Debt Restructuring in Germany

I. Introduction

Germany is renowned for handling matters with great efficiency and success. However, this is not true of debt restructuring. It is general knowledge that many German companies believe German restructuring law is not very helpful and prefer to restructure their debts by entering into English scheme of arrangement proceedings, as evidenced by a remarkable list of cases, starting with *Rodenstock GmbH*[1] and *Primacom Holding GmbH*[2] and ending with *Apcoa*[3]. The main reason for this development is that arriving at a creditors' scheme in Germany which has the effect of binding a dissenting minority is only possible under the regime of formal insolvency proceedings. By then, the procedure comes far too late and is inevitably burdened with the stigma of insolvency. Other obstacles are worth mentioning briefly:

- no (or only a small) possibility of preliminary arrangements with the court (there are 116 insolvency courts in Germany; therefore it is nearly impossible to predict which judge will be in charge of your case and how they will handle the case)
- strict reference to the EIR in transnational cases (if a company requires the opening of insolvency proceedings in Germany for restructuring, it must have its COMI in Germany; there is nothing similar to the "sufficient connection test")
- time-consuming proceedings (there is a wait of at least three to six months until the creditors' meeting; the creditors' decision must then be confirmed by the court, the decision of which is subject to appeal, delaying the point in time at which the scheme takes effect)
- no rules for group company restructuring (which means there must be as many insolvency proceedings as there are group companies involved, with each procedure being managed by a different court).

In summary: despite several advantages, including significantly lower costs, a German company which has problems (only) with its financial creditors and needs a quick, binding restructuring decision may currently be well advised to try an English scheme of arrangement, provided it has a sufficient connection to England and is able to afford the disproportionate costs.

However, this deficient state of affairs has been brought to the attention of the federal legislator, who has reacted in three ways: by updating the German Bond Act (also known as the German Debenture Act), by improving German insolvency law and by announcing the introduction of new pre-insolvency restructuring proceedings as a reaction to the EU Directive proposed by the European Commission on 22 November 2016. I will henceforth discuss these three projects in more detail.

II. The Bond Act

My first remarks concern the German Bond Act (*Schuldverschreibungsgesetz*, SchVG). This statute was first implemented in 1899 but was completely revised in 2009.[4] For our purposes, the most important part of the Act is section 5. According to this provision, creditors of a bond which is governed by German law[5] may change the bond conditions – this includes a postponement of maturity dates or even a "haircut", i.e. a final debt reduction – by a majority vote of the creditors, provided that all creditors are treated equally.[6] The law does not require any financial difficulties of the debtor company, let alone its insolvency, and accepts with regard to essential decisions a majority of 75% of those present and voting, unless the bond terms and conditions themselves provide for a higher majority.

The huge advantage of this Act is that it allows for an early restructuring attempt and for the suppression of dissenting creditors, since the decision is binding on all creditors, including those which have terminated their bond prior to the decision.[7] The huge disadvantage is that s.5 Bond Act is only applicable if the bond's terms and conditions allow for such majority votes. Where this is not the case, dissenting creditors effectively have a veto and thus can block any attempt to restructure the debt. However, the German Federal Court of Justice[8] has decided that a creditors' meeting may retroactively insert such permission into the terms and conditions by a majority vote of 75% (the so called "opt-in decision");[9] hence, this hurdle can be cleared. Yet even with this allowance, the Bond Act is not the solution to all restructuring problems, since it is applicable only to bonds and not to other liabilities (such as receivables of suppliers or banks), and it does not facilitate operational restructuring measures (such as reorganising the business or terminating employment contracts).

III. Insolvency Regulation

The second tool in the German restructurer's toolbox is the so-called "protective umbrella procedure", implemented by the "Act for the Further Simplification of Company Restructuring (ESUG)" in 2012 and regulated by section 270b Insolvency Regulation.[10] This rule creates new restructuring preparation proceedings and aims at providing practitioners with an

early, fast and flexible debtor-in-possession procedure to negotiate an arrangement between the debtor company and its creditors, with the goal being to rescue both the business and the company. The arrangement is supposed to be drafted as an Insolvency Plan during the application stage and shall – as a "pre-packaged plan" – be subject to the vote of the creditors' assembly once insolvency proceedings have been opened.

Aside from the Bond Act, formal restructuring proceedings in Germany are always insolvency proceedings. This is also true of the Protective Umbrella Procedure. The law requires imminent illiquidity or over-indebtedness (balance-sheet insolvency, which usually coincides with imminent illiquidity) but rules out actual illiquidity (in which case only regular insolvency proceedings are available). According to s.18(2) Insolvency Regulation, imminent illiquidity is the probable inability of the debtor to pay their existing liabilities as they fall due. This requirement is met when, with regard to existing liabilities which are not yet due to be paid and the funds available at the relevant time in the future, a durable liquidity gap of more than 10 per cent will probably arise. If a company finds itself in a financial crisis, it should be easy to prove this requirement. However, opponents of restructuring may decide to terminate their contracts. Since, ordinarily, imminent inability to pay one's debts entitles the main lenders to call in their debts immediately, this could lead to actual inability to pay debts, and thus terminate debtor-directed restructuring preparations. To avoid such a roadblock, the occurrence of actual illiquidity must be communicated to the court but does not terminate the Protective Umbrella Procedure automatically. According to s.270b(4) Insolvency Regulation, the court terminates this procedure and switches over to regular insolvency proceedings only if (1) the restructuring has become hopeless and (2) the preliminary creditors' committee applies for termination or (3) in the absence of such a committee, a secured or unsecured creditor does so and disadvantages for the creditors are to be expected if restructuring goes ahead anyway.

The Protective Umbrella Procedure must be applied for by the debtor company. German insolvency proceedings are always commenced by an application of either the debtor or a creditor, leading to an opening procedure which ends with the decision of the court on whether to open regular insolvency proceedings or not. The Protective Umbrella Procedure is embedded in this system: an application of the debtor to open insolvency proceedings coupled with an application for self-administration is necessary, but the court grants a three-month breathing space during the application stage to negotiate an arrangement with the creditors before the opening decision. If the debtor company applies for the Protective Umbrella Procedure, it has to give *prima facie* evidence (1) of the imminent illiquidity or over-indebtedness, (2) of the

lack of actual inability to pay debts and (3) that the restructuring is not without the prospect of success, the latter being required as a precautionary measure against misuse and to ensure that use of the procedure is taken seriously. The evidence must be provided by way of a written, well-reasoned statement from a person with considerable experience in insolvency matters, such as an accountant, an auditor, a lawyer or a person of comparable qualification.

The Protective Umbrella Procedure is a special kind of self-administration, namely the German debtor-in-possession procedure as regulated in s.270 Insolvency Regulation onwards. This means that the management stays in charge of the company's business and an administrator need not be appointed. Instead, the court appoints a preliminary nominee (temporary custodian), who must monitor the debtor's conduct and report back to the court, in order to avoid detrimental behaviour of the debtor and to enable the court to terminate the procedure if the termination requirements are met. In regular proceedings, office holders are not only appointed but also selected by the court. The Protective Umbrella Procedure enables the debtor to make a proposal regarding appointees which is binding on the court, unless the person proposed is obviously unsuitable or it is the same person who gave the aforementioned expert statement on the preconditions for the Protective Umbrella Procedure. Creditors' protection shall also be guaranteed by the establishment of a preliminary creditors' committee. Section 21 of the Insolvency Regulation enables the court to establish such a committee at its discretion, and according to section 22a of the same Regulation the court should do so on the application of the debtor, a preliminary office holder or a creditor, if persons willing to participate in the committee can be nominated. The court is obliged to establish such a committee if, in the last business year, the company met two of the following three criteria: "total balance sheet assets of at least 4,840m Euros", "minimum turnover of 9,680m Euros", or an "average of at least 50 employees". This obligation lapses, however, if the business is closed, the establishment of a creditors' committee is disproportionate to the expected assets' value or the delay caused by the act of establishing the committee leads to detrimental changes in the debtor's financial situation.

If all of the requirements described previously are met, the court attaches a deadline of three months at most to the presenting of an insolvency plan during the opening proceedings. The preparation of the restructuring decision, whether within or outside of formal proceedings, takes time, as it necessitates the investigation of the causes of the crisis, searching for viable restructuring options, negotiating with major creditors and possible investors, and laying the groundwork for the creditors' meeting. The Protective Umbrella Procedure should buy the

debtor company this time. Yet management must also be prevented from using restructuring simply as an excuse to “put off” inevitable insolvency; the time limit on the procedure, the appointment of a custodian, the continuing involvement of the court and even the liability imposed on the responsible parties all work in tandem to prevent misuse of the Protective Umbrella Procedure.

The resultant Insolvency Plan must be presented to the court within three months. The court then opens insolvency proceedings and puts the “pre-packaged” plan forward for a quick decision by a special creditors’ meeting, as regulated in s.217 Insolvency Regulation et seq. The breathing space which allows for all of this to happen is not prescribed by the statute in detail. Furthermore, there is no moratorium that comes into force automatically. Instead, the Insolvency Regulation allows for the court to order security measures for the duration of the application stage (s.270b(2)). In particular, it may establish a preliminary creditor’s committee, interdict the enforcement of claims and prevent secured creditors from disposing of the debtor’s collateral. The court may also order any measure it thinks necessary, and it must establish an enforcement ban if the debtor applies for it. Although regular insolvency proceedings are not yet open during the Protective Umbrella Procedure, the court can also authorise the debtor, on his application, to generate expenses pertaining to the (opened) proceedings (so called “mass liabilities”, which have to be paid in full) in order to support the continuation of the business and bolster the confidence of business partners.[11] On the other hand, if no security measures are ordered, then there is no need for publicity, and there is therefore the prime opportunity for a discrete and silent procedure, providing the debtor only with the backing of the court and the help of the preliminary custodian as a voluntary mediator during the negotiations between the debtor and his creditors.

It has already been mentioned that the Protective Umbrella Procedure always flows into regular insolvency proceedings. However, these proceedings may be conducted via self-administration and are geared towards the creditors’ voting. The court must summon a creditors’ meeting, in which the approval of the insolvency plan requires a simple *per capita* majority of those present and voting, and a simple value majority within every voting group, each of which – subject to a ban on obstruction – must vote separately to approve the plan under s.243 Insolvency Regulation. The creditors’ decision requires the approval of the court to ensure the protection of minorities. The law requires the court to reject the insolvency plan on the application of a creditor if the applicant voted against the plan and stands to be put in a worse position than he would have been in without a plan. The idea behind this norm is that

no creditor should have to accept expropriation by majority vote. According to s.251(3) Insolvency Regulation, the plan can include contingency funds to deal with cases in which a creditor proves it would be at a disadvantage compared to if there were no plan at all, and if the plan includes such contingency funds, applications for minority creditor protection are to be rejected straight away. This allows for the plan to be confirmed and for the restructuring to begin, while providing the creditor with a value-preservation guarantee that they could realise by suing the restructured company in civil law proceedings outside of the plan procedure for the difference between the quota he receives under the plan and the quota that would have been possible without it.

The approval of the court can be challenged. However, according to s.253(2) Insolvency Regulation, an appeal is only admissible when the appellant makes out the *prima facie* case that he will be put in a significantly (!) worse position under the plan than he would have been without a plan at all, and that this disadvantage cannot be rectified out of the contingency funds of the plan itself. Additionally, s.253(4) Insolvency Regulation enables the Regional Court[12] as appellate court to dismiss the appeal immediately if the disadvantages of delaying the plan outweigh the disadvantages for the appellant should his appeal be struck out (the so-called “release procedure”).

The new German restructuring law is the result of years of debate. It is shaped to encourage debtors to file for official proceedings at an early stage of the crisis. The Protective Umbrella Procedure is attractive for debtors because it creates a breathing space for the negotiation of an arrangement with the creditors, leaves the management in control of the business, and allows for the debtor company to select the preliminary custodian. At the same time, it keeps the interests of the creditors in its sights, setting up abuse controls through the involvement of the court and the interim office-holder on the one hand and a time limit on the other. However, the Protective Umbrella Procedure ultimately fails to provide German law with its first pre-insolvency procedure. Although it is conducted through self-administration, it still brings with it the “stigma of insolvency” and impedimental publicity, and it requires an expensive and time-consuming insolvency procedure for the approval of its restructuring plan.

IV. Reaction to the proposed EU Directive

It is against this background that the proposed EU Directive reignites the debate concerning real pre-insolvency restructuring proceedings under German law. In comparing the details of the proposal to the current state of German law, the following can be said.

Leaving aside some minor points and details, the central aspects of the proposed Directive are:

- "likelihood of insolvency" as a trigger for preventative restructuring frameworks, Art. 4(1)
- limited court involvement, Art. 4(2)
- debtor-in-possession proceedings, Art. 5(1)
- no mandatory appointment of an insolvency practitioner, Art. 5(2)/(3)
- enforcement stay available (also with regard to secured and preferential creditors but not with regard to employees), initially for no longer than four months, Art. 6
- suspension of obligation to file for insolvency unless debtor is unable to pay their debts, Art. 7(1)-(3)
- ban on termination or modification of executory contracts, Art. 7(5)
- restructuring plan proceedings available (Art. 8) with voting in groups, but only open to the affected creditors and equity holders, Art. 9, 12
- cross-class cram down possible, Art. 9(6), 11
- plans affecting the interests of dissenting parties and/or providing new finance require confirmation of the court, which must apply the "best interest of creditors" test and decide no later than 30 days after the request, Art. 10
- plan confirmations must be challengeable, Art. 15
- protection for new financing and other restructuring-related transactions, Art. 16, 17.

German law currently meets most (but not all) of these requirements:

- The trigger for the Protective Umbrella Procedure is imminent insolvency, yet according to the statutory definition, the debtor is imminently insolvent "if he is likely to be unable to meet his existing obligations to pay on the date of their maturity" (s. 18(2) Insolvency Regulation). This can be explained, as although in German "imminent" sounds more urgent than "likely", these words are interchangeable in the legal context. Hence, this prerequisite is met by current German law.
- Court involvement is more intensive than intended by the proposed Directive, since the Protective Umbrella Procedure is commenced with an application to the court, which monitors the proceedings.
- We have debtor-in-possession proceedings, as required by the proposed Directive,

- but the appointment of an insolvency practitioner as preliminary nominee is mandatory.
- An enforcement stay is available, initially for no longer than three months.
- At present, it is not possible to suspend the obligation to file for insolvency, and
- currently we have no legal basis for banning the termination or modification of executory contracts.
- Restructuring plan proceedings can be conducted via voting in groups, and unaffected creditors and equity holders are excluded from voting.
- A cross-class cram down is possible and
- all plans (not only those affecting the interests of dissenting parties and/or those providing new financing) require confirmation of the court, which must apply the "best interest of creditors" test.
- There is currently no time limit for the court's decision, but German judges certainly must decide no later than 30 days after the request if the law prescribes such a deadline.
- Plan confirmations are challengeable under German law, and
- new financing and other restructuring-related transactions are sufficiently protected.

In the run-up to the proposed EU Directive, deep discussions have been commenced on how to change German restructuring law. Although it seems possible to settle for the Protective Umbrella Procedure which – after some minor adjustments – would probably fulfil the essential requirements of the Directive, the opinion prevails among practitioners[13] and in literature[14] that Germany needs a new Act operating outside of, and independent of, current insolvency law; insolvency practitioners should be offered an additional tool to add to their restructuring toolbox.[15] The new restructuring proceedings should aim at safeguarding and restoring economic viability outside of formal insolvency proceedings, mainly by restructuring the liability side of the balance sheet, by which all other creditors and third parties, especially employees, will not normally be affected. Hence, the proceedings shall be minimally invasive, and they will not be comprehensive in the sense of necessarily comprising all creditors. However, the flipside of pre-insolvency proceedings is that typical insolvency tools, such as transactions avoidance or termination rights for current contracts, are not available.

Regarding the "trigger moment" – such as the likely inability to pay debts – there is broad discussion under German constitutional law as to whether restructuring proceedings can be

imposed on resistant creditors where the debtor's insolvency has not yet been ascertained.[16] However, this is not a question of how to commence restructuring proceedings but rather a question of the sanctioning of the insolvency plan. In the pre-insolvency phase, the debtor and creditors may start negotiations and enter into formal proceedings, including voting on a re-structuring plan, without a formal assessment of the economic status of the debtor's business. It may suffice to rely on two built-in safeguards.[17] The first could be a high approval rating (of at least 75%) from those present and voting. For example, if three-quarters of the creditors approve of a "haircut" of 20% of their claims, a strong presumption arises that the loss has been accepted, and furthermore that it is justified by the debtor's economic situation, with the real value of the claims not exceeding 80% of their stated value. Second, outvoted creditors can enjoy minority protection by asking the court to refrain from sanctioning the plan on the grounds that they would receive less than in the alternative scenario of the company's liquida-tion. On application, the court may assess the real value of the claims and check whether the interests of dissenting minorities have been justly trumped by those belonging to the consent-ing majority. Interestingly, both current German law and the proposed EU Directive do not require an approval rating of 75% but still insist on minority protection through court deci-sions.

Third, since the proceedings only seek to restructure the liability side of the balance sheet, leaving other creditors and third parties unaffected, only those creditors whose rights would be infringed must be able to participate in voting on the restructuring plan. These creditors can be divided into several groups, but they can also be pooled into one single group. It is not necessary to mention other persons in the restructuring plan unless they are expected to con-tribute to the restructuring, for instance as a surety or by bringing in fresh money.

Fourth, court involvement shall be limited as much as possible. No formal application will be necessary to prompt a court decision to open restructuring proceedings. Consequently, it will not be necessary to publish the commencement of the restructuring proceedings in the official gazette or on the Internet. Courts will only be involved where creditors' rights are affected, for example by an individual enforcement ban, by cram down of opposing creditors or by sanctioning the restructuring plan. In addition, the appointment of a restructuring mediator (or monitor/supervisor) through the court shall be possible. The court shall be able to commission the mediator to assess the reasonableness and fairness of the restructuring plan as well as to ensure necessary transparency and a concerted effort to achieve a fair balance between all interests involved.

Fifth, a general moratorium is not envisaged. It is necessary to support restructuring negotiations through an enforcement ban against single opposing creditors, and courts shall be able to impose such bans on the debtor's request. However, this shall be an exception and it shall only be permissible for a short period of time, and only insofar as is necessary to protect current restructuring negotiations. The advantage is that general publication is not required if a general moratorium is not possible.

Sixth, the restructuring plan can only enter into force if it has been sanctioned by the court. The court has to check whether

- the debtor is at least imminently/likely to be unable to pay their debts; this requirement is considerate of the constitutional concerns mentioned earlier on
- the voting groups have been assembled adequately and fairly
- the proceedings have been transparent and have followed the letter of the law
- the plan has been adopted by the required majority
- a creditor who has voted against the plan and has challenged the voting shall receive less than they would receive in the alternative scenario of the company's liquidation.

Finally, some additional points must be mentioned. First, new financing must be protected if restructuring fails and insolvency proceedings are therefore opened. It is generally accepted, albeit with some concerns, that German law currently grants such protection.[18] Hence, no additional measures are necessary. Second, European recognition must be ensured. It is suggested that a new German Restructuring Regulation will meet the prerequisites of Article 1 of the recently recast European Insolvency Regulation, which nowadays covers not only classical insolvency proceedings (e.g. liquidation or administration) but also debt adjustment proceedings "commenced in situations where there is only a likelihood of insolvency, [if] their purpose is to avoid the debtor's insolvency or the cessation of the debtor's business activities". Third, the German legislature should provide a more concentrated approach within the local jurisdictions to hearing insolvency-related cases. As mentioned previously, Germany currently has 116 insolvency courts; these courts often do not hear enough cases to gain the experience and competence necessary to make fast and professional decisions on restructuring proceedings. It is therefore desirable to make the new proceedings more concentrated and task only one court in each of the German *Bundesländer* with administering these cases. Germany can certainly learn lessons from the English judiciary regarding this issue, i.e. from the competent organisation and decisions of the High Court.

[1] *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch).
[2] *Re Primacom Holding GmbH (No 2)* [2012] EWHC 164 (Ch) and *(No 1)* [2011] EWHC 3746 (Ch).
[3] *Re Apcoa Parking (UK) Ltd. and Ors.* [2014] EWHC 997 (Ch). The scheme included the German companies APCOA Parking Holdings GmbH and APCOA Parking Deutschland GmbH.
[4] Statute of 31 July 2009, Bundesgesetzblatt 2009 I, 2512. More on this by Heiko Tschauner and Wolfram Desch, *Revision of German Bond Act: New Restructuring Options for German Bonds*, ICR 2010, 40 et seq.
[5] Cf. BGH, 01.07.2014 – II ZR 381/13 = BGHZ 202, 7 = NZG 2014 1102 para. 9 et seq.
[6] See BGH, 01.07.2014 – II ZR 381/13 = BGHZ 202, 7 = NZG 2014 1102 para. 16 et seq.
[7] BGH, 08.12.2015 – XI ZR 488/14 0 BGHZ 208, 171 = NJW 2016, 1175 para. 16 et seq.
[8] *Bundesgerichtshof*, BGH.
[9] BGH, 01.07.2014 – II ZR 381/13 = BGHZ 202, 7 = NZG 2014 1102 para. 11 et seq.
[10] *Insolvenzordnung*, InsO; English text at http://www.gesetze-im-internet.de/englisch_inso/index.html. On the following part of this article, see Reinhard Bork, *The "Protective Umbrella Procedure" – a New German Restructuring Tool*, [2012] 25 Insolvency Intelligence, 22-24.
[11] Cf. BGH, 16.6.2016 – IX ZR 114/15 = NJW 2016, 2572 para. 17 et seq.
[12] *Landgericht*, LG.
[13] Several insolvency practitioner associations have published comments on, and proposals for, pre-insolvency restructuring proceedings; cf. Bundesverband ESUG und Sanierung Deutschland e. V., *Thesenpapier zu einem außerinsolvenzlichen Sanierungsverfahren*, ZInsO 2016, 2029-2031; Deutscher Anwaltverein, *Stellungnahme zur Initiative der Kommission über einen wirksamen Insolvenzrahmen in der EU im Anschluss an die Empfehlung der Kommission v. 12.3.2014 für einen neuen Ansatz im Umgang mit unternehmerischem Scheitern und Unternehmensinsolvenzen, C (2015) 1500 final*, ZInsO 2016, 1197-1198; Gravenbrucher Kreis, *Vorinsolvenzliches Sanierungsverfahren in Deutschland?*, ZIP 2016, 1208-1210.
[14] Comprehensively Andrea Braun, *Die vorinsolvenzliche Sanierung von Unternehmen*, Nomos, Baden-Baden 2015; see also Reinhard Bork, *Vorinsolvenzliches Sanierungsverfahren – Schuldverschreibungsgesetz analog?*, ZIP 2011, 2035; Frank Frind and Frank Pollmächer, *Anmerkungen zu den „Thesen des Gravenbrucher Kreises zum vorinsolvenzlichen Sanierungsverfahren in Deutschland" – think twice, before it's all right*, ZInsO 2016, 1290-1295; Uwe Goetker and Benedikt Schulz, *Vorinsolvenzliches Sanierungsverfahren – Warum braucht die Praxis ein solches und wie könnte es aussehen?*, ZIP 2016, 2095-2107; Sacha Lürken, *Totgesagte leben länger – Neuer Anstoß aus Brüssel für die Einführung eines vorinsolvenzlichen Sanierungsverfahrens,* NZI 2015, 3-9; Klaus Siemon, *Das Konzept für ein vorinsolvenzliches Sanierungsverfahren*, NZI 2016, 57-63; Heinz Vallender, *Das vorgerichtliche Sanierungsverfahren – muss Deutschland sich bewegen?*, ZIP 2016, suppl. to issue 22, 82-85; Helmut Zipperer, *Der präventive Restrukturierungsrahmen – ein flankierendes Projekt der Kommission zur Effektivierung der EuInsVO*, ZInsO 2016, 831-840.
[15] See for the following text already Reinhard Bork, *The German Discussion on the Introduction of a Pre-insolvency Regime*, https://www.law.ox.ac.uk/business-law-blog/blog/2016/06/german-discussion-introduction-pre-insolvency-regime
[16] In detail Horst Eidenmüller, *Die Restrukturierungsempfehlung der EU-Kommission und das deutsche Restrukturierungsrecht*, KTS 2014, 401-422 at 420; Florian Jacoby, *Vorinsolvenzliches Sanierungsverfahren*, ZGR 2010, 359-384 at 378 et seq.; Stephan Madaus, *Vorinsolvenzliche Sanierungsverfahren - Perspektiven einer europäisch geprägten Rechtsentwicklung*, KSzW 2015, 183-190 at 188; Lars Westpfahl, *Vorinsolvenzliches Sanierungsverfahren*, ZGR 2010, 385-436 at 416.
[17] Cf. Reinhard Bork, *Vorinsolvenzliches Sanierungsverfahren – Schuldverschreibungsgesetz analog?*, ZIP 2011, 2035.
[18] For protection of solid restructuring attempts against transactions avoidance, see BGH, 12.05.2016 – IX ZR 65/14 = NZI 2016, 636 para. 12 et seq.