

The stabilisation and restructuring framework from the perspective of financing creditors

The German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) and What It Means for Financing Creditors

On 1 January 2021 the new Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) came into force. The new stabilisation and restructuring framework has led to a profound change in the German restructuring landscape. It provides a statutory framework for the restructuring of companies from the time of imminent illiquidity. With the aid of this framework, a waiver of claims can also be enforced against the will of the creditors, even without having to initiate insolvency proceedings.

The German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) is not designed as a purely judicial procedure like insolvency proceedings. Instead, it provides a set of instruments which the company can use in the course of restructuring it is pursuing. No formal opening of proceedings is necessary for this and the instruments can be used independently of each other. This is basically a non-public procedure in which only the affected creditors can be involved. The stabilisation and restructuring framework not only offers the possibility of reducing (financial) liabilities but also offers the possibility of applying for protection from enforcement of execution while the measures are being drawn up. Creditors can participate in the preventive restructuring within the framework of a creditors' committee.

Configuring claims and contractual relationships in the restructuring plan

The central element of the German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) is the restructuring plan which can be used to configure the debtor's legal relationships. The creditors vote on the restructuring plan in groups, similarly to the way they do with an insolvency plan. If the restructuring plan is accepted and confirmed, the effects come into force and apply against the affected creditors.

In principle, restructuring claims and rights to separate satisfaction can be configured in accordance with section 2 German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*). Special rules apply to financial securities subject to the German Banking Act (*KWG*). The German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) provides for the claims themselves to be configured, e.g. deferred or (partially) waived. Exceptionally, however, individual provisions may also be drafted within the framework of multilateral legal relationships between the debtor and several creditors. This especially applies to syndicated financing. According to the explanatory notes on the legislation, this concerns, for example, contractual provisions on complying with certain covenants or the obligation to refrain from



requiring further security if this would lead to disadvantages for the creditors. Being able to configure these individual provisions will enable the debtor to prevent the immediate repayment of the entire financing being required. This makes it possible to relax and adjust restrictive conditions or ancillary provisions.

The creditors vote on the restructuring plan in groups. If the majority of the groups vote in favour of the restructuring plan with at least 75 % each, it is deemed to have been accepted. Section 9 German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) provides for the groups to be classified in a specific way. For example, the holders of rights to separate satisfaction and of "normal" insolvency claims each form a group. However, the debtor is at liberty to divide the groups into further groups as appropriate on the basis of the economic interests. From the debtor's point of view, creating appropriate groups is its central instrument to achieving acceptance of the restructuring plan.

Other relevant provisions in the German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*)

In addition to the restructuring plan, the German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) also provides for other provisions which may be relevant from the perspective of financing creditors.

One of these provisions is section 44 German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) which is what is referred to as the "prohibition on separation clauses". Under this provision it cannot be contractually agreed that the fact that a restructuring case is pending or instruments of the stabilisation and restructuring framework are being used by the debtor is a reason to terminate the agreement, to require repayment to be made with immediate effect or to exercise a right to refuse performance. However, the lender's right of termination due to deterioration of the financial situation remains unaffected by this provision.

This also applies in principle to the stabilisation order pursuant to sections 49 et seqq. German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*). Under this provision the court can order an enforcement or realisation ban.

However, section 55 (3) sentence 2 German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) stipulates that the lender's right of termination before disbursement of the loan due to a deterioration of the debtor's financial circumstances or the value of the security remains unaffected.

Support for debtors in crisis

However, the German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) also offers new and existing investors the opportunity to support the debtor and provide new financing. Pursuant to section 12 German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*), new financing can be provided for in the restructuring plan where it is necessary to finance the restructuring on the basis of the restructuring plan.

In addition, section 89 German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) provides that simply being aware that a restructuring case is pending or that instruments of the stabilisation and restructuring framework are being used does not mean that it is possible to conclude that there has been an immoral contribution towards failure to file for insolvency. The provision is intended to ensure that existing business partners or new investors are not deterred solely by the fact that a restructuring case is pending. Instead the aim is to encourage active involvement in restructuring and to prevent factors which could give rise to liability arising.



Criticism to date from the perspective of financing creditors

It remains to be seen whether the provisions will also be regarded as positive by the financing creditors. So far they have indeed been criticised. Possible negative consequences of the Act could be that lenders will only enter into contractual relationships with companies which are in good financial health. The terms of financing agreements could be reduced or financial ratios determined more strictly. However, this would certainly not be the result that the drafters of the German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) were hoping for.

What we can offer you

We would be happy to clarify your individual questions in a joint workshop. We will show you the options for action from which you can benefit as a financing creditor and explain the provisions of the German Act on the Stabilisation and Restructuring Framework for Businesses (*StaRUG*) from the individual perspective of financing creditors.



Dr Alexandra Schluck-Amend

Partner

Rechtsanwältin | Fachanwältin für Insolvenzrecht (Certified lawyer for insolvency law)

Head of Restructuring and Insolvency, CMS Germany

E alexandra.schluck-amend@cms-hs.com