Restructuring under insolvency protection or the “The owner keeps the company”

Corporate crises call into question companies' very existence; a common problem, they have various causes, among them economic developments, changes in law, the volatility of commodity and currency markets, and internal factors such as management errors, wrong acquisitions or unbalanced financing structures. Crisis situations are exceptional situations, and even a well-positioned management rarely is sufficiently experienced and equipped to deal with them. Overcoming such crises presents a company’s management with significant challenges. Often, the problems are compounded by the aftermath of the world financial and economic crisis that decisively weakened capital and eroded liquidity. Poor balance sheet ratios have led many banks to lower credit ratings and rein in lending despite the availability of sufficient funds on financial markets. These days, even minor issues amplifying the crisis, such as increases in competition or seasonal declines in sales, can turn a performance crisis into a full-blown liquidity crisis.

During the last major economic crisis in 2009, the legislature contributed greatly to overcoming it through legislative measures, e.g., via extending the duration of short-time work or offering state guarantees. Nevertheless, it was clear early on that the financial and economic crisis, in particular, would have further consequences.

For that reason and to further strengthen the German economy the legislature proactively enacted a new insolvency law on 1 March 2012. The ESUG (Act to Further Facilitate the Restructuring of Companies) promotes the restructuring of companies in Germany and has the particular feature of allowing restructuring under insolvency protection. This option is unique and is in many respects even superior to the renowned US Chapter 11. However, despite a number of publications and the successful conclusion of numerous proceedings, the new law is largely unknown or known only in part in many sectors of the German economy. As a consequence, far too few companies have made use of it. Insolvency under the ESUG offers new strategic options for overcoming a crisis situation to an unprecedented extent to date. This includes the clear message that the company owner and management should continue to hold and direct the company - and do so in consultation with the creditors. Accordingly, the process under ESUG ends with a well-positioned company and does not spell the end of the company by liquidation or a so-called asset deal in which an investor buys the interesting assets, such as customer relationships, machinery and real property from the previous owner, while the insolvency administrator liquidates the rest.

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Former shareholders are in that case left with an empty shell, and the company they previously owned no longer exists. The self-administered insolvency plan leads to another outcome; its goal is maintaining the existing owner, i.e., maintaining the existing company, maintaining the shareholder status of the existing shareholders unchanged to the extent possible. That is, only the legal entity is to be restructured.

This is achieved by reducing the liabilities side of the balance sheet by removing old liabilities in whole or in part while eliminating the causes of the crisis through operational restructuring. Both balance sheet and operational restructuring are part of the so-called insolvency plan, on which the creditors must vote at the end of these preparatory proceedings. If they agree to the plan with the majorities required by law, the insolvency plan will often be confirmed by the court at a voting date and the proceedings will be definitively concluded within about two to four weeks. This means the entire insolvency proceedings can be concluded in as little as five to seven months.

Since the new law has taken effect, Buchalik Brömmekamp has been successful in permanently maintaining more than one hundred companies as going concerns by guiding them through a self-administered insolvency plan, in each case without the business owners losing their companies. In the proceedings we have implemented the business owners have largely retained their shareholder positions in full, and equity has been strengthened significantly. Equity ratios have been improved and moved from negative to the middle double-digit positive values, and sufficient liquidity has been generated in the process without the need for additional bank loans. On many occasions, we have even been able to significantly reduce the respective company’s debt and to significantly or even completely eliminate any owner or management liability.

Professional preparation and implementation are an essential precondition for the success of the proceedings because they contain numerous pitfalls. Properly assessed and executed, insolvency under ESUG offers an outstanding opportunity for the owner to maintain its company and free itself from debt and make a fresh start. The results obtained are often near unbelievable, as the references found on www.buchalik-broemmekamp.de clearly attest.

The following articles provide a brief but essential overview of the options offered by the new law. In the articles and in the references at the end, we show how companies have successfully come through a self-administered insolvency plan. Further information on the ESUG can be found in the references. Buchalik Brömmekamp will gladly supply you free of charge with the information referred to there.
Insolvency as a strategic option

Restructuring under insolvency protection by self-administration as part of insolvency proceedings is not new and has been an option in Germany since the insolvency law was reformed in 1999. However, the new law that took effect on 01 March 2012 under the name ESUG simplifies the available options for this type restructuring significantly.

By filing for insolvency, the debtor company places itself under the protection of insolvency law or into provisional self-administration. Thus, unlike the old law, the new law immediately places the company under (provisional) self-administration. An insolvency administrator is no longer necessary in these proceedings; that role is taken over initially by a provisional trustee. Unlike insolvency administrators under the previous law, provisional trustees have only control and monitoring functions. The insolvent debtor is thus its own insolvency administrator (debtor-in-possession) from the very beginning of the proceedings. That is, figuratively speaking, the debtor sits on the coach’s bench, while the trustee sits in the stands. Because the debtor lacks sufficient legal and business knowledge to implement the insolvency, it will need to be guided through the proceedings by an expert who is accountable for the success of the proceedings. The new law also gives creditors a much stronger influence on the course of the proceedings; however, their involvement is in turn significantly influenced by the debtor in self-administration. Both the management and the company are given the opportunity to structure the proceedings with the input of creditors in a way that is by and large legally watertight, and they can also influence the selection of the trustee, even in opposition to the competent court’s opinion as long as the provisional creditors’ committee agrees unanimously.

Building blocks of ESUG

Essentially the new law is based on three building blocks:
• considerably strengthening creditor influence,
• optimising the insolvency proceedings and structuring them in a more risk-free way and
• significantly strengthening self-administration.

Like traditional insolvency proceedings, restructuring under insolvency protection by self-administration begins with filing an insolvency application. The competent insolvency court will first examine whether there is the required reasonable expectation that the proceedings can be carried out successfully. A competent consultant can predict this with great certainty and expertly prepare the proceedings so that success is virtually assured, or if failure is foreseeable, he will not even initiate the proceedings. However, this requires that the consultant has sufficient time to prepare and has comprehensive knowledge of all causes of the specific crisis. Only if the company communicates fully with the consultant is the success of the insolvency proceedings largely ensured and only then can these proceedings be initiated at almost no risk at all.

Insolvency plan governs debt reduction

Upon the opening of the insolvency proceedings, an insolvency plan is drawn up. This plan sets forth the final settlement of the company’s liabilities and is submitted to the creditors for approval. Secured creditors are often satisfied in the amount of their collateral security by having them continue to make loans available to the company against the existing collateral. Unsecured creditors lose their interests completely (e.g., secondary creditors such as mezzanine capital lender) or receive only a pro rata share (other unsecured creditors) of their unsecured claims, which is normally paid to these creditors within about two years after the conclusion of the insolvency proceedings. These unsecured creditors waive the entire remainder of their claims as part of the insolvency plan submitted.

In the course of the proceeding’s new liabilities, e.g., tax liabilities or the insolvency benefit of the Federal Employment Agency will be incurred, and for these, too, these creditors will receive only a pro rata share. The pro rata shares are generally between 5 and 30 percent. In general, this is much more than an insolvency administrator can obtain in standard insolvency proceedings. However, even low pro rata shares for unsecured creditors do not necessarily lead to a rejection of the insolvency plan because what matters to creditors is usually not how high a pro rata share for their claims they can receive in the proceedings; rather, what matters to them is that the company continues to exist as a going concern. Thus, for the Federal Employment Agency a high pro rata share is not relevant; what matters to it is avoiding having to pay unemployment benefits and keeping as many jobs as possible. Likewise, the employees are more interested in keeping their jobs than in getting a high pro rata share. And what matters most to suppliers is keeping their
sales channels and not having to find new customers. The widespread view held by insolvency administrators that they must achieve the highest possible pro rata shares to ensure the best possible satisfaction of creditors conforms neither to the actual intention of the legislature nor to the wishes of most creditors. If insolvency proceedings are conducted as standard insolvency proceedings, the administrator will generally receive substantial compensation for preparing and implementing the plan, which, in turn, reduces the pro rata share. What matters is what the creditors want. Therefore, the creditors are thus asked to vote on the insolvency plan. Low pro rata shares for creditors ensure the company’s future liquidity because the more funds flow to the creditors, the less is available for the company to ensure its future liquidity.

The proceedings are intended to ensure the company as a going concern
The self-administered insolvency plan is intended to enable the company to continue as a going concern. The status of the shareholders remains unaffected. The company is neither liquidated nor sold to a third party, e.g., by means of an asset deal. A capital increase through a third party acquiring shares is possible but must be approved and supported by the existing shareholders. So-called debt equity swaps in which liabilities are converted into equity play hardly a role at all in practice, at least not for medium-sized companies. Creditors’ waivers strengthen equity by considerably reducing liabilities while assets (cash, receivables, inventories) are increased through the inflow of normal revenues at significantly lower costs due to the state insolvency benefits and unpaid old liabilities. The vote on the insolvency plan marks the end of the proceedings. If the creditors approve the plan with the necessary majorities – which is virtually always the case – the court will conclude the insolvency proceedings shortly thereafter (ca. two to four weeks), and insolvency is thus ended. Despite the proceedings being over, the company then still has up to two years, and in exceptional cases significantly more time than that, to implement the plan and earn the funds to pay the pro rata shares owed to unsecured creditors. Due to the effects of the proceedings new loans are usually not necessary.

Operational restructuring is essential
In addition to the restructuring of the balance sheet’s liabilities side, operational restructuring must also be tackled right away and often already at beginning of the proceedings. Only if the operational restructuring is successfully ensured for the long term can the company be effectively and sustainably restructured. Costs must be reduced, processes improved and new markets opened up; here, too, insolvency offers significant relief. Often social compensation plans cannot be financed outside of insolvency proceedings. With a self-administered insolvency plan the necessary funds are generated, and at the same time the social plan costs are reduced, independent of employees’ years of service, to a maximum of two and a half months’ salary. The maximum notice period for terminating employees is three months, regardless of how long an employee has been with the company. Insolvent debtors in self-administration can terminate continuing obligations, such as long-running tenancy or lease contracts, with a notice period of three months. However, termination on the part of the landlord or lessor is excluded as long as the insolvent debtor fulfils its obligations under the respective tenancy agreement. These options give the debtor-in-possession more ways to overcome the crisis at hand, something that would be unthinkable outside of the insolvency proceedings. Whether or not these options will be used will be decided by the previous management and not by an insolvency administrator.

New provisions on group insolvency
In March 2017, the German Bundestag enacted a new law to facilitate the handling of group insolvencies, which takes effect in April 2018. Under that law, all self-administration proceedings relating to a single group are to be consolidated and heard by a single insolvency court – which was not the case in the past. The consolidated self-administration proceedings are intended to safeguard the economic unity of the group and the added value it generates. They facilitate the overall restructuring of the group by preserving the added value generated and the existing jobs. The legislature here has expressed its desire to strengthen and facilitate restructuring through self-administration proceedings even for corporate groups. The aforementioned amendments finally establish the “second chance” concept in Germany, a concept that has been practiced in the USA for decades, and offers ways to make restructuring of corporate groups easier as well. However, these ways can only be utilised if restructuring experts prepare companies in advance for such an “orderly” insolvency by self-administration and guide them through the proceedings because many relevant decisions under insolvency law that have with significant effects on the restructuring process must already be made in this time period.
Protective shield proceedings or provisional self-administration

People still often associate the concept of protective shield proceedings with the new insolvency law. Moreover, the misconception is still widespread that initiating self-administration proceedings and successfully concluding them is possible only if the company is not yet insolvent but is only overindebted or threatens to become insolvent. We will explain briefly below how protective shield proceedings differ from normal provisional self-administration, why protective shield proceedings are actually less desirable than provisional self-administration, and why a company’s insolvency does not necessarily matter in this context.

Example of insolvency benefit payments

To illustrate this, we offer the following example: The insolvency application is filed on 01 February 2017. The Federal Employment Agency will cover the wage and salary payments for March, February and January 2017. If the January wages have already been paid when the company files for insolvency, then the opening of the proceedings will be moved to 01 May 2017 in order to allow the company to utilise the entire three-month insolvency benefit period. The opening of the insolvency proceedings is followed directly by the insolvency thus initiated. In the period following the opening of insolvency proceedings the company is again solely responsible for paying wages and salaries. As a rule, self-administered insolvency involves an insolvency plan. If the creditors approve the plan with the necessary majorities, the insolvency court will usually confirm the plan at the voting date and conclude the proceedings about two to four weeks after that. So-called protective shield proceedings (§ 270b Insolvency Code) and provisional self-administration (§ 270a Insolvency Code) take place exclusively in the period between the filing of the insolvency application and the opening of the insolvency proceedings, that is, only during the insolvency opening proceedings. In both types of proceedings only a provisional trus-
tee is appointed. This trustee has only control rights, but does not have the rights of an insolvency administrator (except for the right to appeal/challenge transactions). The other rights of an insolvency administrator are taken on by the self-administering debtor, and the latter is thus placed in a dual role as both debtor-in-possession and insolvency administrator at the same time.

Advantages and disadvantages of the proceedings

When insolvency is opened, both the protective shield proceedings and provisional self-administration come to an end. Both types of proceedings lead to self-administration, and this self-administration is the same regardless of which type of proceedings preceded it. The main difference between the two types of proceedings is that protective shield proceedings can be used only if the company is not insolvent. However, provisional self-administration is possible even in the case of insolvency. Protective shield proceedings give debtors some additional rights that are not granted in provisional self-administration. Among these is the debtor’s right to freely select its trustee and that the court must always allow debts incumbent on the insolvency assets. Of course, we do not recommend selecting a trustee without consulting the court and the main creditors and obtaining their agreement to the choice. Otherwise the court would have numerous opportunities to derail the proceedings. Likewise, the debtor’s right to enter into debts incumbent on the insolvency assets is usually just as insignificant because even in provisional self-administration this debtor’s right is usually granted by the court on request. The advantage of entering into debts incumbent on the insolvency assets is that suppliers may possibly be more willing to agree to payment terms because their new claims are debts incumbent on the insolvency assets and would therefore have to be paid before all other claims. There are no other major differences between protective shield proceedings and provisional self-administration. In lay discussions the term “protective shield proceedings” is often mentioned because it sounds much better than provisional self-administration. However, the disadvantages of protective shield proceedings can be quite serious. In particular, the court must be notified if the company becomes insolvent in the course of the proceedings. Although this has no direct consequences, the information will be communicated to the creditors, and negative reactions on their part cannot be ruled out. Moreover, whether the debtor is permitted to make payments then or whether such payments would collide with § 64 (1) of the German Limited Liability Company Act (GmbHG) is an open question. Under the latter law, the managing director is liable for any payments he makes after the company becomes insolvent. Whether this also applies during protective shield proceedings or whether insolvency law supersedes company law is an open question. Protective shield proceedings may be initiated only when insolvency is imminent, and therefore a neutral third party must first confirm and certify that insolvency is only imminent but not yet present. This certification process requires additional expenditure of time and money. Moreover, there are still several unresolved legal issues regarding protective shield proceedings. The problem posed by § 64 (1) GmbHG has already been pointed out. However, in protective shield proceedings, an insolvency plan must be submitted within no more than three months. If this does not happen, the fate of the proceedings is completely open, and it is even possible that a standard insolvency will be ordered in the opened proceedings. With provisional self-administration, there is no obligation to submit an insolvency plan within a specified period. In protective shield proceedings, the provisional creditors’ committee can end the protective shield proceedings by a simple majority vote (§ 270b (4) of the German Insolvency Code (InsO)). The committee has no such right in provisional self-administration. Thus, the real advantage of protective shield proceedings lies in their name and not in any actual advantages, particularly because in provisional self-administration it is also possible for companies to impose the trustee of their choice as long as they have the provisional creditors’ committee unanimous agreement.

Both proceedings are insolvency proceedings

Both the protective shield proceedings and provisional self-administration are insolvency proceedings. In both cases, filing an application to open insolvency proceedings is mandatory. Thus, in the context of protective shield proceedings it would be detrimental to convey that the proceedings do not concern the opening of insolvency, but are rather independent restructuring proceedings. As in any standard opening of insolvency proceedings, the trustee will ask the creditors to submit their claims no later than at the opening of the insolvency proceedings and before the start of the actual self-administration proceedings. If creditors had been told prior to this that the proceedings are allegedly not insolvency proceedings, they might be very annoyed and confused because the information the trustee will communicate to the creditors is precisely that the company is now opening insolvency proceedings. Like provisional self-administration, protective shield proceedings end upon the opening of the insolvency proceedings and both lead directly to standard self-administration. From this point on, there is de facto no difference anymore between the two types of proceedings. In any case, the legislature’s original aim of creating independent restructuring proceedings in the form of the protective shield proceedings has not been achieved. Practice dictates that protective shield proceedings should be used only in very exceptional cases. In any case, it may be noted here that if the respective company is already insolvent, the only path to insolvency protection is provisional self-administration. Moreover, provisional self-administration has no serious drawbacks when compared to protective shield proceedings —on the contrary, it offers significant advantages. This view has by now become established in practice, and only about five percent of all self-administration proceedings are protective shield proceedings.
Effects of the self-administration proceedings on the company’s liquidity and balance sheet

Some features of German insolvency law are unique and not found in any other insolvency code. Self-administration enhances these unique features.

The Federal Employment Agency takes over wages and salaries retroactively for the three months prior to the opening of the proceedings in both self-administration proceedings and standard insolvency proceedings. For a company with fifty employees and a gross monthly payroll of approx. 150 TEUR, including social security contributions, this can mean a liquidity advantage totalling 450 TEUR. Of course, for larger companies that advantage is correspondingly higher.

Moreover, in the period between the filing of the application for insolvency proceedings and the opening of the proceedings the company is not burdened with sales tax on its earnings. However, this applies only to self-administration and not to standard insolvency proceedings. All unsecured liabilities at the time the application is filed are considered simple insolvency claims.

Only a part or pro rata share will be paid on these claims in the future. This pro rata share rarely exceeds twenty percent, which means that this generates a significant liquidity advantage. However, this advantage only has an impact some time later when the claims ultimately come due. Moreover, during the proceedings, the company does not pay interest or make repayments to banks, and pays only those claims for goods and/or services that are incurred after the application to open insolvency proceedings was filed.

As a result of not making these payments and accumulating continued normal deposits from sales, the company builds up significant liquidity, and we mention here only its most important sources. Savvy consultants know still many more ways to generate liquidity during the proceedings. While consulting fees and court costs reduce liquidity, these costs, if planned and structured reasonably by the consultant, usually amount to only one-third of the total liquidity advantage. Thus, the enterprise retains significant liquidity, and additional bank loans for crisis management are normally unnecessary.

Building up liquidity

Something very similar takes place on the financial side. Because old liabilities are not paid, that is, only a fraction of the unsecured claims are being paid and secondary liabilities are completely eliminated (for example, mezzanine claims, which are not considered at all in insolvency proceedings), a very substantial restructuring gain is generated and significantly strengthens the company’s equity position.

This is because in a self-administered insolvency plan the original legal entity, namely the company, is preserved. That is, the company is not broken up and its assets are not sold to a third party via an asset deal.

The result is that the asset side of the balance sheet during the proceedings remains mostly unchanged, while the liability side is strengthened by the fact that the creditors’ significant waivers greatly reduce total liabilities and thus lead directly to an increase in equity. It is not uncommon for these proceedings to bring about improvements in the equity ratio of seventy percent or more.

The resulting restructuring-related profit is tax-free with respect to both trade and income tax. However, this must be clarified in advance by obtaining binding information from the competent municipality regarding trade tax and from the competent local tax authority regarding corporate tax if the company is a stock corporation or regarding income tax if the company is a partnership.

The relevant legal provision must still be approved by the EU Commission. However, approval is expected shortly. Still, considerable errors can be made with respect to binding information issued. Without professional advisory support, there is a great risk that taxes will be collected nevertheless and that the restructuring will then fail because of the tax burden.
Impact on equity

Using an example, the following chart summarises the impact of balance sheet restructuring. The figures are the result of negotiations with creditors and therefore depend on the facts of the individual case:

An insolvency plan preserves the original legal entity. Only the liabilities side of the balance sheet will be newly regulated

Fig. 1: Impact of the insolvency plan on the balance sheet’s liabilities side

<table>
<thead>
<tr>
<th>Balance Sheet</th>
<th>Equity and liabilities</th>
<th>Before restructuring plan</th>
<th>After restructuring plan</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>in TEUR</td>
<td>%</td>
<td>TEUR</td>
</tr>
<tr>
<td>A. Equity capital</td>
<td>4,135 18.7</td>
<td>12,290 70.4</td>
<td></td>
</tr>
<tr>
<td>I. Subscribed capital</td>
<td>9,000 40.7</td>
<td>9,000 51.5</td>
<td></td>
</tr>
<tr>
<td>II. Balance sheet result (accumulated)</td>
<td>-4,865 -22.0</td>
<td>3,290 18.8</td>
<td></td>
</tr>
<tr>
<td>B. Mezzanine</td>
<td>530 2.8</td>
<td>0 0</td>
<td></td>
</tr>
<tr>
<td>C. Provisions</td>
<td>1,967 8.9</td>
<td>249 1.4</td>
<td></td>
</tr>
<tr>
<td>I. Pension Provisions</td>
<td>1,643 7.4</td>
<td>164 0.9</td>
<td></td>
</tr>
<tr>
<td>II. sonstige Rückstellungen</td>
<td>324 1.5</td>
<td>85 0.5</td>
<td></td>
</tr>
<tr>
<td>D. Liabilities</td>
<td>15,497 70.0</td>
<td>4,923 28.2</td>
<td></td>
</tr>
<tr>
<td>I. Liabilities against bank</td>
<td>3,166 14.3</td>
<td>3,100 17.8</td>
<td></td>
</tr>
<tr>
<td>thereof secured bank liabilities</td>
<td>3,166</td>
<td></td>
<td></td>
</tr>
<tr>
<td>II. Trade liabilities</td>
<td>4,714 25.1</td>
<td>1,429 8.2</td>
<td></td>
</tr>
<tr>
<td>thereof secured suppliers</td>
<td>1,064 5.7</td>
<td>1,064 6.1</td>
<td></td>
</tr>
<tr>
<td>thereof unsecured suppliers</td>
<td>3,650 19.4</td>
<td>365 2.1</td>
<td></td>
</tr>
<tr>
<td>III. Receivables against bond creditors</td>
<td>7,331 33.1</td>
<td>366 2.1</td>
<td></td>
</tr>
<tr>
<td>thereof unsecured bond creditors</td>
<td>7,331</td>
<td>366</td>
<td></td>
</tr>
<tr>
<td>IV. Other liabilities</td>
<td>286 1.3</td>
<td>28 0.2</td>
<td></td>
</tr>
<tr>
<td>Total Equity and liabilities</td>
<td>22,129 100.0</td>
<td>17,462 100.0</td>
<td></td>
</tr>
</tbody>
</table>

- Equity amounted to EUR 4,135 million before the balance sheet restructuring and through financial measures grows to EUR 12,290 million. The equity ratio increases from 18.7 to 70.4 percent.
- Mezzanine capital is deemed subordinate capital. The mezzanine creditor is completely eliminated.
- In the example, only ten percent of the pension provisions remain, and these are assumed by the company as existing remaining provisions. The remaining 90 percent are assumed by Pensionssicherungsverein (PSV, mutual pension assurance association), which in exchange receives a pro rata share in cash of 10 percent of the waived provisions. This means the insured employees suffer no disadvantages, as the PSV will pay the secured pensions in the future.
- In the example, only 85 TEUR remain of the other provisions, and the rest is waived.
- Bank liabilities are secured by fixed assets and current assets and thus remain unchanged with respect to collateral. However, this must be agreed upon with the banks. Because no payments are made, liquidity is preserved.
- The suppliers with interests secured by a right of retention of title are fully satisfied.
- The unsecured suppliers are serviced with 365 TEUR and must waive 90 percent of their claims.
- The unsecured bond creditors are serviced with 366 TEUR and must waive 95 percent of their claims.
- The Federal Employment Agency has accrued a claim of 286 TEUR during the proceedings and receives only ten percent of that (28 TEUR). It waives its claim to the rest.

The unsecured creditors are willing to accept waiving such significant amounts of their claims after they have been shown that they would receive significantly less if the company were liquidated. The proceedings end with the company’s liquidity situation and balance sheet significantly strengthened and the company ready to start into the future with new momentum.
The importance of early involvement of customers and suppliers in self-administered insolvency plans

Insolvency is still a stigma and only rarely seen as an opportunity. Yet, many business owners could profit from it. The Act to Further Facilitate the Restructuring of Companies (ESUG) of 1 March 2012 is the German legislator’s attempt to motivate companies to consider filing for insolvency early on. The legislator, through planned insolvency by self-administration, provides a company with options to retain the company and to prevent liquidation or disposal of assets by way of an asset deal. Although the process can be structured to be almost legally watertight, virtually always the same concerns are expressed in initial meetings with business owners. Concerns of loss of reputation often keep companies from taking the legally required first steps. Most affected parties not only lack the requisite knowledge of the potential offered by a self-administered insolvency plan but also lack the understanding of the risks involved in insolvency.

A business owner who is informed about the possibilities offered by a self-administered insolvency plan in an initial meeting usually expresses the following concerns:

1. Suppliers will jump ship as they will lose money in the process. If we do not receive resources, we cannot function properly.

2. Customers will no longer be loyal to our company, as their confidence in the company will wane due to the insolvency. Without customers, the company will generate no sales.

However, both concerns are completely unfounded and do not materialise, as we can show by a variety of examples.

Suppliers almost always have an interest in continuing to supply a company, as otherwise they would be left to look for new sales channels. This entails a large expense and is often associated with a considerable loss in yield. Of course, suppliers do lose money in on-going insolvency proceedings. This is of course unpleasant and does not immediately build trust. If, however, the supplier can be convinced by evidence that the company, reorganised under the plan, will have sufficient liquidity to pay supplier invoices in the future, and moreover has an equity ratio that is no longer negative but is clearly moving in a positive direction, the supplier can be easily convinced that the company will be a safe and solvent customer in the future. Usually, for the first few weeks under the insolvency plan, the company will have to pay for the supplier’s good and services in advance. However, as the proceedings progress and the suppliers’ confidence in the customer’s solvency increases, the supplier will gradually alter the payment terms, considering that advance payment is an extremely laborious process. In any event the supplier has no interest in creating new sales channels, because here he is in competition with third parties and must often accept worse payment terms as initially competition only exists with respect to price. Moreover, sometimes even prelisting fees must be paid, which is common practice in retail. In any case, suppliers will always prefer keeping old customers to looking for new ones. If the supplier chooses to do otherwise, however, the loss of its customers may have even more harmful effects than a mere one-off, non-recurring loss. It is even conceivable that this would plunge the very supplier into a crisis that could only be resolved through restructuring measures on its turf. A plan-reorganised company with strengthened liquidity and reduced debt is therefore significantly more attractive to the supplier than an uncertain new customer.

If the supplier cannot be convinced – which is rather the exception –, the company can still switch to other suppliers. After all, why would a new supplier refuse to deliver if advance payment is offered? This of course is a point which applies equally to the affected supplier/creditor, who can monitor whether his client actually develops the way it was predicted.

Customer behaviour can be analysed similarly. Likewise, the customer will not assess the insolvency negatively but rather see it as a sign of proactive entrepreneurial performance if he is explained the method by which the crisis will be overcome by the company’s management. Our experience shows that the insolvency self-administrator does not receive negative reactions from customers but rather is greeted with positive encouragement. In general, the proceedings are still unknown to the customer, and for that reason it is also recommended, just as with respect...
to the suppliers, to explain the proceedings with the help of the competent advisor using a projected balance sheet and projected profit and loss statements. This will clarify to the client the professionalism with which the debtor is meeting the challenge.

The customer’s confidence regarding the company’s future will be significantly strengthened thereby. Sometimes it makes sense to let the customers in on what is being planned, even before the actual petition will be filed. This is particularly the case if the customer is to some degree dependent on the potential debtor. This may be the case e.g. with ongoing projects or when the customer receives important components from its supplier, which cannot be obtained elsewhere in the short term. This dependence is regularly found in the automotive industry. The auto maker always returns to specially tested parts. This is perfectly necessary as shown convincingly by constantly occurring recalls the costs of which often run into billions for auto maker.

Given this background of the impending insolvency, the customer is often prepared to take liquidity support measures. This most likely occurs through easing the payment terms, which can also give substantial additional liquidity to the company in advance of filing the petition. Moreover, it is not infrequent that the esteemed customer itself is one of the causes of the insolvency risk because the profit margins imposed by the customer’s conditions are not sufficient to cover costs. If the insolvency debtor can make this transparent, the customer may even be willing to accept some of the loss.

This requires, however, that the customer has to get involved closely and early in the whole proceeding, including possibly an involvement as a member of the creditors’ committee during the entire proceedings. The decisive criteria for the customer are the advisor’s competence and the evidence he brings regarding the successful outcome, and possibly also his industry-specific knowledge.

Moreover, it is advisable to determine, when one is preparing for the proceedings, which customers and suppliers will be informed, and how and when. Sometimes a simple letter, in which the proceedings are explained, is enough but sometimes a personal visit is necessary. This requires a kind of information strategy that should be developed before the proceedings commence. The major customers and suppliers should not learn about the proceedings from the media but rather receive privileged information in advance as a trust-building measure.

In summary, it can be said that as a rule the concerns that were expressed initially vanish “into thin air” and the flow of information between customers and suppliers can become an opportunity to create an even stronger bond and increase trust in the proceedings. Many company owners who have successfully executed such proceedings can attest to this.
Promptly file the insolvency application or risk liability for the delay

Insolvency always requires an insolvency application. The same applies to a self-administered insolvency plan in. Generally, it is not up to the debtor to decide if and when to file such an application. German insolvency law recognises three reasons for filing an insolvency application: insolvency, overindebtedness and imminent insolvency.

If compelling reasons exist to file for insolvency, the debtor must file an application. Only in cases of so-called imminent insolvency is it left to the debtor’s discretion to file the application. However, the debtor must file the application for insolvency at the latest when the company becomes actually insolvent. When applying insolvency law in German insolvency practice, the only reason for insolvency that really plays a role is imminent insolvency. At any rate, the other reason for insolvency, which is overindebtedness, is of no significance when the company can show a positive prognosis for continuation as a going concern. The company can have this positive prognosis certified by a third party, such as a consultant. Given such a positive prognosis for continuation, a company’s overindebtedness, which is defined as liabilities outweighing assets even after the release of dormant reserves, is no longer relevant in practice because in response to the banking crisis and the overindebtedness of many financial institutions the legislature enacted the Financial Market Stabilisation Act. Due to the great value impairments caused by the so-called “toxic securities” on their books, many banks would have been overindebted and thus obliged to file an insolvency application. In order to prevent this and the resulting economic collapse, the definition of overindebtedness was weakened drastically. Accordingly, a company’s overindebtedness obligates it to file an insolvency application only if the company cannot be continued sustainably or if it is highly unlikely that the company can continue as a going concern.

The important reason for filing an insolvency application is the debtor’s inability to meet its payment obligations as they come due. According to the Federal Court of Justice’s 2005 landmark decision on the matter, this is the case if within a period of three weeks the debtor cannot meet at least ten percent of its total liabilities due unless, in exceptional cases, it can be expected with a probability bordering on certainty that the liquidity gap will be completely or almost completely eliminated in the near future and it is reasonable to expect the creditors to wait based on the particular circumstances of the individual case. It is very difficult for laypersons to determine if and when this is the case, and that is why they should call on expert help. If the debtor fails to file an insolvency application despite its inability to pay the corporate bodies of the debtor become liable to prosecution. This can also have grave implications on future career opportunities of the responsible agents and can lead to personal civil liability risks for the company organs that are obliged to file the insolvency application.

Reason for insolvency: Inability to pay

The situation is different when the reason for insolvency is the company’s inability to pay. Here, the governing bodies of a legal entity or a GmbH & Co. KG always have a duty to file an insolvency application without undue delay no later than three weeks after the company has become insolvent, and failure to comply is punishable. The three-week period is intended to give the corporate bodies the opportunity to implement restructuring measures to sustainably remove the reason for insolvency. However, if it is obvious that this cannot realistically be expected, then the application must be filed promptly, that is, well before the three-week period expires. The reasons for insolvency are normally determined for the company in crisis on the basis of its so-called insolvency status, the results of which must be verifiable and stand up to being challenged – if only for reasons of liability.

Filing the insolvency application early provides more room to manoeuvre

The insolvency reason of imminent insolvency is present when it is expected that the debtor will not be able to meet its existing payment obligations. The earlier an insolvency application is filed, the greater is the company’s room to manoeuvre. If at the time the application is filed there is still sufficient liquidity, the usually necessary advance payments that become due with the filing of the application can be made.
The advantages of insolvency proceedings, e.g., the non-payment of wages and liabilities or portions of sales tax, take effect only after some time. In contrast, suppliers will almost always immediately demand advance payment for new orders. Filing the insolvency application early therefore guarantees an effective and successful restructuring of the company through insolvency. For this reason, companies in crisis should make much greater use of imminent insolvency as a reason for filing for insolvency, for example, by demonstrating in a liquidity plan that in a few days, weeks or months they will be obligated to file an insolvency application. This is sufficient to begin insolvency proceedings. However, self-administration that does not lead to protective shield proceedings is also possible when actual insolvency has occurred, that is, without the reason of imminent insolvency. Nevertheless, it makes sense not to wait until the company is de facto insolvent because in that case, its possible courses of action are significantly limited.

### Reward for early application

The ESUG created incentives for the early filing of an insolvency application. The sooner the application is made and the more cash the company has available, the greater are the chances of successful restructuring under insolvency protection. It may seem surprising, but by naming imminent insolvency as a reason for filing an insolvency application the legislature wanted to reward companies that decide to apply for insolvency early on. The legislature clearly intended for the new law to make insolvency a strategic option.

### Regarding collaboration

“Liquidity problems forced us to deal with the issue of insolvency. On the recommendation of our tax advisor we decided to hire the management consulting and corporate law firm of Buchalik Brömmekamp. At the outset there was the anxious question of how our employees and customers would react to our entering insolvency proceedings in self-administration. A very encouraging consultation with Buchalik Brömmekamp removed these fears and assuaged our concerns. After the consultation I became fully convinced as a businessman that this was the only viable decision for Brinker Fetten, simply because it was the best option for the company. After only one – very eventful - week, in which we examined everything that could influence our decision and the outcome of the proceedings, we decided in favour of self-administration.

The management consultants of Buchalik Brömmekamp did an excellent job of analysing our problems and presenting them to us. We then updated our fleet of vehicles and improved our software. And during the proceedings we made the decision that Brinker Fetten must expand.

Thereafter we conducted an intensive site analysis and found the ideal location for new construction in Duisburg even while the proceedings were still underway. We will have 22,000 m² instead of the current 3,500 m² of space available there in 2018.

Today our business is definitely securely positioned for the future; we have planning security and can look forward to a high volume of orders.

I am glad to have received this legal and business management assistance. I would advise anyone in a crisis situation to enter insolvency proceedings in self-administration only with the support of a proven, competent consulting firm with experience in the matter.

It was also very helpful that one of the employees of Buchalik Brömmekamp assisted us during the proceedings as co-director (CRO). During this hectic period when there was so much additional work to do and many decisions to be made, apart from everyday business, being able to obtain quick and reliable answers from a qualified specialist was indispensable.

First-class advice, as we received, is an irreplaceable building block of success. I am very satisfied all around with the assistance received from Buchalik Brömmekamp. The entire process was highly professional from beginning to end. In retrospect, the path of self-administration proceedings was my best business decision in the last ten years.”

Ludwig Fetten, Managing Director of Brinker Fetten Logistik GmbH & Co. KG
The provisional creditors’ committee: Strengthening creditor participation

The course for a company in insolvency is placed on the correct or incorrect path already within the first 10 to 14 days. Due to this, the new law has given the debtor and creditors the opportunity to influence key strategic decisions from the first day of the proceeding.

Prerequisites for such “controlling participation” are that the company is under professional advisory in at least the last phase of the crisis, is encouraging a dialogue with its key creditors, and is convinced that it will take a mutual path towards restructuring the company under the protection of insolvency law. In contrast, and rightly so, companies that surprise their creditors with an insolvency petition should not have these options of controlling the proceeding available to them. These new possibilities are a meant to be a “reward” from the legislature that simultaneously provided incentives for businesses to move into the protection of insolvency law in a timely manner. The key control instrument at this early stage is a representative, provisional creditors’ committee. In passing the law, the legislature also intended to ensure that from day one the insolvency court can integrate the knowledge of the creditors regarding the debtor company in its decision.

Committee Members

Each insolvency proceeding is influenced by different group interests. The process should prevent – as the legislature intended – the law of the stronger, i.e., the secured creditors, from prevailing over the legitimate interests of general insolvency creditors in the insolvency proceedings, because all group interests must be expressed through the representative nature of the members of the provisional creditors’ committee. The legitimacy of the creditors’ early-controlling influence follows directly from the representativeness of the committee members. For this reason, a provisional creditors’ committee that is proposed in the initiation proceeding should consist of at least five members. The members should not overlap and must clearly reflect the groups of the banking industry, the secured creditors, the institutional creditors, the unsecured creditors and representatives of workers’ interests. If simultaneous to a petition from the debtor, the creditors propose a provisional creditors’ committee, in which the five classes of creditors are clearly and discretely represented, the court must be appoint this group as the provisional creditors’ committee. At the same time this ensures that from day one of the proceeding the creditors may influence the on-going structuring, appointment of the preliminary insolvency administrator, performance of reorganization options and how to open the proceedings in the fastest manner possible without any issue emerging that could potentially delay the proceeding.

The rights of the provisional creditors’ committee, in particular in a self-administration proceeding are very wide reaching. The following are particularly noteworthy:

- Participation in all important decisions in the initiation proceeding, e.g., naming of the insolvency monitor, continuation of self-administration or termination of a protective shield proceeding.
- The insolvency court is bound by the unanimous proposal from the provisional creditors’ committee, in which the provisional insolvency monitor administrator (§ 56a, Para. 2 Insolvency Code (IC)) is named or the professional or personal requirements (§ 56a, Para. 1 IC). By means of a unanimous decision, the provisional committee of creditors may deselect a provisional insolvency monitor that has been previously appointed by the insolvency court.
- Support or rejection of self-administration (§ 270, Para. 3 IC); the insolvency court is bound by an unanimous decision of the provisional creditors’ committee to order self-administration in a proceeding that has already been opened. This is true even if it is obvious that self-administration would be detrimental to the creditors.
- Consent to all transactions of a particular importance as set out in § 160 IC.

The “Can Should Must Committee”

Once one understands the new possibilities for creditor participation by virtue of the provisional creditors’ committee and recognizes the central importance of setting the proper judicial course, then three different legal options must be distinguished.
It is important to note that the creditors, and not the court, have the right to propose suitable persons for the committee. If the creditors do not make use of this right, the court may appoint these members.

Any insolvency petition must include all the appendices required in § 13 IC. If any of these appendices is lacking or incomplete, the petition is deemed inadmissible. The necessary appendices are very complex, thus making professional preparation in the few weeks directly before filing essential.

The “Can or Discretionary Committee”

Although it was previously disputed as to whether the law even permits a provisional creditors’ committee to be appointed in as early as the initiation proceeding, this is now a permitted provisional measure under § 21, Para. 2, Sent. 1 no. 1a IC and may be ordered by the court ex officio at any point in the proceeding. A special feature hereto is that non-creditors or third-party experts may not be represented in a provisional creditors’ committee as they lack the necessary relationship to operations, however parties that become creditors upon the very opening of the proceeding may be members of the committee. This includes not only the Pension Indemnity Fund (PSV) and the Federal Employment Agency, but also all creditors holding undisputed or legally enforceable claims. The representation of workers’ interests should also be permitted via a union active in the company.

The “Should or Petition Committee”

Even if a company does not reach the threshold values for a “must committee” (sales of approx. EUR 10 million, total assets of approx. EUR 5 million, 50 employees), the court should establish a provisional creditors’ committee pursuant to § 22a Para 2 IC, if this is requested by the debtor, any creditor or a preliminary administrator that has already been named. This means that in effect a provisional creditors’ committee can be utilized in every corporate insolvency to thereby bring in creditor participation. This petition must be granted, if the court receives a proposal stating the composition of the provisional creditors’ committee, the consent declaration of each proposed representative is attached to the petition, and no reasons for excluding them exist (§ 22a, Para. 3 IC). If such a committee petition is filed directly with the insolvency petition, the court may not hesitate in appointing the committee. However, here as well, the principle requiring discrete representation of each group must be respected, meaning that the interests must be balanced within the committee of five members.

The “Must or Compulsory Committee”

If the company meets the thresholds in § 22a, Para. 1 IC (sales of approx. EUR 10 million, total assets of approx. EUR 5 million, 50 employees) and it has not yet suspended operations by the filing date, the court is required by law to appoint the provisional creditors’ committee, if a properly composed committee is proposed with the complete insolvency petition and the consent declarations of the nominees are attached. Because such an appointment by the judiciary may take considerable time, a petition containing a proposal of suitable persons should always be filed with the insolvency petition.

If the court initially refrains from establishing a provisional creditors’ committee and immediately appoints a provisional administrator without a hearing, it must convene the hearing of the committee promptly, so that as applicable the latter may make use of its substitution right to substitute and unanimously elect another administrator at the committee’s first meeting (§ 56a, Para. 3 IC).

Conclusion:

The provisional creditors’ committee gives creditors and debtors a means to influence all key issues relating to a reorganization under insolvency protection. However, without professional preparation, these rights will bring about nothing. If the insolvency debtor has the (provisional) creditors’ committee on its side, it can likewise influence all measures that direct the insolvency. The provisional creditors’ committee and its support offer a further instrument to ensure legally certain structuring of plan insolvency in self-administration.
There are many reasons why a small business or the office of a freelance professional might run into financial difficulties. An example of this is when business expansions turn out to be a poor investment due to unforeseen local developments, tying the company down with long-term rent payments, software licences, salary payments, causing continuous negative developments in the cash flow, month after month. In such a situation, any business-owner would want to be able to return to calmer waters, going back to the way things were before the ill-fated expansion.

When normal insolvency proceedings are not possible due to professional regulations

In spite of this, it is difficult to achieve a turnaround, because extrajudicial restructuring, liquidation or normal insolvency proceedings normally fail, because of a lack of consent from the relevant creditors, as well as a lack of options under commercial or procedural law.

In strictly legal terms, small business owners may still be able to contemplate having their company continue to operate as a going concern under an insolvency administrator, assuming the rights of administration and disposal in accordance with the normal insolvency procedure. However, when freelance professionals become insolvent, this solution is often not possible under the applicable professional regulations. This is a crucial factor for the following professional groups:

- Lawyers: Section 14(2) of the Bundesrechtsanwaltsordnung, [German Federal Lawyers’ Code], or BRAO, (revocation of admission to practice law).
- Tax consultants: Section 46(2)(4) of the Steuerberatungsgesetz [German Tax Consultancy Act], or StBerG, (revocation of appointment)
- Auditors: Section 20(2)(5) of the Wirtschaftsprüferordnung [German Auditors’ Code], or WPO, (revocation of appointment)
- Notaries: Section 50(1)(6) of the Bundesnotarordnung [German Federal Notarial Code], or BNotO, (removal of a notary from office)
- Pharmacists: Section 7(1) of the Apothekengesetz [German Pharmacy Act], or ApoG, (personal management of a pharmacy for which the person is responsible)

That is to say, an insolvency administrator would not be able to assume the position of a pharmacist, lawyer, tax consultant or architect, as he/she would lack the relevant qualifications. In addition, the freelance professional will regularly face the threat of having his/her admission to practice revoked by the responsible professional association due to the impairment of assets as indicated by the insolvency.

Nevertheless, liquidation of the practice or the small business is often contrary to the interests of business partners (such as customers and suppliers) in the continuation of the business model as a going concern. Their requirements will often be met as a result of the income gained from the going concern under insolvency proceedings. However, it must be ensured that the prospect of the requirements of the creditors being met will be better than if the debtor’s assets were liquidated.

Self-administration has significant potential of success in restructuring

Self-administration gives the freelance professional the chance to personally continue the company as a going concern. Instead of an insolvency administrator, the insolvency court will appoint a trustee, who will be tasked with (merely)
monitoring the management of the company by the creditor. In addition, information regarding the self-administration proceedings need not necessarily be made public, given that, unlike in normal insolvency proceedings, the duty of disclosure under Section 23 of the Insolvenzordnung does not apply. Only those parties directly affected by the insolvency (banks, customers, suppliers) need be informed of the proceedings by the company management, in order to generate trust.

Ordering self-administration then allows for liquidity to be built by bringing about a range of individual effects. For example, the Bundesagentur für Arbeit [German Federal Employment Agency] will pay the salaries of all employees for up to three months prior to when the insolvency proceedings were opened. The suspension of debt servicing and the waiver of income tax up until the opening of the proceedings also helps build up liquidity. The debtor’s conducting self-administration can also allow the cancellation of long-term and unprofitable contracts, thereby fully repositioning himself/herself.

An insolvency plan offers the best restructuring options

If a positive forecast can be issued for the freelance professional/company, taking into account the measures outlined, additional restructuring measures can be implemented, e.g. the termination of rental or leasing contracts, the adjustment of interest in debt servicing to the restructuring interest rate, etc.

The sole prerequisite for an insolvency plan such as this is that the creditors are not put in a worse position than they would be without the plan. Liquidation would mean the complete loss of claims for most creditors, particularly in the case of freelance professionals and small business owners, as in the case of a liquidation, know-how and intangible assets do not constitute an important asset.

In addition, liquidation creates the risk that the creditor will become unemployed. That is to say that the uncertainty whether, immediately after his/her life’s work has been brought to an end, the debtor is willing and able to find dependent employment and make a living from non-garnished income can create risks for creditors.

The insolvency plan may satisfy the claims of creditors out of the going concern. This means that although an insolvency plan may improve the situation, it does not represent a “business miracle”. In fact, it must be assumed that all of the groups of creditors formed prior to the creation of the plan will agree to the insolvency plan for the purpose of avoiding further harm to themselves and to be able to do business with the business owner in the future. If an insolvency plan has been submitted by the time at which the proceedings are opened, the court will already be in a position to combine the first meeting of creditors with the discussion and ballot meeting, making it possible to achieve a quick confirmation. In such cases, order is restored to the financial situation of the debtor and the revocation of admission/appointment comes to nothing – as the risk of admission/appointment being revoked, as detailed above, would be averted.

Professional support

The individual points set out above already make it clear that it would be difficult for a debtor to implement self-administration proceedings himself/herself, i.e. without professional support, because of their legal complexity and the, often essential, professional communication model. Seeking support from a consultant with experience in restructuring is highly recommended. A consultant will be able to contact all the parties concerned (creditors, the court, employees etc.), inform them in detail about the planned proceedings and persuade them of the prospects of success even before the application is made. Calling a (provisional) creditors committee may be advisable. If the application is supported by the provisional creditors committee, the insolvency court will be required to order self-administration (Section 270 of the Insolvenzordnung). In addition, the (provisional) creditors committee can have a significant impact on the proceedings in another way, by unanimously proposing a (provisional) trustee, which, if suitable, the court will be required to appoint (Section 56a of the Insolvenzordnung).

Conclusion

Up until the 2012 reform of German insolvency law, self-administration was not a very attractive option for crisis management in small companies and for freelance professionals. This was due to the absence of certain mechanisms which were only introduced when the law was amended. However, under certain conditions, the new regulations set out in the Insolvenzordnung (ESUG) now allow for the debtor’s rights of administration and disposal to continue without any restrictions. This makes it possible to take advantage of the benefits of insolvency-specific restructuring in a very short time, without the business owner’s having to give up management powers or even lose their admission/appointment.
The company was established back in 1966 in Bad Zwischenahn by the father of the current owner and managing director Stefan Pfeiffer as a taxi business. Siegfried Pfeiffer started out at that time with a single taxi. But before long the business extended to public transport using buses, school buses, and for handicapped passengers (on bus routes). After giving up the taxi business in the 1970s, the public transport business was extended gradually by renting out buses together with their drivers to clubs, societies and school classes and also by bus excursions (private hire bus and tourism).

In 2009 Stefan Pfeiffer took over from his father the management of what had now become Pfeiffer Reisen GmbH & Co. KG. When in 2013 the legal conditions were created for private sector long-distance bus services to enter into competition with Deutsche Bahn [German Railways], Stefan Pfeiffer extended his business by operating long-distance bus routes for the current market leader in this sector. Furthermore in 2014 he established his own travel agency, offering a local tourism service for bus excursions and car hire.

Driven above all by the extension of the core business of local public transport and also the new business of long-distance bus travel, the company grew annually by 14% in the three-year period before 2015, to reach a turnover of €6 million, a fleet of 79 motor vehicles and a staff of 140.

For the first time in the company’s history, in 2015, a (small) loss was made parallel to a continually shrinking liquidity. There were many reasons for this: the requirement for financing and refinancing required for the rapid growth used up considerable liquidity. Furthermore, the growth in personnel costs resulting from the [German] minimum wage legislation could not be passed on to customers in the short term. Additionally, there were considerable instances of motor damage and bad debts on receivables. Moreover, unexpectedly, the travel agency did not cover its own costs. In view of credit lines which had already been used up and significant personal guarantees given by Stefan Pfeiffer to financial partners and suppliers, the decision was made in January 2015 for restructuring the company via an insolvency plan process in self-administration.

Support throughout the insolvency plan process

With an application for “debtor in possession” Tim Langstädtler from the company Buchalik Brömmekamp, as insolvency director, became a member of the senior management of Pfeiffer Reisen, providing support (with his specific experience of trouble-free ongoing operation in insolvency situations) to Pfeiffer Reisen in the insolvency process. Most importantly this included the regular and intensive support and information provided to the creditors’ committee and the communication with all affected stakeholders concerning progress made in the process. The insolvency plan process had been largely unknown among the customers, suppliers and minor financial partners. The company workers were informed of the process and their situation regarding employment laws in a number of staff meetings.

Also applied were methods proven in practice and instruments of optimum control of the process – all without delay:

- Short-term rolling liquidity planning
- Reporting at short intervals using important key indicators for short-term company management
- Adapting operating processes to insolvency-specific requirements, e.g. in accounting and purchasing

Providing support for the process had to be negotiated with financial partners, major customers and key suppliers. First of all, this concerned the ongoing delivery of fuel, relinquishing calling in the company owner’s personal guarantees and maintaining existing credit lines. Moreover, it had to be avoided that the sole customer in the long-distance bus business withdraw from the contract; a contract concerning factoring of receivables had to be terminated.

Case Study: Restructuring of Pfeiffer Reisen under Insolvency Protection

Pfeiffer Reisen GmbH & Co. KG in Bad Zwischenahn is a traditional bus company with an emphasis on local and long-distance bus routes as well as local bus rental and tourism. Strong growth and diversification in new business sectors together with other factors have led to insolvency without any premonitory symptoms of turnover or profit problems.
Operational reconstruction

Parallel to these short-term measures a comprehensive restructuring concept was developed as part of a provisional process and its implementation commenced. Starting off with a comprehensive analysis of the company’s situation and the market as well as the competitive environment and the causes of the crisis, both operational restructuring and individual measures were devised and a guiding principle for the future of Pfeiffer Reisen was developed.

This guiding principle comprises a strategic focusing on the core business of local bus routes and the growth area of a long-distance bus service, giving up the tourism business, and serving exclusively, as opportunities arise, the private bus hire market as a side line contributing to profit margins without requiring its own personnel and other resources.

- Sales emphasis will be on the regional expansion and widening of the customer bases in local bus routes, an increase in turnover and cost optimisation in long-distance bus services, profitability improvement through price adjustments and development of the weekend business in the private bus hire market and also in providing support for the introduction of key account management.
- In the field of operations, a number of lesser individual measures will yield an increase in availability and hence the utilisation of the buses, the flexible deployment of the salaried drivers in terms of location and time, the optimisation of the structure of the bus fleet including a reduction in the average age of the buses and also the optimisation of workshop capacity.
- The commercial capacity and competence of the company has not adequately kept pace in the last few years with the high growth rates and the new business activities. Professional commercial structures are also required for planned strategic focusing. A newly recruited commercial manager will develop among other things a controlling system including cost centre accounting and accounting based on contributions to margin and also put in place systematic pricing. Future payroll and financial accounting will be done in-house.
- Changes in the area of organisation and personnel will in particular be geared to the organisational conditions required for the sustainable implementation of the new company structure and aims. Important individual measures in this case will be setting up a second level of management and changes in responsibilities and competencies required for the new structure.

Financial restructuring

With insolvency payments made by the Bundesagentur für Arbeit [(German) Federal Employment Agency] and the waiver of social security contributions and sales tax it was possible to generate sufficient liquidity within the scope of the current provisional process in order to maintain business operations.

The waiver of payables which was agreed by the individual creditor groups represented by the creditors’ committee, led to a tax-free restructuring profit in the amount of approximately € 1.4 million, which allowed the company’s equity capital structure to be sustainably strengthened.

With the planned payment quota, the position of the individual creditor groups has been significantly improved as opposed to normal insolvency proceedings in which the company would probably have been wound up.

Back in business

On 18 January 2016, when the application was made for “debtor in possession”, the company was over-indebted and insolvent. On 30 September 2016, after only eight months, the insolvency proceedings were ended and the company was able to continue business operations under its previous owner.

All important business relationships with customers, suppliers and financial partners were maintained. Furthermore, the number of jobs at the company hardly changed.

The detailed business plan, based on the restructuring concept, predicts growth of 4% per annum by the end of 2018 and the return to a rentability level typical for this business sector. Hence Pfeiffer Reisen has become sustainably competitive and is well set up for the future.
Excerpts of references from our clients

Buchalik Brömmekamp can look back on an impressive number of successfully handled cases. When a satisfied client expresses positive feelings, appreciation or praise to us following a successful reorganisation or restructuring – whether under insolvency protection or outside insolvency proceedings – we view this as recognition and an incentive at the same time. The interested reader will find excerpts from these statements below:

“I would expressly like to emphasise the very good and trustworthy collaboration with the CRO and all the Buchalik Brömmekamp staff, both on-site and at the head office, who stood beside me with great professional competence and expertise in this complex procedure, available at all times and always having a sympathetic ear for my questions and problems in this turbulent period.”
Michael Dobbe, former Managing Director of TEUTO-Glas GmbH & Co. KG and TEUTO-Glasveredelung GmbH

“The reorganisation experts at Buchalik Brömmekamp provided superior assistance in all phases of the proceedings from a legal, business and, at times, even an entrepreneurial perspective. We both profited from the other side’s know-how.”
Georg Gabler and Andreas Forster, Managing Directors of RS Gleisbau GmbH

“The staff of Buchalik Brömmekamp Unternehmensberatung were constructive sparring partners for us in developing a convincing concept for the continued operation of our company. We recommend collaboration with Buchalik Brömmekamp to those entrepreneurs who must restructure their companies.”
Thomas Siemensmeyer and Markus Regenstein, Managing Shareholders of Penn Textile Solutions GmbH

“With the Buchalik Brömmekamp management consulting firm, I had an outstanding partner at my side. While the attorneys and management experts took care of the reorganisation, I was able to concentrate on operational management and the realignment of the company. In this way, we were able to develop a comprehensive reorganisation concept, which satisfied the creditors, the court, the customers and the trustee.”
Ulrich Oehm, Managing Director of Oehmetic GmbH

“I am very grateful to the Buchalik Brömmekamp team – both the attorneys and the consultants. With their unfailing highly professional approach in all matters, whether business, general law or tax law, they made it possible to achieve the nearly impossible.”
Paul Timm, former Managing Director of Timm Fleisch- und Wurstmanufaktur GmbH

“Buchalik Brömmekamp’s reorganisation concept showed us a clear and viable path forward into the future. It was so specific that the initial steps and measures could be successfully initiated while insolvency proceedings were underway. Many thanks to Buchalik Brömmekamp for their great collaboration.”
Stefan Pfeiffer, Managing Partner of Pfeiffer Reisen GmbH & Co. KG

“Only with the support of the highly competent Buchalik Brömmekamp team and the extremely creative approaches to reorganisation developed by this team could we finally reach a stage where we are completely debt-free and can operate in the market as a reorganised company.”
Klaus Fischer, Managing Director, F.&K. Trailer Service GmbH

“I am very grateful to the Buchalik Brömmekamp team, which made the nearly impossible possible with their highly professional approach at all times and in all matters, whether business, general law or tax law.”
Jürgen Wagner, Sole Managing Director and shareholder of SWS Gesellschaft für Glasbaubeschläge mbH

“I am grateful for the professional assistance provided by your firm and your highly experienced staff. Without the aid of Buchalik Brömmekamp, we would probably have failed at the outset.”
Andreas Schwaner, Managing Director of Blanke textech GmbH
“The insolvency plan was successfully implemented only because of the professional communication between your attorneys and the court, the creditors, the creditors’ committee and the trustee.”
Jochen Schneider,
Managing Director of e-h-m, elektro-handel u. montage gmbh

“We were surprised at how precisely Buchalik Brömmekamp’s predictions during the planning procedure with respect to the process and the results materialised. In this way, we succeeded in again placing Julius Boos GmbH & Co. KG on a stable foundation, which would have otherwise been difficult to achieve.”
Dr. Erhard F. Grossnigg,
member of the Advisory Board of Julius Boos jr. GmbH & Co. KG

“The support provided by Buchalik Brömmekamp’s attorneys and management consultants in the operational area was absolutely convincing and led to the desired result. If we had to choose again, we would decide in favour of Buchalik Brömmekamp.”
Dr. Hartmut Jaeger,
Chairman of the Supervisory Board of Otto Kind AG

“Only with the support of the highly competent Buchalik Brömmekamp team and the extremely creative approaches to reorganisation developed by this team were we finally able to reach a stage where we are completely debt-free and can operate in the market as a reorganised company.”
Klaus Fischer,
Managing Director der F & K Trailer Service GmbH

“Through our collaboration with Buchalik Brömmekamp, we were able to submit a coherent reorganisation concept, which the trustee, the court, our customers and, above all, the creditors found convincing.”
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