wege und Irrwege zur Erleichterung von Unternehmenssanierungen', NZI 2010, 798 ff; Volker Kammel, and Christian Staps, 'Insolvenzverwalterauswahl und Eigenverwaltung im Diskussionsentwurf für ein Sanierungserleichterungsgesetz', NZI 2010, 791 ff; Matthias Kresser, 'Debt-equity-swaps im Insolvenzplanverfahren de lege ferenda', ZInsO 2010, 1409 ff; Gerhard Pape, 'Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen', ZInsO 2011, 1033 ff; Gerhard Pape, 'Erleichterung der Sanierung von Unternehmen durch Stärkung der Eigenverwaltung', ZInsO 2010, 1582 ff; Sven Schelo, 'Reform der Unternehmenssanierung', DB 2010, 2209 ff; Stefan Smid, 'Große Reform oder Beseitigung der Insolvenzordnung durch ein neues Konkursverfahren?', DZWIR 2010, 397 ff; Spetzler (n 37 above), 433 ff; TMA Stellungnahme der TMA Deutschland zum Diskussionsentwurf für ein Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen vom 15.10.2010, InsVZ 2010, 476 ff; Jasmin Urlaub, 'Notwendige Änderungen im Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (ESUG) zur Verhinderung von Missbräuchen', ZIP 2011, 1040 ff; Joachim Voigt-Salus and Oliver Sietz, 'Bestimmt der wesentliche Gläubiger den besten Verwalter oder ist eine Lanze für den unabhängigen Verwalter zu brechen?', ZInsO 2010, 2050 ff; Jürgen Wallner, Erwin Gerster, and Rüdiger Weiß, 'Steuerbarkeit von Sanierungsprozessen trotz Insolvenz', ZInsO 2011, 16 ff; Silke Wehdeking, and Stefan Smid, 'Soll die Anordnung der Eigenverwaltung voraussetzen, dass der Schuldner dem Insolvenzgericht einen "pre-packaged" Insolvenzplan vorlegt?', ZInsO 2010, 1713 ff; Ralf Zuleger, 'Was wollen Gläubiger?', NZI 2011, 136 f; in English, David Marks, and Robert Hänel, 'On to Pastures New? Some Observations of Germany's Intended Insolvency Law Reforms', ICR 2011, 183 ff.

[40] Regulatory proposals not drawn directly from the draft bill are discussed by Frank Frind, 'Sechs Maßnahmen um die Sanierungsfunktion der InsO zu stärken', ZInsO 2010, 1161 ff;

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2. England

1.17 The reform debate continues in England as well. After the major changes introduced by the Insolvency Act 2000[41] and later by the Enterprise Act 2002[42] in favour of a 'rescue culture', the string of bank insolvencies in 2009 led to the passage of the Banking Act 2009.[43] The Act is concerned primarily with financial institutions in trouble (s 1(1), Banking Act 2009) and contains a number of solutions. The first chapter, ss 1–89, regulates the pre-insolvency transfer of shares or assets to a private investor, a receiver company owned by the Bank of England (a so-called 'bridge bank'), or into temporary public ownership. This transfer is mandatory, and can be ordered by the Bank of England or the Treasury. It is carried out either by the Treasury or the Bank of England, and in some cases compensation may be paid. The procedure for bank insolvency in the second chapter (ss 90–135) and the third chapter (ss 136–168), is intended to be a fall-back option. The bank insolvency procedure is in many ways separate from the general procedure contained in the Insolvency Act 1986, and the Banking Act 2009 contains a number of (mainly technical) deviations from the Insolvency Act procedure. Otherwise, Banking Act insolvency is largely a matter of an orderly winding up or administration procedure. The particularly interesting aspect of the Banking Act in the present context is its third chapter, which regulates the restructuring of the bank in administration and whose regulations—apart from a handful of particularities—generally correspond to normal administration: see s 136(2)(d), Banking Act 2009. Bank administration plays a role, albeit a marginal one,[44] later in this investigation.

1.18 The central question[45] in England at the moment is whether a general moratorium procedure[46] should be introduced. The issue has arisen not because of the palpable effects of the economic crisis, but rather in response to the observation that the crisis will lead to a massive wave of refinancing of corporate debt in the coming years, which will in turn cause a sharp increase in restructuring cases. The current estimates are that by 2015, some 90 billion GBP[47] in leveraged buyout financing will come due, leading to an enormous need for debt regulation. All of this is made

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Hans Haarmeyer and Wolfgang Wutzke, 'Der Sanierungstreuhänder', ZInsO 2010, 1201 ff; Michael Jaffé, 'Restrukturierung nach der InsO: Gesetzesplan, Fehlstellen und Reformansätze innerhalb einer umfassenden InsO-Novellierung aus Sicht eines Insolvenzpraktikers', ZGR 2010, 248, 260 f; and Dirk A. Verse, 'Anteilseigner im Insolvenzverfahren', ZGR 2010, 299, 316 ff.

[41] The introduction of a CVA moratorium, discussed in para 10.31.

[42] New regulations on administration. See para 6.09 below.

[43] In German, Höche (n 38 above), 51 f. Reform plans are discussed by Andrew Campbell and Paula Moffart, 'Dealing with financially distressed investment banks: the new "rescue" proposals', JIBFL 2011, 34 ff.

[44] See para 1.44 below.

[45] A parallel discussion concerns pre-pack administration; see para 6.14.

[46] cf para 10.43 below.

[47] Insolvency Service, *Proposals for a Restructuring Moratorium—a consultation, 2010*, p 8 f, available online at: <http://www.bis.gov.uk/insolvency/Consultations/Restructuring?cat=closedwithresponse>, accessed 9 November 2011 (which also applies to the following). The Freshfields study

worse by the fact that many of these loans were taken out not with banks but on the general capital markets, meaning that debts are owed to an unmanageably large number of creditors—in many cases not even identifiable by name—and that bilateral restructuring negotiations in the hope of informal or contractual solutions are therefore simply not possible; costs and risk rise accordingly, endangering the success of restructuring. It is these developments to which the English legislature is seeking to react.

IV. Regulatory competition

1.19 The German reform debate in particular has been shaped by unfavourable comparisons with foreign regulatory frameworks, especially because many states provide for separate restructuring procedures that either engage sooner than or can operate parallel to insolvency proceedings focused on liquidation.[48] For example:

- **1.20** The restructuring procedure in Chapter 11 of the US Bankruptcy Code,[49] which does not require a state of insolvency of any kind, making it available even to debtors not in particular cash-flow difficulties;
- **1.21** The Belgian Restructuring Act of 2009,[50] which offers debtors a procedure whose goal is a contractual arrangement with creditors, a consent to a reorganization plan, or a transfer-based restructuring ('asset deal');
- **1.22** English law, which distinguishes[51] between a number of different procedures: on the one hand, the scheme of arrangement and the company voluntary arrangement (or CVA; the true restructuring instrument) in which the debtor submits a proposal on which, at the invitation of the so-called nominee, the shareholders and creditors vote; and on the other hand, administration, in which restructuring decisions are placed in the hands of an administrator;

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mentioned in n 16 above calculates refinancing needs between now and 2016 at about US$120bn, or approximately GBP 75bn.

[48] These other legal systems' restructuring statutes have, in some cases, been reformed multiple times. Their efficiency also begs closer investigation, since it is evident that in most cases, less than 1,000 cases per year are dealt with under each régime. Raw numbers are not of much substantive guidance, since it could be that restructuring is used for the 500–800 most interesting cases, while the masses of smaller businesses are consigned to the heap of liquidation. The matter is discussed broadly in David Smith and Per Strömberg, 'Maximizing the value of distressed assets: bankruptcy law and the efficient reorganization of firms', in Patrick Honohan and Luc Laeven (ed), *Systemic Financial Crises* (Cambridge, 2005), 232 ff, 255 ff.

[49] The US Bankruptcy Code occupies Title 11 of the United States Code, and is therefore often cited as '11 U.S.C. § . . .' Recent summary overviews are available from Gerard McCormack, *Corporate Rescue Law—An Anglo-American Perspective* (Cheltenham, 2008), 78 ff; Peter Minuth, 'Chapter 11 des U.S.-amerikanischen Bankruptcy Code: Mythos und Realität', in Festschrift für Günter Greiner (Cologne, 2005), 245 ff.

[50] *Loi relative à la continuité des enterprises* of 31 January 2009 (*Moniteur belge* of 9.2.2009, p 8436), in force since 1 April 2009; see Sophie A. Jacmain, 'Flexible and Debtor-friendly Restructuring Tool: The Belgian Business Continuity Act', ICR 2011, 176 ff.

[51] Discussed extensively below at paras 6.01 ff.

1.23 • French law, which draws a similar distinction:[52] between *conciliation*,[53] a formal arbitration procedure[54] characterized by unusual confidentiality and an absolutely voluntary nature, in which an arbitrator works to negotiate a contractual agreement between the debtor and his most important creditors;[55] and the *procédure de sauvegarde*,[56] a pre-insolvency procedure that can be opened on the debtor's application if he finds himself in insurmountable difficulties,[57] and which gives the debtor up to six months to develop a restructuring plan with the help of an *administrateur*. The plan must then, in the case of larger companies, be submitted to the creditors' committee for a vote; in the case of smaller companies the plan is subject to the court's jurisdiction.[58] Since 1 March 2011, a fast-track variant of the *procédure de sauvegarde*, limited to financial creditors, has also been available.[59]

1.24 • Italian law, which alongside the *piano di risanamento* (restructuring plan) and the *accordi di ristrutturazione* (restructuring arrangement) focuses considerable attention on the *concordato preventivo*,[60] an instrument which broadly corresponds in regulatory content to the German insolvency plan procedure, but instead operates prior to and separate from insolvency as a way of staving off liquidation.[61] The *concordato* procedure is begun on application of the

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[52] Overviews can be found in Beissenhirtz (n 29 above), 64 ff; Reinhard Dammann, Die Erfolgsrezepte französischer vorinsolvenzlicher Sanierungsverfahren, NZI 2009, 502 ff; Ellen Delzant and Patrick Ehret, 'Die Reform des französischen Insolvenzrechts zum 15.2.2009', ZInsO 2009, 990 ff; Koray Kosal, 'Psychologisch geschickter verpackt', INDat-Report 4/2010, 16 ff; and in detail Natalia Alexandra Medla, 'Präventive Unternehmenssanierung im deutschen und im französischen Recht' (Baden-Baden, 2008), *passim*.

[53] Discussed in detail in Medla (n 52 above), 98 ff.

[54] The regulation of the procedure differentiates between the *conciliation* and the *mandataire ad hoc* per Art L611-3 C Com, under which, on the debtor's application, the president of the commercial court can appoint an investigator and set that investigator's competencies. The further process of the negotiations, the reaching of an agreement, and the remedies and legal consequences are not regulated. The *mandataire* has thus fallen out of favour, largely pushed aside by the *conciliation*.

[55] Art L611-4 ff C Com.

[56] See also Medla (n 52 above), 162 ff; Andreas Piekenbrock, 'Empfiehlt sich angesichts der Wirtschaftskrise die Einführung eines gesonderten Restrukturierungsverfahrens?', ZVglRWiss 108 (2009), 242, 259 ff.

[57] Art L620-1 C Com ('*difficultés qu'il n'est pas en mesure de surmonter*').

[58] Art L626-1, L626-9 ff C Com.

[59] For more detail, see Reinhard Dammann and Gilles Podeur, 'Sauvegarde financière express: vers une consécration législative du "prepack à la française"?', Recueil Dalloz 2010, 2005 f.

[60] Art 160 ff *legge fallimentare*. The *legge fallimentare* does not apply to particularly large businesses, which are subject by particular statute to a special administrative insolvency procedure. (*Decreto legislativo Nr. 1999/270 Nuova disciplina dell' amministrazione straordinaria delle grandi imprese in stato di insolvenza* of 8 July 1999, *Gazetta Ufficiale* No 185 of 9 August 1999.)

[61] Comments in Roland Arlt, Vorinsolvenzliche Sanierungsverfahren und Restrukturierung in Italien, ZInsO 2009, 1081, 1085 ff; Florian Bünger, 'Das neue italienische Insolvenzplanverfahren', DZWIR 2006, 455 ff; Lisa Busch, 'Zerschlagungsabwendende Verfahren im deutschen und italienischen Insolvenzrecht—eine rechtsvergleichende Untersuchung unter besonderer Berücksichtigung der italienischen Reformgesetzgebung' (Berlin, 2009), 92 ff; Giuseppe Farinacci, 'The Italian Restructuring Framework: A Brief Overview', ICR 2009, 285, 288 f; Hein in DACH Europäische Anwaltsvereinigung e.V. (ed), *Restrukturierung von Unternehmen* (Zürich, 2010), 168 ff.

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crisis-beset debtor, who must also present the restructuring proposal, which is then subject to approval by a vote of the creditors and acceptance by the court.

- **1.25** Austrian law[62] has, since a wide-ranging reform in 2010, offered debtors likely to become insolvent a special restructuring plan procedure if, at the time of application, they can present a restructuring plan according to §§ 140 ff of the Austrian Insolvency Regulations (öIO) that proposes to meet at least 20 per cent of their debt obligations over the next two years: see §§ 166 ff öIO. This restructuring procedure is an insolvency procedure under the direction of an administrator (§ 80 öIO), but is not labelled as an insolvency procedure as long as a majority of the creditors (by vote and as a percentage of the debt: see § 147 öIO) approve the plan within 60 to 90 days (§ 168 Abs. 1 öIO). If the debtor can submit a qualified restructuring plan and offer as much as 30 per cent repayment over two years, the restructuring procedure can be combined with self-administration, although this is limited to 90 days in the first instance (§§ 169 ff öIO).

1.26 These various régimes, some of them still very new, have yet to provide sufficient data[63] to properly evaluate their success or failure. But the proponents of these regulatory models have put great pressure on the German legal system, driving its internal discussion onward.

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B. Refining the Question

1.27 Picking up this discussion and focusing it onto restructuring law requires closer engagement with the concept of the restructuring procedure itself.

I. Restructuring

1.28 The first order of business is to determine what restructuring actually entails. In doing so, one must distinguish between the business and its 'owner', the holder of the business. On the one hand, restructuring is about reforming the business—fixing the causes of its crisis, neutralizing factors that could lead to insolvency, and restoring sustainable financial stability such that the business and its products are again competitive.[64] But restructuring can also mean shaking up the business's holder (the company), a process known as 'reorganization'[65] or 'restructuring' in a narrower sense. This process achieves its goals when not only the business itself but

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[62] An overview is provided by Fruhstorfer in DACH (n 61 above), 1 ff; Hans-Georg Kantner, 'Das neue österreichische Insolvenzrecht—IRÄG 2010', ZInsO 2010, 2388 f; Bettina Nunner-Krautgasser, 'Das neue österreichische Insolvenzverfahren nach dem Insolvenzrechtsänderungsgesetz 2010—ein Überblick', ZInsO 2011, 117 ff; Stephan Riel, 'Die Eigenverwaltung im neuen österreichsichen Sanierungsverfahren', ZInsO 2011, 1400 ff.

[63] See also n 48 above; cf for Austria, the *ZInsO-Dokumentation* in ZInsO 2010, 2082 ff.

[64] cf the definition in Tz 1 of the *Sanierungserlasses des BMF* (n 19 above).

[65] See para 1.45 below.

also its holder are either restored to productivity or have averted their likely insolvency such that they can carry on at the head of the reorganized business.

1.29 This dichotomy corresponds to the difference between (plain) restructuring and restructuring by way of an asset deal.[66] Both have as their basis the restructuring of the business, but between these two terms, restructuring indicates that of both the business and its holders, whereas asset-deal restructuring results in the sale of the business, the prorated transfer of the proceeds to the holders' creditors, and the liquidation of the holding company.[67] If restructuring removes debt from the business, asset-deal restructuring removes the business from its debt. Asset deals are heavily favoured in practice,[68] since they are quick, separate the assets from the liabilities with efficiency and legal certainty, and ultimately rescue the business and the jobs it provides. But they become problematic when they lead to the destruction of a company holding specific legal entitlements that the business itself might need: favourable long-term contracts, licences, certifications, public-law permissions, stock exchange listings, or loss carryforwards against taxation may require the consent of third parties to be transferred, if they can be transferred at all.[69] In addition, every asset deal brings with it the danger of dissipation: particularly when the sale is to insiders—and especially to the company's management—the question arises of how a fair market price can be guaranteed. But in many cases, there is no alternative to an asset deal: for example, when financial backing for a bare restructuring cannot be found, or when only a portion of the crisis-plagued business is competitive or even viable while the rest is unsalvageably burdened by deficit to the point that even were the debt forgiven, the viable branch of the business would be unable to finance the dead weight, and insolvency would loom again soon after.

1.30 The restructuring procedure (and the law governing it) being investigated here is usually invoked to save the business and its holder. The possibility of an asset deal must, however, be kept in view, for it is often the only recourse for rescuing a business. Asset-deal restructuring has to be possible at the end of a restructuring attempt, and therefore may not be excluded by statute.

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[66] On the latter, Reinhard Bork, *Einführung in das Insolvenzrecht* (5th edn, Tübingen, 2009), para 375 ff; Sven-Holger Undritz, 'Restrukturierung in der Insolvenz', ZGR 2010, 201, 205 ff; Helmut Zipperer, 'Übertragende Sanierung—Sanierung ohne Grenzen oder erlaubtes Risiko?', NZI 2008, 206 ff.

[67] For detail see Volker Arends, and Sebastian Hofert-von Weiss, 'Distressed M&A—Unternehmenskauf aus der Insolvenz', BB 2009, 1538 ff; Georg Bitter, 'Sanierung in der Insolvenz—Der Beitrag von Treue- und Aufopferungspflichten zum Sanierungserfolg', ZGR 2010, 147, 151 ff.

[68] According to data from Undritz (n 66 above), 205, well over 90% of successful restructurings within insolvency proceedings in Germany are asset-deal restructurings. On England, see below at para 6.14.

[69] Described vividly by Bitter (n 67 above), 157 ff; Brinkmann (n 39 above) as well as below at paras 12.17 and 12.30.

II. Procedure

1.31 The term 'procedure' leads to another preliminary question: per current German law, lacking as it does a separate Restructuring Act, there are two possible avenues to restructuring: privately, through an out-of-court agreement between the debtor and his creditors,[70] or formally, through a procedure that necessitates declaring insolvency and submitting to the supervision of the court.[71] Expanding the view to include non- or pre-insolvency procedures, one could be permitted to assume, as a working hypothesis, that there will have to be a regulated procedure. And in this context, a regulated procedure means one regulated by law and managed by a court.[72] That concept in itself asserts nothing about the court's competence; it simply postulates that the procedure will be initiated under the auspices of a court and, where appropriate, that the court will steer and supervise it. The necessity of going to court may perhaps require further justification.[73]

1.32 Firstly, attempts at private out-of-court agreements often fail in the face of basic mistrust between parties in crisis. Their inability to reach a consensus, often combined with personal bad blood and a diminishing capacity to assess the financial situation realistically, makes any search for an agreement difficult[74] without the intervention of outside moderators, a role which a regulated procedure is designed to play.

1.33 The object is to prevent a rush on the last scraps of value in the debtor's assets. Privately ordered contractual solutions tend to be reached in back-room deals, but when a company's impending restructuring becomes public, creditors begin to fight over whatever valuable assets remain.[75] In the face of the creditors' willingness to do battle, the only way to ensure an orderly procedure is to enter a tightly-regulated legal process that contains and protects space for the drawing-up of a restructuring concept and a decision about whether or not to accept it. French law's division between the confidentiality- and autonomy-focused *conciliation* and the

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[70] Discussed in detail by Horst Eidenmüller, 'Insolvenzbewältigung durch Reorganisation', in Claus Ott and Hans-Bernd Schäfer (eds), Effiziente Verhaltenssteuerung und Kooperation im Zivilrecht (Tübingen, 1997), p 146 ff; Undritz (n 9 above), para 12 ff, 26. Private ordering of the scope of negotiation and decision is also discussed by Horst Eidenmüller, 'Privatisierung der Insolvenzabwicklung: Workouts, Covenants, Mediation—Modelle für den Insolvenzstandort Deutschland?', ZZP 121 (2008), 273 ff. The 'London Approach' in England is dealt with below at para 6.01.

[71] See para 5.07 below.

[72] An administrative procedure would also be possible, but there is no European legal tradition of this (but see Italy at n 60 above), and at least in Germany, it would quickly come up against constitutional limits: see Art 92 GG.

[73] See also Smith and Strömberg (n 48 above), 259 ff.

[74] A good description at Rudolf Neuhof, 'Unternehmenssanierung—ein neues Geschäftsfeld für Insolvenzverwalter?', ZIP 2011, 307.

[75] See para 10.02 below.

publicity-oriented *procédure de sauvegarde* gives special consideration to these difficulties.[76]

1.34 Neither can this investigation proceed without handling the problem of dissenting creditors.[77] Privately-ordered solutions require the agreement of all the parties, and the present jurisprudence of the BGH does not permit creditors to be forced into a restructuring agreement.[78] Every creditor whose cooperation is necessary for the success of the restructuring therefore has considerable leverage to secure individual advantages by threatening to exit the agreement, a potential threat that, again, can only be resisted through an efficiently shaped and well-arranged restructuring procedure.[79]

1.35 Bringing creditors together into a regulated procedure connected with a discussion process also has the advantage that it entails a procedural guarantee that the best economic solution will be reached.[80] Insofar as the restructuring process aims for the agreement of (at least the majority) of the parties involved and therefore grants them the right to participate in the procedure, then there is something to be said for the presumption that it balances the parties' interests, gives them an opportunity to be heard, and takes them into account when rendering a decision that finally produces an economically sensible and acceptable solution.

1.36 Lastly, the need for formality is linked to modern forms of finance. Businesses years ago ceased to draw their necessary financing exclusively from a handful of creditor banks and now finance themselves on the general capital markets. The first consequence of this is that debtors generally no longer know their creditors—scattered equity investors—personally (if at all), and it is therefore not possible to sit down across a table with them and attempt to negotiate a restructuring solution. A process is needed that can impose a solution agreed by the majority onto all the creditors involved. The second is that debtors increasingly face creditors in the form of profit-maximizing private equity firms with no connection to the company and to the local region. The decisions of such firms during restructuring proceedings therefore reflect only their own interests or those of the investors behind them, making it more difficult to reach an out-of-court agreement.

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[76] See para 1.23 above.

[77] The situation is different for dissenting shareholders at a shareholders' meeting: see below, para 5.06.

[78] *BGHZ* 116, 319, 321 ff ('co-op'); discussed at para 5.03.

[79] In general, see Hans-Bernd Schäfer and Claus Ott, 'Lehrbuch der ökonomischen Analyse des Zivilrechts' (4th edn, Berlin, 2005), 575 ff.

[80] A detailed discussion can be found in Madaus, *Der Insolvenzplan* (n 29 above), 489 ff.

III. Restructuring and insolvency proceedings

1.37 The final point to be settled deals with time limits and the distinction between restructuring and insolvency proceedings. Restructuring can happen before insolvency; the basic scenario is one in which a company requires restructuring but where substantive insolvency—a state of manifestly rather than merely potentially sinking into over-indebtedness or being unable to meet payment obligations—has not yet set in but is not unlikely. The company, seeking to avoid insolvency at an early stage, reaches for restructuring measures. Restructuring through an insolvency procedure would fail at this stage for lack of actual insolvency.[81] A pre-insolvency Restructuring Act must in this context take into account the limits of (and the transition to) insolvency. On the other hand, restructuring can take place within a formal insolvency procedure.[82] Such a procedure shifts the focus from avoiding liability through voluntary restructuring over to realizing it through a mandatory insolvency procedure. Restructuring becomes not so much the subject of the proceedings as the result.

1.38 In chronological terms, the restructuring procedure spans only the point up to the submission of the insolvency application and the decision on a restructuring plan. The procedure, in the sense it is discussed here, need not necessarily involve the execution of the plan. But it will certainly be appropriate to examine this phase at the relevant points.[83]

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C. Thematic and Technical Aspects

1.39 With every incentive, as described above, to reconsider German and—from a comparative perspective—English law's suitability as a venue for restructuring, the analysis can be conducted in a way that positively tests the adaptability of insolvency law to restructuring as it currently stands. This book will indeed do so. An analysis that considers from a much wider public policy standpoint the features of restructuring law that would best serve practice, regardless of whether they appear in any of the present legal systems, will be a much more fruitful one. In so doing, one can increase the value of an economic analysis of law, as this chapter has already done, without claiming to deliver original conclusions along those lines.

1.40 As stated above, English law will also be drawn in and analysed. This is not to exclude relevant insights from third legal systems, which are introduced

[81] Setting aside for the moment the possibility of applying for insolvency because of looming inability to meet payment obligations, as foreseen in § 18 InsO. Triggering situations are discussed in more detail at paras 8.01 ff below.

[82] On the economic necessity of a reorganization option in insolvency, see Madaus, *Der Insolvenzplan* (n 29 above), 443 ff.

[83] See also paras 18.01 ff below.

where appropriate. But since the English law has—at the very least since the *Schefenacker case*[84]—played a particularly high-profile role, it offers itself as the best candidate for a concentrated comparison. English law is the law of England and of Wales; Scottish law is subject to a number of diverging legal norms[85] based on its local legal tradition, and these remain outside the scope of this analysis. The parallel rules in Northern Ireland[86] will also have to be left unmentioned. Some of the cited case law and literature, however, may have a wider scope. Citation of all sources follows the Oxford Standard for the Citation of Legal Authorities, or OSCOLA.[87]

1.41 The book will be published in German and in English, and is intended for the interested reader from either realm, demanding a somewhat more thorough discussion of both legal systems. The English reader is kindly asked to forgive the author's sometimes unusually exhaustive discussion of English law, and vice versa for the German reader. English law occupies more space in the book, but this is entirely the result of its more numerous legal instruments in this area.

1.42 Cross-jurisdictional descriptions also have unavoidable terminological consequences. The book speaks consistently of restructuring-candidate debtors as 'companies' and their 'shareholders' without differentiating between the various company structures of the two countries. In England this is justified by the Companies Act 2006 and its single recognized company form in s 1, which then is differentiated only by its suitability for the capital markets and the liability of the shareholders, and also because in the event, 95 per cent of companies take the form of a private company limited by shares.[88] For Germany, there is much to recommend differentiating between person- and capital-based companies as well as for privately (GmbH) and publicly (AG) held ones, but these differences make no difference to the goals of this investigation and have therefore been left by the wayside.

1.43 Similarly, company leadership is consistently referred to as 'management'. In this book, 'management' serves as a general term for the legal representatives of the debtor, even if this is not always the case in practice, and independent of their precise label in the various legal systems and in the various company forms. Particularly, it refers to the managing directors of the German GmbH, the board members of the AG, and in England, the directors in the sense of s 154 ff of the Companies Act 2006, without in any case being limited to just these people.

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[84] See para 1.07 above.

[85] See, for example, ss 16, 50 ff, 113, 120 ff, 138, 142, 147, 161 f, 169, 185, 193, 198 f, 204, 242 f, 440, IA 1986.

[86] Especially the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), and the Company (Northern Ireland) Order 1989, SI 1989/2404 (NI 18).

[87] Available online at <http://www.law.ox.ac.uk/publications/oscola.php>.

[88] Described by Felix Steffek, *Gläubigerschutz in der Kapitalgesellschaft* (Tübingen, 2011), 5 f.

1.44 The special rules on the restructuring of financial institutions in the form of the German *Kreditinstitute-Reorganisationsgesetz*[89] (KredReorgG) are, albeit only marginally, taken into account, as is the Banking Act 2009.[90] The justification is that from 2008, it was with respect to these institutions that policymakers first reacted to the financial crisis. Here, the German law is subject to more searching examination, since its KredReorgG represents the more fundamental reform of previous law and places entirely new restructuring instruments at the German law's disposal. The Banking Act 2009, on the other hand, deals principally with mandatory transfer of shares or assets and only secondarily with insolvency-law procedures. In doing so, the Act regulates matters that are highly technical from the standpoint of this investigation, and anyway does so chiefly by building on and referring to the existing rules on administration in Sch B1 to the Insolvency Act 1986 (ss 136(2)(d), 145(3), Banking Act 2009). In most cases, there will be little reason to delve into the Act any further.

1.45 It should be pointed out in closing that 'restructuring' and 'reorganization' are used rather interchangeably, and in the sense of this book, are rather inexact terms. 'Reorganization' often refers to the retooling of the (holding) company itself, as opposed to asset-deal restructuring of the business, whereas 'restructuring' is often taken to mean simply the restructuring of liabilities: financial rather than operational changes.[91] German has an umbrella term for both—*Sanierung*—but there is no uniform usage across the two legal systems or languages, and so the preferred term in the English edition of this book will be 'restructuring' unless the context calls for something else.

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[89] See para 1.13 above.
[90] See para 1.17 above.
[91] See para 4.13; terminology is also discussed by Eidenmüller, 'Insolvenzbewältigung' (n 70 above), 145.