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Act on the further development of restructuring and insolvency law (Restructuring and Insolvency Law Further Development Act – SanInsFoG)

Restructuring & Insolvency

On 18 December 2020, the German Federal Parliament (Bundestag) passed the Act on the Further Development of Restructuring and Insolvency law (Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz (German abbreviation SanInsFoG, herein: "Insolvency Reform Act")); the Act was approved on 19 December 2020 by the German Federal Senate (Bundesrat) and took effect on 1 January 2021. At the heart of the Insolvency Reform Act is the creation of a pre-insolvency restructuring framework through the Corporate Stabilisation and Restructuring Act (German abbreviation StaRUG, herein "Business Stabilisation and Restructuring Act"), which implements the EU-wide requirements of EU Directive 2019/1023 of the European Parliament and Council of 20 June 2019 ("Restructuring Directive"). In addition, the Insolvency Reform Act provides for amendments to the Insolvency Code intended to harmonise the Business Stabilisation and Restructuring Act with the restructuring instruments of the Insolvency Code and incorporates findings from the assessment of the Act to Further Facilitate the Restructuring of Companies (German abbreviation ESUG, herein "2011 Restructuring Act"), which came into force at the end of 2011.

Further provisions of the Insolvency Reform Act take into account the significant economic consequences of the COVID-19 pandemic. The Insolvency Reform Act is also aimed at meeting the widespread necessity of reorganisations and restructurings which have already been and will still be caused by the COVID-19 pandemic more effectively than with the restructuring instruments available to date. To this end, the law provides for temporary reduction of the entry requirements for self-administration under insolvency law, the definition of over-indebtedness will be altered during a transitional period and the suspension of duties to file for insolvency provided for in connection with the COVID-19 pandemic has been extended for certain cases once again until the end of January 2021.

The version of the Insolvency Reform Act that was ultimately adopted was preceded by a government draft dated 14 October 2020; we commented on this previously in our Legal Update dated 21 October 2020. However, some significant changes were made to the original government draft in the course of the legislative process. Accordingly, in the following, we have set out the changes to restructuring and insolvency law that took place in the final version of the Insolvency Reform Act that took effect on 1 January 2021.

A. Changed reasons for filing for insolvency and extension of the interim suspension of insolvency filing duties

Companies that are not yet illiquid (Section 17 Insolvency Code) or over-indebted (Section 19 Insolvency Code) shall be given access to a pre-insolvency restructuring procedure as soon as they are threatened with illiquidity. This is provided in the form of the Business Stabilisation and Restructuring Act.

In order to distinguish these pre-insolvency proceedings more clearly from insolvency itself (a rule known as the "distance requirement"), the forecast periods required for the liquidity forecast for over-indebtedness (Section 19 Insolvency Code) and imminent insolvency (Section 18 Insolvency Code), which were previously largely identical for both circumstances, are now differentiated.

The Business Stabilisation and Restructuring Act stipulates that "*a forecast period of 24 months is, as a general rule, to be used as a basis for determining imminent illiquidity*", while a forecast period of only 12 months applies to the continuation forecast in the context of over-indebtedness.

***Note for practitioners**: The limitation "as a general rule" shows that different standards may apply in individual cases depending on the particular individual circumstances. Even in cases where a liquidity bottleneck becomes apparent outside the 24-month period, managers (both in the future and up until now) would therefore have to deal with the question of imminent illiquidity.*

Under insolvency law, over-indebtedness continues to oblige the managers of limited liability companies (in par-

ticular GmbH, GmbH & Co. KG, and AG) to file for insolvency, just as in the event of (actual) illiquidity. However, the Insolvency Reform Act provides for an extension of the maximum insolvency application period from three to six weeks in the event of over-indebtedness. This is intended to enable managers to avert over-indebtedness.

Note for practitioners: *Despite an extension of the application deadline in the event of over-indebtedness, managers should note that the deadline is still only available if the applicant can expect to resolve the over-indebtedness within the six-week period. If it is already clear before the expiry of the deadline that over-indebtedness cannot be eliminated in time, the insolvency petition must be filed immediately. If the elimination of over-indebtedness has not yet been successful and a restructuring plan has not been prepared or appears unlikely to succeed, then as of 1 January 2021, the circumstances of each individual case will have to be examined to determine whether and to what extent the six-week application period can still be used.*

In order to take account of the special circumstances of the COVID-19 pandemic, the definition of over-indebtedness will apply only in a weakened form for a transitional period between 1 January 2021 and 31 December 2021 for companies that are over-indebted as a result of the COVID-19 pandemic by reducing the period for the continuation forecast from twelve to four months. The pandemic will be assumed to be responsible for over-indebtedness where a company's sales from ordinary business activities in 2020 have dropped by at least 30 % compared to the previous year, the business was not illiquid on 31 December 2019and where the business achieved positive results from ordinary business activities in the last financial year completed before 1 January 2020 (Section 4, Covid Insolvency Act).

In certain cases (only), the Insolvency Reform Act once again provides a special COVID exemption from the duty to file for insolvency until the end of January 2021. The Covid Insolvency Act provided exceptions until the end of September 2020 for businesses threatened by insolvency as a result of the COVID-19 pandemic (please see our Legal Update dated 3 April 2020). This suspension was later extended for over-indebted businesses until 31 December 2020 (subject to the original exception tests). Under the Insolvency Reform Act, the legislator wishes to once again suspend the duty to file for insolvency under the Covid Insolvency Act for businesses that meet the requirements to receive state support programmes to alleviate the economic effects of the COVID-19 pandemic but which were not yet able to successfully make use of these. Under Section 1 (3) of the Covid Insolvency Act, and subject to the further tests contained in Section 1 of the Covid Insolvency Act (see the details of these in our Legal Update dated 3 April 2020), the managing directors of limited liability corporations are not required to file for insolvency in spite of the corporation being illiquid or over-indebted where the corporation (i) applied for financial support under the COVID support programmes in the period from 1 November 2020 to 31 December 2020 or (ii) is entitled to file such an application, but has not been able to do so for legal or factual reasons. Businesses that clearly have no chance to obtain financial support measures, or for which such measures will not be sufficient to remedy their insolvent condition, will not benefit from the suspension of the duty to file.

B. Managerial duties in a crisis

The Business Stabilisation and Restructuring Act now expressly obliges managers to set up an early warning system for crises and to react accordingly to recognisable business threats (Section 1 (1) Business Stabilisation and Restructuring Act). Further duties contained in other legislation remain unaffected (Section 1 (3) Business Stabilisation and Restructuring Act).

Within a restructuring proceeding governed by the Business Stabilisation and Restructuring Act, managers are additionally required to take efforts to ensure that the debtor business undertakes the restructuring with the due care of a conscientious businessperson and protects the interests of the sum of the creditors. In the event this duty is breached, managers are liable towards the business in the amount of damage incurred by creditors unless the managers are not culpable for the breach (Section 43 Business Stabilisation and Restructuring Act).

An essential innovation for managers that was originally contained in the government draft was abandoned in the Insolvency Reform Act that was ultimately passed: In the government draft, it was expressly intended that the managers of limited liability companies would be obliged, when *imminent illiquidity* was apparent, to orient the management of the company primarily to the interests of creditors and only secondarily to those of shareholders and other stakeholders ("*other affected parties*"). This is known as the *shift of fiduciary duties*. Even prior to the amendments, some commentators on the law at the time took the view that in imminent illiquidity circumstances, management is already obliged to review restructuring measures (including filing an insolvency application for

self-administration) and potentially to undertake these measures even against the will of the shareholders (see on this: *Hölzle*, ZIP 2013 at 1846). It therefore remains to be seen whether and to what extent court decisions and legal policy discussions will stake out such a shift in fiduciary duties above and beyond strict interpretation of the general statutory norms on management's duties to act (in particular under Section 43 GmbHG, Section 93 (1) AktG). A basis for an expanded interpretation is provided for in Art. 19 of the Restructuring Directive, according to which Member States must ensure that, in the event of a "*likelihood of insolvency*", management has due regard to, *inter alia*, "*the interests of creditors, equity holders and other stakeholders*" and "*the need to take steps to avoid insolvency*".

Note for practitioners: *In spite of the removal of the original provision in the government draft, having regard to the requirements of the Restructuring Directive, management will remain subject to tension between the interests of shareholders and creditors. It accordingly appears all the more important that management documents precisely how and for what reasons it makes use of its discretionary powers in crisis situations. This is the only way to minimise the risk of "hindsight bias" due to retroactive evaluations if managerial decisions are later reviewed in court in a subsequent liability suit.*

C. Key elements of the restructuring framework

I. Restructuring plan

The core of the Business Stabilisation and Restructuring Act is the provision of a restructuring plan based on the insolvency plan procedure, which can also be enforced in a binding manner against the resistance of dissenting minorities. The restructuring plan allows for a flexible structuring of a debtor's legal relationships threatened with illiquidity in the form of a 'modular system' from which the debtor can select those instruments which it requires in its specific restructuring situation. Accordingly, it is not a collective procedure. Rather, the plan can be limited to include only certain selected creditor groups chosen based on "*appropriate criteria*". (Section 8 Business Stabilisation and Restructuring Act). The Business Stabilisation and Restructuring Act is thus intended to close the gap between restructuring possibilities within insolvency proceedings and non-insolvency consensual restructuring solutions, and to eliminate the obstruction potential of individual "holdout creditors". However, the Act excludes claims by employees, claims arising from intentional torts, and fines from inclusion in a restructuring plan.

In principle, the primacy of freedom of contract applies to the design of the restructuring plan and accompanying measures, just like with an insolvency plan. The parties accordingly enjoy general contractual freedom to structure their legal relationships, whereby the Business Stabilisation and Restructuring Act expressly emphasises that the following legal relationships can be subject to the restructuring process:

- liabilities of the debtor (e.g. by (partial) waiver of claims),
- collateral provided by the debtor, and third-party collateral (in return for appropriate compensation) provided by affiliates of the debtor (e.g. through release of collateral),
- "individual terms" of contracts in multilateral legal relationships between the debtor and a number of creditors. This refers in particular to syndicated loan agreements (e.g. by extending maturity or amending covenants or termination rights in a syndicated loan agreement), and, under certain circumstances, to bond terms and conditions (whereby, in the case of the latter, case-by-case review is necessary of whether inclusion in a restructuring plan brings advantages over a (possibly parallel) restructuring of the bond under the existing provisions of the German Bond Act),
- terms governing relations between creditors within these multilateral agreements or in intercreditor agreements concluded in connection therewith, in which the debtor itself – as in the case of intercreditor agreements – need not be involved at all (e.g. by amending necessary approval thresholds in syndicated loan agreements or adjusting intercreditor agreements),
- any share and membership rights in the debtor (e.g. through debt-to-equity swaps).

It should be noted that, following the model of Section 225a Insolvency Code, participation in the debtor itself, i.e. the rights of the shareholders, can also be included in the plan. This was criticised in discussions as an obstacle to initiation of proceedings, since the shareholder would then run the risk of losing its shares during restructuring. However, the provision follows the model of broad contractual freedom.

Note for practitioners: *To the extent that third-party collateral provided by group companies is included in the restructuring plan, the value of the third-party collateral must be settled accordingly. The regulation is therefore – and in our view rightly – to be understood above all as a measure to avoid potential disruptions and knock-on insolvencies by ensuring that the liquidation of third-party collateral within the framework of the restructuring happens in a coordinated manner based on the model as set out in Section 166 of the Insolvency Code. It also creates the possibility of structuring new financing (see under C. V.) in a flexible manner by making released third-party collateral available to new financing creditors.*

As expected, the Business Stabilisation and Restructuring Act does not contain any provisions on the tax consequences of restructuring, which is why § 3a of the Income Tax Code remains applicable.

Note for practitioners: *This means the restructuring process will generally also have to be accompanied by obtaining binding assessments from tax authorities. Obtaining such assessments in complex restructurings will usually take considerably longer than the time limits provided for in the Act for the implementation of a restructuring plan procedure. Accordingly, timely and comprehensive preparation of the restructuring process is essential. The necessary time period, also taking into account the tax authorities' expected processing time, determines the standards for action on the part of management and must be taken into account when selecting the "right" restructuring instrument (consensual restructuring, restructuring plan, or self-administration?).*

For the purpose of voting on the plan, the parties to be included in the plan are divided into groups with the same legal status (as a general rule (1.) secured creditors, (2.) unsecured creditors, (3.) creditors whose claims would be subordinate in insolvency proceedings; and (4.) shareholders). Relevant parties within the same group must, in principle, be treated equally in the restructuring plan. The principle of equal treatment interacts here with the assessment of the appropriateness of the selection of the participants to be involved in the plan, which, according to the principle, may not be arbitrary and must be justified by the specific plan.

Acceptance of the restructuring plan requires acceptance in principle by each group with at least 75 % of the voting rights; the voting rights are determined for secured creditors by the value of their collateral, for unsecured creditors by the amount of their claim, and for shareholders by their nominal share in the debtor's share capital or partnership interest. Disagreeing groups of creditors may, however, be outvoted (so-called "*Cross-Class Cram-Down*") if (i) the affected parties are not worse off under the plan than they would be without it, (ii) they are given an appropriate share in the economic value of the restructuring and (iii) the majority of the groups have agreed to the plan (in the case of only two groups, it should even be sufficient if only one group agrees) (Section 26 Business Stabilisation and Restructuring Act).

Note for practitioners: *By means of clever plan architecture, cram-down decisions will be possible even against majorities in the restructuring plan procedure if only two groups are (or may be) formed, since then the agreement of one group is sufficient to outvote the creditors in the rejecting group.*

II. Are the proceedings public?

The Business Stabilisation and Restructuring Act is intended to enable out-of-court restructurings, which, in principle, means that only parties involved in the proceedings will be made aware of them. For this reason, as in the case of a freehand restructuring, there are no formal requirements for starting restructuring negotiations and preparing the restructuring plan. Accordingly, the proceedings will also not be publicly disclosed.

However, if the debtor wishes to have a court review the plan in advance, carry out the voting procedure, or confirm the plan in court – which, for example, is mandatory in the case of cross-group majority decisions (the so-called *cross-class cram-down*) – it must file the restructuring plan with the competent restructuring court. The same shall apply if stabilisation orders (suspension of individual enforcements of claims by way of enforcement and realisation of collateral) or encroachments on contractual rights are to be requested from the court or approved (see under C. III.). However, even in this case, disclosure is made only to the parties to the proceedings, i.e. the creditors involved in the proceedings.

Notifying the competent restructuring court of the restructuring project has the advantage that obligations to file for insolvency are suspended while the restructuring matter is pending (Section 42 (1) Business Stabilisation and Restructuring Act). However, the debtor must notify the court of any illiquidity or over-indebtedness occurring during the proceedings, and failure to do so is punishable at criminal law. The court will set aside the restructuring matter if the restructuring plan has not already been im-

plemented to such an extent that the opening of insolvency proceedings would obviously not be in the interest of the creditors, or if actual insolvency results from the termination or maturity of a claim after notification of the restructuring matter to the court, and the success of the restructuring plan is more likely than not.

III. Further measures to safeguard the restructuring plan

The pre-insolvency restructuring procedure is a modular system. The debtor can reach into different drawers and take out the instruments needed in any specific case.

Accordingly, upon application by the debtor to secure the restructuring project, the court may issue stabilisation orders for a period of up to three months which prohibit creditors from enforcing their claims by way of enforcement and the realisation of collateral (Section 49 draft Business Stabilisation and Restructuring Act).

Note for practitioners: *With regard to the possibility of ordering a halt to realisation (Sections 49 (1) no. 2, 54 Business Stabilisation and Restructuring Act) for items encumbered with security interests, the Act makes comprehensive reference to Section 21 (2) no. 5 Insolvency Code. The relevant case law on the inapplicability of the realisation stop to current assets (BGH dated 24.01.2019 - IX ZR 110/17) specifies that in preliminary insolvency proceedings, the preliminary insolvency administrator must ensure that the collateral basis (storage security transfers, other collateral on inventories, lessor's liens) is not reduced by further access to the collateral. Section 54 (2) Business Stabilisation and Restructuring Act follows this logic. Accordingly, if a realisation ban is issued in the restructuring process, the debtor is obliged to separate or pay out the proceeds from the collection of claims assigned by way of security or from the sale or processing of movable property in which security interests exist, unless otherwise agreed with the secured parties. This means that the management or the restructuring officer will, where possible, be required to enter into "non-genuine (estate) credit agreements" with the secured parties in order not to have to separate collateral proceeds.*

During the moratorium, the right of creditors of the debtor to file for insolvency is also suspended (§ 58 Business Stabilisation and Restructuring Act). The duration of the order may, in certain circumstances, be extended for a further month when a plan offer is made and, after the application for court confirmation has been made, for up to eight months after the initial order. The restructuring project can therefore be accompanied by a moratorium vis-à-vis all participating creditors.

Note for practitioners: *In practice, it will be necessary to carefully consider whether extending the proceedings to supplier creditors, in particular, is appropriate and conducive to restructuring. This is the case because their inclusion will usually result in the cancellation, or at least freezing, of lines by trade credit insurers, which would significantly increase the liquidity needs of the debtor company due to the significant reduction of payment target terms or even a switch to advance payment. A resulting working capital requirement would then have to be made available again by financiers, because countervailing liquidity advantages, such as the insolvency funding effect in insolvency proceedings, for example, are not offset by this.*

Section 44 Business Stabilisation and Restructuring Act also contains a provision similar to Section 119 Insolvency Code, according to which contractual clauses which link the termination of a contract to the pendency of a restructuring plan or the use of the Business Stabilisation and Restructuring Act are invalid.

The government draft of the Business Stabilisation and Restructuring Act originally additionally provided another provision under which contracts entered into by the debtor would be able to be terminated in the context of a restructuring plan process. This would have allowed businesses, in particular those with chain stores, to use a restructuring plan to divest themselves of long-term lease agreements (and accordingly, from unprofitable sites). The contract termination instrument was subject to relatively strong criticism in the legislative process having regard to freedom to contract principles; now, this consolidation opportunity is reserved exclusively for insolvency proceedings. In international comparisons, the Business Stabilisation Act is not as advanced as, for example, the “Dutch scheme”, which is the Netherlands variation for restructuring proceedings and which provides for the opportunity to terminate long-term contracts.

IV. Inclusion of a restructuring officer

Restructuring proceedings pursuant to the Business Stabilisation and Restructuring Act are designed as proceedings in which the debtor retains its autonomy. In principle, the debtor therefore controls the restructuring plan proceedings itself, and retains control over its company.

However, as soon as the level of fully consensual settlement is abandoned, i.e. a majority decision against minorities is to be enforced or a moratorium ordered, the Business Stabilisation and Restructuring Act provides for the restructuring court to involve a restructuring officer as an independent supervisory and mediating body. In particular, the restructuring court must appoint a restructuring officer (apart from exceptional cases) if (i) consumers, micro, small, or medium-sized enterprises are involved, (ii) stabilisation orders are issued, or (iii) it is foreseeable that the plan can only be implemented against the resistance of individual plan participants (Section 73 Business Stabilisation and Restructuring Act). The scope of the powers of oversight and participation conferred on the restructuring officer is at the discretion of the court. In particular, the court may also entrust the restructuring officer with certain oversight tasks as an expert (e.g. on whether illiquidity is imminent, or whether compensation for the release of intra-group third-party collateral is adequate).

Note for practitioners: *We expect the fully autonomous execution of proceedings to remain mere theory. While purely consensual restructurings are already possible today, the advantage of the procedure lies precisely in the fact that it allows moratoriums to be ordered and minorities overruled. The use of these measures will, however, necessarily lead to the appointment of a restructuring officer, who will be given extensive (oversight and auditing) tasks and powers, because the restructuring courts will not have the resources to be able to examine the project in detail within the time frame provided for by law.*

Note for practitioners: *According to the Business Stabilisation and Restructuring Act, the restructuring officer is to be remunerated on the basis of appropriate hourly rates, the amount of which is to be determined by the restructuring court taking into account the complexity of the restructuring situation and the qualifications of the officer. The remuneration should ordinarily be up to EUR 350 per hour for the restructuring officer him or herself and up to EUR 200 per hour for qualified employees. In view of the extensive tasks of the restructuring officer (e.g. auditing claims and collateral) and his or her liability towards affected parties as provided for in Section 75 (4) Business Stabilisation and Restructuring Act, these hourly rates fall well short of normal market compensation, at least with respect to major restructuring projects. It can therefore be assumed that in larger and more complex restructuring cases, the practice will be to use the different remuneration provided for in the Act (Section 83 Business Stabilisation and Restructuring Act) for special cases (which permit higher hourly rates or compensation calculated on the basis of the value of the claims included in the restructuring plan or the company assets).*

Irrespective of the conditions under which a restructuring officer is mandatory, an "optional restructuring officer" (Section 77 Business Stabilisation and Restructuring Act) may also be appointed at the request of the debtor or of creditors who hold more than 25 % of the voting rights in a group to assist the debtor and creditors in drawing up and negotiating the restructuring plan.

V. Securing new financing

The restructuring plan may also contain provisions on new financing commitments and their collateralisation (in the form of personal and/or asset security) (Section 12 Business Stabilisation and Restructuring Act). Aside from some exceptional cases, the provisions of a restructuring plan and the legal acts taken to execute it are not subject to a subsequent insolvency law claw-back claim under Sections 129 *et seq.* Insolvency Act until the occurrence of a "*sustainable restructuring*" (§ 90 (1) Business Stabilisation and Restructuring Act). This privilege provides financiers with greater legal certainty, particularly with regard to possible claw-back actions regarding the collateralisation of new financing. However, such preferential treatment will not apply to subordinated shareholder loans and their collateralisation. Furthermore, the exclusion of claw-back claims is only intended to protect (external) financiers from a failure of the planned restructuring concept which unexpectedly leads to insolvency. If, on the other hand, the debtor's insolvency occurs at a later point

in time, independently of the restructuring project, and thus only *after* the occurrence of a "*sustainable restructuring*", the protection against claw-back claims no longer applies. This restriction corresponds to Section 39 (4) sentence 2 Insolvency Code, which regulates an exception to subordination under insolvency law for shareholder loans made to effect a restructuring.

Further legal risks in connection with restructuring financings outside of restructuring plans are to be minimised by ensuring that legal acts undertaken in the knowledge of a restructuring plan project are not regarded as an improper contribution to culpable delay in filing for insolvency (Section 89 (1) Business Stabilisation and Restructuring Act).

Note for practitioners: *The privileged status of new financing schemes with regard to the exclusion of claw-back claims is mainly limited to the collateralisation of those schemes. According to the explanatory memorandum to the original government draft (which was adopted without changes for the provision on claw-back protection), however, Section 90 (1) Business Stabilisation and Restructuring Act is not intended to cover loan repayments, as these are not included in the "implementation" of the restructuring plan.*

VI. Restructuring moderation

Independently of restructuring plan proceedings, the Business Stabilisation and Restructuring Act provides for the possibility, at the debtor's request, of a court appointment of a restructuring moderator for a period of up to three months. The moderator mediates between the debtor and its creditors in an economic crisis and assists in drawing up a (consensual) restructuring concept. The restructuring moderation can result in the preparation of a restructuring settlement which, if confirmed by a court, is subject to the same privileges against claw-back claims as the measures of a restructuring plan (see above under V.).

However, unlike the restructuring plan, a settlement does not allow enforcement against the will of obstructive creditors. The restructuring moderation tool is intended in particular for micro and small enterprises, which can quickly be financially overwhelmed by the costs of professional external restructuring consultation.

D. Amendments to self-administration and insolvency plan proceedings

Finally, the Insolvency Reform Act provides for changes to insolvency law self-administration and insolvency plan proceedings.

In particular, the entry barriers for recourse to self-administration shall be raised, which serves the interest of creditors. In future, the debtor must accompany its request for self-administration with a self-administration plan which must contain, in particular: (i) a financial plan for a period of six months, (ii) a specific restructuring concept, (iii) a description of the status of negotiations on restructuring with creditors, (iv) a description of the arrangements to ensure that all the debtor's obligations under insolvency law are met, and (v) a description of the expected additional or reduced costs of self-administration compared with customary insolvency proceedings. Before initiating self-administration proceedings, the insolvency court must review the self-administration plan for completeness and conclusiveness.

However, under Section 5 of the Covid Insolvency Act, the provisions governing self-administration proceedings remain applicable in their original form provided that self-administration is applied for between 1 January 2021 and 31 December 2021 and the illiquidity or over-indebtedness of the applicant is based on the COVID-19 pandemic. It must be certified by an expert that the insolvency situation was caused by the pandemic.

Note for practitioners: *The order of a moratorium under the Business Stabilisation and Restructuring Act should, in future, generally rule out the admissibility of self-administration proceedings for a period of three years. This means that if the restructuring plan fails, self-administration is, in principle, no longer possible. Only externally-managed insolvency proceedings are permitted. This makes it all the more important for the parties involved to carefully consider which restructuring instrument (a restructuring plan with targeted interventions, for example in the financing structure, or self-administration with comprehensive restructuring) best meets the economic challenges faced by the respective company.*

For insolvency plan proceedings, in particular, the Act creates the opportunity (in accordance with the provisions in the Business Stabilisation and Restructuring Act governing restructuring plans) to include in the plan intra-group third-party collateral which were provided by affiliates for liabilities of the debtor.

E. Conclusion

The Insolvency Reform Act is not limited to implementing the minimum requirements under EU law, but rather chooses a "big solution" with the introduction of an independent restructuring framework, although this takes the form of an optional modular system. The high degree of flexibilisation opens up wide avenues for structuring insolvency and related proceedings, even where the Insolvency Reform Act falls short of possible pre-insolvency restructuring proceedings opportunities by leaving out the instrument of contract termination.

The Insolvency Reform Act adds sensible provisions to German restructuring and reorganisation law. In particular, the planned restructuring framework provides a solution for cases where restructuring (in particular balance-sheet restructuring) risks failure owing to resistance from individual holdout creditors. The law may be particularly relevant for companies with high financing liabilities (perhaps also as a result of taking out KfW loans made available in connection with the COVID-19 pandemic) and rent or tax liabilities which have been deferred under COVID-19 support measures. Only practical experience can show how broad the scope of the new laws or the advantages they confer, will be (in addition to a well-prepared self-administration procedure). The Insolvency Reform Act provides more nuanced solutions for German reorganisation and restructuring law, so that it should be possible, at least in part, to prevent the kind of “escape” into foreign legal systems seen in the past. In particular, as a result of removing opportunities to terminate contracts, the opportunities to potentially make use of foreign legal systems (to the extent applicable) will still need to be taken into account in restructuring law considerations.

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This overview is for general information only and does not substitute for specific legal advice in individual cases. Please contact the authors if you have any questions. Information on the authors can be found on our homepage www.goerg.de.

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