

StaRUG: A model for Europe?

Myriam Maily (INSOL Europe Technical Officer) and Paul Omar (INSOL Europe Technical Research Coordinator) report on the recent online lecture by Professor Christoph Thole

The INSOL Europe Academic Forum 2021 Winter Lecture on the subject of 'StaRUG: The New German Restructuring Law' took place online on 1 December 2021. Sponsored by Edwin Coe LLP and facilitated by Tomáš Richter (JŠK, Prague; Chair, INSOL Europe Academic Forum), the lecture was given by Professor Christoph Thole (University of Cologne).

According to Professor Thole, the new legislation entered into force on 1 January 2021 with the introduction of pre-insolvency proceedings based on the likelihood of insolvency with a restructuring plan outcome allowing for a cram-down of minority creditors. The pre-insolvency process is a completely new tool insofar as cram-down is now available. The legislation takes a toolbox approach allowing for different instruments (plan confirmation, early examination, stay of enforcement and execution, in-court voting procedure etc.), albeit absent the possibility for contract/lease termination.

Change has also been made to the organisation of courts dealing with restructuring with the introduction of 24 specialised restructuring courts. The scope of the new legislation addresses itself to debtors as sole legal entities as well as within group structures. The German legislator has also introduced a jurisdiction requirement based on the German interpretation of COMI while facilitating cross-border (European) recognition of judgments.

One question remains as to whether the traditional tests of insolvency (over-indebtedness/balance sheet insolvency) remain applicable, thus requiring that notice of intention to file for court protection be filed within six weeks. Nonetheless, overall, the procedure offers

flexibility in terms of voting (a quick process via electronic means) with the possibility at the end to involve courts as required. As for professional involvement, courts will appoint practitioners (on a mandatory or voluntary basis where there is the possibility of proposing a particular appointment) and will also oversee remuneration so as to keep the costs of proceedings down.

On the moratorium ('stabilisation order'), the new law offers a stay of execution and/or enforcement of rights over movables with the debtor granted the right of use (but not of sale except with creditor consent). A further obligation added stipulates there is no duty to advance fresh money without security. However, in respect of safe harbour provisions, there is no fresh money privilege and no super-priority, albeit the plan and its effects can be protected, in particular from transaction avoidance claims. Nonetheless, there is no certainty on how far this protection can go in practice. Indeed, there is no clear view yet on the number of cases, as they are confidential (although the estimate is that approximately 15 cases have been commenced since January 2021, though precise data will not be 'available' till July 2022).

In summary, the new legislation has certainly had a real impact on the conduct of out-of-court negotiations with creditors. The main features of the new legislation combine to create a system seemingly more favourable to the debtor.

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Call for Papers - Annual Conference Dublin 2022

We are excited to announce that the call for papers for the March 2022 conference in Dublin attracted 27 paper proposals from 15 jurisdictions. As expected, the papers mostly focus on preventive restructurings, both at the national level and in the cross-border and general policy context, but submissions also cover a number of other interesting topics in our field of research.

The results of the selection process, which informs the technical programme for the conference, can be found on our website: www.insol-europe.org/academic-forum-events