Saggi

The new German preventive restructuring framework

La recente legge tedesca sui quadri di ristrutturazione preventiva

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ABSTRACT:

For the first time, German law provides an instrument that is designed to prevent a debtor's insolvency. The collective pressure of the European Directive EU 2019/1023 and the particular needs resulting from the pandemic pushed the German legislator to act rapidly. This article gives an overview about the new Act and a bit of a cultural background in front of which the new instrument is to be seen and understood.

Keywords: preventive restructuring framework – German Law – transmission of european law

Per la prima volta, la legge tedesca fornisce uno strumento che è destinato a prevenire l'insolvenza del debitore. La pressione congiunta della direttiva europea EU 2019/1023 e delle speciali esigenze derivanti dalla pandemia ha spinto il legislatore tedesco ad agire rapidamente. Questo articolo fornisce una panoramica sulla nuova legge e un po' di background culturale utile ad esaminare e comprendere il nuovo strumento.

***Parole chiave**: quadri di ristrutturazione preventiva – diritto tedesco – attuazione del diritto europeo*

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1. *General remarks about Germany's attitude towards insolvency prevention.*

The Germans used to be (and still are) quite strict in their attitude towards doing business and insolvency: these are two separate areas and they are divided by a Rubicon. Even more than 20 years after the introduction of the German version of the US Chapter 11-proceeding in the Insolvenzordnung (Insolvency Ordinance, InsO) the sentiment of the stigma of insolvency is still quite wide-spread and strong. This might have to do, among others, with a simple linguistic fact: The German words "Schuld, schulden, überschuldet, etc." have entirely different connotations than their foreign counterparts such as obligation, dette, deuda oder impegno. The German words are synonymous with the English word guilt (it: la colpa) and are, thus, linked with what the anthropologist *Ruth Benedict* [1] has discovered as being formative for our culture group – the guilt cultural background. Different from a shame culture surrounding is the burden of carrying a guilt with you shattering even if nobody knows. Given the enormous influence of the language on our thinking [2], it becomes explicable why non-German politicians complain when discussing debt issues with Germans that it turns right away into „moral philosophy" [3].

Under these circumstances it is of only limited help to point at the greater picture of why it is nowadays indispensable to introduce a rescue option into insolvency law [4]. This has to do with what the economic historians describe as the dawning tertiary economic sector, i.e. the service economy. Here, insolvency law's traditional liquidation instrument of selling the debtor's assets and to

[1] *The Chrysanthemum and the Sword – Patterns of Japanese Culture*, 1947.

[2] The discussion about the connection between language and thinking began (in Germany) with *Johann Gottfried Herder* (1744-1803) and *Wilhelm v. Humboldt* (1767-1835) but was boosted by *Benjamin Lee Whorf*'s (1897-1941) dissertation on the language of the Hopi Indians (Language, Thought, and Reality) and is discussed still today; cf. G. DEUTSCHER, *Im Spiegel der Sprache – warum die Welt in anderen Sprachen anders aussieht*, 2014, 148 ff.; H. GIPPER, *Gibt es ein sprachliches Relativitätsprinzip? Untersuchungen zur Sapir-Whorf-Hypothese*, 1972.

[3] It was allegedly the Italian Prime Minister Mario Monti who said this.

[4] On this, cf. C.G. PAULUS, *Ausdifferenzierungen im Insolvenz– und Restrukturierungsrecht zum Schutz der Gläubiger*, in *Juristenzeitung (JZ)*, 2019, 11 ff.

distribute afterwards the proceeds among the creditors does not really help the creditors; since the really valuable assets are no longer 'mobilia, immobilia et nomina' [5] (which the ancient Roman jurists have taught us to transform into money by means of a sale) but 'knowhow, goodwill, charisma' etc. These goods are dependent on the debtor's involvement so that creditors can monetarize them only with the debtor's help; that is why we have turned from killing the debtor – most famously by the Twelve Table legislation from 450 BC – 180 degrees to helping him to come back into business.

And yet, despite all these obstacles, Germany has enacted an insolvency avoidance mechanism which entered into force on Jan. 1, 2021. This is the result of the power of the combination of "the capital market" plus the present pandemic. Until last year, the dominant understanding has been that involuntary impairments of creditor rights were permissible only within an insolvency proceeding due to constitutional reasons. This attitude was questioned, though, in the first decade of this century when some German firms started to shift their centre of main interests (COMI) from Germany to the U.K. in order to apply there the rather debtor-friendly CVA (companies'voluntary arrangement). Irritated by this perfectly permissible forum shopping, the Ministry of Justice invited thereupon a couple of experts from the U.K. and France to learn from them about the functioning of such pre-insolvency proceedings. As an inter-ministerial harassing fire did in those days the Ministry of Economics arrange a conference in which the pros and cons of a pre-insolvency proceeding were discussed [6].

But even this quite unique interference did not change the Ministry of Justice's attitude. It amended the insolvency code in 2013 by a moratorium-like entry proceeding, called "Schutzschirm" (protective umbrella) which, after max. three months, turns into a regular insolvency proceeding [7]. When in 2014, the EU Commission published its recommendation to all member states to enact a preventive restructuring framework, the general feeling in Germany was: we have it already! The pressure group behind this recommendation, though, was strong enough to push things further on. The capital market wanted to see better results so that, from 2016 on, Germany's and other member states' inactivity gave cause to the drafting of the Regulation EU 2019/1023 [8]. It has to

[5] Cf. D 42.1.15.2 (Ulp).

[6] On the results cf. C.G. PAULUS *et al.*, *Sanierung im Vorfeld von Insolvenzverfahren*, in *WM*, 2010, 1337 ff.

[7] It had by then become sort of popular for German firms to reschedule their debts by means of an English scheme of arrangement.

[8] On this Directive, cf. the commentary ed. by C.G. PAULUS, R. DAMMANN, *European Preventive Restructuring – an Article-by-Article Commentary*, 2021.

be transposed into national law until mid-2021, and it seemed for a while as if the Ministry of Justice in Berlin was willing to use this timespan in toto.

But then came the virus and the pandemic. The still not yet arrived but still expected insolvency wave of many businesses in combination with the federal elections in 2021 made it very urgent to offer an alternative to a regular insolvency proceeding – remember the abovementioned strength of the German inclination towards the insolvency stigma – which might help entrepreneurs without creating artificially zombies, i.e. companies which should be liquidated from an economic stance. Accordingly, the Ministry submitted to the public its draft bill in mid-September 2020 which was transformed into a governmental draft only some three weeks later and which was enacted on 1 January 2021. It runs under the name Statute on the Stabilisation and Restructuring Framework for Enterprises Act (henceforth StaRUG [9]).

2. *European Commonalities?*

Before describing the details of the new Act, one more aspect should be highlighted which has to do with the pan-European sluggishness and missed opportunities. For this, one has to step back for a moment and to look at the globe as a whole. There it becomes visible that there is something like a competition among (and sometimes within [10]) jurisdictions for becoming hubs for restructurings and insolvency cases [11]. The first competitor has been the U.S. with her Chapter 11 proceeding which was used by debtors on a worldwide scale – including Russia in the notorious Yukos case –; the U.K. was another one; and only recently Singapore discovered the chance and tries hard to become the hub for East Asia [12]. So, there are three competitors nicely spread

[9] Gesetz über den Stabilisierungs– und Restrukturierungsrahmen für Unternehmen, Artikel 1 G. v. 22.12.2020 BGBl. I, p. 3256 (Nr. 66). The citations in this article refer to this statute if not otherwise indicated.

[10] In the U.S., the insolvency courts of the Southern District of New York, of Delaware, and now also Houston are competing for the big cases.

[11] On this, cf. C.G. PAULUS, R. DAMMANN, *Präsidentielle Vorgaben und Symbiosen im Insolvenzrecht – Annäherungen zwischen Deutschland und Frankreich*, in *ZIP*, 2018, 249 ff.; ID., *La loi Pacte – Une Convergance Franco-Allemande en Marche Forceé*, in *Recueil Dalloz*, Paris, 2018, 248 f.

[12] On its scheme of arrangement cf. W.Y. WAN, C. WATTERS, G. MCCORMACK, *Singapore Schemes of Arrangement: Empirical and Comparative Experience*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723104.

over the map of the world. It was one of those occasional historic happenstances that at the time when the U.K. decided to leave this group by cutting off all the EU-wide automatisms of recognition of private law court and insolvency decisions, the Commission in Brussels started the project of a European-wide Restructuring Framework. So, there would have been a chance to fill the gap torn by the Brexit through a Union-wide instrument. However, that is not how Europe functions. Instead, the Directive EU 2019/1023 offered almost 90 options for variations so that in the end it is to be assumed that there will be 27 different insolvency avoidance instruments. Like Europe as a whole, Germany, too, refrained from drafting a competitive Act; the so far only ones who are ready to step in for the U.K. are The Netherlands [13].

However, one commonality might come to light once all member states have enacted their transposition laws – namely, that there is a two-step approach to restructurings: the first takes place entirely out of court but in the shadow of the second, whereby the second, the official restructuring procedure serves as a threat through all the options granted by the Directive. Germany is insofar a perfect example: Until end of last year (2020) the negotiations between debtor and creditors for averting insolvency had been, as it were, handicapped as the (more or less) only bargain chip for the debtor had been to menace the creditors to file a petition for opening an insolvency proceeding. This is (and always has been) a kind of overkill since that proceeding is affecting all assets, all creditors, and the entirety of the business relationships. Now – with the insolvency avoidance procedure – things are different. Now, the debtor has as a bargain chip to threaten the selected creditors to make use of the new restructuring instrument without all these collateral damages of a regular insolvency proceeding [14]. Such threat is needed since in those out-of-

[13] On the new Dutch Wet Homologatie Onderhands Akkoord (WHOA) cf. T. BIL, *An Overview of the Upcoming Dutch Scheme*, in 33 *Insolvency Intelligence* (2020), 99 ff.; R.J. VAN GALEN, *Het Wetsontwerp Homologatie Onderhands Akkoord*, in *Ondernemingsrecht*, 39, 2020, 139 ff (in English translation by the author on file with the present author); J. BERKENBOSCH, S. PEPELS, *The Dutch Scheme is in Force: European Restructuring Practice on the Move! Inside Story*, January 2021, Insol Europe, available at: https://www.insol-europe.-org/news/inside-stories; C. RINALDO, *Il salvataggio delle imprese in crisi: l'attuazione della direttiva sulla ristrutturazione e sull'insolvenza in germania e in olanda e prospettive per l'ordinamento italliano*, in *Nuove leggi civ. comm.*, 2020, 1508 ff.; C.G. PAULUS, *European and Europe's Efforts for Attractivity as a Restructuring Hub*, in *Texas International Law Journal*, forthcoming in 2021.

[14] On the criticism of this, cf. C.G. PAULUS, *Der Wandel von einem gläubigerzentrierten zu einem schuldnerzentrierten Sanierungsansatz unter dem StaRUG*, in *NZI Sonderbeilage*, 1, 2021, S. 9 ff.

court-negotiations the unanimity principle of the general contract law prevails; only when and if all creditors give their consent, those negotiations are successful. When they fail, the second step has to be climbed the conditions of which in their German version are to be described now.

3. *The statute (StaRUG).*

Needless to point out that the StaRUG is a product of German legislation. This means that it is – unlike the rules of the new English "super scheme" (some 8 sections) or the "Dutch Scheme" (around 25 sections) – a rather voluminous Act in itself with more than 100 sections. Instead of just reflecting the sequence of the bill's rules and structure, I prefer to unfolding the contents of the Act by describing the options which are offered to the debtor on a timeline [15]. This is all the more recommendable as there is not the proceeding which is to be applied; the statute rather contains a tool-box from which the debtor may chose whichever tool(s) appears him to be most appropriate. It should be noted, however, that the subsequent description is just an overview [16]; many details will be left unmentioned.

3.1. *Early warning.*

Sec. 1 StaRUG deals with early warning. Since the German company, trade and civil law has already set up numerous of such early warning signals [17], sec. 1 obliges more or less [18] all those who are legally responsible for running a business to constantly monitor the prospects of that business's development.

[15] To be sure, the description here is limited to a more or less rough outline; not every facet will be recorded.

[16] Cf. additionally C. RINALDO, *Il salvataggio delle imprese in crisi*, (nt. 13), 1508, 1523 ff.

[17] Cf. H. SÄMISCH, *Früherkennung – der Schlüssel zur effektiven Krisenbewältigung, Zeitschrift für das gesamte Insolvenz- und Restrukturierungsrecht*, in *ZInsO*, 2021, 169; C.G. PAULUS, *Frühwarnsysteme*, in *Neue Zeitschrift für Insolvenzrecht (NZI)*, 2020, 659 ff.; S. HAGHANI, *Die Umsetzung von Frühwarnsystemen im vorinsolvenzlichen Sanierungsverfahren*, in *NZI-Beilage*, 1, 2019, 20 f.

[18] In sec. 101, it is stated that the website of the Ministry of Justice will provide some early warning information; and sec. 102, thereby following a recent decision of the German Supreme Court, dec. from 26 Jan. 2017 – IX ZR 285/14, NZI 2017, 312, obliges auditors and tax consultants to make their clients aware of critical signs when they have to assume that their clients have not yet recognized.

Whereas this is just a generalization of a duty which anyway was already seen to exist before – at least with regard to stock companies and private limited companies –, did the legislator eliminate further rules from the previous draft which would have caused a major shift in company law. Pursuant to sec. 2 and 3 of the Draft Bill the director(s) of a company were supposed to be obliged – from the moment of imminent insolvency on (on that decisive term see in a moment) – to take into account in their entire business activity the interests of the entirety of their creditors. On the last meters, as it were, these sec. 2 and 3 of the Draft Bill were deleted, thereby making it less likely that (at least) private limited companies will submit restructuring plans which include a separate class of shareholders. Since now, the director(s) still have to comply with the mandates of the shareholders [19].

As mentioned before, the term imminent insolvency plays an eminent role in the bill. Whereas the Directive speaks about 'likelihood of insolvency' has the German legislator translated this into 'imminent insolvency', thereby picking up a term which exists already in the Insolvency Ordinance (InsO), sec. 18, as one out of three opening reasons. The other two reasons – insolvency and over-indebtedness – can be triggered by both the debtor and the creditors. In contrast, the opening reason 'imminent insolvency' is reserved exclusively for a debtor petition. Accordingly, in the future the debtor will have the choice to petition either for the restructuring framework or for a regular insolvency proceeding whereby 'imminence' will be defined as a time span of two years.

3.2. *Out-of-court negotiations.*

It is a question of general contract law that the debtor has the right and the possibility to enter into out-of-court negotiations; this was described supra as step no. 1. Sec. 94-100 support this kind of negotiations by offering a rescue moderator ("Sanierungsbeauftragter") to be appointed by the court. This person (copied from the French conciliateur) shall act more or less as a mediator and try to get the parties to an agreement. When and if this agreement will be confirmed by the court, the possibility to avoid the transactions in this agreement are limited in a potential subsequent insolvency proceeding, sec. 97 par. 3. To be sure, in this particular case, the participation of the court is restricted to a control of formalities. But the rescue moderator can be used as supporting the debtor in his effort to get the deal done on step no. 1.

[19] Sec. 37, par. 1, GmbHG.

What sounds as an attractive option – all the more as there is no need for the debtor to be imminently insolvent – comes, however, at a price: To apply for such a rescue moderator, the debtor has to file a respective petition with the court in which the debtor's financial or economic difficulties are to be addressed. They are the triggers for the commencement of a rescue moderation. This disclosure is certainly tolerable, but the law entitles the moderator to check the business records and books and obliges him to report to the court not only on the contents and progress of the negotiations but also if there is an insolvency reason for the debtor's estate. The moderator is, thus, a kind of a court's spy. His remuneration is to be based on time spent [20], so that it seems that this concept is meant primarily for SMEs.

3.3. *Restructuring plan.*

All tools which are to be described here and subsequently are dependent on the debtor's imminent insolvency (but not yet inability to pay debts as they fall due or over-indebtedness [21]); and most of them are modeled closely after the existing rules in the Insolvency Ordinance [22]. This begins with the restructuring plan the contents and voting of which are regulated in meticulous details in sec. 2 to 28 StaRUG and resemble closely the rules in sec. 220 ff. InsO. The legislator has done here certainly an intellectually impressive work but very likely not one that can easily (if at all) be understood by a non-lawyer [23].

3.3.1. *Contents and structure.*

Unlike the Insolvency Ordinance, the StaRUG confines its personal applicability to entrepreneurs and legal entities [24]; thus, consumers cannot not make use of these instruments [25]. Sec. 2 and 4 prescribe and limit the objec-

[20] Sec. 98 StaRUG.

[21] The duty to file in those cases pursuant to sec. 15a InsO still exists unrestricted.

[22] Sec. 217 ff. InsO.

[23] This is mentioned here since in 2016, at the meetings of the so-called expert rounds in Brussels, strong emphasis was laid on easy, cheap, and (possibly) judge-free access to the new instrument.

[24] Sec. 30, par. 1, StaRUG.

[25] This is an interesting convergence towards the French law (and its legal family) where

tive applicability: accordingly, claims against the debtor (called: restructuring claims), security rights, membership rights as well as certain rights from intra-group securities are subject to potential re-scheduling whereas claims of workers and those resulting from torts are not. A debt-equity swap is permissible, which is, i.a., an instrument in the struggle against non-performing loans (NLs); after all, it encourages loan-to-own-strategies [26] by which investors buy claims on the secondary market at a discounted price so that they can take-over the company.

The restructuring plan must be divided into a declaratory and a constructive part [27]. Whereas the first part describes the fundaments and effects of the plan does the second one determines in what way the addressed rights are affected. The debtor is more or less free in the selection of the affected creditors [28]; they have to be put into classes whereby the criteria for the classification need to be appropriate and to be explained in the declaratory part. When and if affected, certain classes are mandatory – e.g. secured creditors or shareholders [29] – whereby the Act seems to indicate in sec. 8 no. 2 and sec. 73 par. 2 that primarily finance creditors are meant. The principle of the equal treatment of creditors (*par condicio creditorum*) is to be applied only within the classes not among them [30]. Sources of new financing as well as their securitization can be included in the plan [31] as well as any changes in property law rights [32].

In order to fulfill the requirements of a restructuring plan, sec. 14 and 15 oblige the debtor to add certain information such as a reasoned (whatever that might imply) declaration about the prospect of that plan to eliminate the imminent insolvency, a detailed financial statement and, where appropriate, ex-

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insolvency law always has been a matter of commercial law. For the interrelationship of modern commercial law and the approach of the Directive 2019/1023 insightful A. THERY, Eu*rofenix*, Summer 2019, 18 f.

[26] Further alleviation for this strategy by the German Supreme Court, dec. from 7 May 2020 – *IX ZB 56/19*, in *Zeitschrift für Wirtschaftsrecht (ZIP)*, 2020, 1138 with annotation by N.R. PALENKER. On the strategy comprehensively *idem*, *Loan-to-own*, 2019. On the recent legislative restrictions in the amended Stock Corporation Act T. FLORSTEDT, *Finanzinvestoren als nahestehende Personen*, in *ZIP*, 2021, 53 ff.

[27] Sec. 16 promises to provide a check-list for the drafting of a restructuring plan, available on the website of the Ministry of Justice.

[28] Sec. 8 StaRUG.

[29] Sec. 9 StaRUG.

[30] Sec. 10, par. 1, StaRUG.

[31] Sec. 12 StaRUG.

[32] Sec. 13 StaRUG.

pressions of consent (e.g., from the directors to continue the business in case of a successful rescue).

3.3.2. *Offer and acceptance of the plan.*

The next passage of norms, sec. 17-23, clarifies that the restructuring plan is part of an offer to the affected creditors. The complete offer has furthermore to include the articulate notice that the plan might bind opposing creditors in case that the relevant majority of creditors accepts the offer and the court confirms the plan [33]. The acceptance of that offer is to be done by the creditors'voting which, in its fastest version [34] and when everything goes smoothly, can be held seven days after the notification of the offer. Before it comes to that step in a particular meeting, however, a discussion about the offered plan might take place in this meeting or in a separate one. Changes in the plan as a result of such discussion do not hinder the voting when and if they are related only to individual issues. Deadlines are to be observed and the procedural steps have to be carefully documented. Otherwise, the plan might not become confirmed by the court [35]. In practice, it is therefore to be assumed that debtors will make use of the court supervised voting procedure (on this, see below).

3.3.3. *Technicalities.*

The final passage of norms on the restructuring plan, sec. 24-28, deals with voting rights and majority-requirements. Regarding the rights, sec. 24 has as a starting point that the nominal value of the claims is decisive and the value of the security right respectively. Sec. 25 regulates that the needed majority in each class of creditors (or shareholders) is three quarters of the voting rights of all members in that particular class, not just of those creditors who actually vote.

If this majority is reached in each class the plan offer is accepted upon subsequent court confirmation; if this is not case, acceptance can be achieved by means of a cross-class cram-down. As a matter of fact, this is a kind of legal magic; since a "no" is transformed into a "yes" – provided that three requirements are fulfilled: firstly, the members of the particular class are presumably

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[33] Sec. 17, par. 1, StaRUG.

[34] This is pursuant to sec. 19 and 20 when the debtor allows for an electronic voting.

[35] Cf. sec. 63, par. 3, StaRUG.

in no worse condition by the plan than without any plan at all; secondly, the members of that particular class receive an adequate portion of the value which is supposed to be given to all affected creditors of the plan (the so-called plan value); and thirdly, a numeric majority of classes has voted in favour of the plan (when there are just two classes, it suffices that one class has given its consent).

The second requirement is the tricky one since adequate participation of the plan value is easy to understand in theory but hard to determine in practice. Accordingly, sec. 27 clarifies that the absolute priority has to be observed; this means roughly that no creditor receives more than what is owed and no creditor receives anything before creditors of a higher rank are satisfied in toto – whereby fictitiously the insolvency ranking is applied. However, sec. 28 deals with permissible exceptions from the absolute priority; a relative priority [36] is, thus, acceptable when, for instance, such value participation is appropriate for coping with the particular economic difficulties of the case at hand and its surrounding circumstances.

3.3.4. *Conclusion.*

To be sure, a debtor is not obliged to comply with the aforementioned proceduralized steps. But since it is hard to predict at the beginning of out-of-court negotiations whether unanimity will be reached among the creditors, the debtor is well advised to undergo this hardship. When and if he succeeds to overcome the described and numerous further challenges [37] to get the plan accepted unanimously, no court involvement is required. In such a case the stick was obviously pressure enough to get potential hold-out creditors in line with all other creditors who are ready to support the debtor. If, however, individual creditors are not ready to accept the plan's constructive part with its rescheduling of claims, the debtor needs further support.

This is where the court enters the stage: for getting the plan accepted by the mechanisms of binding the outvoted creditors, the debtor needs the judicial confirmation of the plan. But, as the case might be, further support might be necessary; the statute has four additional remedies which work as a tool box from which the debtor is basically free to choose what is needed.

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[36] On this, just see L. STANGHELLINI, R. MOKAL, C.G. PAULUS, I. TIRADO, *Best Practices in European Restructuring*, p. 45 f.

[37] I.e. those which are not described in the text.

3.4. *The tool box.*

Beginning with some formalities (3.4.1) and the restructuring commissioner (3.4.2), the respective tools are to be presented subsequently (3.4.3 to 3.4.7); finally, some remarks about international implications shall be made (g) before then some concluding remarks on the new statute will be given (4).

3.4.1. *Formalities.*

In sec. 29 the four tools (called restructuring and stabilisation instruments) are listed: judicial voting, pre-check, stabilisation, plan confirmation; a fifth tool – discontinuation of contracts – became also eliminated on the "last meters" of the legislative process. These tools are meant to be used for a "sustainable elimination of an imminent insolvency"[38]. Whichever tool the debtor plans to choose – alone or several together, it can be done only in a sort of proceduralized way; this is the consequence of having the court participating in all those cases.

(1) Accordingly, the first step is the debtor's notification of the court of the intended restructuring with the help of the tool box[39]. The notification, to be sure, is not just a brief and informal information but has to be accompanied by a rather elaborate concept of the envisaged restructuring (when possible the plan (as described supra under 3) or a draft of it), by a report about the status of negotiations with the affected creditors, and by evidencing how the debtor has prepared to be ready to comply with the duties imposed by the statute. Additionally, the debtor has to indicate whether rights of consumers or SMEs will be affected by the plan plus whether opposing creditors exist. The latter information is necessary for the need to appoint a restructuring commissioner.

(2) The competent court is called "restructuring court". This type of court does not yet exist but it shall be, like insolvency courts, a division of the local courts ("Amtsgericht"). Sec. 34 wants 24 restructuring courts to be established – one in each district of a court of appeal. However, this might turn out to be just another attempt to overcome the inefficiencies of the German federal structure: despite the complexities of modern insolvency law Germany indulges the waste of resources to keep more than 180 local courts dealing i.a. with insolvency law. Needless to point out that many of the judges know little

[38] Sec. 29, par. 1, StaRUG.

[39] Sec. 31 StaRUG.

if anything about this field of law. Therefore, the Federal Ministry of Justice tries again and again to push the "Bundesländer" towards a concentration of their insolvency courts – so far more or less in vain.

The court's exclusive competence is dependent on the debtor's general venue or its centre of economic activity; this serves as a safeguard for compliance with the European Insolvency Regulation when and if the rescue attempt fails and ends in an insolvency proceeding. A rather limited sort of *vis attractiva* is to be applied by the court [40]; and in case of a group restructuring case, the court may, upon request by the debtor, declare its competence for the entire group [41]. Even though the Civil Procedure Ordinance (Zivilprozessordnung) is generally applicable [42], does sec. 39 oblige the restructuring court to investigate the facts *ex officio* (if not otherwise stated).

(3) The abovementioned notification marks the commencement of the restructuring case and leads to a two-fold reaction by the court. Firstly, the court examines its own jurisdiction and potential reasons for ending the case [43] – for instance, if the debtor has filed a petition for an insolvency proceeding or when he, in the further course of the case, gravely violates his duties (on which, see below). When, however, the case goes on, the notorious duty to file under German law, cf. sec. 15a InsO, is suspended, or better: replaced by a notification duty (see below). During the entire pendency of the restructuring case, the debtor is under the duty to take the creditors'interests into account; any culpable violation is sanctioned by a personal damage claim of a creditor [44]. Secondly, the court considers whether or not a restructuring commissioner is to be appointed, cf. below.

Ipso facto-clauses, i.e., contractually agreed upon automatic discontinuation of contracts through the commencing of a restructuring case are declared to be of no effect [45].

(4) As long as the case is pending, the debtor is subjected to additional duties which are listed in sec. 32 and 42. They are quite burdensome and begin with the duty to engage in the restructuring case with the care of an "orderly and conscientious restructuring manager" (whatever that might be) and to omit all actions which contradict the goal of the restructuring, e.g. to serve or give

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[40] Sec. 36 StaRUG.

[41] Sec. 37 StaRUG.

[42] Sec. 38 StaRUG.

[43] Sec. 33 StaRUG.

[44] Sec. 43 StaRUG.

[45] Sec. 44 StaRUG.

security for a claim which shall be rescheduled in the restructuring plan. Furthermore, the debtor has to keep the court informed on all issues that might be relevant for success of the envisaged restructuring procedure – including the predictable failure of the plan. Instead of the duty to file for insolvency when and if the debtor turns out to be insolvent or over-indebted – in other words, if one of the insolvency reasons [46] is given – the debtor is obliged to notify the court on the spot.

What makes these duties so harsh are their sanctions. Forborne notification of the court about the existence of an insolvency reason is subject to civil and criminal liability. And culpable violation of the other duties may lead to the creditors'damage claims against the office holders. In short, to make use of the tool box is not just fun for the debtor!

(5) Sec. 89-91 offer some safeguards for restructuring attempts in that they limit liabilities and the possibility to apply later on the claw-back rules of the German Insolvency Ordinance which are usually not only rather strict but have also been made even stricter by judicial case law. For instance, the possibility to avoid a transaction made in the course of a restructuring case cannot be founded on the reason alone that there was a mutual understanding between debtor and the other party and that therefore they both intended to act to the detriment of the creditors, sec. 89. And sec. 90 grants actions and transactions from a court-confirmed plan largely avoidance-proof.

3.4.2. *Restructuring commissioner.*

Whereas the "practitioner in the field of restructuring" plays a subordinated role in the Directive 2019/1023 [47], it is to be feared that the contrary is true in the future German law. A closer look to the rule on the mandatory appointment of a restructuring commissioner ("Restrukturierungsbeauftragter") [48], reveals that not many restructuring cases will be initiated without commissioner participation [49]. Thus, no. 1 of sec. 73 makes an appointment mandatory when

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[46] Cf. sec. 17 and 19 InsO.

[47] Cf. the definition in art. 2 no. 12 of the Directive; on this, cf. M. VEDER, in C.G. PAULUS, R. DAMMANN, *European Preventive Restructuring*, 2021, art. 2, mar. 58 ff.

[48] Sec. 73 StaRUG.

[49] As it has been indicated supra: lobbying has done a thorough job in the drafting process. Accordingly, the quite detailed rules on the commissioner's remuneration, sec. 80-83, are heavily disputed by the practitioners.

rights of consumers or of SMEs will be affected by the envisaged restructuring plan; no. 2 does the same when and if all admissible creditors – or at least "essentially all" – creditors will be affected by that plan. Moreover, par. 2 orders the participation of a commissioner also in those cases in which it is foreseeable that a considerable number of creditors are opposing the restructuring plan so that a cross-class cram-down is likely to be needed. Finally, when the plan stipulates that the accepted plan's fulfillment shall be supervised, a commissioner is also to be appointed.

The appointment is to be done by the restructuring court which shall be selected from its own list of qualified persons; under certain conditions, however, the court is bound to appoint the person proposed by the debtor. The commissioner is subject to supervision by the court, is burdened with liabilities [50], and has various duties, i.a. to inform the court about any justification to revoke the restructuring case, to control the economic situation of the debtor, etc.

In the few remaining cases in which no appointment is obligatory, the debtor might nevertheless wish to have a commissioner being involved. Details of this option are described in sec. 77-79. In such a case the commissioner is supposed to act as a kind of mediator [51].

3.4.3. *Plan confirmation.*

Pursuant to sec. 60, the debtor is free to choose the time at which the court shall confirm the plan. He will abstain from any court involvement when the restructuring plan has found unanimous acceptance. But as soon as there is just one opposing creditor, court confirmation is necessary. Accordingly, the debtor might apply for a judicial confirmation before the voting or after. In the latter case, i.e. when the entire voting process has already been absolved without any court involvement, the debtor has to present a detailed evidence about that voting process: procedure, participation, results, etc. The court is free to hear the affected parties before it decides on the motion to confirm. And it will reject the motion *ex officio* [52] when (a) the debtor is not imminent insolvent (it is here where this requirement is examined); when (b) the rules on the contents of the restructuring plan and the offer and acceptance procedure – as described supra under 3 – are violated in an essential aspect, or when (c) the plan

[50] Sec. 75, par. 4, StaRUG.

[51] Sec. 79 StaRUG.

[52] Pursuant to sec. 66, individual creditors are also entitled to request a rejection.

affected claims as well as the other non-affected claims obviously cannot become fulfilled due to the financial or economic situation of the debtor [53].

If the debtor's motion for court confirmation masters all these hurdles and the plan gets confirmed, the constructive part of the restructuring plan (cf. supra 3 a) will enter into effect. I.e., from then on all the foreseen rescheduling and restructuring of claims as well as all imposed duties will become effective [54]. Accordingly, even when a creditor had before an enforceable title for a claim and this claim is affected by the plan, the title will be replaced by the plan [55].

Sec. 79 offers the option to include in a plan a provision which obliges the restructuring commissioner to supervise the fulfillment of the plan. This sort of control might be in the mutual interest of the debtor and the creditors. The commissioner is, again, held to inform the court when and if claims will not get satisfied.

3.4.4. *Judicial voting.*

Given the intricacies of the voting process (cf. supra at 3 c), the debtor might prefer to have it done under the auspices of the court. If so, the court may collect the necessary information [56], before it then summons the affected creditors to a discussion and voting meeting. The discussion is meant for the contents of the plan and the voting right of the creditors [57].

3.4.5. *Pre-check.*

In case that the debtor feels uncertain about any relevant issue regarding the envisaged restructuring plan, he is entitled pursuant to sec. 47 to have the court doing a pre-check. This can be applied for even without requesting a subsequent judicial voting or confirmation. Before the court renders its opinion on the posed question, it has to hear the affected parties [58].

[53] Sec. 63 StaRUG.

[54] Sec. 67 StaRUG.

[55] Sec. 71, par. 4, StaRUG.

[56] Sec. 46 StaRUG.

[57] Sec. 45 StaRUG.

[58] Sec. 48 StaRUG.

3.4.6. *Stabilisation.*

By completely eliminating the possibility of a discontinuation of contracts the tool box not only became deprived of what some had seen as an important contribution to the rescue of companies (such as warehouses) which are suffering from increasing rent obligations; it also "nudges" thereby future debtors to primarily think of their financial creditors when planning a restructuring under the StaRUG. What is left in the tool box, is the fourth instrument, the "stabilisation" ("Stabilisierung"), which, in fact, is just another word for the much more common term and time-honored [59] "moratorium". Sec. 49-59 deal with it. Pursuant to sec. 49, such a stabilisation is possible as an execution stop and as an enforcement stop for secured creditors [60]. Upon request of the debtor – which, again, has to be accompanied by a multitude of information [61] – such a stop can be directed against a single, several or all creditor(s). The court will comply with the request if the debtor has handed in complete information about a consistent restructuring concept and when the court has no knowledge of (a) fake information given by the debtor, (b) of the futility of the intended restructuring, (c) that the debtor is not yet imminent insolvent, and (d) that the requested measure is not necessary for the purpose of the restructuring [62]. The order of a stop might, under limited circumstances, be repeated. It is limited to three months [63], whereby prolongations up to eight months max. are possible [64].

The effect of a stop is the debtor's obligation to pay interest to the affected creditor and to reimburse him for diminished value of the collateral. Moreover, for the duration of the stop the creditor is prevented from termi-

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[59] Note that a possibility of a (5-years) moratorium was already introduced by Iustinian in the year 531/532, the *quinquennale spatium*, C 7.71.8.

[60] The usual exemption for the benefit of financial creditors is provided for in sec. 56 StaRUG. On some contextualisation cf. C. G. PAULUS, *Multinational Enterprises and National Insolvency Laws: Lobbying for Special Privileges,* in *European Business Law Review* (EBLR) 2018, 393 ff.

[61] Sec. 50 StaRUG.

[62] Sec. 51 StaRUG.

[63] This is in alignment with the banking rules on risk quantification of a defaulting obligor, art. 178 par. 1(b) Capital Requirements Regulation EU 575/2013; on them, cf. L. STANGHELLINI, R. MOKAL, C. G. PAULUS, I. TIRADO, *Best Practices in European Restructuring*, (n. 36), 129 ff.

[64] Sec. 53, par. 3, StaRUG.

nating the contract just because of a previous non-performance from the debtor, nor may he refuse to deliver in that time span[65]. In addition, during that time span the creditors'right to file for insolvency is suspended[66].

To be sure, the debtor is explicitly subjected to a special liability[67], and the court is given a rather long list of reasons that allow a termination of a stop[68].

3.4.7. *Notification.*

Usually, all German insolvency related court proceedings are subject to public notification. The new statute breaks with this rule and leaves it to the debtor to decide whether there shall be notification or not, sec. 84-88. A respective motion to the court is to be made before the first decision. If it is made the court then has to include in its decisions the reasons why the court believes to have jurisdiction pursuant to art. 3 of the European Insolvency Regulation (EIR)[69]. It is planned to have the notified restructuring case listed in Annex A of the EIR which means that such a "public proceeding" is to be treated (and recognized) like a regular insolvency proceeding[70].

4. *Concluding remarks.*

The so-called Dutch scheme served in many respects as a model for the German preventive restructuring instrument. However, it did not follow the approach of creating an instrument that advertises itself as a competitor on a contested market. It has, accordingly, throughout a rather introvert attitude[71]. This is certainly tolerable; what is less tolerable, though, is the Act's complexity and intricacy which makes is usefulness for SMEs rather unlikely. Drafting the restructuring plan substantially in parallel to the insolvency plan – of

[65] Sec. 55 StaRUG.

[66] Sec. 58 StaRUG.

[67] Sec. 57 StaRUG.

[68] Sec. 59 StaRUG.

[69] Sec. 84, par. 2, StaRUG.

[70] This seems to be just one more copy from the Dutch model.

[71] On this C.G. PAULUS, *StaRUG und die Internationalität deutschen Rechts*, in *ZIP*, 2020, 2363.

which it is throughout understood to be too complicated to have it done by a debtor without professional help – implies increased costs for making use of the StaRUG. Experience teaches that this is a deterrence for a wide-spread utilization of the new instrument. It is to be feared that in particular those entrepreneurs for whose benefit the preventive restructuring framework was originally intended for – the SMEs – will make little if any use of this innovation.