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ESUG MADE A CHANGE, AT LEAST FOR THE BIG AND INTERNATIONALLY RELEVANT CASES. THE PREJUDICE THAT GERMAN PROCEEDINGS TAKE TOO LONG IS OBVIOUSLY NOT TRUE FOR THE NEW DIP PROCEEDINGS

Germany: New insolvency laws

Three years of "ESUG": Wind of change or same procedure under new label?

The German law to facilitate the restructuring of enterprises ("ESUG") entered into force three years ago. Now several studies are at hand assessing the impact of this insolvency law reform in Germany. ESUG's goal was not merely to modernise the insolvency regime in Germany generally, but was clearly focused on three goals:

(i) Enhancing the legal framework for debtor-in-possession proceedings ("DIP"),
(ii) granting more power and influence to the creditors, and
(iii) making the insolvency plan more efficient by introducing means for a debt-equity swap.

This was aimed at bringing German insolvency law back on a level-playing field to other jurisdictions and avoid further forum shopping cases.

Although there is still much debate about the ESUG, the first look at the number of new proceedings does not seem to indicate that much has changed. According to a study from BCG (The Boston Consulting Group, "*Drei Jahre ESUG, Höherer Aufwand lohnt sich*", 2015) only 2.7% of the insolvency proceedings were DIP-proceedings. However, this is including all classes of proceedings and when looking at the big cases the picture clearly changes: Here, the BCG study points out that a third of the 50 biggest insolvency cases were now "ESUG-procedures". Within the ESUG procedures, all being still only modifications from the uniform and court lead insolvency proceedings, one must distinguish between regular DIP-proceedings under the new law (Sec. 270a Insolvency Code, "InsO") and the so-called "protective shield" proceedings (Sec. 270b InsO). The latter type is only available for early filings, where the debtor is only imminently insolvent and the restructuring ability is vouched for by a neutral expert. In such Sec. 270b proceedings the debtor can, generally speaking, install an insolvency office holder of his choice as "custodian" and is required to present an insolvency plan within three months regularly.

As a study by hww hermann wienberg wilhelm reveals ("*hww radar ESUG*", 2015) both types of proceedings can be finished at very short notice. The shortest Sec. 270a and Sec. 270a proceedings were finished in 80 days only, while the longest lasting went to approx. two years and three months. In any case the new proceedings are regarded by the hww study as being significantly swifter than regular proceedings as Sec. 270a proceedings are now lasting 245 days on the average, whereas Sec. 270a proceedings are only lasting 251 days on average.

Other studies assessed what the market players are thinking about the new law. According to a study by Roland Berger (Roland Berger Strategy Consultants, "*Polarisierung der Meinungen*", 2015) 58% of the respondents believe that the complexity of the new procedures is higher. As the main reason for this, the increased number of players in a proceeding was identified. Nevertheless, this study shows that 31% of the respondents confirm that ESUG met their expectations and 58% agree that it met at least partially their expectations. In detail: 59% believe that the number of forum shopping cases has been reduced by ESUG; 69% state that the new proceedings help facilitating DIP proceedings, whereas 64% welcome the strengthened influence of creditors. Another study, provided by Noerr and McKinsey (Noerr and McKinysey & Company, InsO Study, 2015, "*Are German insolvency statutes internationally competitive after 3 years of ESUG?*"), concluded that 81% of the respondents were not of the opinion that the modification of shareholders' rights in the insolvency plan (e.g. debt-equity swap) is too much of a disadvantage to shareholders. As this study was generally looking at the competitiveness of the "new" German insolvency law, it addresses the shortcomings of the German insolvency regime as follows:

(i) no group insolvency law (71% tend to agree),
(ii) German claw back law (70%),
(iii) no pre-insolvency restructuring procedure (64%), and
(iv) no limitation to specific groups of creditors (54%).

In summary it can be said that ESUG made a change, at least for the big and internationally relevant cases. The prejudice that German proceedings take too long is obviously not true for the new DIP proceedings. Insofar, the new law may help avoid forum shopping. However, it is still necessary to look at the points of criticism, but the German Federal Ministry of Justice already provided the next level of law reform introducing an insolvency law for groups, now debated at the *Bundestag*, and passed another bill limiting now the possibilities of claw-back actions, that were deemed to be getting out as it was allegedly made "too easy" for the insolvency office holder to establish such a claim.

What remains is the question whether Germany needs a real pre-insolvency proceedings or proceedings only involving part of the creditors. This debate, now only started by the "New Approach" of the European Commission, has just begun in Germany.