

# InsO study 2015



Are German insolvency statutes internationally competitive after 3 years of ESUG?

Berlin, June 2015

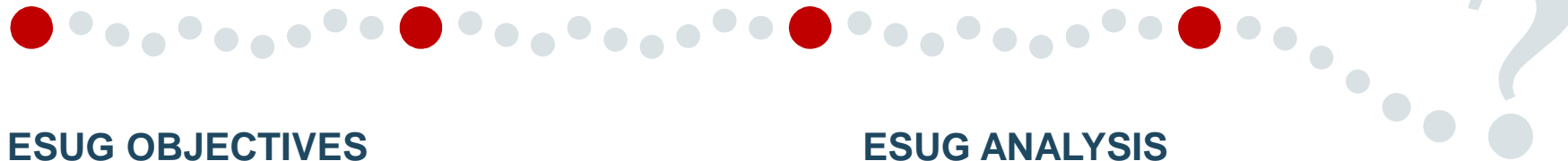
McKinsey&Company

Noerr

# The 2015 McKinsey/Noerr InsO study explores the international competitiveness of German insolvency law after 3 years of ESUG

ESUG (March 2012)

3 years later



## ESUG OBJECTIVES

- **Strengthen the competitiveness** of German insolvency law
- **Stop** German companies **attempting to restructure** under UK law

## KEY CHANGES

- **Strengthen influence** of creditors
- **Simplify self-administration**
- **Eliminate obstacles** and **delays** to the insolvency plan proceedings

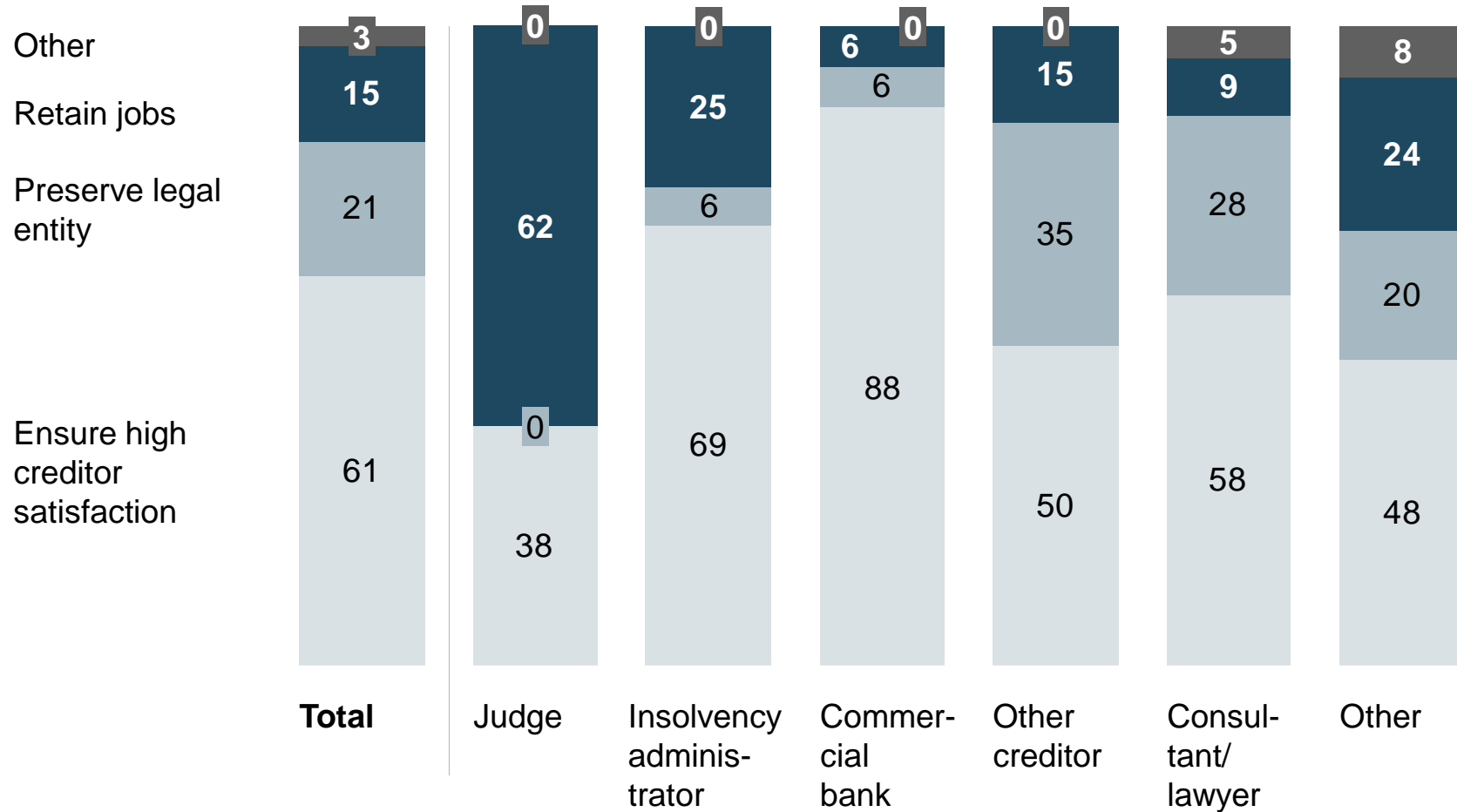
## ESUG ANALYSIS

- **Legislators are not due to assess ESUG until 5 years** have passed
- **Preliminary study with interim findings after 3 years**
- Focus on **competitiveness in an international context**
- To this end, a survey was conducted in March 2015 of **around 220 restructuring and insolvency experts**
- **More than 2/3 of respondents** already have some **experience with other legal systems**

# Delivering high creditor satisfaction is still seen as the most important objective of a restructuring

## How would you describe a successful restructuring?

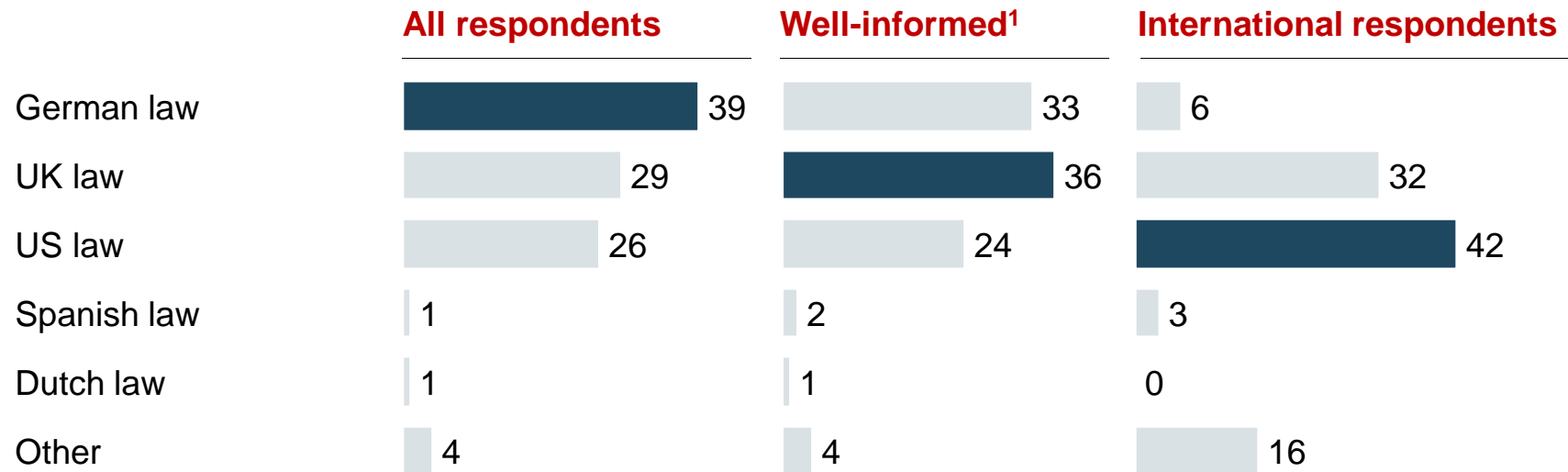
Percent



# German insolvency law is internationally competitive; however, respondents from other countries see US and UK law as more competitive

Which insolvency law do you think is the most attractive when it comes to restructuring?

Percent



*"I believe that ESUG has made German insolvency law more competitive. If you want to restructure operationally as well as financially, I think the InsO self-administration/protective shield procedure is actually more suitable than a SOA under UK law."*

– German commercial bank

*"If we had a pre-insolvency restructuring procedure then Germany would also be a competitive location for restructuring."*

– Anglo-Saxon distressed investor

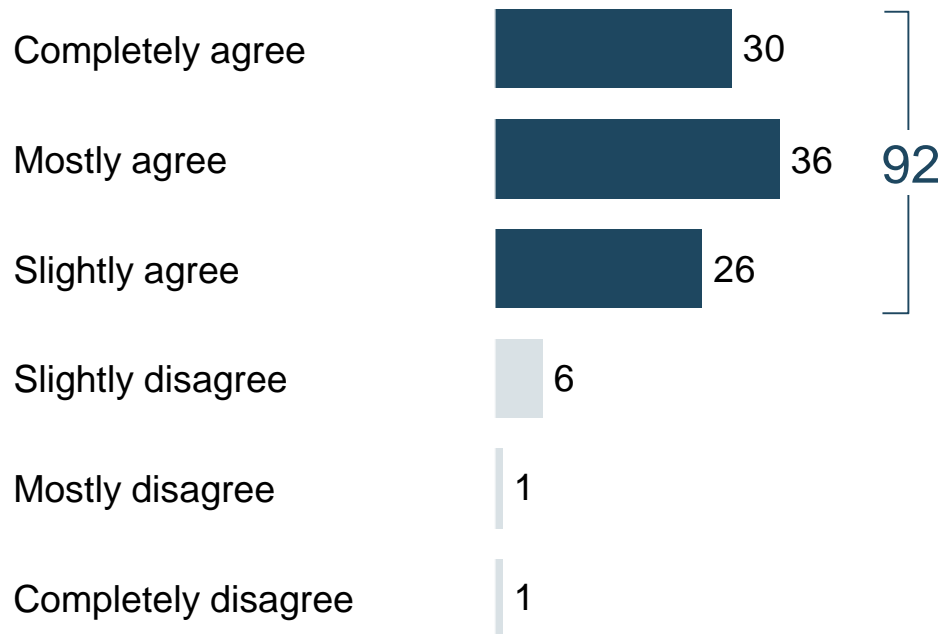
<sup>1</sup> Participants responded positively to the question: I feel that I have sufficient information about the options available to me in other legal systems

# Changes to ESUG have made German restructuring law more attractive – broad agreement in all groups surveyed

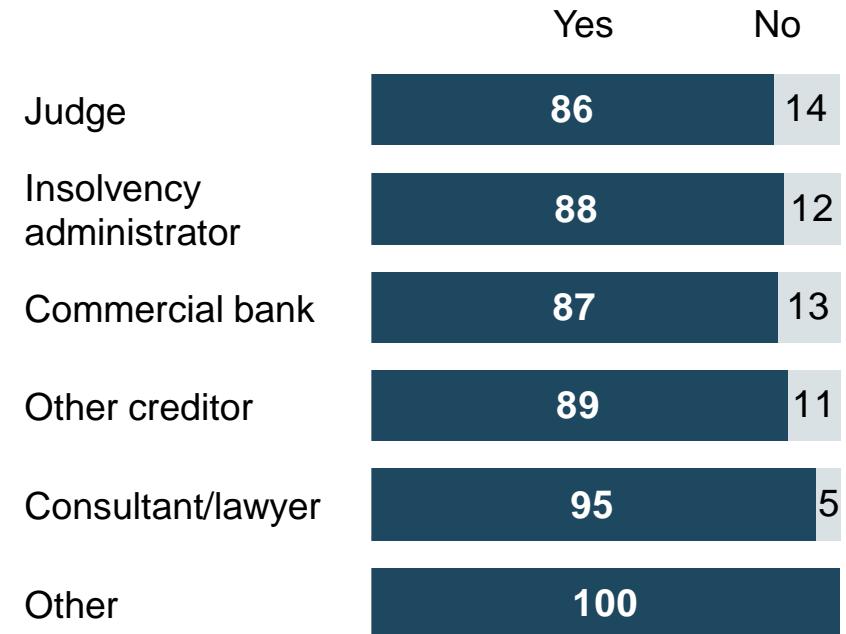
## Changes to ESUG have made German restructuring law more attractive

Percent

### The high level of agreement ...



### ... continues across all groups



*"Even though ESUG still has a few wrinkles to iron out, it is so much better than what we had before in Germany."*

– Anglo-Saxon distressed investor

# Planning security is the key criterion in selecting a jurisdiction – this criterion is largely met under post-ESUG German law

✓ Criterion met    [✓] Criterion partly met    ✗ Criterion not met

Criteria	For you, what are the key criteria in choosing a specific jurisdiction for insolvency proceedings? Percent	What conditions are met under German insolvency law (post-ESUG)? Percent	
High level of planning security	37	27	✓
Proceedings do not take much time	17	12	[✓]
Debtor's ability to exert influence	14	20	✓
Limitation to specific groups of creditors	11	6	✗
Low risk of abuse	8	12	[✓]
Minimal access requirements	7	17	✓
Low procedural costs	5	6	✗



*"ESUG now delivers greater planning reliability under German law for business owners, managers, and consultants while simultaneously retaining the competitive advantage of insolvency payments."*

– Insolvency administrator

# Criteria that can be regulated by law are met under ESUG – lack of management competency seen as most critical risk

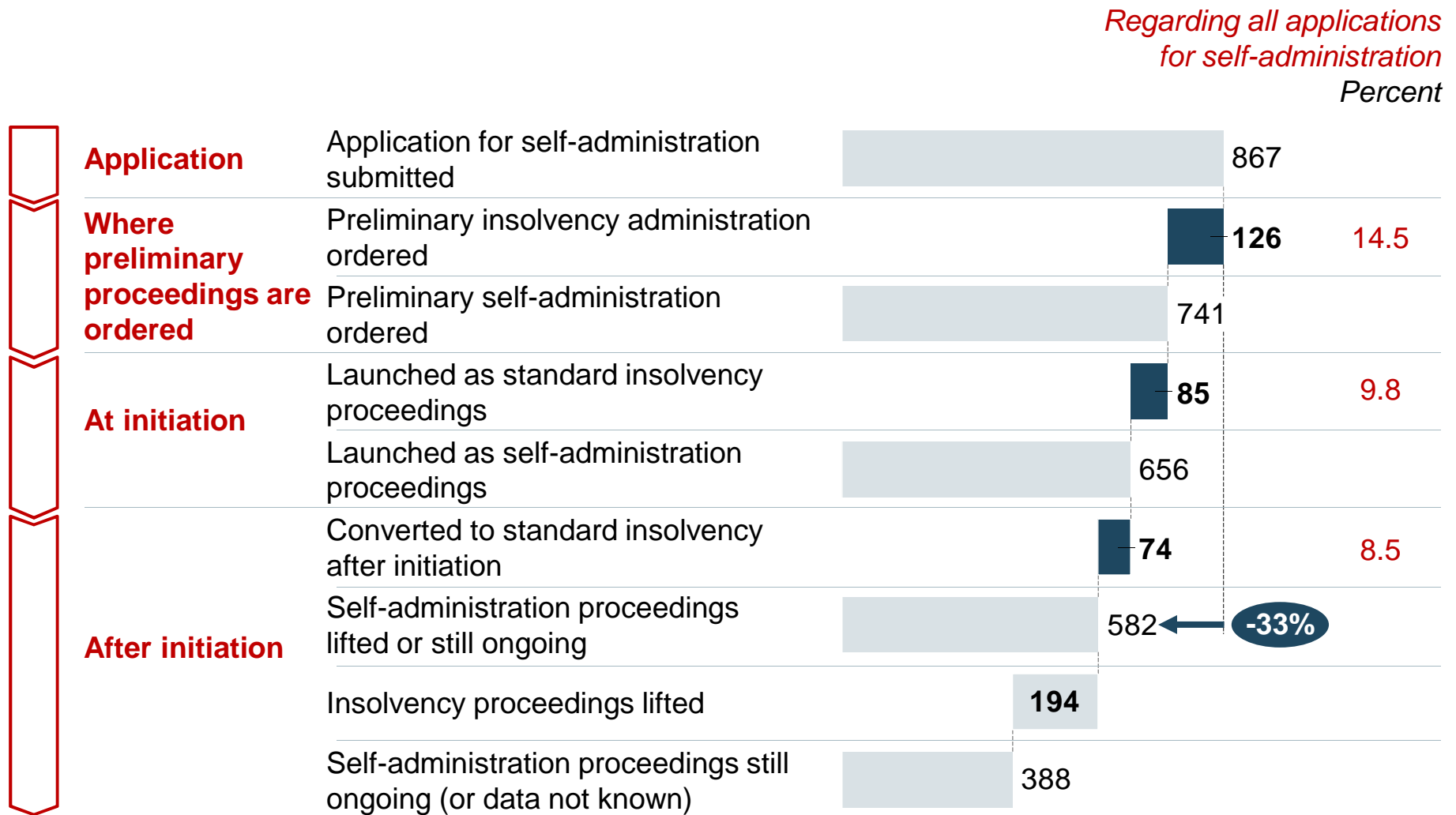
✓ Criterion met

[✓] Criterion partly met

✗ Criterion not met

Criteria	What do you believe are the most important factors in a successful self-administered restructuring?		Which criteria do you are met under German insolvency law (post-ESUG)?	
	Percent		Percent	
Competent management team (know-how, use of CRO)	22		7	✗
Cooperation between self-administrators and administrators	19		13	✓
Collaboration with a competent preliminary creditor committee	14		14	✓
Planning security	13		14	✓
Early application	10		11	[✓]
Alignment with insolvency legislation	8		10	[✓]
Fast completion of proceedings	6		6	✗
Independence of custodian	4		10	[✓]
Debtor's right to appoint the preliminary custodian	4		14	✓

# Around 1/3 of self-administration proceedings are converted to standard insolvency proceedings as they progress

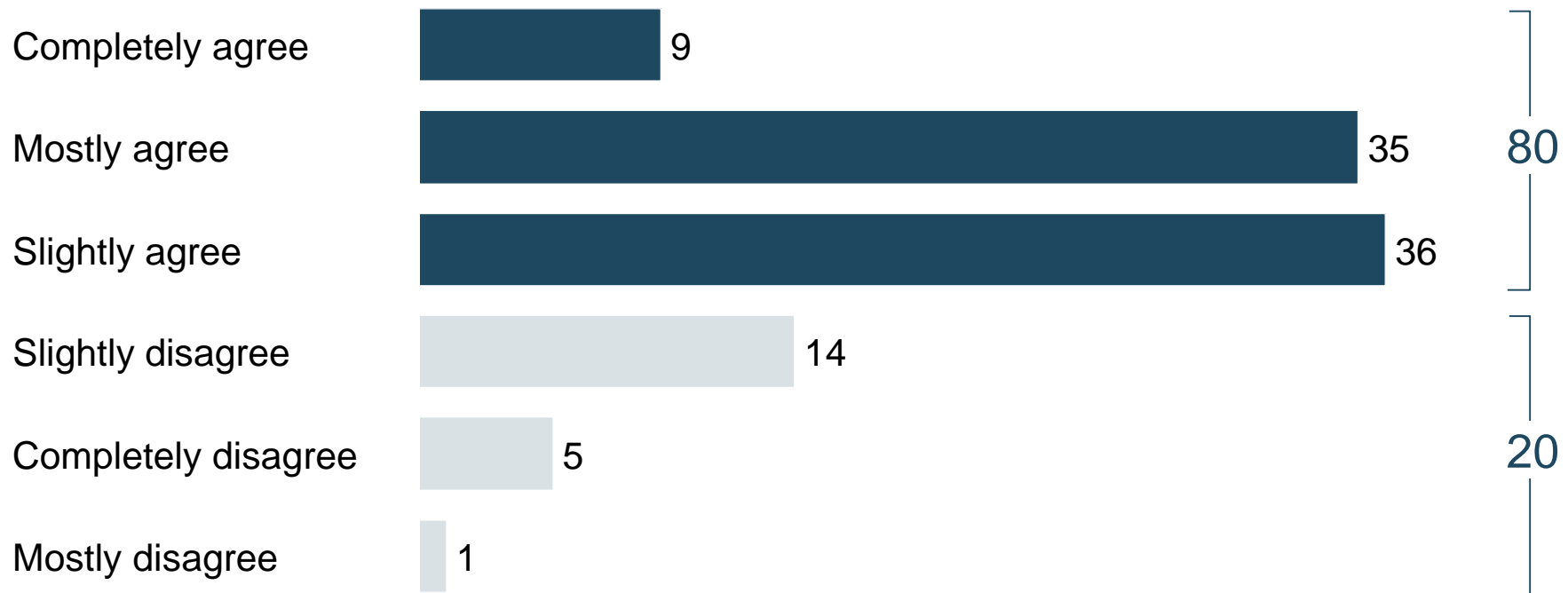




## However, the improvements made have increased complexity and led to increased consulting effort ...

**ESUG has made restructuring more complex and has led to increased consulting effort**

Percent



“

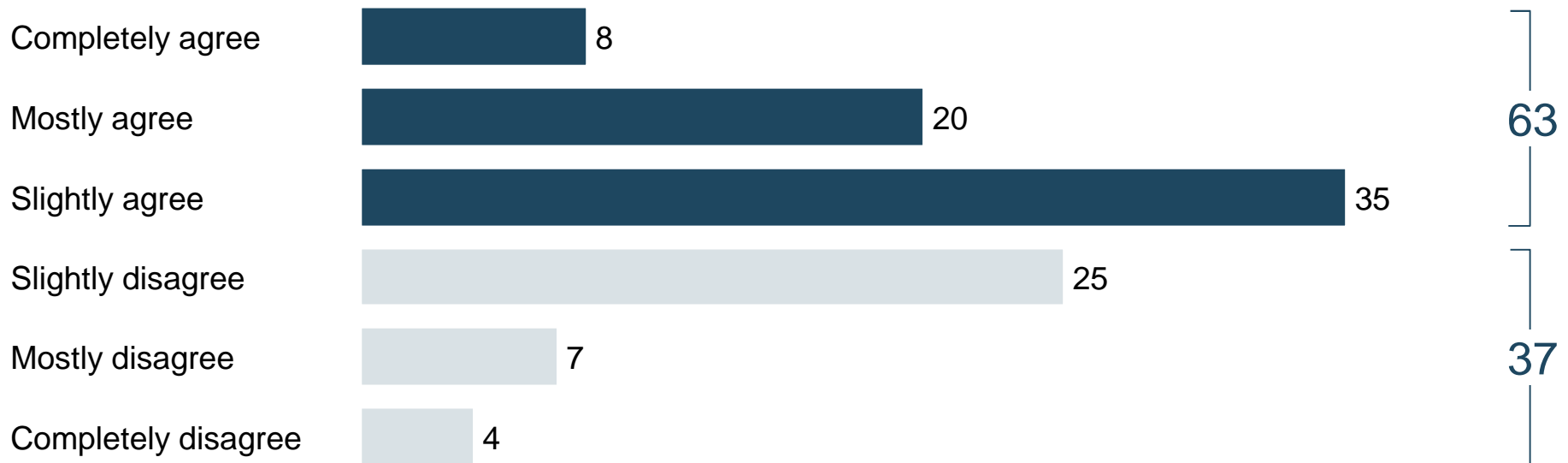
*"The [...] protective shield and plan proceedings in particular are too complex."*

– University professor

## ... which is also reflected in the higher cost of restructuring

**Restructuring under the protective shield and subsequent insolvency proceedings costs more than restructuring in plan proceedings (before changes)**

Percent



“

*"Debtors are not usually able to initiate successful self-administration proceedings without external consulting [...]."*

– Insolvency judge

*"For smaller companies especially there are significant obstacles: the cost of consulting is typically at least EUR 200,000[...]."*

– Lawyer

## Protective shield and subsequent insolvency proceedings usually take 7 to 12 months to complete

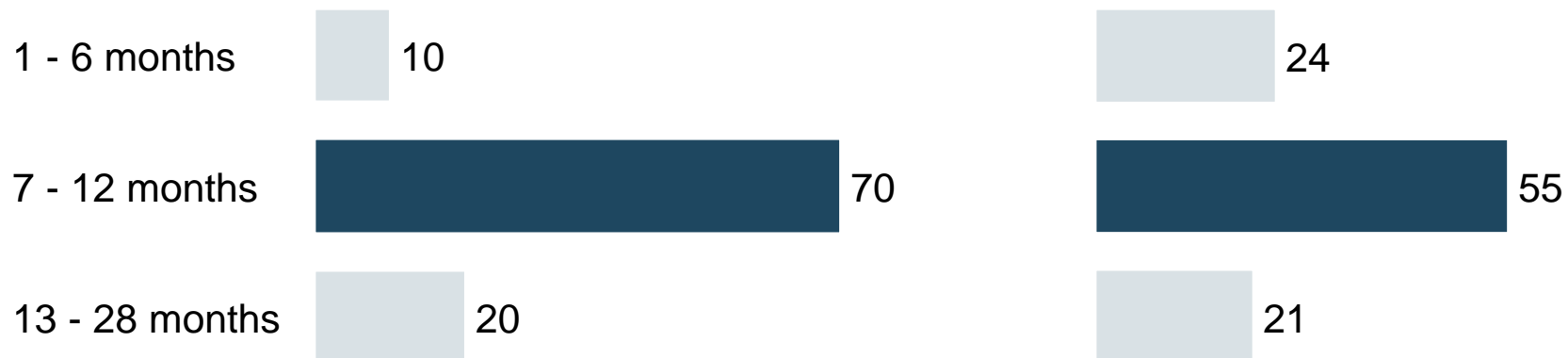
**How long, in your experience, does restructuring take with the protective shield and subsequent insolvency proceedings?**

Percent

**Assessment of time between application and end of proceedings**

**March 2012 to April 2015**

Percent



**2/3 of respondents stated that restructuring with the protective shield and subsequent insolvency proceedings is relatively fast**

## The options available for creditors to assert influence are considered positive following the introduction of ESUG

		Agreement Percent	
Shareholder rights	I	The modification of shareholders' rights <b>outlined in the insolvency plan</b> (e.g., debt equity swap) <b>does not seriously disadvantage shareholders</b>	81
	II	The <b>option to become involved</b> in the creditor committee <b>increases creditors' willingness</b> to support restructuring	83
Creditor involvement	III	<b>Creditor committees are becoming increasingly professional</b>	82
	IV	The rights of the preliminary creditor committee <b>should be expanded</b>	62

“

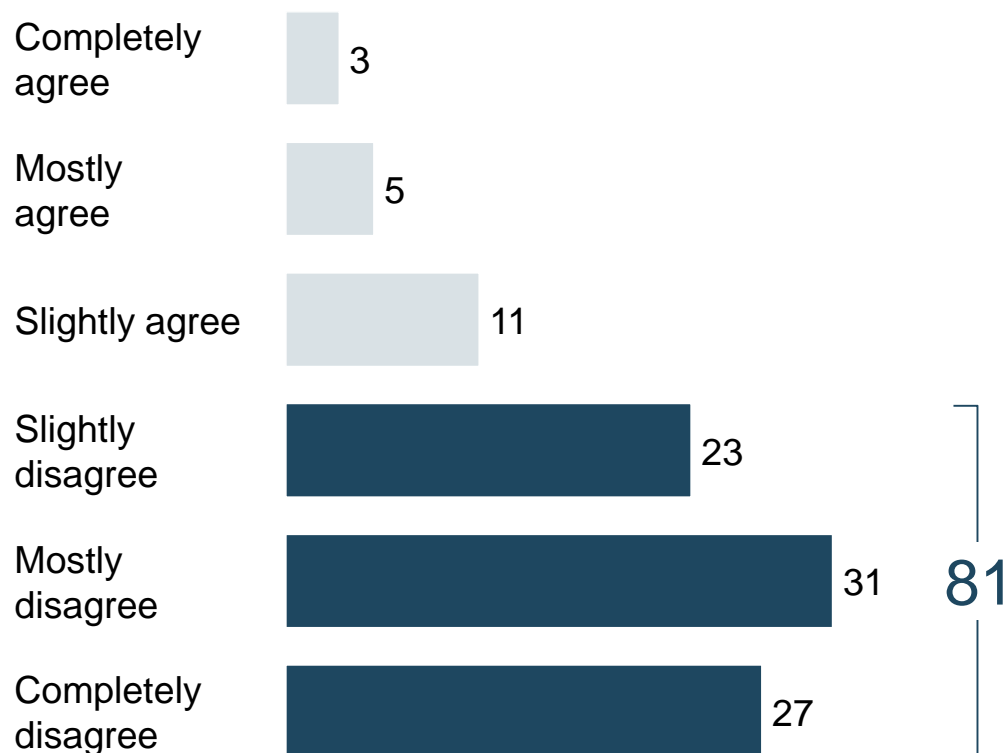
*"As of now, the insolvency law has relinquished all moderation under company law."*

– Insolvency administrator

# I The modification of shareholders' rights outlined in the insolvency plan is appropriate

**The modification of shareholders' rights outlined in the insolvency plan (e.g., debt equity swap) is too much of a disadvantage to shareholders**

Percent



## Comments

- Debt equity swap is an established restructuring instrument in US and UK
- Initiating a debt equity swap is now easier in Germany thanks to ESUG (prohibition to obstruct §245 InsO and liability for difference §254 para. 4 InsO)
- Debt equity swap has been implemented in several prominent proceedings



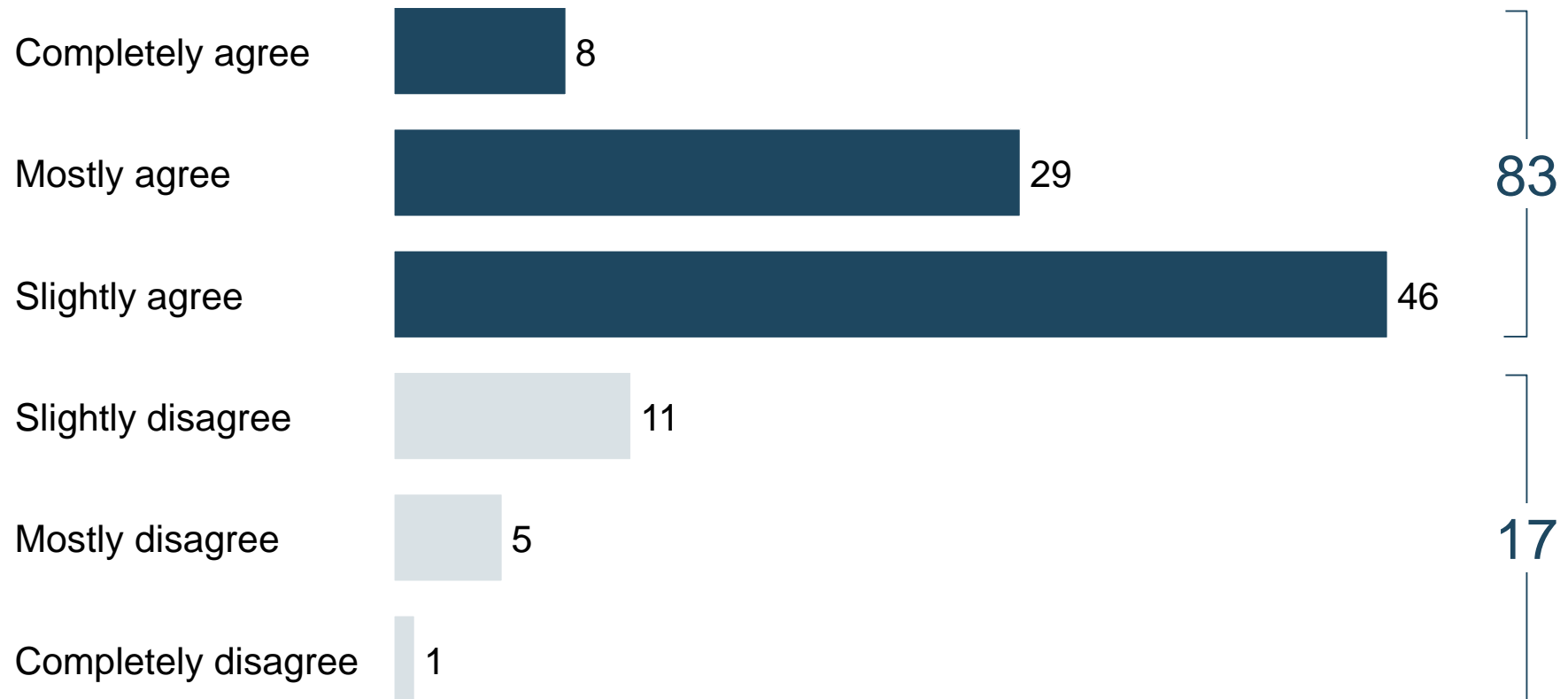


## The option to become involved in the creditor committee increases creditors' willingness to support restructuring

BACKUP

### The option to become involved in the creditor committee increases creditors' willingness to support restructuring

Percent





# Creditor committees are becoming increasingly professional – the rights of the preliminary creditor committee should be expanded

BACKUP

**Creditor committees are becoming increasingly professional**

Percent

**The rights of the preliminary creditor committee should be expanded**

Percent

Agree



82



62

Disagree



18



38



*"Our practical experience of being involved in (preliminary) creditor committees has been generally positive."*

– German commercial bank

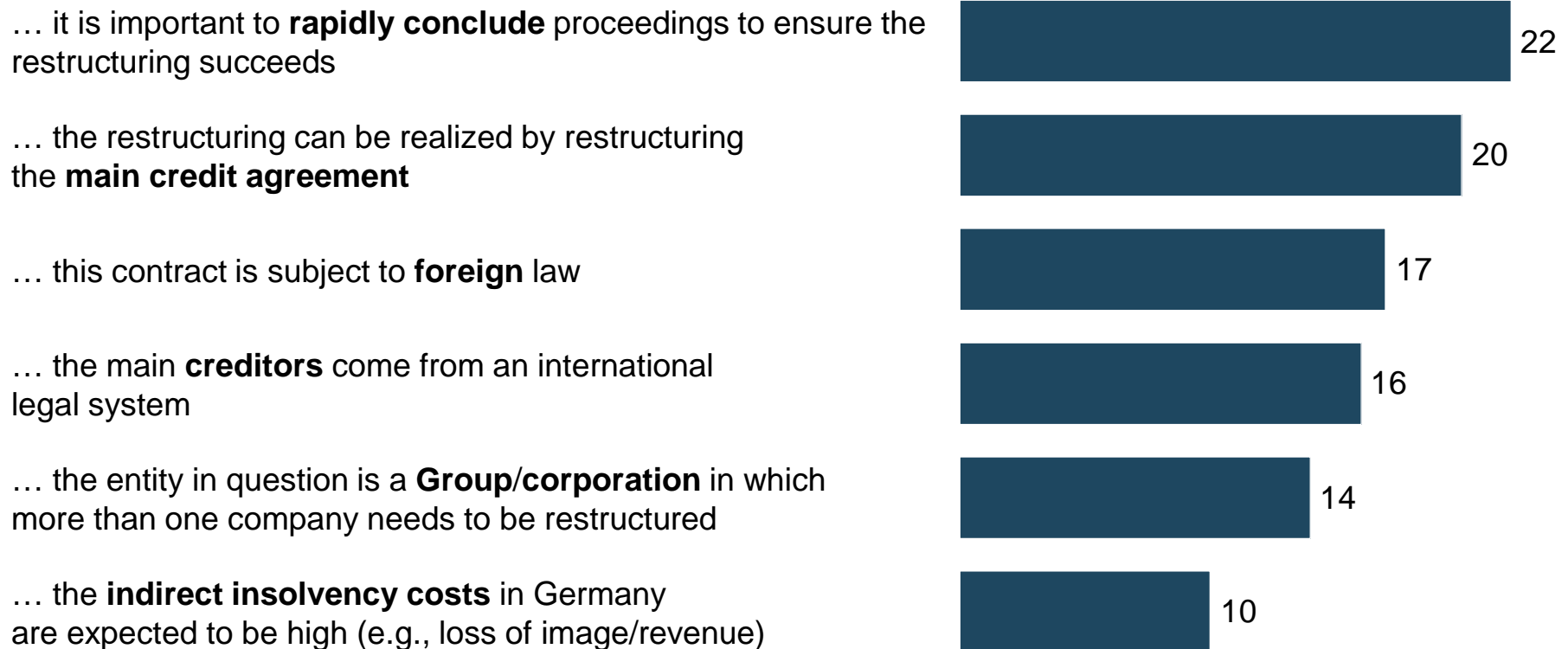
*"We do not usually participate in the creditor committee."*

– German commercial bank

## Even post-ESUG there are myriad reasons for restructuring under international law – analysis based on individual cases

### Restructuring should be carried out under foreign law if ...

Percent



**In practice, the limitation to individual groups of creditors was an especially important argument**

APCOA  
PARKING

Deutsche Nickel

prima.com

ATU  
AUTO TEILE UNGER

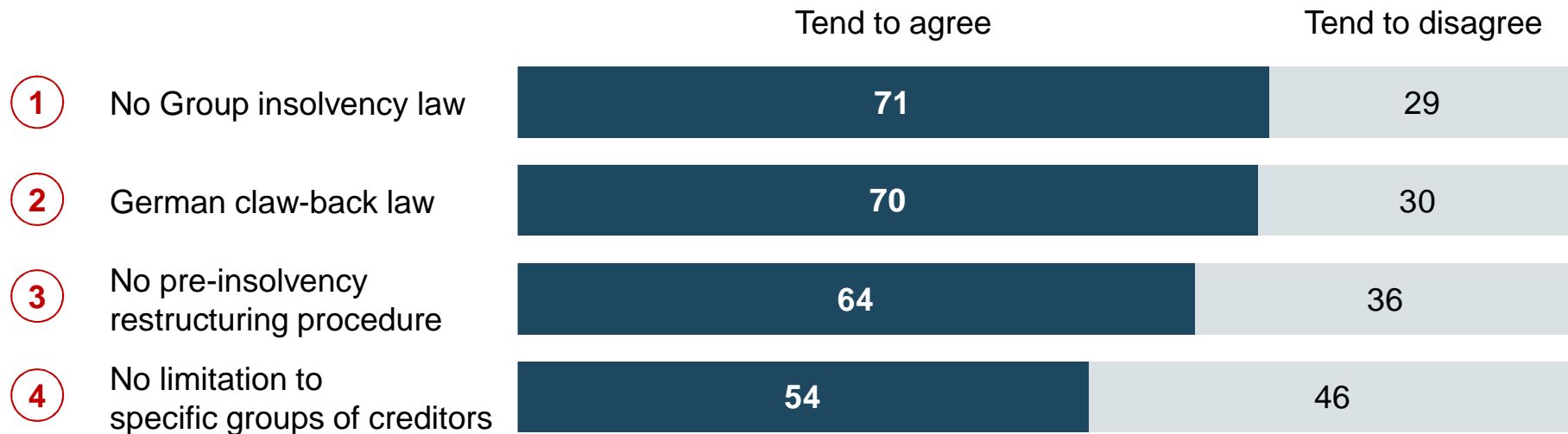
RODENSTOCK  
telecolumbus



## Respondents identified 4 main disadvantages of German insolvency law compared to other legal systems

Are the following characteristics of German insolvency law perceived as disadvantages?

Percent



For judges and insolvency administrators, the disadvantages of German insolvency law tend to carry less weight

“

*"Unfortunately, you still have to file for insolvency in Germany – ESUG has not changed that – even though a pre-insolvency restructuring procedure is long overdue."*

– Anglo-Saxon distressed investor

*"It's bad that Germany has no viable Group insolvency law, and sadly the current drafts do not bode well – cooperation is all well and good but is often barely justiciable."*

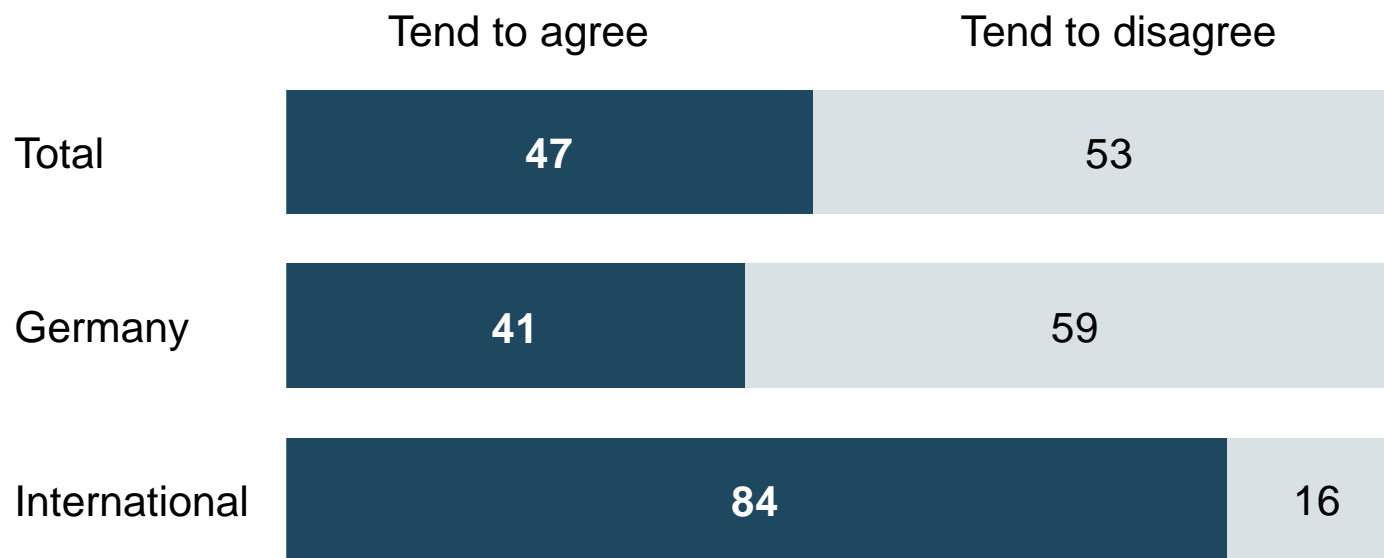
– Anglo-Saxon distressed investor

# International respondents are extremely interested in having English as an additional language of the court

BACKUP

**English should be introduced as an additional language of the court for insolvency proceedings where the majority of creditors are international**

**Percent**



## Conclusion and outlook

- Germany's insolvency law is **mostly seen as positive** after 3 years of ESUG – **international respondents** still recognize **shortcomings** compared to **US and UK law**
- **Disadvantage: restructuring against the wishes of individual creditors is only possible in comprehensive insolvency proceedings** that cover all of the debtor's business relationships
- **A (pre-insolvency) restructuring procedure** with the option of **restructuring with only a limited group of creditors** would be a major step toward improving the competitiveness of Germany as a restructuring location
- The number of company insolvencies has fallen year on year since 2010 – **litmus test of a major wave of bankruptcies is yet to be carried out.** **"Flight risk" for proceedings being conducted abroad has not yet been eliminated**, especially not for large-scale and complex proceedings focusing on financial restructuring

We look forward to this discussion with you!

Noerr

McKinsey&Company



**Dr. Thomas Hoffmann**

Partner, Co-Head  
Restructuring &  
Insolvency

thomas.hoffmann  
@noerr.de

**Dr. Andrea Braun**

Graduate research  
assistant/ legal  
trainee

andrea.braun  
@noerr.de

**Klaus Kremers**

Partner, Recovery  
and Transformation  
Services

klaus\_kremers  
@mckinsey.com

**Daniel Himmel**

Junior partner,  
Recovery and  
Transformation  
Services

daniel\_himmel  
@mckinsey.com

**Dr. Johannes Klein**

Junior partner,  
Recovery and  
Transformation  
Services

johannes\_klein  
@mckinsey.com

**Michael Becker**

Engagement  
manager, Recovery  
and Transformation  
Services

michael\_becker  
@mckinsey.com

**Lea Weinekötter**

Senior associate

lea\_weinekoetter  
@mckinsey.com

Noerr

Noerr is one of the top European law firms with more than 500 professionals in Germany, Europe and the USA. Its Restructuring & Insolvency practice area comprises more than 50 professionals. Noerr's comprehensive legal services in this field are supported by the business-oriented Noerr Consulting as well as Team Treuhand GmbH when it comes to tackling specialized tasks, such as representing bond holders and assuming the position of restructuring shareholders

McKinsey&Company

McKinsey & Company is the leading global management consulting firm comprising more than 9,000 consultants, of which 1,300 consultants are based in Germany. McKinsey established the Recovery & Transformation Services (RTS) unit in 2010 to focus exclusively on holistic transformations and restructuring efforts. We call on professionals in industry, private equity, and restructuring and blend their restructuring experience with the global network of industry and functional experts in our firm. We work hand-in-hand with our clients: we advise, drive change processes in management and the front line, negotiate with stakeholders, and secure implementation