

GERMANY

The Insolvency and Restructuring Review 2022

GSK STOCKMANN



BIO

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Germany: When in Germany do as the English do?

Andreas Dimmling¹ and Sandra Krepler



Introduction

2021 had started with the most profound innovation for German restructuring law for over two decades. One year later this innovation has not kept its promises but the German restructuring market had not been as uneasy as it had been 2021.

After many German restructuring experts and

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insolvency practitioners had long campaigned for the introduction of a formal out-of-court restructuring, the implementation of the EU Restructuring Directive (Directive (EU) 2019/1023 of 20 June 2019) into German law (so-called SanInsFoG) as of 1 January 2021 finally brought change.²

The German law now provides for the first time ever for an out-of-court restructuring regime that allows cram down of dissenting creditors.

The German legislator reckoned it necessary to bring in the new restructuring regime as of January 2021 because many of the state's measures to avoid a wave of insolvencies due to the COVID pandemic expired in 2021. However, we still do not see any increase in corporate insolvencies in Germany. And this is not because of the new restructuring law.

So, let's have a closer look at the German insolvency and restructuring market:

I. Is German Economy STILL in crisis?

After GDP fell by 5 per cent in 2020 compared to 2019, marking the first time since the financial crisis in 2008/2009 that the domestic economy has fallen into recession, the German economy recovered well and reached a substantial growth of 2.7 per cent in 2021 compared to the previous year.³ The labour market also recovered somewhat and the unemployment rate even fell to 5.4 percent.⁴

Consequently, the expected increase in corporate insolvencies did not materialise. From January to October 2021, a decrease of 14 % compared to the previous year was recorded.

Many companies still profit from numerous aid and support measures for the economy in 2020 by German government.

However, the rapidly rising inflation rate has been a cause for concern in recent months. In February 2022, it was 5.1% for Germany compared to the previous year. Raw materials and energy in particular have become 20% or more expensive.

II. Development in Insolvency law

1. One year after the introduction of the new restructuring act -an interim assessment

German insolvency law lacked a proper and formal out-of-court restructuring tool. Cramdown proceedings in out-of-court restructurings were not possible under existing law.

On 20 June 2019, the European Parliament and the European Council passed the Directive (EU) 2019/1023⁵, which, inter alia, contains the introduction of preventive restructuring measures to avoid insolvencies at an early stage in the process. This forced the German legislator introducing a proper out-of-court restructuring tool. Are there already prominent use cases for the

¹ Andreas Dimmling and Sandra Krepler are lawyers in the Munich office of GSK Stockmann; Andreas co-heads the insolvency and restructuring group of GSK Stockmann.

² See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023>.

³ See https://www.destatis.de/EN/Press/2022/01/PE22_020_811.html

⁴ See <https://www.arbeitsagentur.de/en/press/en-2022-06-labour-market-in-january-2022>

⁵ The full directive can be accessed via <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=de>

Since January 1, 2021 the Directive has been transferred into German Law. The core of the SanInsFoG is the Act on the Stabilisation and Restructuring Framework for Companies (StaRUG). Yes, I agree, the German legislator has never been good in giving its most innovative laws a comprehensive and catchy title.

What is the basic principle?

The basic principle of the StaRUG is that a company offers a restructuring plan to creditors during a status where insolvency has not occurred yet. The company can choose if all creditors shall take part in the plan or only certain groups of creditors. The plan is drawn up by the company and presented to all involved creditors. The creditors shall then vote on the plan divided into different groups. If a sufficient majority of 75% of the debts to be restructured vote in favour of the plan, even dissenting creditors or dissenting groups shall have no power to prevent the plan from becoming effective (crossclass cram down effect).

During the phase of the restructuring plan being drawn up and voted on, the company can seek certain standstill measurements through court order. As a consequence, creditors cannot take legal action against the company during this time for immediate enforcement of debts.

The restructuring plan will in most cases be drawn up under the supervision of a restructuring expert who shall be appointed by the court if the debtor or a minority of at least 25% of creditors ask for. The restructuring expert can be a lawyer experienced in restructuring cases. He may have also monitoring and moderating tasks between the company and creditors.

StaRUG is somewhat similar to the Scheme-of-Arrangements or (since June 2020) Restructuring Plans in England. But is different in two points. First, although the new German restructuring plan requires professional assistance, costs involved should be still considerably lower than reaching out for a Scheme of Arrangement in London. Second, Schemes of Arrangement are not recognised in Germany as insolvency procedures and therefore the stipulations of a Scheme of Arrangement are not easily enforced in Germany. So, Germany had to do it "the German way".

INTERIM BALANCE AFTER ONE YEAR OF StaRUG - Has the restructuring tool starug already been widely adopted?

StaRUG procedures are not published in registers open to the public. Therefore, we lack information on how many StaRUG procedures have taken place since beginning of 2021. However, according to well informed sources it seems likely that not more than 10-15 cases had been completed successfully. In 4 cases, there was a court-confirmed restructuring plan.⁶

Does the StaRUG meet the expectations of the practice?

The small number of StaRUG cases leads to the interim conclusion that the regime falls short of its high expectations. Some therefore refer to the StaRUG as a "toothless tiger".⁷ The reasons for this are still not clear. One important point is that under a StaRUG procedure the debtor cannot adjust the contractual terms of current contracts (such as lease agreements) against the will of the contracting party.

Additionally, some creditors and insolvency courts are quite reluctant to test the new regime and tend to prefer traditional insolvency procedures.

Those cases where the StaRUG procedure went well were characterized by a complex debt structure that prevented the operational restructuring.

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⁶ See <https://rsw.beck.de/aktuell/daily/meldung/detail/studie-wenige-firmen-nutzen-bislang-neues-sanierungsverfahren>.

⁷ See <https://www.ifo.de/recht/kanzleien-unternehmen/k/starug-unternehmensstabilisierung-gesetz-insolvenz-zwischenbilanz-eu-2019-1023-saninsfог/>.

Are there already prominent use cases for the application of the StaRUG?

The best-known case connected with the StaRUG procedure is the clothing company Eterna Mode Holding GmbH, based in Passau. On September 10, 2021, its creditors approved a restructuring plan to implement a reorganisation under the StaRUG. This provided for a debt cut to bondholders and payment of a settlement rate of 12.5% on their claims and outstanding interest. The necessary financial resources were provided by the existing shareholders of Eterna. The responsible restructuring court confirmed the restructuring plan in October 2021.

2 Extension of deadlines for imminent insolvency and overindebtedness test

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The 2021 Insolvency Act reform also introduced new regulations on the legal obligation to file for insolvency.

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Whereas under the former law, the deadline for filing for insolvency had to be no later than three

weeks after the reason for opening insolvency proceedings occurred, the new version doubles this deadline to six weeks in the event of over-indebtedness. Thus, the debtor has more time trying to restructure avoiding insolvency. In case of illiquidity, the maximum deadline remains at three weeks after illiquidity occurred.

III. What are the most interesting insolvency cases in Germany at the moment?

Even though the number of corporate insolvencies in 2021 was lower than forecast, there were important insolvency proceedings. Two are of particular interest to the international readership.

1. Eyemaxx real estate AG – can we already speak of insolvency tourism to Austria?

Eyemaxx Real Estate AG is a real estate project developer registered in Germany. Unlike many other similar companies, Eyemaxx had issued numerous bonds over the years for financing expansion and real estate projects.

When Eyemaxx suddenly filed for insolvency in November 2021, many investors and real estate observers were surprised. On the one hand, the question suddenly arose whether the real estate industry is not as crisis-proof as thought? On the other hand, experts were surprised that Eyemaxx filed for insolvency in Austria and not in Germany. The Austrian insolvency court that already was responsible for the Air Niki case in 2017, quickly accepted the filing and appointed the same insolvency administrator as it had appointed in 2017 for the Air-Berlin subsidiary. The argument as to why the Austrian court considered itself competent is also the same as in the Air-Niki case in 2017: although the debtor is registered in the commercial register in Germany, the COMI is located in Austria. It is sufficient that the main decisions are taken and the management is based in Austria.

This move provoked turmoil among bond holders of Eyemaxx because the insolvency regime is less favourable for bond holders in Austria than in Germany. The Eyemaxx manoeuvre was described as a new insolvency tourism from Germany to Austria.

However, following several creditor filings for insolvency of Eyemaxx in Germany, the German insolvency court of Aschaffenburg opened secondary insolvency proceedings in Germany. This step is also similar to the Air Niki case in 2017. The secondary proceedings limit the main insolvency proceedings, by removing the domestic assets from the seizure effect of the main proceedings. Accordingly, the assets of Eyemaxx located in Germany – that seem to form the majority of assets - will be realised in Germany and bondholders can protect their position in the German proceedings now.

2. Wirecard AG – it just becomes more and more obscure

The inglorious winner of Germany's biggest insolvency scandal is still Wirecard AG. Wirecard was valued more than 21 billion euros at the end of 2018 and now lost all its glamour and value. Wirecard's bookkeeping was manipulated by its management, approximately 1.9 billion euros failed to exist, Wirecard's former managing directors are held on remand by German prosecutors or are on the run.

Meanwhile, Wirecard's insolvency administrator sued the former members of the Management Board and two former members of the Supervisory Board for a total of 140 million euros in damages for possible breach of duty in granting loans worth millions. The aim of the lawsuit is to obtain the directors' and officers' liability (D&O) insurance of the board members. In addition, there have also been increasing indications recently that Wirecard's auditors of the past could also be liable. Investors had initially failed with lawsuits against the auditors. But a court information in the next higher instance could be the prelude to an unprecedented settlement between investors, the insolvency administrator and the Big 4 auditing firm.

IV. German restructuring Market – Quo Vadis?

German restructuring experts continue to expect that the number of substantial restructuring and insolvency cases should rise strongly soon. If the COVID pandemic and the new StaRUG procedure could not trigger this wave, current crises seem to have the potential to get many German companies into trouble. Even before the Russian attack on Ukraine, inflation was climbing inexorably, making production and refinancing increasingly expensive for companies. The war in Ukraine, the sanctions against Russia and the looming shock to the global economy could now be the prelude to sharply rising restructuring cases. In this situation, the StaRUG procedure could still develop into a powerful instrument because it can so quickly and silently overcome the company's financial crisis. These advantages could fit well with the current demand for quick help in a crisis without much publicity.

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paving the way
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Restructuring & Insolvency

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In order to restructure companies, we provide perfectly tailored and often creative solutions. We combine our many years of expertise in the restructuring market with the special sector know-how that our law firm has acquired across a range of sectors, including real estate, funds and the public sector. Our experts understand not only you, but also your market and your mission – so that everything will get back on track again as quickly as possible. We have particular expertise in the following areas:

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- Restructuring and insolvency for real estate
- Providing representation in court to assert or provide defence for crisis-related claims such as executive liability or contesting insolvency
- Advising liquidators on complex legal aspects of insolvency proceedings, e.g. corporate law, state aid law and bank law
- Liquidation and alternative methods for winding down companies
- Tax law in restructuring
- Labour law in restructuring
- Distressed M&A
- Restructuring complex loans
- Sale of collateral
- Supporting companies in crisis situations

➤ “The restructuring team at GSK impressed us with their precise analyses and the dynamism of their content. What particularly impressed me, however, was their respectful approach that paved the way for constructive solutions without having to surrender one’s own position. If I ever have to assert complex claims again, I shall definitely rely on the expertise of GSK.”

Frank Gebert, former CEO of Alno AG



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