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Pre-insolvency moratoria – a legal comparison

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Abstract

In transformation of the EU Directive on restructuring and insolvency, some Member States have adopted new laws on pre-insolvency restructuring, including norms on a moratorium (or stay). Similarly, the United Kingdom has updated its restructuring and insolvency tool box. The present article introduces the relevant rules in Dutch ("WHOA"), English ("CIGA"), and German law ("StaRUG"). It presents the details of moratoria under these three statutes and describes differences as well as advantages and disadvantages.

I. Introduction

Article 6 of the Directive on restructuring and insolvency[1] obliged the EU Member States to ensure that debtors can benefit from a suspension of individual enforcement measures in support of negotiations on a restructuring plan within a preventive restructuring framework. The German legislator has complied with this obligation through sec. 49 et seq. StaRUG,[2] which came into force on 1 January 2021.[3] They authorise the restructuring court, at the debtor's request, to order a suspension of enforcement and realisation, which at the same time has consequences under contract law (in particular, a freeze of rescission and termination). The central objective of the moratorium, which the legislator refers to as a "stabilisation order"[4], is to provide the debtor with breathing space during the phase of restructuring preparation, negotiation, and decision-making by preventing creditors opposing the restructuring plans from pursuing their rights during this period, in particular through enforcement, realisation of collateral, and termination of contracts.[5]

Even before deliberations on the StaRUG began, two other jurisdictions had already introduced restructuring moratoria. In the Netherlands, the *Wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord (Wet*

[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 disqualification, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Official Journal of 26.6.2019, L 172/18. - Hereafter "the Directive" for short.

[2] Act on the Stabilisation and Restructuring Framework for Businesses of 22 December 2020, BGBl. I, 3256.

[3] Extensively Bork, ZRI 2021, 345, 358 et seq.; Cranshaw/Portisch, ZInsO 2020, 2617, 2625 et seq.; Desch, BB 2020, 2498, 25017 et seq.; Riggert, NZI 2021, Sonderbeil. 1, p. 40 et seq.; Thole, ZRI 2021, 231 et seq. as well as those mentioned below in footnote 16; in preparation already Bork, Festschrift für Klaus J. Hopt, 2010, p. 1629 et seq.; Bork, ZIP 2010, 397, 406.

[4] Notwithstanding the criticism of the word "moratorium" by Thole (ZIP 2020, 1985, 1995 and ZRI 2021, 231, 232), this internationally used term is retained here.

[5] Quite graphically, in England they speak of a "payment holiday" (albeit with regard to the new moratorium as regulated in Part A1 Insolvency Act 1986 – cf. below at fn. 8 – only), in the Netherlands of an "afkoelingsperiode" (cooling-off period).

homologatie onderhands akkoord; hereinafter abbreviated to WHOA[6]) was already adopted in spring 2020, entered into force on 1 January 2021 and, among other things, inserted the new articles 376-380 into the Dutch Insolvency Act (*Faillissementswet*; hereinafter abbreviated to "Fw"), supplying debtors with a moratorium to secure restructuring plan proceedings. A little later, on 26 June 26 2020, the Corporate Insolvency and Governance Act 2020 (hereinafter abbreviated to CIGA 2020) came into force in the United Kingdom,[7] adding a new Part A1 (sec. A1-A55 IA 1986) to the Insolvency Act 1986 (hereinafter abbreviated to IA 1986), which also deals with a moratorium,[8] thus supplementing the regulations already in place for administration.[9]

All three regulations have the same objective, namely to give the debtor breathing space to negotiate and implement its restructuring plan, but they differ greatly in their details, as the following remarks may illustrate.

II. Details

A closer look at the details reveals similarities, but also many differences. The following section is limited to a descriptive presentation of these characteristics. A brief assessment is provided below under III.

1. *Stand alone*-procedure

The first question is whether the debtor can apply for the moratorium in isolation or only together with a (judicial) restructuring (plan) procedure. German law answers this question in sec. 29 (3) StaRUG: According to this provision, the debtor may make use of the instruments of the stabilisation and restructuring framework listed in sec. 29 (2) StaRUG, which according to sec. 29 (2) No. 3 StaRUG also include the stabilisation order, independently of each other. The moratorium is therefore not necessarily linked to the preparation and implementation of a judicial restructuring plan procedure (sec. 29 (2) No. 1 and 4 StaRUG), but can also be applied for in order to shield out-of-court negotiations with the creditors (if necessary moderated by a restructuring moderator, sec. 94 et seq. StaRUG), irrespective of whether these are to

[6] In detail van Galen, KTS 2021, 225 ff.; Noldus, Int. Corp. Rescue 18 (2021/1), 17 ff.; Salah, Journ. of Int. Banking Law and Regulation 36 (2021/5), N51 f.; focusing on comparative law also Kern, NZI 2021, Sonderbeil. 1, p. 74 ff.

[7] In the following text, only "England" is referred to, somewhat abbreviated. This is because the Insolvency Act 1986 essentially applies to England and Wales. It contains numerous special provisions for Scotland, while the Insolvency (Northern Ireland) Order 1989 applies to Northern Ireland.

[8] For a detailed discussion, see Doyle, Insolv. Int. 33 (2020/4), 107 et seq.; Linklater/Wildridge, Insolv. Int. 33 (2020/3), 96 et seq.; Payne, SSRN 3759730 (https://ssrn.com/abstract=3759730); Saunderson, Intern. Corp. Rescue 17 (2020/5), 342 et seq.; Sidle, Corp. Rescue and Insolv. 13 (2020/4), 119 et seq. – For a comparison of StaRUG with the plan provisions of CIGA 2020 (Part 26A Companies Act 2016; hereinafter CA 2006 for short), see Tashiro, NZI 2021, Special Supp. 1, p. 77 et seq.; for comparison of WHOA and CIGA 2020, see Herding/Kranz, ZRI 2021, 123 et seq.

[9] See below in fn. 10.

result in a contract (sec. 17 et seq. StaRUG), a restructuring settlement (sec. 97 StaRUG), an out-of-court plan vote (sec. 20 et seq. StaRUG), or ultimately in court proceedings (plan vote, sec. 45 et seq. StaRUG, and/or plan confirmation, sec. 60 et seq. StaRUG). The same applies to English law, since sec. A1 IA 1986 does not link the moratorium to other remedial measures. It is possible to combine the moratorium with a procedure based on a Company Voluntary arrangement (sec. 1 et seq. IA 1986), a Scheme of Arrangement (sec. 895 et seq. CA 2006) or an Arrangement for companies in financial difficulty (sec. 901A et seq. CA 2006). However, these combinations are not mandatory,[10] although one should have in mind that the monitor must confirm that it is likely that the moratorium will result in rescue of the company as a going concern and must terminate the moratorium if they no longer consider this to be the case. The situation is different in the Netherlands. There, Art. 376 (1) Fw requires that the debtor has notified restructuring intentions with the court (Art. 370 (3) Fw) and intends to submit a restructuring plan within the next two months, or that the court has appointed a plan expert to prepare and submit such a plan (Art. 371 Fw).

2. Debtors

There are also differences regarding debtors eligible for the moratorium. For German law, it follows, albeit only very indirectly, from sec. 4 (2) StaRUG that this law is addressed to all entrepreneurs, regardless of whether they are natural persons or legal entities. For the Netherlands, the same follows from Art. 369 para. 1 Fw. In England, on the other hand, the moratorium is available only to certain companies (*eligible companies*) pursuant to sec. A1 (1) IA 1986, the scope of which is defined in sec. A2 in conjunction with Schedule ZA1 IA 1986. Thus, a debtor who operates his or her business as a natural person cannot obtain a moratorium.

3. Court order

As the name "stabilisation order" implies, a moratorium in Germany requires an order of the restructuring court, but this can only be issued at the request of the debtor (sec. 49 (1) StaRUG). This also applies to the Netherlands, where, in addition to the debtor, a plan expert appointed by the court is also entitled to apply (Art. 372 (3), 376 (1) Fw). Things are different again in England. Here, the debtor can trigger the effects of the moratorium him- or herself by filing the documents required by law with the court

[10] This is different in the case of the previously already available moratorium in administration proceedings, which is triggered by law upon commencement of an administration (para. 42 et seq. Schedule B1 IA 1986). However, these moratorium effects are more or less the seizure effects of insolvency proceedings aimed at restructuring. For comparative law on the differences, see Bork, Corporate Insolvency Law, Cambridge/Antwerp/Chicago (Intersentia) 2020, para. 3.7, 5.17, 8.27; for a comparison of the two forms of moratorium in England, see Linklater/Wildridge, Insolv. Int. 33 (2020/3), 96 et seq. However, this article is limited to the new Part A1 moratorium and does not elaborate on the administration moratorium.

(sec. A3, A7 (1) lit. a IA 1986). A court order is only required if winding-up proceedings have already been instituted against the company – in which case a moratorium can only be considered if it promises a better result for the creditors than winding up the company – or if the company does not have its centre of main interests (COMI) in the United Kingdom (sec. A3 (1), A 4, A5, A7 (1) lit. b/c IA 1986).

4. Substantive prerequisites

All the legal systems examined here link the moratorium to certain substantive conditions.

a) Triggering event

Since a moratorium is associated with – albeit possibly temporary – coercive interventions in creditors' rights, these require a legitimation that can be derived from the debtor's proximity to insolvency. Art. 1 (1) (a) of the Directive links the application of the Directive to a crisis stage "when there is a likelihood of insolvency" (as defined in national laws, Art. 2 (2) (b) of the Directive). The German legislator translated this into "imminent insolvency" (sec. 29 (1), 51 (1) (sentence 1) No. 3 StaRUG), thus choosing a triggering event which would entitle the debtor not only to apply for restructuring proceedings but also for insolvency proceedings (sec. 18 InsO). This parallelism of proceedings in the stage of imminent insolvency is justified, as there is, in both cases, already a common pool problem due to the concrete threat to creditors' claims associated with the impending insolvency, which can be solved by liquidation, by restructuring outside insolvency proceedings, and by restructuring inside insolvency proceedings[11] depending on which instruments are necessary.[12] However, it is also clear under German law that, in the event of inability to pay debts (illiquidity, cash-flow insolvency) and overindebtedness (balance sheet insolvency), a pre-insolvency moratorium has to be terminated or lifted or converted to insolvency proceedings (sec. 33 (2) (sentence 1) No. 1, (3), 59 (3) StaRUG). English law is more generous in this respect, as it allows a moratorium not only in the case of likely insolvency, but also in the case of actual (present) insolvency (sec. A6 (1) lit. d IA 1986). In the Netherlands, it must be shown that the debtor is in a situation where it is reasonable to assume that he or she will not be able to continue payments on due debts (Art. 370(1) Fw), which ultimately amounts to probable or imminent insolvency, comparable to German law.

b) Necessity

The next question is whether the threat of insolvency is sufficient for a moratorium or whether it must be necessary for achieving the restructuring objective. English law does not recognise this requirement expressly,

[11] Skeptically Skauradszun, KTS 2021, 1, 51 f.
[12] For example, it may be helpful to apply transactions avoidance law, which in all jurisdictions inspected here is only available in insolvency proceedings and may justify the possibly higher costs.

although the moratorium is only available if and for so long as the monitor considers that rescue of the company as a going concern is likely. As opposed to this, the StaRUG in sec. 49 (1), 51 (1) (sentence 1) No. 4 only permits a moratorium if it is necessary for (preserving the prospects of) achieving the restructuring objective. More pointedly, Art. 376 (4) Fw requires that the moratorium is necessary for the continuation of operations and negotiations and that it can reasonably be assumed that it serves the interests of the creditors as a whole and does not cause lasting damage either to the rights of third parties or to those of an enforcement creditor or an insolvency petitioner, which ultimately amounts to a proportionality test that is not provided for in this way in the other two legal systems.

c) Positive restructuring prognosis

In order to prevent abuse and to limit the moratorium to what is necessary, sec. 29 (1) StaRUG requires that the moratorium serves to sustainably eliminate the threat of insolvency, and sec. 51 (1) (sentence 1) No. 2 StaRUG requires a positive restructuring prognosis, but only in the sense that the restructuring project must not be hopeless because there is no prospect that a plan implementing the restructuring concept would be accepted by those affected by the plan or confirmed by the court. In addition, the restructuring plan must be conclusive (section 51 (1) (sentence 1) StaRUG), which, according to sentence 2 of the provision, means that it must not be obvious that the restructuring objective cannot be achieved on the basis of the envisaged measures. Indirectly, the same applies to England, where the debtor must submit with the moratorium application a certificate from the proposed *monitor* that, in the monitor's view, the moratorium is likely to result in the rescue of the going concern (sec. A6 (1) lit. e IA 1986).[13] Dutch law does not require a positive rescue prognosis. However, it may be assumed that this will be taken into account in the necessity and proportionality test required by Art. 376 (4) Fw.

d) Further requirements

While the other two legal systems are content with these requirements, German law regulates yet another constellation. It requires in three cases that it is to be expected that the debtor is willing and able to adhusts his or her management to the interests of the general body of creditors: if there are significant payment arrears to employees, pensioners, suppliers, social security institutions, or the tax authorities; if the debtor has not disclosed its annual financial statements in at least one of the last three financial years; or if a moratorium or protective measures pursuant to sec. 21 (2) (sentence 1) No. 3 or 5 InsO

[13] Surprisingly, this excludes from the outset reorganisation by means of an asset deal, which, although not a priority in Germany, was certainly in the focus of the StaRUG legislator; cf. sec. 90 (2) StaRUG and explanatory memorandum before sec. 4 StaRUG, BT-Drs. 19/24181, p. 109.

have already been ordered in favour of the debtor in the last three years, unless the reason for these orders has been overcome by a sustainable restructuring. However, it should be noted that Dutch law also provides for a three-year moratorium ban if, during this period, a restructuring plan submitted by the debtor has been refused approval by the creditors or the court (Art. 369 (5) Fw). In England, a further moratorium is possible at the earliest after one year, but here the court may allow exceptions (para. 2 (1) (b) Schedule ZA1 IA 1986).

5. Duration

In Germany, the duration of the moratorium is generally determined by application of the debtor, but there is a maximum limit of three months (sec. 53 (1) StaRUG). An extension for a further month is possible if the debtor has submitted a plan offer to his or her creditors and its acceptance is expected within that month (sec. 52, 53 (2) StaRUG). A further extension to a maximum of eight months is permissible if the debtor has applied for judicial sanctioning of the accepted restructuring plan and the plan is not obviously incapable of such sanctioning (sec. 52, 53 (3) StaRUG). In contrast, the primary maximum period under English law is unusually short at 20 working days (sec. A9 IA 1986). However, there are various possibilities for extension. For example, the debtor can obtain an extension by a further 20 working days simply by giving notice (sec. A10 IA 1986). In addition, extensions – including multiple extensions – up to a total of one year are possible with the consent of the creditors (sec. A11, A12 IA 1986) or the court (sec. A13 IA 1986). Finally, the moratorium may be extended until the termination of CVA or scheme proceedings (sec. A14, A15 IA 1986). In contrast, Dutch law is relatively simplistic. It provides for a maximum period of four months (Art. 376 (2) Fw), which the court may extend to a maximum of 8 months (Art. 376 (5) and (6) Fw), provided that the debtor can convincingly show that the plan proceedings have progressed, which is to be presumed if plan confirmation is requested.

6. Second attempt

On a different note is the lock-in period for a second moratorium after the failure of the first restructuring attempt. In Germany, a second moratorium is only possible after three years have elapsed, unless it can be expected that the debtor is able to align its management with the interests of the creditors despite these circumstances (sec. 51 (2) (sentence 2) StaRUG). Similarly, in the Netherlands, a second application is not permissible where the debtor has offered a restructuring plan that has been rejected by all classes or in respect of which the court has refused court confirmation unless a plan expert has been appointed who applies for the moratorium. In England, a company is excluded from being eligible under para. 2 (1) (b) Schedule ZA1 IA 1986 if at any time during the period of twelve months ending with the filing date, a moratorium for the company was in force (but

see section A42(6) IA 1986 for power of the court to modify the effect of this paragraph).

7. Involvement of a Restructuring Practitioner

In a grey area between prerequisites and legal consequences is the question of whether the moratorium is to be combined compulsorily with the appointment of an official restructuring officer. The three legal systems take different approaches here. In Germany, pursuant to sec. 73 StaRUG, a Restructuring Practitioner is only to be appointed by the court *ex officio* if the moratorium affects the rights of consumers or medium-sized, small, or micro-enterprises, if it is essentially directed against all creditors, or if it is foreseeable that the restructuring objective can only be achieved by making use of the rule on obstruction ban (cross-class cram-down). In contrast, in England the debtor must in any case bring along a monitor who must (among other things) also comment on the conditions of the moratorium sought (sec. A6 (1) IA 1986). Here, therefore, the involvement of a Restructuring Practitioner is mandatory. Dutch law provides only for an optional plan expert appointed by the court at the request of the debtor, a shareholder, a creditor, or the employees' representative body (Art. 371 (1) Fw). In addition, pursuant to Art. 376 (9) (sentence 2) Fw, an observer may be appointed if the court deems this necessary to safeguard the interests of creditors or shareholders.

8. Creditors affected

Next, it must be clarified against which creditors a moratorium may be directed. Here, it is first of all of interest that the debtor in Germany and the Netherlands has the option of limiting the moratorium to individual creditors or a group of creditors (sec. 49 (2) (sentence 2) StaRUG, Art. 376 (8) in conjunction with Art. 241a (2) Fw), whereas in England it inevitably covers all creditors; the provisions on the conditions (sec. A1 et seq. IA 1986) and effect of the moratorium (sec. A14 et seq. IA 1986) do not provide for any possibilities of limitation in terms of personal scope.

On a substantive level, the moratorium may block the enforcement of all claims, unless they have been expressly excluded by sec. 4 StaRUG (sec. 49 (2) (sentence 1) StaRUG; this applies above all to employee claims). Apart from this, it does not matter whether the claim arose, became due, or was titled before or after the issuance of the stabilisation order. The same applies in the Netherlands (Art. 376 (8) in conjunction with Art. 241a (2), 369 (4) Fw). English law takes a completely different approach. Here, the moratorium restricts only those claims – but then also all, except employee claims (sec. A21 (1) lit. e IA 1986) – which were established before the moratorium took effect (pre-moratorium debts), even if they fall due during the moratorium. Excluded are rents, wages, loan instalments, and payments for supplies made during the moratorium period (sec. A18 (3),

A53 IA 1986). Receivables for which the legal basis was established during the moratorium (moratorium debts) are therefore not included. On the contrary, all claims which are not affected by the moratorium (i.e. moratorium debts and certain pre-moratorium debts) enjoy a first priority right in subsequent insolvency proceedings commenced within the next twelve weeks (super priority, sec. 174A (2) (b) IA 1986). German and Dutch law, on the other hand, make no distinction between claims created before and after the moratorium order, nor have they made use of the possibility of a priority right as provided for by Art. 17 (4) Directive.

9. Legal consequences

In the case of a court order (Germany, Netherlands), the legal consequences of the moratorium are initially determined by the court, otherwise by statute. In this respect, it is interesting to note in advance that the legal consequences in Germany and England are precisely described in the statute, whereas Dutch law additionally provides for a general authorisation to the court to issue all measures necessary to protect the interests of creditors or shareholders (Art. 376 (9) (sentence 1), 379 (1) Fw). In other respects, a distinction must be made.

a) Enforcement ban

In the foreground in all countries examined here is the enforcement bar, i.e. the blocking of any enforcement of the creditors' claims concerned[14] (sec. 49 (1) No. 1 StaRUG, sec. A21 (1) lit. e IA 1986, Art. 376 (2) Fw). This includes collective enforcement through the application for insolvency proceedings. In Germany, the obligation to file an insolvency petition is suspended during the moratorium (sec. 42 (1) (sentence 1) StaRUG) and insolvency petition proceedings already commenced are "suspended"[15] by operation of law (sec. 58 StaRUG). The latter also applies in the Netherlands (Art. 376 (2) lit. c Fw) and in England (sec. A20 para. 1 IA 1986).

b) Realisation Ban

In principle, the moratorium also restricts the enforcement of security rights. In Germany, they are subject to the enforcement bar if included in the stabilisation order (sec. 49 (1) No. 1 StaRUG). In addition, the law provides for a separate application and order for a freeze on the surrender and realisation of movable assets pledged as collateral (sec. 49 (1) No. 2, 54 StaRUG).[16] Since security rights on real estate are generally to be realised by way of execution, the enforcement ban is sufficient in this case. A special feature of the

[14] For this purpose, see above at 7.
[15] Terminologically, the legislator is on the wrong track here. According to the terminology of civil procedure law, a stay of proceedings requires a court order, usually issued upon application, cf. sec. 246 et seq. ZPO (Zivilprozessordnung, German Code of Civil Procedure). As opposed to this, a stay of proceedings by force of law is referred to as an interruption (cf. sec. 239 et seq. ZPO).
[16] For more details, see, among others, Knauth, NZI 2021, 158 ff; Smid, ZInsO 2021, 198 ff; Thole, ZRI 2021, 231, 233 ff; Trowski, NZI 2021, 297 ff; Zuleger, NZI 2021, Sonderbeil. 1, p. 43 ff.

realisation ban for movables is that the collateral may be used for the continuation of the business. This includes wear and tear (which must be compensated by interest payments), but not – which is particularly relevant in the case of revolving collateral – sale and consumption by the debtor, as long as the secured creditor has not consented to this (sec. 54 (2) StaRUG). The other two legal systems are less differentiated in this respect. In the Netherlands, the moratorium automatically also applies to loan collateral, but only on the condition that the debtor can provide sufficient substitute collateral if required (Art. 376 (7) Fw). The legal situation in England is similar. Here, the realisation of collateral is explicitly mentioned in the law as being barred from the moratorium (sec. A21 (1) lit. c IA 1986). The court may allow exceptions (with or without conditions),[17] but not for the enforcement of a floating charge (sec. A21 (3) IA 1986), which can be easily explained by the fact that going concern and restructuring are hardly possible if the entire assets of the company are to be realised.

It is also interesting to note that in all three legal systems there is a prohibition of recovery for suppliers who have delivered under retention of title. In Germany, this follows from the ban on realisation (sec. 49 (1) No. 2 StaRUG), provided this has also been applied for and ordered against the supplier. Repossession under any hire-purchase agreement is also prohibited in England, where the court may, however, allow exceptions (sec. A21 (1) lit. d IA 1986). Dutch law also recognises such a prohibition on retrieval, unless the supplier is informed of the moratorium and the court agrees (Art. 376 (2) lit. a Fw).

c) Consequences under Contract Law

All the legal systems examined here also have consequences under contract law. In Germany, sec. 44 StaRUG denies effect to all *ipso facto* clauses that link termination of the contract to the initiation of a restructuring project as soon as the restructuring project is notified with the court. In addition, a moratorium means that no rights of termination, rescission, or retention[18] may be derived from claims which became due before the moratorium and with which the debtor is in default, provided that the creditor's counter-performance is indispensable for the going concern (sec. 55 (1) (sentences 1 and 2) StaRUG).[19] It remains permissible to dissolve the contract for other reasons, e.g. in the event of default on liabilities falling due after the stabilisation order. In England, the prohibition of *ipso facto* clauses and the inadmissibility of termination, rescission, etc. follows from sec. 233B (3) and (4) IA 1986, which places the moratorium on an equal

[17] In this respect, the principles set out in the decision of the Court of Appeal (Nicholls LJ) *Re Atlantic Computer Systems Plc* [1992] Ch. 505 continue to apply.
[18] The latter relates to creditor payments falling due after the stabilisation order, provided that they do not relate to the overdue part of the debtor's payment (sec. 55 (1) (sentence)2 StaRUG).
[19] For more details, see Thole, ZRI 2021, 231 ff.

footing with insolvency proceedings. However, the prohibition applies only to contracts for the supply of goods and services, with financial service providers being expressly excluded (sec. 223B (10) in conjunction with Schedule 4ZZA IA 1986). Default on claims falling due after the moratorium takes effect is also not covered (sec. 233B (6) IA 1986). However, the debtor's management or the monitor may agree to the termination of the contract and, in cases of particular hardship, the court may also grant exceptions (sec. 233B (5) IA 1986). In contrast, Dutch law is reasonably straightforward. Similar to German law, it denies effect to dissolution clauses and at the same time prohibits dissolution of the contract by rescission, termination, etc. due to a default occurring before the moratorium was ordered (sec. 373 (4) Fw).

d) Further legal consequences

While this concludes the legal consequences provided for in German and Dutch law, English law has further restrictions. Thus sec. A21 (1) lit. e IA 1986 also blocks civil proceedings against the debtor, subject to a court exception; only labour disputes are excluded. The debtor is also subject to certain restrictions. For example, he and she can only take out loans in excess of £500 if he or she has previously informed the lender of the moratorium (sec. A25 IA 1986). In addition, certain financial market transactions are prohibited (sec. A27 IA 1986), which can be an obstacle to the issuance of (reorganisation) bonds in particular. Payments on old claims are only possible up to an amount of £5,000 without the consent of the monitor (sec. A28 IA 1986). Dispositions generally require the consent of the monitor or the court unless the disposal is made in the ordinary way of the company's business (sec. A29 et seq. IA 1986). This applies in particular to the establishment of new security rights (sec. A26 IA 1986). German law only recognises such restrictions on disposal if (exceptionally[20]) a Restructuring Practitioner has been appointed and at the same time (which is also only possible in exceptional cases) a reservation of consent has been ordered for payments outside the ordinary course of business (sec. 76 (2) No. 3 StaRUG). In the Netherlands, the debtor remains entitled to dispose of the assets in the normal course of business (see Art. 377 (1) Fw), unless the court orders restrictions to protect the interests of third parties (Art. 377 (2) and (3) Fw).

10. Legal remedies

Finally, the legal remedies can be considered. In all jurisdictions, they are only available to a very limited extent. In Germany, only the debtor can lodge an immediate appeal if his or her application for a stabilisation order has been declined (sec. 51 (5) (sentence 2) StaRUG). Creditors may not challenge the

[20] See above at 6.

stabilisation order (sec. 40 (1) (sentence 1) StaRUG), but may only apply for the order to be set aside (sec. 59 StaRUG). The situation is similar in England. Since here the moratorium is already triggered by a notification of the debtor to the court, an appeal against this is not possible in the absence of a court decision. Consequently, sec. A 42 et seq. IA 1986 are confined to submitting measures of the monitor or management to judicial review during a moratorium. In the Netherlands, on the other hand, Art. 369 (10) Fw excludes any appeal, since Art. 376 et seq. Fw do not provide for such an appeal. Here, too, the only remedy available to the creditors is to apply for annulment (Art. 376 (10) Fw).

III. Overall view

In the overall view, the main question is how the three legal arrangements examined here satisfy the practical need for a protective instrument that is both effective and flexible in order to safeguard the restructuring negotiations against uncooperative creditors on the one hand and also grants sufficient protection of creditors against abuse of the moratorium tool by the debtor on the other hand. German law strives for the greatest possible flexibility but contains strict requirements for the moratorium, which serve to protect creditor rights. It also permits the stabilisation order in isolation, i.e. outside of judicial restructuring plan proceedings, and but goes rather overboard with the depth of regulation. Dutch law is more generous in this respect, authorising the court – which has also to take the creditors' rights into account – to take all necessary measures, but offering the moratorium only in conjunction with judicial restructuring plan proceedings. Otherwise, the two sets of rules are comparable in many respects, which is not surprising because they are both based on the Directive on restructuring and insolvency and thus on the same legal basis, and because the German legislator formulated the StaRUG with the WHOA in mind.[21]

In contrast, the English moratorium falls well short. The English legislator was not (or no longer) bound by the Directive on restructuring and insolvency and was therefore able to take its own path. However, the result is also disappointing from an English perspective.[22] The moratorium is only available to companies, not to entrepreneurially active natural persons. It is always directed against all creditors, not just those who obstruct restructuring negotiations. There is no judicial commencement control. Necessity is not examined. The involvement of a monitor is mandatory, but his or her role is limited and therefore no replacement for the lack of judicial commencement control? It has

[21] Cf. only explanatory memorandum StaRUG, BT-Drs. 19/24181, p. 150.

[22] Clear criticism in Payne (fn. 8), passim, as well as from the perspective of a monitor Doyle, Insolv. Int. 33 (2020/4), 107 et seq.

only a very short basic term, which leads to additional expenses for possible extensions. It makes resolution clauses ineffective only against suppliers and service providers (excluding financial service providers) and provides for considerable restrictions on debtor-in-possession powers, so that relatively little remains of the basic assumption – shared by all three legal systems – that restructuring takes place in debtor-in-possession proceedings. For continental European observers, it is astonishing that English law, which is known for its flexibility and economic friendliness, has missed an opportunity here, albeit possibly in an effort to protect creditor rights.