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The new German "Stabilisation and Restructuring Framework for Businesses"

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Abstract

On 1 January 2021, the Bill on the Further Development of Restructuring and Insolvency Law (Sanierungs- und Insolvenzrechts-fortentwicklungsgesetz, SanInsFoG) entered into force in Germany. The core piece of the SanInsFoG is the Act on the Stabilisation and Restructuring Framework for Businesses (Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen, StaRUG). In implementation of the Directive on restructuring and insolvency, it provides for a preventive restructuring framework. The key element of the framework is the option of a restructuring plan by means of which the debtor may achieve a discharge of debt in order to maintain the viability of his or her business. For the first time in German law, distressed companies now have access to a comprehensive restructuring procedure outside formal insolvency proceedings. In particular, the restructuring plan may become binding upon dissenting creditors if certain criteria are met (so-called cram down). Since a discharge of debt required unanimous approval of all affected creditors so far, this is a groundbreaking novation to the restructuring landscape in Germany The aim of this article is to give a first introduction to the new StaRUG-scheme, identifying both strengths and weaknesses. It will be shown that the framework is particularly suited for the restructuring of financial obligations. On the other hand, the German legislator did not follow the Dutch example and refrained from implementing an option to terminate mutual contracts what might be an obstacle where the debtor seeks to effect a restructuring of his operational business.

Keywords

Implementation of the Directive on Restructuring and Insolvency; German law; Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen; StaRUG-scheme

1. Introduction

The Directive on restructuring and insolvency[1] requires the Member States to ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework. In particular, such framework must include the option of a restructuring plan providing for a discharge of debt in order to maintain or re-establish the debtor's viability. A key element of the restructuring plan to be implemented by the Member States is that it may become binding upon dissenting creditors if certain criteria are met (so-called cram down).

The implementation of the Directive on restructuring and insolvency has been long awaited in Germany, since, as a matter of principle and pursuant to a judgment of the Federal Court of Justice (*Bundesgerichtshof*, hereafter referred to

[1] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring,

as: BGH) dated 12 December 1991[2], out-of-court restructurings required unanimous approval by all affected creditors. A cram down could only be achieved by means of an insolvency plan, which, however, is only available in formal insolvency proceedings and therefore subject to substantial court involvement, even in debtor-in-possession proceedings (*Eigenverwaltung*) pursuant to sec. 270 ff. of the German Insolvency Act (*Insolvenzordnung*, InsO). As a truly collective proceeding, regular insolvency proceedings cover the general body of creditors whereas the newly introduced preventive framework allows the debtor to choose which creditors or group(s) of creditors are to be included in the restructuring.

On 17 December 2020, the German Parliament passed the Bill on the Further Development of Restructuring and Insolvency Law (*Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz*, SanInsFoG)[3] which entered into force on 1 January 2021. The core piece of the SanInsFoG is the Act on the Stabilisation and Restructuring Framework for Businesses (*Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen*, StaRUG[4]) implementing a preventive restructuring framework as required by the Directive on restructuring and insolvency. As the first published cases (one regarding the restructuring of a syndicated loan[5] and another the restructuring of shareholder loans[6]) indicate, the StaRUG seems to gain some importance in Germany.

Alongside with that, the SanInsFoG provides for some major changes to the InsO, especially a re-design of the debtor-in-possession proceeding. Moreover, the insolvency ground of overindebtedness (*Überschuldung*, i.e. balance sheet insolvency), which constitutes an obligation to file for the opening of insolvency proceedings, will be reduced to a twelve month going-concern prognosis (sec. 19 (2) InsO) as compared to the existing practice which requires a liquidity forecast for the current and the following business year.[7] Thus, the duty to file for insolvency on the grounds of overindebtedness will lose some of the importance it previously enjoyed in German law.

The aim of this article is to give a first introduction to the new StaRUG-scheme which is open to all debtors who meet the criteria of the insolvency ground of imminent illiquidity (*drohende Zahlungsunfähigkeit*) and are capable of restructuring (sec. 29 (1) StaRUG). Imminent illiquidity constitutes a right but not an obligation to file for the opening of insolvency proceedings and is defined by law as the predominant likelihood of becoming illiquid within 24 months (sec. 18 (2) InsO). Thus, it is possible to make use of the new proceeding even if illiquidity is still quite far ahead. Filing for insolvency would be possible at this stage, too, but as compared to the

insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

[2] BGH, decision of 12 December 1991 (IX ZR 178/91), 116 BGHZ 319.

[3] Bundesgesetzblatt [2020] Part I p. 3256 ff.

[4] A translation of the StaRUG can, i.a., be found at: https://www.allenovery.com/de-de/germany/news-and-insights/publications/starug-finaler-gesetzestext-und-zusammenfassung.

[5] AG Köln, decision of 3 March 2021 (83 RES 1/21), [2021] NZI 433.

[6] AG Hamburg, decision of 12 April 2021 (61a RES 1/21).

[7] G. Pape in B.M. Kübler, H. Prütting and R. Bork (eds.), Kommentar zur Insolvenzordnung (RWS 2019) § 19 para. 40.

StaRUG regime the insolvency proceeding would be truly collective encompassing all creditors. However, there might be a potential overlap with overindebtedness and therefore the duty to file for insolvency in the period of twelve months prior to the expected entry of illiquidity (infra, 5.1.2.1.).

2. Structure of the StaRUG

The statute is divided into four parts. Part 1 (sec. 1 StaRUG) imposes a monitoring duty on the directors of an enterprise in order to detect economic crises at an early stage. Part 2 (sec. 2-93 StaRUG) constitutes the statute's centrepiece and describes the actual stabilisation and restructuring framework. Part 3 (sec. 94-100 StaRUG) contains provisions on the so-called "recovery mediation", a French style non-public procedure which is aimed at reaching agreement on a recovery settlement under the mediation of an independent practitioner. Finally, Part 4 (sec. 101 f. StaRUG) complements Part 1 by regulations on "early warning systems".

Part 2 begins with general provisions on substantive and procedural requirements for the restructuring plan, in particular with regard to the classification of the affected parties in groups and the voting procedure (sec. 2-28 StaRUG). Subsequently, the statute addresses the special procedural aids of the stabilisation and restructuring framework that the debtor may obtain under involvement of the court. This order of the statutory provisions was chosen because the voting procedure is generally administered by the debtor him- or herself, whereas in-court voting on the plan is just optional (sec. 45 f. StaRUG). In fact, involvement of the court is only necessary if the debtor decides to utilise the tools listed in sec. 29 StaRUG. Besides the aforementioned judicial administration of the voting procedure, these include a preliminary examination of legal questions relevant to the restructuring plan (sec. 47 f. StaRUG), stabilisation orders, such as a temporary stay of execution (sec. 49-59 StaRUG), or a judicial confirmation of the restructuring plan (sec. 60-72 StaRUG). However, as will be shown below, debtors might, generally speaking, be inclined to have the voting procedure run by the court. In particular, this reduces the risk of objections by opposing creditors to the court confirming a plan, as any remaining doubts as to the procedure that was followed to adopt the plan hinder the judicial confirmation of the plan (sec. 63 (1) no. 2 StaRUG). As, unless every single creditor agrees to the plan, court confirmation of the plan will be required anyway, it might be sensible to involve the court at an early stage.

Still, the framework designed by the StaRUG is not a full-fledged court proceeding. It generally starts by a notification to the court (sec. 31 (1) StaRUG). This notification has some legal effects such as the suspension of the duty to file for insolvency, but it does not lead to the kind of court involvement we see in insolvency proceedings. In particular, notification does not lead to a formal examination of the imminent illiquidity. There is no formal entrance boundary to overcome. Only if the further restructuring constitutes the necessity to involve the court, in particular because a confirmation of the plan or a stay of execution is

needed, some requirements must be met and compliance with these requirements will be examined by the court.

Sec. 73-83 StaRUG govern the office of the restructuring practitioner. Sec. 89-91 StaRUG contain important provisions regarding both the avoidance and claw back of legal acts and the directors' liability for such acts performed during the pendency of the restructuring matter or in fulfilment of the restructuring plan. Finally, sec. 84-92 StaRUG (which will take effect on 17 July 2022) allow the debtor to request that the restructuring matter is conducted as a public procedure, which is a necessary condition for the recognition of the procedure under European Insolvency Regulation (EIR)[8] and its inclusion in the regulation's Annex A.

3. Early crisis detection (sec. 1, 101-102 StaRUG)

Art. 19 of the Directive on restructuring and insolvency obliges the Member States to ensure that the directors of a distressed company have due regard to the interests of the creditors, the need to take steps to avoid insolvency and the need to avoid deliberate or grossly negligent conduct that endangers the viability of the business.

Once the preventive framework has been initiated by way of a notification to the court (sec. 31 (1) StaRUG), the directors must align their management with the interests of the general body of creditors which then prevail over the interests of the shareholders (sec. 32 (1), 43 StaRUG). This is to be distinguished from the stage before the StaRUG-procedure is officially entered into. To this effect, the legislative proposal of the Federal Government (StaRUG-RegE)[9] initially provided for an early shift of duties. According to sec. 2 (1) StaRUG-RegE, the directors of an enterprise in a state of imminent illiquidity (likelihood of insolvency) had the primary duty to protect the creditors' interests, irrespective of whether preventive proceedings had already been initiated. In contrast, the interests of the shareholders and other stakeholders had only secondarily to be taken into account. This would have meant a new concept to German law since the directors principally and primarily owe their duties to the enterprise and the shareholders until the occurrence of actual insolvency, i.e. illiquidity or overindebtedness.[10]

The German Parliament, however, did not adopt sec. 2 StaRUG-RegE, following the recommendation of its Committee for Law and Consumer Protection according to which the existing rules of corporate law were sufficient to protect the creditors' interests.[11] In fact, it is already commonly acknowledged under current law that, even before insolvency proceedings formally commence, the shareholders' potential to

[8] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

[9] The Federal Government's legislative proposal of the SansInsFoG including an Explanatory Memorandum is accessible at the homepage of the Federal Ministry of Justice (https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Fortentwicklung_Insolvenzrecht.html).

[10] BGH, decision of 8 October 2007 (AnwZ (B) 92/06), [2008] NJW 517, 519; Fleischer in H. Fleischer and W. Goette (eds.), Münchener Kommentar zum GmbHG (C.H. Beck 2018) § 43 para. 13.

[11] Bundestags-Drucksache 19/2535, p. 6.

exert influence on the management is restricted for the reason of creditor protection,[12] although to a lesser degree than the envisaged shift of duties pursuant to sec. 2 StaRUG-RegE would have brought about. In particular, the shareholders are liable for economically destructive withdrawals of funds from the company's estate under sec. 826 of the German Civil Code (*Bügerliches Gesetzbuch*, BGB).[13] Accordingly and under these circumstances, the directors are not obliged to comply with resolutions and directions of the shareholders which may endanger the continued existence of the company.[14] The denial to approve restructuring measures in the state of imminent illiquidity most certainly falls within this scope if there is no alternative to ensure the company's existence and insolvency proceedings impend to be opened.[15] In this case, the directors may (and must do so subject to their crisis related duties owed to the company as legal entity[16]) continue to pursue the restructuring despite an opposing resolution of the shareholders. Besides such intentionally destructive behaviour of the shareholders, the deletion of sec. 2 StaRUG-RegE, however, leaves the general rules of corporate law in place and denies a paramountcy to creditor interests. The degree to which creditor interests have to be taken into account and whether or not directors are bound by instructions by the body of shareholders has become a matter of debate.[17] Thus, the deletion of the proposed provisions has left more questions than answers.

Instead, the legislator focussed on early crisis detection. For this purpose, sec. 1 (1) StaRUG urges the directors to continuously monitor developments that could endanger the continued existence of the company. Where such developments are identified, the directors are obliged to take appropriate countermeasures and report to the supervisory bodies without undue delay. In case the measures to be taken fall within the remit of other corporate bodies of the company, the directors must procure the involvement of such bodies without undue delay.

The directors' monitoring duty under sec. 1 (1) StaRUG is complemented by the provisions on "early warning systems" which serve the implementation of Art. 3 of the Directive on restructuring and insolvency. Sec. 101 StaRUG states that the Federal Ministry of Justice will publish information on the availability of early warning tools provided by public authorities. Such tools may include alert mechanisms when the debtor has not made certain types of payments or advisory services. Finally, sec. 102 StaRUG imposes insolvency related information and warning duties to certain third parties. According to this provision, tax advisers, tax agents, auditors, sworn accountants and lawyers must inform the

[12] Cf. M. Beurskens in M. Beurskens, L. Fastrich, U. Haas et. al. (eds.), Gesetz betreffend die Gesellschaften mit beschränkter Haftung (C.H. Beck 2019) § 43 para. 20.

[13] BGH, decision of 16 July 2007 (II ZR 3/04), 173 BGHZ 246 ff.; BGH, decision of 9 February 2009 (II ZR 292/07), 179 BGHZ 344.

[14] M. Beurskens (fn. 5) para. 20.

[15] C. Thole, 'Der Entwurf des Unternehmensstabilisierungs- und restrukturierungsgesetzes (StaRUG-RefE)' [2020] ZIP 1985, 1987.

[16] R. Bork, 'Pflichten der Geschäftsführung in Krise und Sanierung' [2011] ZIP 101, 106 f.

[17] P. Scholz, 'Die Krisenpflichten von Geschäftsleitern nach Inkrafttreten des StaRUG' [2021] ZIP 219; T. Kuntz, '§§ 2, 3 StaRUG-E: Gesetzlich verordnete bad corporate governance' [2020] ZIP 2423; L.M. Guntermann, 'StaRUG: Neuausrichtung der Geschäftsleiterpflichten bei drohender Zahlungsunfähigkeit?' [2021] WM 214.

client if they find that a reason for the opening of insolvency proceedings under sec. 17-19 InsO has occurred. This provision is not substantially new to German law since the BGH already derived a respective duty from the general contractual relations between tax advisers and their clients; in case of a breach of that contractual duty, the tax adviser is liable to the insolvent company.[18] As a result of sec. 102 StaRUG translating a contractual duty in a statutory duty, advisers are now potentially liable to the creditors, too (sec. 823 (2) BGB).

4. Restructuring plan (Sec. 2-28 StaRUG)

The rules on the restructuring plan (sec. 2-28 StaRUG) are, just as the respective provisions of the Directive on restructuring and insolvency, partially based on the model of the insolvency plan that can be utilised in formal insolvency proceedings under sec. 217 ff. InsO.

4.1. Modifiable legal relations (Sec. 2-4 StaRUG)

Sec. 2 StaRUG contains an essential predetermination for the restructuring plan. The provision sets out which legal relations may be modified (*gestaltet*) by way of a restructuring plan. In addition to both intra-group securities provided to outside creditors and shareholders's rights, eligible for modification are so-called restructuring claims (*Restrukturierungsforderungen*) and expectant separate satisfaction rights (*Absonderungsanwartschaften*) as defined by sec. 2 (1) StaRUG. The distinction between restructuring claims and expectant separate satisfaction rights refers to the legal position a creditor would have in hypothetical insolvency proceedings.

To this effect, restructuring claims constitute the equivalent of insolvency claims, i.e. all well-founded claims held by the creditors against the debtor on the date when insolvency proceedings were opened (sec. 38 InsO). Since there is no such clear "demarcation line" such as the formal opening of insolvency proceedings for the framework, sec. 2 (5) StaRUG defines the relevant date as of which the restructuring claims must be constituted. As a basic principle, the classification of a claim as restructuring claim depends on the date on which the debtor submits his or her plan offer (sec. 17 StaRUG). In case the voting procedure is administered by the court, the date on which the debtor filed the respective request (sec. 45 StaRUG) is relevant. If the debtor obtains a stabilisation order (sec. 49), e.g. a stay of execution, before submitting the plan offer or requesting an in-court voting on the plan, the date on which such initial order is issued prevails. As in the case of sec. 38 InsO, a claim is considered as constituted as soon as its legal basis is laid under the rules of general civil law.[19] As a result, claims subject to a condition and claims not yet due may also be modified in a restructuring plan (sec. 3 (1) StaRUG).

[18] BGH, decision of 26 January 2017 (IX ZR 285/14), [2017] ZIP 427.

[19] BGH, decision of 22 September 2011 (IX ZB 121/11), [2011] NZI 953; R. Sinz in H. Hirte and H. Vallender (eds.), Insolvenzordnung (Franz Vahlen 2019) § 38 para. 26.

Similarly, expectant separate satisfaction rights are defined as rights to the debtor's assets which, in the event of insolvency proceedings being opened, would entitle their holder to separate satisfaction pursuant to sec. 49 ff. InsO (*abgesonderte Befriedigung*). In insolvency proceedings, creditors holding a separate satisfaction right are entitled to prior distribution of the proceeds realised by the disposal of the relevant asset (sec. 170 InsO). Such separate satisfaction rights are granted by pledges (sec. 50 InsO) or comparable security instruments (sec. 51 InsO). Separate satisfaction rights, i.e. security rights, have to be distinguished from rights to separation pursuant to sec. 47 InsO (*Aussonderung*). In case of a right to separation, the entitled person, e.g. the owner of an item in the debtor's possession, can claim that a certain asset is not part of the insolvency estate. Such separation rights are not mentioned in sec. 2 StaRUG and can, hence, not be modified based on the restructuring plan.

The distinction between separate satisfaction rights and rights to separation is sometimes difficult, especially when the debtor purchased goods and the seller retained title until payment of the agreed purchase price (*Eigentumsvorbehalt*). In this case, the seller will deliver the purchased items to the buyer, but ownership is only transferred subject to the condition precedent of the purchase price being paid in full. As a result, the seller may demand separation of the delivered goods under sec. 47 InsO if the buyer becomes insolvent and has not fully paid the purchase price yet.[20] It is, however, quite common that the seller authorises the buyer to resell the delivered goods to third parties. In return, the buyer assigns the claims against his or her customers to the seller in order to secure the obligation to pay the purchase price (so-called extended retention of title, *verlängerter Eigentumsvorbehalt*). In the event of the buyer's insolvency, the claims assigned to the seller are just subject to separate satisfaction (sec. 51 No. 1 InsO) but do not entitle the seller to separate from the estate.[21]

Sec. 2 (2) StaRUG refers to cases where the debtor raised funds from a plurality of creditors based on uniform terms and conditions. This provision applies to restructuring claims and expectant separate satisfaction rights (i.e. security rights) deriving from multilateral contracts between the debtor and several creditors (sentence 1) or bonds and similar instruments (sentence 2). The crucial amendment established by sec. 2 (2) StaRUG is that the restructuring plan may also adjust individual terms and conditions of the relevant financing arrangements. Sec. 2 (2) StaRUG reacts to the fact that the debtor will often be contractually obliged to meet certain financial covenants or omit certain actions, such as to provide securities for further loans. By means of a restructuring plan, the debtor can now avoid to breach covenants and, as a consequence, become insolvent due to claims for immediate repayment of loans.[22]

[20] BGH, decision of 27 March 2008 (IX ZR 220/05), 176 BGHZ 86; C. Thole in K. Schmidt (ed.), Insolvenzordnung (C.H. Beck 2016) § 47 para. 29.

[21] BGH, decision of 9 July 1986 (VIII ZR 232/85), 98 BGHZ 160, 170; C. Thole (fn. 20) para. 39.

[22] Explanatory Memorandum of the SanInsFoG (fn. 7) p. 128.

According to sec. 2 (2) sentence 3 StaRUG, the restructuring plan may not only modify the legal relationship between the debtor and each individual lender but can also amend intercreditor-agreements. This provision concerns arrangements where the debtor raised loans based on independent legal relationships but the enforcement of the creditors' claims and rights to the debtor's assets is coordinated by a multilateral contract. Sec. 2 (2) sentence 3 StaRUG is meant to serve as a remedy to overcome the resistance of obstructing creditors. This might be necessary when it comes to adjusting covenants or other conditions in syndicated loan agreements or similar financial arrangements.[23]

Sec. 2 (3) StaRUG provides that shares and other equity rights in the debtor company are open to modification as well. The restructuring plan may, just as the insolvency plan (sec. 225a InsO), provide for any measure that is permitted under corporate law. Sec. 7 (4) StaRUG states that it is, in particular, admissible to provide for a debt-to-equity-swap, a reduction or increase of capital, contributions in kind, the transfer of shares or equity rights and, finally, the exclusion of subscription rights or settlement payments to withdrawing shareholders.

An absolute novelty to German law is established by sec. 2 (4) StaRUG. According to this provision, the restructuring plan may also modify the rights owed to creditors holding restructuring claims under any liability assumed by an affiliate (*verbundenes Unternehmen*) within the meaning of sec. 15 of the German Stock Corporation Act (*Aktiengesetz*, AktG). This applies to all kinds of intra-group securities, such as guarantees, joint debt or any other right a creditor holds in the assets of an affiliate. In contrast, the former sec. 254 (2) InsO had explicitly excluded third-party securities from the effects of an insolvency plan up until now. The SanInsFoG, however, adapted sec. 254 (2) InsO to sec. 2 (4) StaRUG. It is a major improvement that intra-group securities are now eligible for modification in an insolvency plan or a restructuring plan: by this means, it is possible to avoid that the insolvency of the parent company causes cascading insolvencies of its subsidiaries that procured upstream securities.

If the restructuring plan interferes with intra-group securities, the creditors holding such rights must be compensated adequately in return (sec. 2 (4) StaRUG). The statute does not expressly determine how the compensation owed by the debtor has to be calculated. Sec. 64 (1) StaRUG, however, sets out the principal rule that no creditor may be put in a worse position by the restructuring plan as compared to his or her situation without the plan. Consequently, the compensation must at least amount to the proceeds the affected creditor would have gained by enforcing his or her security.[24] These proceeds are thus dependent on the financial situation of the assignor or guarantor and whether or not the security would have been enforceable. If the plan includes intra-group securities, the court may appoint a restructuring practitioner and instruct him or her to review the

[23] Explanatory Memorandum of the SanInsFoG (fn. 7) p. 129 f.

[24] C. Thole (fn. 15) p. 1989 f.

adequacy of the compensation set out by the plan (sec. 73 (3) no. 3 StaRUG).

Finally, sec. 4 StaRUG defines some legal relationships that the restructuring may not modify. First, this concerns claims from intentional tortious acts (sec. 4 no. 2 StaRUG) and administrative fines subject to sec. 39 (1) no. 3 InsO. Second and most importantly, the German legislator excluded claims of employees and pensioners from the preventive restructuring framework (sec. 4 no. 2 StaRUG). As a result, the adjustment of claims held by the employees is left to (individual and collective) labour law, what might be an obstacle where the debtor seeks to effect an operational restructuring of the business.

4.2. Content of the restructuring plan (Sec. 5-16 StaRUG)

Like the insolvency plan (sec. 220 f. InsO), the restructuring plan consists of a declaratory part (*darstellender Teil*) and a constructive part (*gestaltender Teil*), sec. 5 StaRUG. The declaratory part has to provide the affected parties with all information relevant to their decision if they consent to the plan. It shall describe the basis and effects of the restructuring plan, including the causes of the crisis as well as the measures to be taken (sec. 6 (1) StaRUG). On the other hand, the constructive part determines the manner in which the restructuring plan will modify the legal position of the affected parties (sec. 7 (1) StaRUG).

One key element of the declaratory part is the compulsory comparative calculation that sets out which effect the restructuring plan has on the creditors' prospects of satisfaction (sec. 6 (2) StaRUG). For this purpose, the payments as stipulated in the plan have to be contrasted to the payments the creditors could expect without the plan. If the restructuring plan provides for the continuation of the business, the prospects of satisfaction in the alternative scenario shall also be determined on the basis of going-concern values (sec. 6 (2) sentence 2 StaRUG). The break-up value may only be assumed if a sale of the business or its continuation can be ruled out under any circumstances (sec. 6 (2) sentence 3 StaRUG).[25]

Other than the insolvency plan, the restructuring plan does not necessarily encompass the debtor's entire capital structure. Subject to sec. 8 StaRUG, the debtor may choose the (groups of) creditors whose rights shall be modified in the plan. The provision sets out that, if the plan does not interfere with all modifiable claims, the selection of the affected parties must be performed in line with appropriate criteria. The statute names some cases in which the selection of affected parties shall generally be deemed appropriate. In particular, this applies to restructuring plans that exclusively adjust financial obligations and respective securities while the claims of consumers as well as small and medium-sized businesses remain unaffected (sec. 8 sentence 2 no. 2 StaRUG).

When the debtor has decided which claims the restructuring plan shall modify, the affected parties must be grouped in classes in accordance

[25] AG Hamburg, decision of 12 April 2021 (61a RES 1/21).

with their different legal positions (sec. 9 (1) StaRUG). In this respect, a distinction must be made between compulsory and discretionary classes.

The debtor must, in any case, form separate classes for the creditors holding expectant separate satisfaction rights (sec. 9 (1) sentence 2 no. 1 StaRUG) and for the creditors holding restructuring claims that would have to be asserted as unsubordinated insolvency claims in the case insolvency proceedings were opened (sec. 9 (1) sentence 2 no. 2 StaRUG). In addition, classes have to be formed for each group of subordinated creditors pursuant to sec. 39 (1) nos. 4, 5 or (2) InsO. This concerns claims to the debtor's gratuitous performance, claims for restitution of shareholder loans and claims which the creditor and the debtor contractually agreed to be subordinated in insolvency proceedings (sec. 9 (1) sentence 2 no. 3 StaRUG), as well as for the holders of shares or equity rights (sec. 9 (1) sentence 2 no. 4 StaRUG). In case the restructuring plan interferes with intra-group securities, the holders of such rights will also form a separate class (sec. 9 (1) sentence 3 StaRUG).

The debtor may, at his or her discretion, subdivide the aforementioned compulsory classes in further classes (sec. 9 (2) StaRUG). These classes vote as independent, ordinary classes. The criteria for distinguishing these sub-classes must rely on economic parameters and be appropriate. However, the debtor has to form own sub-classes for small-sum creditors in any class to be formed pursuant to sec. 9 (1) StaRUG. The proper composition of classes is of vital importance as it can help ensure the necessary majority and/or facilitate a cross-class cram down.

Sec. 12 StaRUG sets out that the restructuring plan may also provide for commitments to grant new financing as required in order to realise the restructuring based on the plan. This applies to loans as well as other forms of credit, such as commodity credits or loans in kind; pivotal is that these arrangements serve to finance the intended restructuring and are conducted based on the plan.[26] Thus, sec. 12 StaRUG can only refer to financings that will be paid subsequent to the confirmation of the plan or at least the plan approval. If the restructuring plan provides for new financing, the court has a broader standard of review when confirming the plan. In this case, it has to refuse confirmation if the restructuring concept is not convincing (*schlüssig*) or if circumstances are known which show that the concept is not based on the actual facts or does not have reasonable prospects of success (sec. 63 (2) StaRUG). Yet, the court does not need to assess the viability of the restructured company in every detail. The scope of judicial review is, in fact, restricted to the question whether or not it is plausible that the restructuring goal will be achieved by the envisaged measures.[27] The restructuring plan does not grant the new financer a full "fresh money"-privilege in subsequent insolvency proceedings in terms of a super-priority over other creditors; however, avoidance rights with respect to new financing including new

[26] C. Thole (fn. 15) p. 1989.

[27] Cf. AG Köln, decision of 3 March 2021 (83 RES 1/21), [2021] NZI 433, 435.

securities are to a certain degree excluded pursuant to sec. 90 StaRUG.

As required by Art. 8 (1) lit. h) of the Directive on restructuring and insolvency, the debtor must accompany the declaratory part with a declaration concerning the prospects that the restructuring plan will remove imminent illiquidity and ensure or restore the company's viability (sec. 14 (1) StaRUG). If a restructuring practitioner is appointed, he or she will comment on the debtor's viability declaration (sec. 80 (4) StaRUG). The court, however, does not review whether the information given in the declaration is substantially correct, because sec. 63 (1) no. 2 StaRUG only refers to the provisions concerning the content of the actual restructuring plan. Yet, the court, of course, will take the information displayed in the viability declaration into account for its general assessment of the restructuring plan.[28]

4.3. Out-of-court voting on the plan (Sec. 17-28 StaRUG)

Sec. 17-28 StaRUG govern the voting procedure which is, as a basic rule, administered by the debtor him- or herself. Before submitting the plan offer, the debtor must give all affected parties the opportunity to jointly discuss the plan or, if a plan is not yet finalised, the restructuring concept, i.e. the underlying economic approach to achieve the restructuring goal (sec. 17 (3) StaRUG). For this purpose, the debtor may (and must do so upon request of any affected party) also convene a meeting subsequent to submitting the plan offer. The debtor can directly put the restructuring plan to the vote on that occasion (sec. 20 (1) StaRUG). Otherwise, the meeting of the affected parties only serves the joint discussion of the plan while the votes are cast in written form (sec. 17 (4) StaRUG).

The meeting has, in any case, to be convened in writing (sec. 126 BGB) – an e-mail, for instance, only suits the text form of sec. 126b BGB and would therefore not be sufficient – after a period of at least 14 days (sec. 20 (1) sentence 2 and 3, 21 (2) sentence 1 and 2 StaRUG). All affected parties are entitled to propose amendments to the plan (sec. 20 (3) sentence 4, 5, 21 (3) StaRUG). Such proposals must be made available to the debtor in text form at least one day before the meeting commences.

The voting rights of the affected parties are determined by sec. 24 StaRUG. In case difficulties and disputes arise in this regard, the debtor may file a request for a judicial preliminary examination of voting rights, even if the voting procedure is not run by the court (sec. 47 sentence 3 StaRUG). It is important to stress that the debtor fully remains in charge of the procedure: if the voting right attributable to a claim or right is a matter of dispute, the debtor is entitled to allocate the voting right (sec. 24 (4) StaRUG). However, the wrong allocation may, of course, endanger a later court confirmation. With regard to the judicial confirmation of the plan, the debtor has to note in the voting record that, to what extent, and

[28] C. Thole (fn. 15) p. 1989.

for what reason the voting right has been contested.

As a basic principle, the voting right conferred on holders of restructuring claims is determined by reference to the amount of the claims (sec. 24 (1) no. 1 StaRUG). If a claim is subject to a condition, the voting right can, however, not simply be calculated based on the nominal value of the claim because it is still uncertain whether the condition will be met or not. For this reason, conditional claims are only recognised at their estimated value, especially considering the likelihood of the respective condition being fulfilled (sec. 24 (2) no. 2 StaRUG). Other than in insolvency proceedings (sec. 191 InsO), the restructuring plan may provide for a "cash-out-quota", i.e. set out that payments on the claim will be made prior to the fulfilment of the condition (as compared to earn out payments to be derived from future revenues).[29] As far as the holder of an expectant separate satisfaction right is concerned, a voting right can conceivably be attributed to the respective entitlement as well as to the underlying claim (if the debtor is personally liable to the entitled person). As long as the creditor does not waive his or her separate satisfaction right, the voting right attributed to the restructuring claim has to be determined with reference to the default that would presumably remain after enforcing the security (cf. sec. 24 (1) no. 2 StaRUG).[30] Thus, the creditor will cast his or her vote partially in the group of the holders of expectant separate satisfaction rights (at the amount of the estimated value of his security) and partially in the group of restructuring claims (at the amount of the remaining default). This bifurcation makes the voting procedure more complex but is a necessary consequence of the rule that no creditor shall be granted voting rights exceeding the nominal value of his or her claim.

In order for the restructuring plan to be adopted, each of the affected classes must consent with a majority of at least 75 percent of all voting rights (i.e. not only the cast votes), sec. 25 (1) StaRUG. The German legislator did not make use of the option provided by Art. 9 (6) subparagraph 1 sentence 2 of Directive 2019/1023 to implement an additional requirement of a per capita majority (as sec. 244 (1) no. 1 InsO does for the adoption of the insolvency plan). On the other hand, the majority requirement with respect to the total sum of voting rights is much higher as compared to sec. 244 (1) no. 2 InsO.

The cross class cram down is governed by sec. 26 StaRUG. The provision applies to the constellation where the required majority is not achieved in every class. In this event, the rejection of the plan by one of the classes may be overruled. The dissenting class is deemed to have consented if the majority of all voting classes adopts the plan pursuant to sec. 25 (1) StaRUG (sec. 26 (1) no. 3 StaRUG. In addition, two substantive criteria must be met in order to avoid an unfair treatment of the members of the dissenting class: first, they may not be put in a worse position by the plan as compared to their situation without the plan (sec. 26 (1) no. 1 StaRUG) and, second, they must receive a fair share of the plan value, i.e. the

[29] C. Thole (fn. 15) p. 1990.

[30] C. Thole (fn. 15) p. 1990.

economic value to be received by the affected parties under the plan (sec. 26 (1) no. 2 StaRUG).

The issue whether the members of the dissenting class have a fair share in the plan value is subject to the differentiated provisions of sec. 27 f. StaRUG. As a basic principle, sec. 27 (1) StaRUG applies the absolute priority rule that is already known from sec. 245 InsO. It is, thus, not sufficient if the overruled class is treated with a relative privilege compared to a lower-ranking class.[31] Instead, an appropriate treatment of the dissenting class may only be assumed if no creditor receives values exceeding the full amount of his or her claim (sec. 27 (1) no. 1 StaRUG), neither a subordinated creditor nor the debtor or any shareholder receives any value that is not fully compensated by a contribution to the debtor's assets (sec. 27 (1) no. 2 StaRUG) and, finally, no equal-ranking creditor is treated more favourably than the creditors of the dissenting class (sec. 27 (1) no. 3 StaRUG).

However, sec. 28 StaRUG provides for some exceptions to the absolute priority rule. Sec. 28 (1) StaRUG corresponds to the provision of sec. 8 StaRUG which states that the restructuring plan must not necessarily interfere with all modifiable claims or rights. Accordingly, an exemption from sec. 27 (1) no. 3 StaRUG can be made if the different treatment of equal-ranking creditors is appropriate in view of the circumstances, especially the economic difficulties to be overcome. This rule's aim is, again, to strengthen the opportunity to pursue a mere financial restructuring. For this purpose, it might be necessary to modify financial obligations in a different manner compared to obligations which derive from the debtor's business operations.[32]

Subject to the requirements of sec. 28 (2) StaRUG, the debtor or a shareholder may retain an interest in the assets of the business contrary to sec. 27 (1) no. 2 StaRUG. Such an arrangement is admissible if the cooperation of the debtor or the shareholder is indispensable for the continuation of business (sec. 28 (2) no. 1 StaRUG) or the interference with creditors' rights is minor, in particular because rights are not reduced and their maturity is not postponed by more than 18 months (sec. 28 (2) no. 2 StaRUG). The assumption that the cooperation of the debtor or the shareholder is necessary to realise the plan value can only be built on circumstances related to the person of the debtor or the shareholder. Moreover, the beneficiary of an arrangement deviating from sec. 27 (1) no. 2 StaRUG must undertake to cooperate as required and to transfer the retained economic values in the event he or she ceases to cooperate before the expiry of five years.

5. Stabilisation and restructuring tools (Sec. 29-72 StaRUG)

Sec. 29 (1) StaRUG lists the procedural instruments of the restructuring and stabilisation framework (tools) the debtor may request the court to make available. The utilisation of these tools must serve to lastingly remove an imminent illiquidity within the meaning of sec. 18 (2) InsO.

[31] C. Thole (fn. 15) p. 1990.

[32] Explanatory Memorandum of the SanInsFoG (fn. 7) p. 150 f.

The statute does not narrow down what is meant by the required "lasting" removal of imminent illiquidity. Since sec. 18 (2) InsO refers to a forecasting horizon of 24 months, the intended restructuring must, in any case, guarantee the viability of the company for a longer period of time, at least for the period of these 24 months.[33]

5.1. *Lis pendens* of the restructuring matter

In order to file for the tools provided by the framework, the debtor must notify the competent court of the proposed restructuring (sec. 31 (1) StaRUG). Upon that notification, the "restructuring matter", which has to be distinguished from the request for specific tools, becomes pending (*rechtshängig*), sec. 31 (3) StaRUG. The court must terminate the restructuring matter *ex officio* as soon as one or more of the conditions of sec. 33 StaRUG are fulfilled.

The competence of the restructuring courts is determined by sec. 34 (1) StaRUG. According to this provision, the local court (*Amtsgericht*) that is competent for regular insolvency proceedings at the location of a higher regional court (*Oberlandesgericht*) has exclusive jurisdiction for decisions in restructuring matters for the district of the higher regional court. Since there is a strong factual connection between the restructuring framework and insolvency proceedings, it is welcomed that the legislator concentrated the competence for both procedures at the same court. The competence of the courts depends on where the debtor's COMI is situated (sec. 35 clause 2 StaRUG). The StaRUG is not designed to allow for the restructuring of foreign companies on the grounds of less strong ties to Germany.

5.1.1. Suspension of the obligation to file for the opening of insolvency proceedings (sec. 42 StaRUG)

The crucial importance of the notification of the proposed restructuring is that the directors' obligation to file for the opening of insolvency proceedings pursuant to sec. 15a InsO will be suspended as long as the restructuring matter is pending (sec. 42 (1) sentence 1 StaRUG). This applies regardless of whether the debtor actually requests for a stabilisation order, such as a stay of execution, or any other tool after notifying the proposed restructuring. The suspension of the obligations under sec. 15a InsO does, of course, not retroactively resolve a delay in filing for the opening of insolvency proceedings that has already occurred (and any liability for damages related hereto). Thus, the directors cannot fulfil their duty to file for the opening of insolvency proceedings *post hoc* by submitting the notification pursuant to sec. 31 (1) StaRUG. That is absolutely consistent, since the restructuring plan may, in contrast to insolvency proceedings, provide for only partially collective arrangements.[34]

Sec. 42 (1) sentence 2 StaRUG forms the counterpart to the suspension of the directors' duty to file for the opening of insolvency proceedings: in the event illiquidity (sec. 17 (2) InsO) or overindebtedness (sec. 19 (2) InsO) occurs, the

[33] C. Thole (fn. 15) p. 1991.

[34] C. Thole (fn. 15) p. 1991.

directors are obliged to notify the court without undue delay. According to sec. 32 (3) StaRUG, such obligation to notify the court is vested not only in the directors personally but also in the debtor as a legal entity. Sec. 42 (2) StaRUG clarifies that the notification duty shall be deemed to befulfilled timely if the directors file for the opening of insolvency proceedings. A violation of the notification duty by the directors is a criminal offense (sec. 42 (3) StaRUG) and may result in a liability to the company under sec. 43 (1) StaRUG. However, the statute does not explicitly provide for a direct liability of the directors or the company to the creditors. The notification requirement set out by sec. 42 (1) sentence 2 StaRUG is linked closely to sec. 33 (2) sentence 1 no. 1 clause 1 StaRUG. According to that provision, the court must terminate the restructuring matter *ex officio* if the debtor notified his illiquidity or over-indebtedness or other circumstances are known which show that the debtor meets the criteria for insolvency. As in regular insolvency proceedings (sec. 5 (1) InsO), the court has not only to consider the information provided by the debtor or other affected parties but is obliged to investigate all relevant circumstances *ex officio* (sec. 39 (1) StaRUG). For this purpose, it particularly may hear witnesses or experts.

In implementation of Art. 7 (3) sentence 2 of the Directive on restructuring and insolvency, sec. 33 (2) sentence 1 no. 1 clause 2 StaRUG provides for two exemptions from the termination of the restructuring matter. First, the court may refrain from terminating the restructuring matter if opening insolvency proceedings would obviously not be in the best interest of all creditors in view of the status achieved in the restructuring matter. The court may also do so if, second, illiquidity or overindebtedness results from the termination or acceleration of a claim that is proposed to be modified by the restructuring plan and it is likely that the restructuring goal will be achieved. These exemptions must, however, be interpreted strictly. Sec. 33 (2) sentence 1 no. 1 StaRUG will only apply in an advanced stage where the restructuring goal has almost been achieved, particularly if the restructuring plan has already been adopted and is close to become confirmed.[35]

If the court terminates the restructuring matter, the notification of the envisaged restructuring ceases to have effect (sec. 31 (4) no. 3 StaRUG). In this case, the directors' obligation to file for the opening of insolvency proceedings under sec. 15a InsO comes into force again immediately. If the debtor already met the criteria of insolvency before the restructuring matter became pending, the deadline of three (illiquidity) or six (overindebtedness) weeks given under sec. 15a (1) sentence 2 InsO does not begin anew.[36] Thus, in this case the restructuring attempt has been unsuccessful, the restructuring matter has been terminated and directors will have to file for insolvency without further delay. The restructuring court will – at least in many cases (cf. sec. 3(2) InsO) – be the competent insolvency court as well.

[35] Explanatory Memorandum of the SanInsFoG (fn. 7) p. 162 f.

[36] C. Thole (fn. 15) p. 1991.

5.1.2. Eligibility of illiquid and overindebted enterprises for the framework?

The mechanism as implemented by sec. 33, 42 StaRUG leaves the question unanswered whether an illiquid or overindebted debtor can still utilise the tools given under the framework. When ordering a stabilisation, the court examines if the debtor is "not yet" in a state of imminent illiquidity (sec. 51 (1) no. 3 StaRUG). Thus, subject of the court's review is only if the debtor's request comes too early, whereas the statute does not explicitly mention the case that the request is submitted too late. This also applies to sec. 63 (1) no. 1 StaRUG according to which the court must refuse to confirm the restructuring plan if the debtor is "not" in a state of imminent illiquidity. Since imminent illiquidity is the entry requirement for the restructuring framework (sec. 29 (1) StaRUG), the term "not" used by sec. 63 (1) no. 1 StaRUG must apparently be read as "not yet", too.

5.1.2.1. Overindebtedness

The distinction between imminent illiquidity and overindebtedness, the former constituting a discretionary and the latter a mandatory ground for filing for insolvency (sec. 15a, 18 (1) InsO), is sometimes difficult because both are determined by a prognostic assessment of the debtor's viability and liquidity. In order to reduce delimitation problems in this regard, the SanInsFoG limited the forecasting period for determining overindebtedness to twelve months while imminent illiquidity is subject to a prognosis of 24 months (sec. 18 (2), 19 (2) sentence 1 InsO). During the first twelve months the debtor, however, can still be in a state of imminent illiquidity and overindebtedness at the same time. This potential coincidence raises the question if the debtor who notified the proposed restructuring in accordance with sec. 31 (1) StaRUG can still become overindebted in the first place.

According to sec. 19 (2) sentence 1 InsO, overindebtedness shall exist if two requirements are met: first, the debtor's obligations must exceed the value of his or her assets (financial overindebtedness, *bilanzielle Überschuldung*). Second, it must be unlikely that the enterprise will continue to exist for the next twelve months (negative going-concern prognosis, *negative Fortbestehensprognose*). The legislative draft of the Federal Ministry of Justice (StaRUG-RefE) initially stated that a pending restructuring matter could resolve an existing financial overindebtedness. To this effect, claims to be modified in the restructuring plan were only to be considered with the shortened amount as stipulated in the plan (sec. 32 (3) sentence 3 StaRUG-RefE). In other words, the success of the restructuring plan had to be pre-assumed for the purpose of determining the financial overindebtedness. This proposal has been righteously contested, since the prospects of the restructuring plan entering into force in the future do not affect the debtor's current debt but rather the going-concern forecast.[37] In response, the legislator did not adopt sec. 32 (3) sentence 3 StaRUG-RefE.

[37] C. Thole (fn. 15) p. 1992.

This does, however, not mean that a pending restructuring matter is without any prejudice to the existence of overindebtedness. On the contrary, the potential success of the restructuring plan has to be taken into account as part of the going-concern prognosis. In general, a positive going-concern prognosis within the meaning of sec. 19 (2) sentence 1 InsO requires that it is more likely than not that the debtor's enterprise will continue to exist for the relevant period of twelve months. A pending restructuring matter may prevent the occurrence of overindebtedness if the plan is fit to ensure the debtor's viability and highly likely to be adopted and confirmed.[38] Whether this is the case, is not subject to any kind of preliminary examination by the court. However, the directors can prevent civil and criminal charges attached to a delay in filing for insolvency by seeking advice from qualified and independent consultants. Yet, such exculpation is subject to some requirements. The directors may only rely on expert advice if the consulting engagement included the question whether the debtor meets the criteria of insolvency and the consultant was furnished with all relevant information and documents.[39]

A different question is whether an *intended* restructuring affects the determination of overindebtedness for the time *prior* to the pendency of the restructuring matter. Apparently, sec. 32 (3), 42 StaRUG only refer to the situation *subsequent* to the notification of the restructuring matter. It has been argued in the past that a potential discharge of debt could be taken into account within the going-concern forecast, even if it was *only* to be achieved by a judicial cram down.[40] This does, however, not necessarily apply to the restructuring plan. As indicated by sec. 33 (2) sentence 1 no. 1 clause 3 StaRUG, the framework only dispenses with the duty to file for the opening of insolvency proceedings if the restructuring plan will be adopted and confirmed shortly. Conversely, the pure prospect of a later discharge of debt based on a restructuring matter under the StaRUG that is not even pending yet might not be sufficient to resolve overindebtedness.[41] In other words, if a cram down is the *only* way to accomplish a restructuring and if voluntary concessions are not likely, the debtor has indeed to initiate the StaRUG framework within the time frame of six weeks as stipulated by sec. 15a InsO. If, however, as in most cases, a contractual solution is still on the table and reaching an out-of-court agreement with the creditors is still more likely than not, there is no overindebtedness in the first place.

Anyway, as soon as the restructuring matter is pending, a possible discharge of debt to be achieved by the plan can then be taken into account as part of the going-concern forecast. In other words, the debtor may resolve an existing overindebtedness by utilising the restructuring framework subject to the condition that the plan

[38] C. Thole (fn. 15) p. 1992.

[39] BGH, decision of 14 May 2007 (II ZR 48/06).

[40] Cf. with respect to the English Scheme of Arrangement C. Thole, 'Quo vadis Überschuldungstatbestand?' [2019] ZInsO 1622, 1623; T. Hoffmann and I. Giancristofano, 'Ist das englische Scheme of Arrangement (noch) ein taugliches Sanierungsinstrument für deutsche Unternehmen?' [2016] ZIP 1151, 1154; S. Sax and A.M. Swierczok, 'Das englische Scheme of Arrangement – ein taugliches Sanierungsinstrument für deutsche Unternehmen!' [2016] ZIP 1945, 1950; B. Meyer-Löwy and S. Fritz, 'Zahlungsfähigkeit und positive Fortführungsprognose auch bei Vorlage eines Scheme of Arrangement' [2011] ZInsO 662.

[41] Cf. C. Thole (fn. 15) p. 1992.

has sufficient prospects to be adopted and confirmed. Conclusively, overindebted companies are eligible for the framework but will no longer be overindebted upon the notification pursuant to sec. 31 (1) StaRUG if it is likely that the plan ensures the enterprise's viability. Thus, it follows that within a pending StaRUG-framework companies are safeguarded from overindebtedness as long as it is more likely than not that the restructuring plan will be confirmed.

In the event the restructuring plan forfeits its chances to be adopted and confirmed, the debtor and the directors will at first profit from the *ex-nunc*-suspension of the duties under sec. 15a InsO as provided by sec. 42 (1) sentence 1 StaRUG. The directors are, however, obliged to notify the court that overindebtedness has occurred (sec. 32 (3), 42(1) sentence 2 StaRUG); as a consequence, the court will terminate the restructuring matter and the duty to file for the opening of insolvency proceedings comes into force again (sec. 31 (4) no. 3, 33 (2) sentence 1 no. 1 StaRUG).

5.1.2.2. Illiquidity

Since the determination of illiquidity does not require a long-term prognosis of the debtor's viability, the notification of the proposed restructuring pursuant to sec. 31 (1) StaRUG does not change anything in this regard. If the directors of an illiquid debtor do notify a restructuring matter, the duty to file for the opening of insolvency proceedings would be suspended *ex nunc*. However, that would not be of much use, because the directors would be under a duty to immediately notify illiquidity in accordance with sec. 42 (1) sentence 2 StaRUG. Consequently, the court would have to turn on the spot and directly terminate the restructuring matter. Thus, it is pointless for the directors to utilise the restructuring framework if the debtor is already in a state of illiquidity.

5.1.3. The debtor's and the directors' obligations during pendency of the restructuring matter

Sec. 32 StaRUG defines the obligations to be fulfilled by the debtor during the pendency of the restructuring matter. Sec. 43 StaRUG translates these obligations into personal duties of the directors. As a basic principle, the debtor must pursue the restructuring matter with the due care of a prudent and conscientious manager in recovery proceedings, safeguarding the interests of the general body of creditors (sec. 32 (1) sentence 1 StaRUG). A respective legal responsibility of the debtor as legal entity and not just the directors personally is necessary because sec. 33 (2) no. 3 StaRUG sets out that the court has to terminate the restructuring matter if *the debtor* severely breached his or her duties in pursuing the restructuring.

According to sec. 32 (1) sentence 2 StaRUG, the debtor must particularly omit any actions which are not compatible with the restructuring goal or which jeopardise the success of the envisaged restructuring. Thus, the debtor's duty of care is concretised as compared to the situation prior to the notification of the restructuring matter and now aimed at the realisation of the specific restructuring concept. However, the determination which actions comply with the restructuring concept and which not will sometimes be difficult

and depend on each individual case. Some clarity can be derived from sec. 32 (1) sentence 3 StaRUG according to which it is generally not compatible with the restructuring goal to satisfy or secure claims that are proposed to be modified by the restructuring plan. Yet, sec. 32 (1) sentence 3 StaRUG does not affect the creditors' ability to enforce their claims. Such restrictions can only be implemented subject to a stabilisation order pursuant to sec. 49 ff. StaRUG.

Sec. 32 (2) - (4) StaRUG contain several additional notification requirements that may result in the termination of the restructuring matter.

5.1.4. Contractual effects (sec. 44, 55 StaRUG)

Following the Dutch example, the legislative draft by the federal cabinet initially contained provisions that would have allowed the termination of mutual contracts equivalent to the rules applicable in regular insolvency proceedings (sec. 103 ff. InsO). Subject to sec. 51 (1) StaRUG-RegE, the debtor could request the court to terminate any mutual contract which is not fully performed by both parties if the other party does not comply with a request made by the debtor for adjustment or termination. In the event of such termination by court order, the other party was only entitled to a claim on grounds of failure to perform; such claim could, however, also be modified in the restructuring plan (sec. 54 (3) StaRUG-RegE). Since these proposals had been strongly criticised[42], the legislator did refrain from such severe interference with the creditors' contractual rights and did not adopt sec. 51 ff. StaRUG-RegE at last.

The statute now only imposes some restrictions on the creditors seeking to exercise contractual default rights themselves by employing *ipso facto*-clauses. According to sec. 44 (1) StaRUG, the fact that the restructuring matter is pending or that tools of the framework are used by the debtor does not "as such" constitute cause for the termination of contract, for the acceleration of performance, for a right by the other party to refuse performance owed or to demand adjustments to the relevant contract. Any contrary contractual agreements are invalid (sec. 44 (2) StaRUG).

If a stabilisation is ordered, the right of the affected creditor to refuse performance or terminate the contract is suspended pursuant to sec. 55 (1) StaRUG. This provision serves the implementation of Art. 7 (4) of the Directive on restructuring and insolvency and applies for the time of the duration of the stabilisation order only. After that time, sec. 44 (1) StaRUG will, however, be applicable again, since the restructuring matter remains pending even if the stabilisation expires.[43]

The words "as such" are of crucial importance for the interpretation of sec. 44 (1) StaRUG. According to settled case law, sec. 119 InsO which provides for a comparable ban on *ipso facto*-clauses in regular insolvency proceedings, is without any prejudice to the material existence of the affected contractual default rights; instead, the provision only prohibits exercising those rights with reference to certain incriminated

[42] R. Bork, 'Erstreckung der §§ 103 ff. InsO auf die präventive Restrukturierung?' [2020] ZRI 457 ff.

[43] C. Thole (fn. 15) p. 1994.

circumstances.[44] Transferred to sec. 44 (1) StaRUG, this indicates that the creditors principally retain their contractual default rights and are only hindered from enforcing them solely because the debtor utilised the restructuring framework. Conversely, it particularly remains admissible to found contractual default rights on the condition that the debtor is in a state of imminent illiquidity.[45] Thus, sec. 44 StaRUG might be of rather limited effect although its precise scope will still have to be determined by case law and practice.

Subject to sec. 55 (1) StaRUG, the creditor may, accordingly, not refuse performance or terminate the contract "solely" because the debtor's performance is overdue as long as the stabilisation order is effective. On the other hand, as a general principle, default rights based on other circumstances, such as the violation of ancillary obligations or the breach of covenants remain unaffected. Considering the rules set out by sec. 44 (1) StaRUG, this does, however, only apply insofar as such terms and conditions do not refer to the pendency of the restructuring matter or the utilisation of tools provided by the framework. Sec. 55 (2) StaRUG states that the contractual effects of the stabilisation only apply if the debtor depends on the performance owed by the creditor in order to continue the business. In case of doubt, it has to be assumed that such a dependency is given.[46]

Finally, sec. 55 (3) StaRUG contains important exemptions: the stabilisation order does not affect the right of a creditor to retain performance under the plea of uncertainty (sec. 321 BGB). According to this provision, the party of a mutual contract is only obliged to perform in advance if the other part provides him or her with sufficient security. Moreover, sec. 55 (1) StaRUG is without any prejudice to the right of lenders to terminate the loan agreement before the loan is disbursed on the grounds of a deterioration in the financial circumstances of the debtor or in the value of the securities granted for the loan (sec. 490 (1) BGB). The gist of this provision is that a lender is not required to increase his or her level of exposure even further.

5.2. In-court voting on the plan and preliminary examination (sec. 45-48 StaRUG)

Division 2 (sec. 45-46 StaRUG) and Division 3 (sec. 47-48 StaRUG) provide for further opportunities to involve the court. Pursuant to sec. 45-46 StaRUG the debtor may transfer the administration of the voting procedure to the court. That might, in particular, be appropriate if the restructuring plan does not only affect a limited number of financial creditors but rather a large variety of different creditors, especially including small-sum creditors.[47]

At the request of the debtor, the court must schedule a meeting for a preliminary examination of the restructuring plan (sec. 46 StaRUG). At this occasion, any question relevant to the

[44] BGH, decision of 15 November 2011 (IX ZR 169/11), [2013] ZIP 274.

[45] C. Thole (fn. 15) p. 1994.

[46] Explanatory Memorandum of the SanInsFoG (fn. 7) p. 185 f.

[47] C. Thole (fn. 15) p. 1994.

confirmation of the plan may be discussed. The court will summarise the result of the preliminary examination in a note. The statute does not answer the question if the court will be bound to its findings from the preliminary examination when confirming the plan later on. The settled case law applicable to sec. 231, 250 InsO does, however, indicate that the preliminary examination has no strict binding effect.[48] Even though the preliminary examination may be concerned with any question relevant to the plan, the court's scope of review is limited to the issues that are also subject to the judicial confirmation of the plan pursuant to sec. 60 ff. StaRUG. This does, for instance, mean that the court is only competent to review legal questions but not the economic expediency of the envisaged restructuring.[49]

As mentioned above, the debtor may also request a preliminary examination if the voting procedure is not administered by the court (sec. 47 StaRUG). In the event the administration of the voting procedure remains with the debtor, the court may be concerned with individual questions that will be relevant to the confirmation of the plan. Thus, in-court voting on the plan and the judicial confirmation of the plan must be distinguished. The plan put to vote by the debtor him- or herself may also be confirmed by the court pursuant to sec. 60 ff. StaRUG.

5.3. Stabilisation (sec. 49-59 StaRUG)

Similar as sec. 21 (2) sentence 1 no. 3 InsO does in preliminary insolvency proceedings, sec. 49 (1) no. 1 StaRUG provides for a stay of execution. Moreover, the debtor may obtain an order prohibiting the enforcement of rights to movable assets that would constitute a separate satisfaction right or right to separation in hypothetical insolvency proceedings (sec. 49 (1) no. 2 StaRUG). Such stay of enforcement is also known in preliminary insolvency proceedings (sec. 21 (2) sentence 1 no. 5 InsO).

Claims that are not open to modification in the restructuring plan pursuant to sec. 4 StaRUG are also excluded from possible stabilisation orders; besides that, the stabilisation may be directed at individual, several, or all creditors (sec. 49 (2) StaRUG). The stabilisation order is without any prejudice to the maturity of the affected claim under substantive law. Hence, the respective claims must still be taken into account when determining if the debtor is illiquid within the meaning of sec. 17 InsO.[50]

The creditor who is affected by a stay of enforcement must be adequately compensated. For this purpose, the debtor is obliged to pay any interest accruing on the creditor's claim and reimburse the creditor for any loss in value on account of the use of the asset subject to his or her right to separation or separate satisfaction (sec. 54 (1) StaRUG). Since sec. 54 (1) StaRUG only refers to the "use", the debtor is, in general, not allowed to dispose the relevant asset without the creditor's consent. This particularly applies to goods, machinery or other equipment that serve as

[48] BGH, decision of 16 February 2017 (IX ZB 103/15), [2017] NZI 260; BGH, decision of 26 April 2018 (IX ZB 49/17).

[49] C. Thole (fn. 15) p. 1994.

[50] Cf. BGH, decision of 14 February 2008 (IX ZR 38/04), [2008] ZIP 706 stating that enforced deferrals are not to be considered when determining illiquidity.

collateral for a seller or lender. If the debtor does so anyway, he must distribute any proceeds received hereby to the creditor or at least hold the proceeds in a distinct form. This also applies if the debtor is authorised to collect receivables assigned to him or her in order to secure a claim, especially in the cases of an extended retention of title.

A stabilisation order may be issued for a duration of up to three months (sec. 53 (1) StaRUG). The debtor, however, can request for extension or new orders after that time (sec. 52 StaRUG). This does not apply if the debtor already submitted a plan offer and no circumstances are known from which it could be inferred that the plan cannot be expected to be adopted within the next month (sec. 53 (2) StaRUG). In this case, the maximum duration of the order is extended to four months but may exclusively be directed against affected parties of the plan.

The prerequisites for a stabilisation order are laid out in sec. 50 StaRUG. In particular, the restructuring plan documentation submitted by the debtor must be complete and "convincing" (*schlüssig*), sec. 50 (1) sentence 1 StaRUG. This term leaves much room for interpretation. As a matter of fact, the court should only assess/determine if it is plausible that the restructuring goal can be achieved based on the proposed concept.[51] The question whether the envisaged restructuring is economically expedient is not subject to judicial review.

Sec. 57 StaRUG sets out that the directors are liable to the affected creditor if a stabilisation order is issued based on intentionally or negligently incorrect information. Yet, it might be difficult for the creditor to calculate and prove damages suffered particularly due to the stabilisation order in the individual case.

Sec. 59 StaRUG provides for specific reasons for the revocation and termination of the stabilisation order. The termination of the stabilisation order, if such step is not based on the notification of the restructuring ceasing to have effect (sec. 31 (4), 59 (1) no. 2 StaRUG), does not necessarily result in the termination of the restructuring matter. This is because the restructuring plan can conceivably be adopted without an ongoing stabilisation. Reversely, the court may not terminate the restructuring matter as long as a stabilisation order is still in force (sec. 33 (3) StaRUG).

According to sec. 59 (2) StaRUG, the court must revoke the stabilisation order if an affected creditor files a respective request and shows to the satisfaction of the court that a reason for termination pursuant to sec. 59 (1) no. 2 or 4 StaRUG has occurred, especially because circumstances are known from which it can be inferred that the debtor is not willing and able to align the management with the best interest of all creditors.

Finally, sec. 59 (3) StaRUG ensures an orderly transition of the restructuring matter into regular insolvency proceedings. The provision prevents fast creditors from executing their claims immediately upon termination of the stabilisation order (such actions would most likely be avoidable

[51] C. Thole (fn. 15) p. 1996.

in subsequent insolvency proceedings anyway). For this purpose, the court may refrain from terminating the stabilisation order even if the conditions of sec. 59 (1), (2) StaRUG are fulfilled. However, if the debtor does not furnish proof to the court that a request for the opening of insolvency proceedings was filed within a maximum period of three weeks, the stabilisation order will still be revoked.

5.4. Confirmation of the plan (sec. 60-72 StaRUG)

Subject to Division 5 (sec. 60-72 StaRUG) the court may confirm the restructuring plan adopted by the affected parties. The respective provisions apply regardless of whether the voting procedure is in or out of court. Subdivision 1 (sec. 60-66 StaRUG) governs the confirmation procedure, Subdivision 2 (sec. 67-72 StaRUG) sets out the effects of the confirmed restructuring plan.

The judicial confirmation of the plan requires a request of the debtor (sec. 60 StaRUG). Before deciding on the confirmation, the court may (and must do so if voting on the plan was not conducted in the context of a court procedure) hold a meeting to hear the affected parties (sec. 61 StaRUG). Sec. 63 StaRUG sets forth the grounds on which the court must refuse confirmation *ex officio*. In particular, the court has to review if the debtor is in a state of imminent illiquidity (sec. 63 (1) no. 1 StaRUG), if the provisions concerning the content, procedural treatment and the adoption of the plan have been complied with (sec. 63 (1) no. 2 StaRUG), as well as the prospects that the claims can be satisfied as stipulated in the plan (sec. 63 (1) no. 3 StaRUG).

According to sec. 64 StaRUG that corresponds to sec. 251 InsO, the court must also refuse confirmation at the request of an affected party who voted against the plan and righteously claims to be piut in a worse position by the plan as compared to the situation without the plan. Without prejudice to the specifics as set out by sec. 64 (4) StaRUG, such request is only admissible if the affected party objected to the plan already during the voting procedure (sec. 64 (2) StaRUG). The debtor may prevent the confirmation being refused based on sec. 64 StaRUG by providing for funds to be made available to any affected party who can prove that it is put in a worse position by the plan (sec. 64 (3) StaRUG).

The decision on the confirmation of the restructuring plan, if it is not already announced at the hearing meeting or the discussion and voting meeting, has to be announced in a special meeting as soon as possible (sec. 65 (1) StaRUG). Subject to the requirements of sec. 66 StaRUG, each affected party (if confirmation is refused, the debtor respectively) may file an immediate appeal against the court's decision within a period of two weeks (sec. 569 (1) of the German Code of Civil Procedure, *Zivilprozessordnung*, ZPO). Upon expiry of that period, the confirmation of the plan becomes final. The effects stipulated in the constructive part of the plan will, however, already enter into force as soon as the plan is confirmed (sec. 67 (1) sentence 1 StaRUG), notwithstanding the right to appeal. An affected party who filed an immediate appeal may only request the court to order the suspensive effect of the appeal subject to the condition that implementing the restructuring plan would result in serious disadvantages that are

disproportionate to the advantages of an immediate implementation of the plan (sec. 66 (4) StaRUG).

The effects of the plan also enter into force in relation to affected parties who voted against the plan or did not participate in the voting (sec. 67 (1) sentence 2 StaRUG). In contrast, creditors' rights against third parties remain unaffected, with the exception of rights under intra-group securities which were modified pursuant to sec. 2 (4) StaRUG (sec. 67 (3) StaRUG). If the plan provides for the constitution, alteration, transfer, or cancellation of rights, all declarations or resolutions necessary under general civil law and corporate law will be deemed to have been made in the legal form, thus suspending from, e.g, the need to consult a public notary (sec. 68 StaRUG).

The constructive part of the restructuring plan may provide that satisfaction of the claims owed to the creditors is to be monitored by a restructuring practitioner (sec. 72 StaRUG). If the debtor substantially defaults in performing the plan, the deferral or waiver of a claim as stipulated in the plan will no longer be binding on the respective creditor (sec. 69 (1) StaRUG). Such default shall be assumed if the debtor fails to pay a due debt although the creditor has issued a warning in writing, setting a grace period of at least two weeks. The confirmed final and non-appealable plan serves as a basis to levy execution against the debtor in the same way an enforceable judgement does (sec. 71 (1) StaRUG). If a creditor asserts the rights due to them in the event of a substantial default of the debtor, the creditor must, however, show to the satisfaction of the court that the requirements of sec. 69 (1) StaRUG are met (sec. 71 (3) StaRUG).

6. Restructuring practitioner (sec. 73-83 StaRUG)

The office of the restructuring practitioner is governed by sec. 73-83 StaRUG. A distinction has to be made between the mandatory and the discretionary restructuring practitioner.

The court must, in particular, appoint a restructuring practitioner *ex officio* if the rights of consumers or small and medium-sized as well as micro enterprises are envisaged to be affected or if the debtor requests a stabilisation order which is to be directed against substantially all creditors (sec. 73 (1) StaRUG). Moreover, a restructuring practitioner must mandatorily be appointed if it is foreseeable that the restructuring goal can only be achieved by a cross class cram down pursuant to sec. 26 StaRUG (sec. 73 (2) StaRUG). On the other hand, a restructuring practitioner may also be appointed upon request of the debtor or a group of creditors representing at least 25 percent of the voting rights of their class (sec. 77 StaRUG).

The person to be appointed as restructuring practitioner must have a qualification similar to the insolvency administrator (sec. 56 InsO). According to sec. 74 (1) StaRUG, any tax adviser, auditor, or lawyer who is experienced in restructuring and insolvency matters and independent of the creditors and the debtor is eligible to be appointed as restructuring practitioner.

The specific requirements for the appointment of the restructuring practitioner differ depending on whether the appointment is required by law or happens on an optional basis. In case of a mandatory restructuring practitioner, the court is obliged to "consider" proposals by the debtor, the creditors or shareholders (sec. 74 (2) sentence 1 StaRUG). Comparable to the cases of sec. 56a (2) InsO, the court is principally bound to the debtor's proposal if he or she presents a certificate issued by a tax adviser, auditor, or lawyer showing that the envisaged restructuring does not manifestly lack the prospects of success (sec. 74 (2) sentence 2 StaRUG). Subject to this condition, the court may only deviate from the debtor's proposal if the candidate is obviously not suitable. This also applies if affected parties who hold more than 25 percent of the voting rights in each class submit a joint proposal (sec. 74 (2) sentence 3 StaRUG). In case the restructuring practitioner is to be appointed on an optional basis, the court is only bound by the joint proposal of a group of creditors who are anticipated to collectively represent all classes of affected parties (sec. 78 (2) StaRUG).

Sec. 76 StaRUG governs the function and duties of the mandatory restructuring practitioner. He or she must observe the restructuring and is obliged to report if circumstances which justify the termination of the restructuring matter pursuant to sec. 33 StaRUG occur (sec. 76 (1) StaRUG). In the aforementioned cases of sec. 73 (1) StaRUG, the practitioner is to decide how the restructuring plan is put to vote. If he or she decides not to pass the vote in court proceedings, the practitioner will chair the meeting of the affected parties, run the voting procedure and clarify disputed or doubtful voting rights by way of a preliminary examination pursuant to sec. 47 f. StaRUG (sec. 76 (2) no. 1 StaRUG). In case the debtor obtains a stabilisation order, the practitioner will constantly review whether the conditions for the order continue to apply and, if not, may inform the court of the reasons for revoking the order (sec. 76 (3) StaRUG).

The court may also furnish the practitioner with powers comparable to those of the monitor in debtor in possession insolvency proceedings. In particular, the court may confer the power on the practitioner to monitor the debtor's economic situation and the management and to demand from the debtor that receivables can only be collected by and payments can only be made by the practitioner (sec. 76 (2) no. 2 StaRUG). Alternatively, the court may instruct the debtor to notify the practitioner of payments and to only effect payments outside the ordinary course of business if the practitioner consents (sec. 76 (2) no. 3 StaRUG).

In contrast, the function of the discretionary restructuring practitioner is principally limited to assisting the debtor and the creditors in developing and negotiating the restructuring concept and the plan based thereon (sec. 77 (1), 79 StaRUG). The court may, if requested, also assign one or several duties of the mandatory restructuring practitioner to the discretionary, optional restructuring practitioner (sec. 77 (2) StaRUG).

The remuneration of the practitioner is governed by sec. 80-82 StaRUG. The standard remuneration is based on appropriate hourly rates up to 350 € to be determined by the court, especially considering

the size of the debtor's business, nature and scope of the economic difficulties faced by the debtor and the qualification of the practitioner (sec. 84 (3) StaRUG). In special cases the remuneration may, however, be determined on a different basis and exceed the maximum amount set out by sec. 84 (3) StaRUG. This applies, in particular, if all anticipated expense debtors give their consent (sec. 83 (1) sentence 1 no. 1 StaRUG).

7. Public restructuring matters (sec. 84-88 StaRUG)

Sec. 84-88 StaRUG, that will not enter into force before 17 July 2022, contain supplementary provisions with regard to public announcements. As a basic principle, public announcements will only be made if the debtor so requests (sec. 84 (1) StaRUG). The crucial importance of this rule is that the restructuring matter only qualifies as insolvency proceeding within the meaning of the EIR if the debtor opts for a public procedure.

If the debtor opts for the public proceeding, the first decision issued in the restructuring matter must specify the grounds on which the jurisdiction of the court is based (Art. 3, 4 EIR, sec. 84 (2) StaRUG). To this effect, the restructuring matter will be the "main insolvency proceeding" if the debtor's COMI is situated in Germany (Art. 19 (1) EIR). The first decision issued in the restructuring matter will then constitute the "judgement opening insolvency proceedings" within the meaning of Art. 2 (7) EIR. It has already been announced that Germany intends to register the new framework in the EIR's Annex A so that it will fall within its scope.[52] Whether or not the confidential version of the StaRUG-proceeding (likewise a similar proceeding in other Member states) is eligible for recognition under the Brussels Ia-Regulation 1215/2012,[53] is a matter of debate and will eventually be decided by the European Court of Justice (ECJ). In particular, Recital 7 clause 4 of the EIR raises some doubts.

8. Right of avoidance and liability law (sec. 89-91 StaRUG)

Sec. 89, 90 StaRUG set out important rules restricting the liability of the directors and creditors in the context of restructuring. Sec. 89 StaRUG refers to legal actions performed while the restructuring matter is pending, whereas sec. 90 StaRUG addresses legal actions performed in implementing the restructuring plan.

Sec. 89 (1) StaRUG not only reduces the liability risks of credit grantors under sec. 826 BGB but also refers to the right of avoidance under sec. 133 InsO. According to that provision, the assumption of a contribution *contra bonos mores* to a delay in filing for insolvency (constituting a liability under sec. 826 BGB) or a legal act committed with the intent to disadvantage creditors (constituting a right of avoidance under sec. 133 InsO) cannot be based *solely* on the fact that a person involved had knowledge that the restructuring matter was

[52] Explanatory Memorandum of the SanInsFoG (fn. 7) p. 210.

[53] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

pending or that the debtor made use of tools of the framework.

Sec. 89 (3) StaRUG addresses the directors' liability for payments effected at a time when the debtor already met the criteria for insolvency under sec. 15b InsO. In this regard, sec. 89 (3) sentence 1 StaRUG states that any payment made in the ordinary course of business shall be deemed compatible with the due care of a prudent director until the restructuring matter is terminated under sec. 33 (2) sentence 1 no. 1 StaRUG and therefore not give rise to any liability. The aim of sec. 89 (3) StaRUG is to safeguard the continuation of the debtor's business for the exceptional case that the court refrains from terminating the restructuring matter pursuant to sec. 33 (2) sentence 1 no. 1 clause 2 or 3 StaRUG. In this situation, the interdiction of payments as imposed by sec. 15b InsO would be counterproductive. The directors must, however, refrain from making payments until a decision is issued by the court if this is possible without jeopardising the continuation of the restructuring project (sec. 89 (3) sentence 2 StaRUG). Moreover, sec. 89 (3) sentence 1 StaRUG does, of course, only apply if the directors comply with the notification requirement pursuant to sec. 42 StaRUG.

Sec. 90 (1) StaRUG widely excludes the provisions of a confirmed and non-appealable plan as well as legal actions performed in implementing such plan from transactions avoidance. In general, the law of transactions avoidance is only applicable subject to the condition that the plan was confirmed based on incorrect or incomplete information by the debtor and that the other party was aware thereof.

According to sec. 90 (2) StaRUG, this does not apply if the plan provides for the transfer of all or substantially all of the debtor's assets. In this case, legal actions are only excluded from transactions avoidance if it is ensured that creditors who are not affected by the plan are able to obtain satisfaction, with priority over the affected parties, from the funds the debtor received in return for the assets transferred.

Sec. 90 StaRUG particularly gains relevance with respect to new financings within the meaning of sec. 12 StaRUG. Such arrangements, that also include deferments and prolongations, may also obtain protection from transactions avoidance what has not been possible up until now. However, pursuant to an often strongly criticised remark in the official explanatory notes to the new law, the later repayment of a newly given loan is not subject to this privilege[54], whereas security granted by the debtor on the basis of the restructuring plan does qualify for the new avoidance exemption. This differing treatment is because only provisions regarding the commitment to grant new financing and corresponding security can be subject to the restructuring plan. In contrast, sec. 12 StaRUG does not mention the repayment of the loan. Furthermore, the lawmaker wanted to avoid discussions on whether the protection of a repayment of a "plan financing" is subject to

[54] Explanatory Memorandum of the SanInsFoG (fn. 7) p. 216.

exemptions in particular circumstances (e.g., if the debtor, two years later, repays the loan with the clear intent to prejudice his or her creditors). However, it is important to note that even without the protection by sec. 90 StaRUG, the repayment of a plan financing is usually not subject to avoidance unless other criteria are met (e.g. an intent to prejudice the general body of creditors). Pursuant to case law, payments in a restructuring scenario may be protected from avoidance anyway.

9. Recovery moderation (sec. 94-100 StaRUG)

The recovery moderation established by sec. 94-100 StaRUG and based on the role model of the French *Mandat ad hoc* is a completely new procedure. It does not form part of the actual restructuring framework but rather defines a precedent stage. The recovery moderation is not a public procedure and, thus, not an insolvency procedure within the meaning of Regulation 2015/848.

The recovery mediation is designed to reach a mutual recovery settlement concluded by the debtor and his or her creditors (sec. 97 StaRUG). This procedure is, in particular, suitable for small-sized and micro enterprises.[55] Eligible for recovery moderation are all enterprises capable of restructuring that not obviously meet the criteria of insolvency (sec. 94 (1) StaRUG). The court will appoint an independent person who is experienced in the relevant line of business as recovery moderator (sec. 94 (1) StaRUG). His or her task is to mediate between the debtor and the creditors by identifying a solution to overcome the economic and financial difficulties (sec. 96 (1) StaRUG).

Equivalent to the restructuring plan, the debtor may request the court to confirm the recovery settlement (sec. 97 StaRUG). The essential significance of such confirmation is that the settlement will then only be voidable subject to the requirements of sec. 90 (1) StaRUG. However, it remains unclear if this only refers to the settlement itself or also to legal actions performed in implementing the settlement.[56]

10. Conclusion

The StaRUG-Scheme is a real enrichment to the German restructuring landscape. The restructuring framework enables the debtor to implement a plan outside formal insolvency proceedings. A sophisticated cross class cram down mechanism serves to overcome the resistance of obstructing creditors. A detrimental treatment of dissenting creditors is avoided by the absolute priority rule, also allowing exceptions to facilitate the success of the envisaged restructuring. The debtor enjoys a high degree of flexibility when pursuing the restructuring under the framework. He or she can either decide for a completely debtor-driven procedure or request supplementary procedural aids by involving the court, especially stabilisation orders safeguarding the plan implementation. An obstacle to an operative restructuring within the framework is that it does not provide for an option

[55] Explanatory Memorandum of the SanInsFoG (fn. 7) p. 216.

[56] C. Thole (fn. 15) p. 2000.

to modify claims held by employees or to terminate mutual contracts. If such measures are required, the debtor should rather envisage a restructuring within regular debtor-in-possession insolvency proceedings which have been successful in many recent cases, too. Despite these shortcomings, the new German law is, as the first published cases (one regarding the restructuring of a syndicated loan[57] and another the restructuring of shareholder loans[58]) indicate, particularly suited for the needs of a financial restructuring, offering a flexible possibility to adjust multi-party credit transactions including inter-creditor agreements and allowing for adjustment to covenants and reporting obligations.

[57] AG Köln, decision of 3 March 2021 (83 RES 1/21), [2021] NZI 433.

[58] AG Hamburg, decision of 12 April 2021 (61a RES 1/21).