EQUITY IN GERMAN PRIVATE LAW[1]

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Abstract: The German legal system, as in most continental legal systems, is primarily based on statutes. When deciding a case, judges apply the law as written in norms and do not put their own idea of a just and equitable result in place of the solution provided by the legislature. Seen in this light, statutes are "curdled equity". This leaves little room for deciding a case under the principle of equity, understood as a means to find a resolution of the tension between the abstract-general provisions of the law and the particularities of the case at hand, i.e., the establishment of justice in individual cases. In this article, the relationship between statute and equity will be illustrated for German private law, highlighting the principle (predominance of statutes) and the exemptions (gateways to equity for legislature and courts). Further examples from German insolvency law complete the picture.

Keywords: *boni mores*; construction of norms; decency; equity; good faith; judgment *ex aequo et bono*; methodology; separation of powers; statute; teleological reduction

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I. INTRODUCTION

The reference to equity goes back to Roman law. According to *Ulpian*, *"law is the art of the good and equitable"*.[3] Under the influence of canon law, the Latin *"aequitas"*, from which the term "equity" stems, developed to a remedy against too rigid and inflexible binding laws. This can be seen very clearly in the origins of equity in English law. There, in the early days, it was a matter of bringing a decision found by the courts on the basis of the – at that time very formal – common law before the king as guarantor of justice and equity and asking him to review the decision, applying the principles of morality and his conscience, and to set it aside *"ex aequo et bono"*. As formulated in 1615 in the famous *The Earl of Oxford's Case*, in those times, the idea of

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[3] Digest 1.1.1: *"ius est ars boni et aequi"*. – For the historical roots in general, reference is made to the articles in ARMGARDT, M. – BUSCHE, H. (eds.). *Recht und Billigkeit*. Tübingen: Mohr Siebeck, 2021.

equity was *"to soften and mollify the extremity of law"*.[4] Today, equity is indubitably part of the law and not its merciful correction *"for the love of God and in the way of charity"*.[5] In modern times, equity is a remedy between the poles of legal certainty through abstract norms on the one hand and individual case justice on the other. As the German *Bundesgerichtshof* (Federal Supreme Court) put it: *"Equity is the resolution of the tension between the abstract-general provisions of the law and the particularities of the individual case, i.e., the establishment of justice in individual cases."*[6] However, role and relevance of equity vary greatly between jurisdictions.

II. EQUITY IN GERMAN PRIVATE LAW

If we look at its position in German private law, the following can be said.

1. STATUTE VS. EQUITY

Under German private law, "equity" is a last resort. The German legal system is primarily based on statutes. At the starting point, when deciding a case, judges apply the law as written in norms and do not put their own idea of a just and equitable result in place of the solution provided by the legislature. Seen in this light, statutes are "curdled equity". This has a lot to do with the separation of powers: it is for the legislature to create the rules and for the courts to apply these rules.

Where, for example, a lessor demands the return of a rented computer after having terminated the lease agreement, it is not the judge's task to consider whether this return would be just and equitable. Rather, it is the task of the judge to apply the norms that order such a return, namely the relevant provision from tenancy law (§ 546 BGB)[7] on the one hand and the relevant norm from property law (§ 985 BGB) on the other.

Similarly, where the tenant has sold the rented computer to a third party, pretending to be the owner of the computer, it follows from statute, namely § 932 BGB, that the third party has acquired title unless they knew or should have known that the vendor was not the owner of the computer (i.e., acted in good faith as defined in § 932(2) BGB). The judge confronted with this case will apply this norm and equity is not a topic in this constellation.

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4 *The Earl of Oxford's Case* (1615) 1 Rep. Ch. 1 = 21 Eng. Rep. 485, 486 at (7); extensively LERCH, K. D. Aufstieg und Fall der Billigkeit im englischen Recht. In: ARMGARDT, M. – BUSCHE, H. (eds.). *Recht und Billigkeit*. Tübingen: Mohr Siebeck, 2021, pp. 345–387.

5 With this formulation, the party turned to the King as the source of all justice and mercy, cf. LERCH, *c. d.*, p. 352.

6 BGH, Beschl. v. 16. 9. 2016 – VGS 1/16 = BGHZ 212, 48 at (32): *"Billigkeit ist die Auflösung des Spannungsverhältnisses zwischen den abstrakt-generellen Regelungen des Gesetzes und den Besonderheiten des Einzelfalls, mithin die Herstellung von Einzelfallgerechtigkeit."*

7 *Bürgerliches Gesetzbuch* [Civil Code]; English text is available: German Civil Code BGB. In: *Federal Ministry of Justice – Federal Office of Justice* [online]. [cit. 2023-06-02]. Available at: https://www.gesetze-im-internet.de/englisch_bgb/index.html.

Finally, "unjust enrichment" is another example in this context. In England, this legal figure stems from equity[8] and it was only in 1991 that the House of Lords acknowledged it as a legal institute.[9] In Germany, unjust enrichment is regulated in the Civil Code, which addresses this legal institution since 1896 in great detail in 11 sections (§§ 812–822 BGB) which in principle leave no room for corrections on the basis of equity considerations.

2. GATEWAYS TO EQUITY

However, this does not mean that a German judge is bound to apply the statutes without exception even if the outcome seems to be unjust or inequitable. During my law studies, one of my professors advised his students: *"Once you have finished your analysis, take a step back from your findings and ask yourself: is this a reasonable result?"* This is a very helpful advice, but what if the answer to this question is *"no, this is not a reasonable result"*? In this case, it may very well be that the legal analysis is wrong. But it may also be that the result, which is unreasonable from the judge's point of view, corresponds to the will of the legislature. In this case, the court must in principle accept the legislature's decision unless *"the contradiction of the positive law with justice reaches such an intolerable degree that the law, as 'incorrect law', must give way to justice"*.[10] Admittedly, this is a rather crude and broad-brush view of the relationship between statutory law and equity, since there are many gateways to equity in German law too.[11]

A) EQUITY AS PART OF THE NORM

First, in many norms, the German legislature has made the term equity a constituent element, i.e., it has made the legal consequence ordered expressly dependent on it being equitable or, in any case, not inequitable. In the German Civil Code alone, the word "equity" occurs in 43 sections,[12] mainly, but not exclusively, in family law where equity is a general principle.[13] The reason for referring to equity is mostly that, in situations as regulated in the respective section, a just and equitable solution depends generally so much on the concrete circumstances of the individual case rather

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[8] Enlightening, SWAIN, W. Unjust Enrichment and the Role of Legal History in England and Australia. *UNSW Law Journal*. 2013, Vol. 36, No. 3, pp. 1030–1052.

[9] *Lipkin Gorman (a Firm) v. Karpnale Ltd*. [1988] UKHL 12 = [1991] 2 AC 548.

[10] So-called "*Radbruch* formula", see RADBRUCH, G. Gesetzliches Recht und übergesetzliches Unrecht. *Süddeutsche Juristen-Zeitung*. 1946, Jhrg. 1, Nr. 5, pp. 105, 107.

[11] Comprisingly, MECKE, CH.-E. – HUCK, W. Billigkeit im Recht oder Billigkeit versus Recht? *Archiv für die civilistische Praxis*. 2020, Jhrg. 220, Heft 6, pp. 861–892.

[12] §§ 253(2), 271a, 284, 288(6), 315(3), 317(1), 319(1), 556a(3), 571(1), 595(7), 660(1), 745(2), 829, 920(2), 971(1), 1024, 1246, 1318, 1360a(4), 1361a, 1361b(3), 1381, 1382, 1383(1), 1568a, 1568b(1), 1570, 1574(2), 1576, 1577, 1578b, 1579, 1581, 1585, 1585a, 1611(1), 1613(3), 1615l(2), 1649(2), 2048, 2057a(3), 2156, 2331a(1) BGB.

[13] Cf. BGH, Beschl. v. 25. 1. 2007 – IX ZB 6/06 = NZI 2007, 298 at (10); BGH, Urt. v. 20. 2. 2003 – IX ZR 102/02 = BGHZ 154, 64 at (27).

than typical circumstances that it is difficult, if not impossible, for the legislature to provide in an abstract rule a solution which fits in all or at least most cases.

Two examples may illustrate this. First, where spouses live in separation, § 1361b BGB establishes a right of one spouse to live alone in the matrimonial residence if this is necessary to avoid "inequitable hardship". The other spouse may demand payment for the use "insofar as this is equitable". Like in many other rules of family law, the legislature refrained from a clear decision in favour of one spouse and referred instead to the circumstances of the individual case by making equity expressly an element of the respective norm.

A second example is § 829 BGB which is part of German tort law and a pure equity-rule. Under §§ 827 and 828 BGB, a person cannot be held liable for damages caused by him or her if this person was unable to perceive the wrongness of its behaviour. This holds particularly true for minors. However, § 829 BGB provides that such a person is to pay damages. *"[U]nless it is possible to obtain compensation of damages from a third party with a duty of supervision, to the extent that in light of the situation given, in particular the circumstances of the parties involved, equity requires indemnification and they are not deprived of the resources needed for reasonable maintenance and to discharge their statutory maintenance duties."*

Interestingly, the legislature, on the one hand, provides for a claim for damages against a person not responsible for its behaviour if "equity requires indemnification" and, on the other hand, tries to specify the facts relevant for determining an equitable solution in the case at hand[14] (compensation claims against a third party that breached its duty of supervision; the situation given; the – primarily: economic – circumstances of the parties; the essential needs of the damaging party).

B) METHODOLOGICAL REMEDIES

Another gateway to equity is applying the instruments of the methodological toolbox.

AA) CONSTRUCTION OF NORMS

In many cases, inequitable results can be avoided by construing the relevant norm in a way that leads to a reasonable outcome. For the construction of contracts, §157 BGB stipulates that the interpretation must be guided by good faith and take customary practice into consideration. Unlike § 932 BGB, which has been mentioned earlier, the term "good faith" here does not refer to the knowledge of an involved party but to the standards of reason, common sense, and honesty, which opens the door to equity, since an inequitable result is not compatible with good faith. For the construction of statutes, no written guidelines are available. However, it is generally acknowledged that statutes should, where possible, be construed in a way that avoids inequitable results.

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[14] Cf. BGH, Beschl. v. 16. 9. 2016 – VGS 1/16 = BGHZ 212, 48 at (39).

A famous example for this comes from the law of unjust enrichment. If a mutual contract turns out to be void, both parties are entitled to demand the return of their performances. This would normally lead to two independent claims, in the case of a sales contract one claim for repayment and one corresponding claim for return of the delivered object. However, according to the prevailing opinion, the two claims are still linked to each other in the way that claims of the same kind are to be off-set against each other, so that only the difference can be demanded, and dissimilar claims can only be asserted with the proviso that the performance has to take place concurrently against the counter-performance. Where, for example, a car worth 9,000 € has been sold for 10,000 € and the sales contract is void, under this so-called "balance theory"[15] the vendor can demand return of the car, but only if they offer concurrent repayment of the purchase price, and vice versa. Where the buyer has destroyed the car in a car accident, they can claim repayment of the purchase price (10,000 €) due to the void contract but in turn has to replace the value of the car (9,000 €); hence, under the balance theory, only 1,000 € can be claimed. All this is not expressly contained in the wording of the German Civil Code, but according to settled case law, which ties on the term "enrichment", it is a *"correction of the law for reasons of equity"*.[16] The fact that it is based on equity also allows exceptions to be made if equity requires a different result, for example if the nullity of the contract results from the lack of legal capacity of a party[17] or from wilful deceit by the party favoured by the balance theory[18].

However, it is important to emphasise that the enforcement of equity by way of construction is subject to the legislature's will and intent. If it is clear that the legislature did not want this result, judges are hindered to come to it by way of construction.

BB) TELEOLOGICAL REDUCTION

Another methodological tool is the teleological reduction. Where a concrete case is covered by the wording but not by the ratio of a norm, the norm can be reduced to its intended scope by adding an unwritten exception. This approach is called "teleological reduction". In this regard, one example may suffice.

Under § 33(1) (sentence 1) LuftverkehrsG,[19] the owner of an aircraft shall be obliged to compensate the damage if, in the course of operating the aircraft, someone is killed, their body or health injured, or property damaged by accident. This norm was invoked by a company, which, on behalf of the airport, had set up measuring instruments at the end of a runway to monitor aircraft movements. The instruments were damaged by a landing aircraft. The company sued the airline, but without success. Referring to equity, the *Bundesgerichtshof* dismissed the action on the grounds that it was the legislative intention that only persons who were in no way involved in the operation of

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15 *"Saldotheorie"*. Leading case is a ground-breaking decision of the German *Reichsgericht* (Supreme Court of the German Empire), Urt. v. 14. 3. 1903 – V 458/02 = RGZ 54, 137, 141 f.

16 See BGH, Urt. v. 19. 1. 2001 – V ZR 437/99 = BGHZ 146, 219, 308; BGH, Urt. v. 8. 1. 1970 – VII ZR 130/68 = BGHZ 53, 144, 147.

17 BGH, Urt. v. 4. 5. 1994 – VIII ZR 309/93 = BGHZ 126, 105, 107.

18 BGH, Urt. v. 8. 1. 1970 – VII ZR 130/68 = BGHZ 53, 144, 147.

19 *Luftverkehrsgesetz*, Aviation Act.

the damaging aircraft were protected by § 33 LuftverkehrsG. Therefore, contrary to its overly broad wording, the provision was to be reduced teleologically.[20]

C) GOOD FAITH-EXCEPTION

Another springboard for equity is § 242 BGB.[21] This norm provides that an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration. At first sight, it is a norm of the law of obligations, but it is generally accepted that it is the expression of a general principle of law. As mentioned above in the context of § 157 BGB, the wording of which is nearly identical with § 242 BGB, the term "good faith" refers to the standards of reason, common sense, and honesty. Regarding § 242 BGB, one example may suffice.

According to § 537(2) BGB, a tenant is not obliged to pay the rent as long as the landlord is incapable of granting the tenant use because use has been permitted to a third party. In a case decided by the *Bundesgerichtshof*, the defendant, a tenant of a booth at a trade fair, refused to participate in the fair. The landlord therefore let the booth to another exhibitor free of charge and demanded the rent from the defendant who invoked § 537(2) BGB. This defence was not successful. The *Bundesgerichtshof* referred to § 242 BGB, holding that the defendant acted in breach of good faith, since it was *"inequitable if the tenant derives rights from a conduct of his otherwise contractually faithful contractual partner which he himself brought about by a gross breach of this contract"*.[22]

It should be emphasised, though, that even § 242 BGB is not an authorisation to decide according to equity instead of applying the law. This norm is itself part of the written law and serves as a last resort in extreme cases rather than as a general tool to decide the case at hand.

D) TRANSACTIONS CONTRA BONOS MORES

With § 157 BGB and § 242 BGB, we have already become acquainted with two provisions that belong to the so-called "general clauses". These are norms which do not offer a solution for a concretely described conflict of interests but require in general a fair and honest behaviour. In the case of § 157 BGB and § 242 BGB, this is done by referring to good faith (*"Treu und Glauben"*). In a third norm, which comes from contract law, it is done by referring to morality: according to § 138 BGB, a legal transaction is void if it is *contra bonos mores*, i.e., if it violates principles of morality.[23] In our context, it is of particular interest that case law defines *boni mores* as *"what is in*

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[20] BGH, Urt. v. 8. 11. 2016 – VI ZR 694/15 = NJW-RR 2017, 476 at (12).

[21] Cf. BGH, Urt. v. 29. 6. 1989 – IX ZR 175/88 = BGHZ 108, 179, 183 where the *Bundesgerichtshof* used § 242 BGB as a norm of equity.

[22] BGH, Urt. v. 19. 12. 2007 – XII ZR 13/06 = NJW 2008, 1148 at (30): *"Dabei ist entscheidend, dass es unbillig ist, wenn der Mieter aus einem Verhalten seines sonst vertragstreuen Vertragspartners, das er selbst durch einen groben Vertragsbruch herbeigeführt hat, Rechte herleitet."*

[23] A similar rule is § 826 BGB which provides that a person who, in a manner violating *bonos mores* (i.e., offending common decency), intentionally inflicts damage on another person is liable to the other person to provide compensation for the damage.

accordance with the sense of decency of all equitably and justly thinking people".[24] It should just be mentioned in passing that this definition is not uncritically commented on.[25] However, we can see that we have here another general clause which opens the doors to equity considerations.

III. MORE EXAMPLES: EQUITY IN GERMAN INSOLVENCY LAW

Against this background, we can now turn to the role of equity in insolvency law.[26] This legal field does not give very much room for discretion. It is primarily composed of procedural law and property law. However, even here, equity has its rightful place, and we will see that the gateways to equity are also opened in insolvency law.

1. DETERMINATION OF THE ESTATE

At their core, insolvency proceedings are collective enforcement proceedings which aim at a joint satisfaction of all the debtor's creditors by seizure and realisation of all the debtor's assets (the estate) and distribution of the proceeds to the creditors on a *pro rata* basis.[27] It is therefore the primary task of any insolvency law to determine the insolvency estate. Since it is the idea of insolvency proceedings to realise the debtor's estate existing when proceedings are opened for the benefit of the creditors entitled when proceedings are opened, the estate consists typically of all assets belonging to the debtor at the moment of the opening of the insolvency proceedings.[28] However, there are typical exceptions. Some assets are not part of the estate, be it that they are not seizable and therefore not object of either individual or collective enforcement proceedings, be it that they are not commercialised, not transferable, or worthless.[29]

In Germany, for example, § 36(1) (sentence 1) InsO[30] provides that unseizable assets are not part of the estate. For the seizability, § 36(1) (sentence 2) InsO refers to the respective rules of the Code of Civil Procedure.[31] Of special interest for our topic is § 890b ZPO. Under this rule, the debtor's claims for certain emoluments are only seizable where the enforcement against the debtor's other movable assets has not achieved,

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[24] Most recently, BGH, Urt. v. 15. 11. 2022 – X ZR 40/20 = NJW 2023, 846 at (17): *"was dem Anstandsgefühl aller billig und gerecht Denkenden entspricht"*.

[25] Representatively, BORK, R. *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*. 4th ed. Tübingen: Mohr Siebeck, 2016, para. 1181.

[26] In this article, the English terminology will be used which distinguishes corporate insolvency from personal bankruptcy, whereas, in the USA, the term bankruptcy covers both, corporate and personal insolvency; cf. BORK, R. *Corporate Insolvency Law*. 2nd ed. Cambridge: Insertia, 2023, para. 1.15.

[27] For details, see ibid., para. 1.3.

[28] See ibid., para. 4.5.

[29] Details at ibid., para. 4.12 et seq.

[30] *Insolvenzordnung* [Insolvency Act]; English text is available: Insolvency Code (Insolvenzordnung – InsO). In: *Federal Ministry of Justice – Federal Office of Justice* [online]. [cit. 2023-06-02]. Available at: https://www.gesetze-im-internet.de/englisch_inso/index.html.

[31] *Zivilprozessordnung* [ZPO]. English text available: Code of Civil Procedure. In: *Federal Ministry of Justice – Federal Office of Justice* [online]. [cit. 2023-06-02]. Available at: https://www.gesetze-im-internet.de/englisch_zpo/index.html.

or foreseeably will not achieve, the full satisfaction of the creditor and where the attachment is equitable in light of the circumstances of the case, in particular in light of the nature of the claim to be recovered and the amount of the emoluments. This means, for example, that a debtor's claim against their parents for a maintenance pension is only part of the insolvency estate where other assets are not sufficient to satisfy the creditors' claims (which is typically the case in insolvency proceedings) and the insolvency court finds it equitable to collect the maintenance pension for the benefit of the general body of creditors.[32] This is another example for the legislature's decision to make the term equity expressly a constituent element of a statutory rule.[33]

In a similar case, the debtor was a victim of child abuse by a priest of the Catholic Church which granted the debtor voluntarily a compensation payment despite all legal claims being time-barred. After the opening of insolvency proceedings, the Insolvency Practitioner claimed the compensation payment for the estate. This was rejected by the *Bundesgerichtshof*. The court drew on § 851 ZPO according to which claims are not seizable (and therefore not part of the insolvency estate) if they are not transferrable. Under § 399 BGB, claims are not transferrable if the transfer would lead to a change in the content of the claim. The court affirmed this requirement on the grounds that, from the point of view of equity, compensation should benefit the victim personally. The sole purpose of the material benefit awarded was to alleviate the consequences of the victim's traumatisation in recognition of their suffering and to help the victim cope with stressful life circumstances. The relief intended by the payment could only occur if the payment originated from the sphere of the injurer, i.e., if it remained with the original debtor and the original creditor of the payment. It seemed, so the *Bundesgerichtshof*, impossible that the Catholic Church would have granted the payment if the Insolvency Practitioner could collect the amount for the estate instead of the insolvency debtor.[34] This is an illuminating example of how aspects of equity can influence the interpretation and application of a statutory norm.

However, regular claims are part of the estate, and this entails, that these claims may only be collected by the Insolvency Practitioner and payments to the insolvency debtor are invalid. However, the legislature has granted the third-party debtor protection of trust in § 82 InsO, because, according to this provision, payments by the third-party debtor to the insolvency debtor are effective if the latter was not aware of the opening of insolvency proceedings. According to the *Bundesgerichtshof*, the legislature granted this protection of legitimate expectations "for reasons of equity"[35] – proof that legal norms can be "curdled equity".

In another case, which brought up § 242 BGB, the debtor's real estate was burdened with two mortgages, the second of which was worthless because the value of the

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[32] For examples, see BGH, Urt. v. 15. 7. 2010 – IX ZR 132/09 = NZI 2010, 777 at (40) et seq.; BGH, Urt. v. 3. 12. 2009 – IX ZR 189/08 = NZI 2010, 141 at (10) et seq.

[33] Cf. above at II.1.a.

[34] BGH, Urt. v. 22. 5. 2014 – IX ZB 72/12 = NZI 2014, 656 at (21); similarly for a claim for compensation for excessive duration of proceedings under EU law BGH, Urt. v. 24. 3. 2011 – IX ZR 180/10 = BGHZ 189, 65 at (44).

[35] BGH, Urt. v. 19. 4. 2018 – 19. 4. 2018 – IX ZR 230/15 = BGHZ 218, 261 at (59); see also BGH, Urt. v. 16. 7. 2009 – IX ZR 118/08 = BGHZ 182, 85 at (13).

real estate didn't even suffice to cover the first mortgage. The Insolvency Practitioner intended to sell the real estate. Since the buyer required the mortgages to be deleted, the Insolvency Practitioner asked the holder of the second mortgage unsuccessfully to consent to the deletion. Brought before the *Bundesgerichtshof*, the court held that there was no legal basis for the Insolvency Practitioner's claim for deletion and that *"[t]he surrender of a legally acquired security* […] *cannot be demanded of the creditor solely for reasons of economic expediency or mere equity. The exercise of legal powers is only inadmissible in good faith if it is abused. The exercise of such powers is an abuse of rights and thus inadmissible if it does not serve the purposes provided for by law but other* […] *legally disapprovable purposes* […]. *This may be the case, for example, if the creditor uses his legal position to obtain an advantage to which he is not entitled or if he exercises a right specifically only to harm the other party."*[36]

The *Bundesgerichtshof* was not convinced that an abuse of rights could be established and therefore refused to overrule the defendant's legal position under § 242 BGB for reasons of equity.

2. SET-OFF

Particular challenges arise in connection with off-setting. Creditors who are enabled to set their claims off against counterclaims of the debtor (or the estate respectively) enjoy a special "security" for their claims, since they can satisfy these claims against the debtor by utilising the debtor's counterclaims, similar to a pledge or lien on the debtor's claims.[37] However, this only holds true where the set-off situation existed before the opening of insolvency proceedings. In German law, this is expressly regulated in §§ 94-96 InsO which leave little room for equity considerations.

This can be illustrated by a landmark decision of the *Bundesgerichtshof*. In the underlying case, the Insolvency Practitioner claimed payment from a third-party debtor of the insolvency debtor. The third-party debtor pleaded that he had paid debts of the insolvency debtor and could set-off the claim for recourse against the insolvency debtor's claim. However, since the payment was made after the opening of the insolvency proceedings, the set-off situation did not exist before the commencement of the proceedings. The set-off therefore failed due to §§ 94 et seq. InsO. The *Bundesgerichtshof* refused to bring equity into play via § 242 BGB, arguing that the principle of equal treatment of creditors trumped all reasons of equity.[38]

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[36] BGH, Urt. v. 30. 4. 2015 – IX ZR 301/13 = NZI 2015, 550 at (8): *"Die Aufgabe eines* […] *rechtmäßig erworbenen Sicherungsmittels kann dem Gläubiger deshalb nicht allein aus Gründen wirtschaftlicher Zweckmäßigkeit oder bloßer Billigkeit abverlangt werden. Nach Treu und Glauben unzulässig ist die Ausübung rechtlicher Befugnisse im Rahmen der vollstreckungsrechtlichen Rechtsbeziehung nur im Falle ihres Missbrauchs. Rechtsmissbräuchlich und damit unzulässig ist die Ausübung solcher Befugnisse, wenn sie nicht den gesetzlich vorgesehenen, sondern anderen* […] *rechtlich zu missbilligenden Zwecken dient* […]. *Dies kann etwa der Fall sein, wenn der Gläubiger seine Rechtsstellung dazu benutzt, um einen anderweitigen, ihm nicht zustehenden Vorteil zu erlangen, oder wenn er ein Recht gezielt nur zur Schädigung des anderen Teils ausübt."*

[37] *Stein v. Blake (No 1)* 2 WLR 710. For details, see BORK, *Corporate Insolvency Law*, para. 5.49 et seq.

[38] BGH, Urt. v. 14. 7. 2005 – IX ZR 142/02 = NJW 2005, 3285 at (16); see also BGH, Urt. v. 2. 12. 2004 – IX ZR 200/03 = BGHZ 161, 241 at (41).

3. TRANSACTIONS AVOIDANCE

An important part of insolvency law is transactions avoidance law. Rules on transactions avoidance are aimed at the rescission of, or the compensation for, transactions that are detrimental to the general body of creditors and have been performed prior to the opening of insolvency proceedings. The "effect of the opening of insolvency proceedings" is typically the shift of the power of disposal from the debtor to the Insolvency Practitioner. Hence, transactions made by the debtor *after* the opening of the proceedings are in most jurisdictions not valid, since the debtor no longer has the power to administer and dispose of their assets. As opposed to this, transactions performed *prior* to the commencement of insolvency proceedings are normally not affected, since the estate is not seized retroactively. This leaves performances of the debtor, e.g., gifts to the spouse or payments to creditors, untouched. However, in almost all national laws, under certain conditions, this might be contrary to foundational principles of insolvency law. They therefore mitigate the harsh consequences of the clear cut-off date (opening of the proceedings)[39] and allow for certain transactions to be challenged in order to tackle unacceptable displacements of assets benefitting the recipient.

The rules on transactions avoidance are the expression of a balance of underlying principles, above all the principle of equal treatment of creditors on the one hand and the principle of the protection of trust (or: legitimate expectations) on the other.[40] In this respect they are themselves "curdled equity" and no further equity control is necessary.

In rare cases, however, equity also comes into play in transactions avoidance law. For example, in a case decided by the *Bundesgerichtshof*, the debtor had given an apartment building gratuitously to his wife, who rented out the property. After the opening of insolvency proceedings, the Insolvency Practitioner challenged the transfer of the property as a transaction at an undervalue and demanded the return of both the house and the rents received. The wife objected that the Insolvency Practitioner's claim should be reduced by the value of the administrative services she had provided for the property. This defence was accepted by the *Bundesgerichtshof*. The court referred to § 102 BGB, according to which those who have a duty to surrender fruits may claim reimbursement of the costs of producing the fruits, and argued that the application of this rule in the context of transactions avoidance law was necessary for reasons of equity.[41]

In a second case, the Insolvency Practitioner challenged payments to an employee of the insolvent debtor. Although all prerequisites for the avoidance of this transactions were met, the defendant argued that employees should be exempted from transactions avoidance for social and equity reasons. The *Bundesgerichtshof* did not accept this argument, emphasising the relevance of the principle of equal treatment of creditors:

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[39] Cf. *Angove's Pty Ltd v. Bailey* [2016] UKSC 47 at [25].

[40] Intensively on the principles of transactions avoidance law BORK, R. –VEDER, M. *Harmonisation of Transactions Avoidance Laws*. Cambridge: Intersentia, 2022, para. 2.74 et seq.

[41] BGH, Urt. v. 24. 1. 2019 – IX ZR 121/16 = NZI 2019, 372 at (17).

"If the courts were allowed to differentiate the prerequisites for avoidance with regard to different groups of creditors, this would ultimately amount to an allocation of the estate on the basis of a judicial equity decision."[42]

4. DISCHARGE

Insolvency proceedings normally only result in partial satisfaction of the creditors' claims. The unsatisfied part of the claims continues to exist, and the creditor can demand performance if the debtor achieves a new estate after the termination of the insolvency proceedings. However, in personal bankruptcies, many jurisdictions provide for a statutory discharge of the residual debt. This holds also true for Germany where the debtor can be granted a discharge under §§ 286 et seq. insO under the condition that he or she accepted – during a compliance period which used to be six years and is now three years – any reasonable employment and transferred the attachable part of the resulting income to a trustee for the benefit of the creditors. When the compliance period was six years, the debtor could apply for a premature discharge provided they managed to satisfy 35% of the claims within the first three years. In a recent case, the debtor paid 35% but only four weeks after the expiry of the three years period. She applied for premature discharge, arguing that it would be inequitable to deny the discharge because the three-year time limit had only been slightly exceeded. The *Bundesgerichtshof*, however, rejected this argument, holding that every statutory deadline is ultimately set arbitrarily and that this is acceptable because it serves legal certainty precisely because of the rigidity of the time limit.[43] This fits in with the general line of the *Bundesgerichtshof*, which is generally very cautious when it comes to disregarding missed deadlines for reasons of equity.[44]

Once discharge is granted, the debtor is no longer obliged to pay. However, § 302 InsO[45] provides that certain claims are exempted, in particular fines and claims from intentionally committed torts. It is interesting, that the *Bundesgerichtshof* assessed this norm as an appearance of equity: *"Ultimately, it is equity considerations that underlie the statutory regulation. The law considers it inequitable that a debtor is released from liabilities to a creditor whom he has intentionally harmed."*[46] In this interpretation, § 302 InsO is a good example for the thesis that statutes are – or at least can be – "curdled equity".[47]

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42 BGH, Urt. v. 10. 7. 2014 – IX ZR 192/13 = BGHZ 202, 59 at (25): *"Würde den Gerichten gestattet, die Anfechtungsvoraussetzungen im Blick auf unterschiedliche Gläubigergruppen jeweils zu differenzieren, liefe dies letztlich auf eine Zuteilung der Masse aufgrund richterlicher Billigkeitsentscheidung hinaus."*

43 BGH, Beschl. v. 19. 9. 2019 – IX ZB 23/19 = NJW 2020, 60 at (24).

44 Cf. BGH, Urt. v. 1. 10. 1987 – IX ZR 202/86 = NJW 1988, 266, 267.

45 For other jurisdictions, see BORK, *Corporate Insolvency Law*, para. 9.22.

46 BGH, Urt. v. 1. 10. 2020 – IX ZR 199/19 = NZI 2021, 36 at (24): *"Letztlich sind es Billigkeitsgesichtspunkte, die der gesetzlichen Regelung zu Grunde liegen. Das Gesetz hält es für unbillig, dass ein Schuldner von Verbindlichkeiten gegenüber einem Gläubiger befreit wird, den er vorsätzlich geschädigt hat."* See also BGH, Urt. v. 25. 6. 2015 – IX ZR 199/14 = NJW 2015, 3029 at (14).

47 Above at II.1.

IV. OVERALL PICTURE

When summarising the results of these reflections, the following picture emerges.

First, in German law, equity is a last resort. In German civil law, as in most continental legal systems, there is a predominance of statutory law. This is ultimately based on the separation of powers, under which it is primarily the task of the legislature to provide guidelines for decision-making. Against this background, statutory norms often prove to be "curdled equity". In principle, this leaves little room for judicial decisions on equity.

Second, no statute-based jurisdiction can ignore the fact that the legislature can only prescribe standardised solutions that may not fit in a specific individual case. Therefore, there are gateways to equity in Germany as well. Such gateways are sometimes opened by the legislature itself, in particular by expressly referring to equity in the wording of the relevant norm. Sometimes, general clauses can help which refer to good faith or the principles of decency, thus opening the doors to equity when construing or applying the law. And sometimes we can pick from the methodological toolbox in order to justify an equitable result.

Third, it is generally agreed that these instruments have to be handled restrictively and always with a view to the will of the legislature. This is in line with the historical origins of equity jurisprudence, which was always intended to mitigate overly harsh consequences of the application of the written law because of the concrete circumstances of the individual case. This does not call into question the fundamental primacy of written law.

Fourth, little is known about the methodology of equity, i.e., the rules that guide equity decisions. A few remarks may suffice. It follows from what has just been said that it does not suffice to simply refer to equity. It is not enough to reason a decision with sentences like "it is a requirement of equity" or "it corresponds to equity", since this would be nothing more than an attempt to give the judge's gut feeling a professional touch. Instead, it is necessary to substantiate in more detail *why* equity requires the result found. To this purpose, all equity decisions must take all relevant circumstances of the individual case into account. The factual inventory must be complete. Further, all these circumstances must be examined thoroughly to determine whether the case is so exceptional that a deviation from the regular legislative solution is justified. Equity is not a free ride to judicial arbitrariness. The weighing and balancing of the relevant circumstances must therefore be conducted in the light of the objective of the statutory norm and with respect to the tenets and principles underlying this norm. To put it in the language of procedural law, the decision must be so thoroughly and convincingly reasoned that both the parties and higher instances can accept that the equity decision found is admissible and justifiable.

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