

# Contents

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

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

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

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

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