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GLOBAL INSOLVENCY PRACTICE COURSE (ONLINE)

2021 / 2022

**Module A: Session 7 Materials -
Continental Europe Panel Discussion
(France, Germany and the Netherlands)**



CONTENTS

PowerPoint Slides for France

PowerPoint Slides for Germany

PowerPoint Slides for the Netherlands



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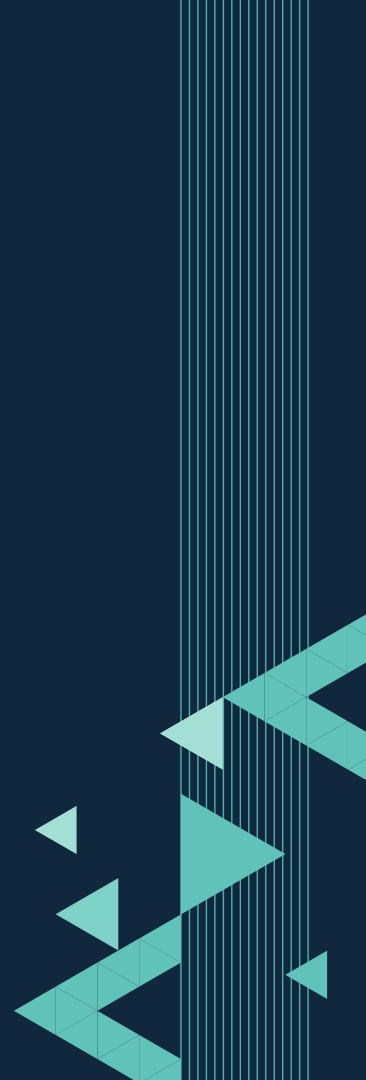
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RESTRUCTURING IN FRANCE

Transposition of the EU directive known
as “Restructuring and Insolvency”

GIPC COURSE 2021 / 2022



Insolvency proceedings

French law provides a dual system :

- Amicable restructuring proceedings (*Mandat ad hoc & Conciliation*)
- Judicial restructuring proceedings (*Sauvegarde, Redressement & Liquidation*)

Particularity :

- Judges elected among traders
- 2 different independent professionals
 - *Administrateur Judiciaire* (restructuring)
 - *Mandataire Judiciaire* (liquidation)



AMICABLE SETTLEMENT
Law 84-148 of 1 March 1984
➤ Lightly Court supervised

BUSINESS SAFEGUARD ACT
Law 2005-845 of 26 July
2005

**CONCILIATION, « PREPACK » & FAST
TRACK SAFEGUARD PROCEDURE**
Order n°2014-326 of 12 March 2014

1984

1985

2005

2010

2014

2021

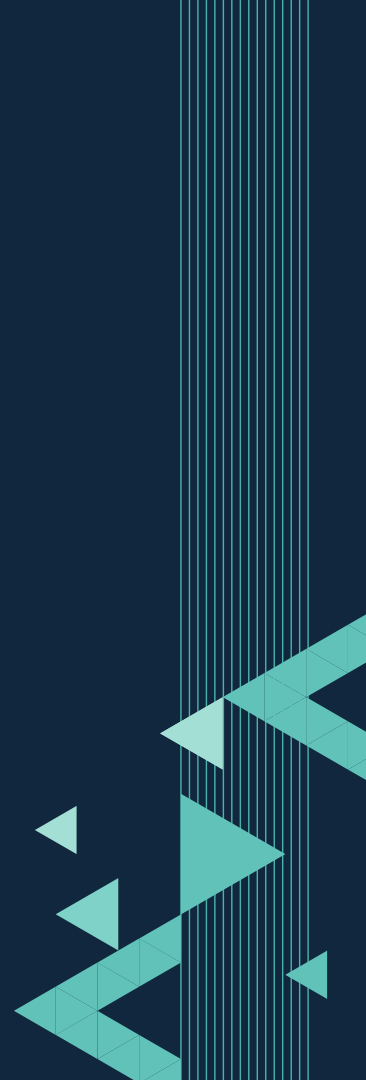
**REORGANIZATION &
LIQUIDATION PROCEEDINGS**
Law 85-98 of 25 January 1985
➤ Formal restructuring

**FAST TRACK FINANCIAL
SAFEGUARD**
Law 2010-1249 of 22 October 2010
➤ Financial Cram-down


**AMENDEMENT BOOK IV OF
COMMERCIAL CODE– Transposition of
EU DIRECTIVE**
Order n°2021-1193 of 15 September
2021

Most commonly used process

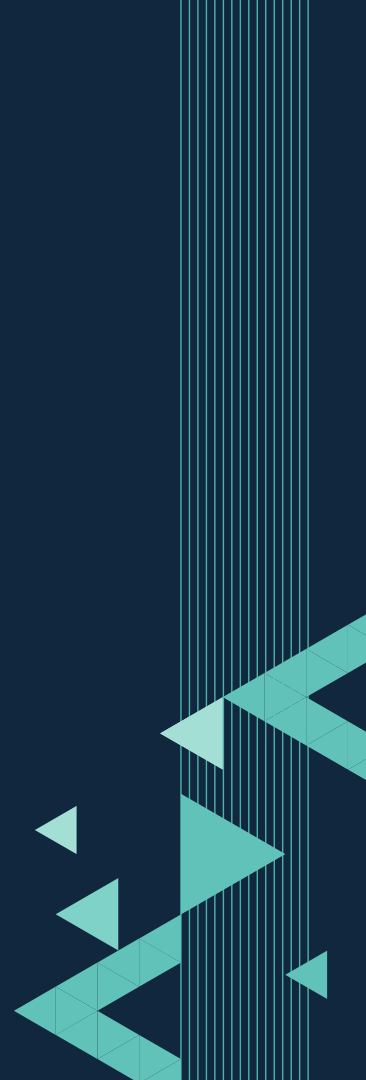
- Very small firms : 60% end up directly in Judicial Liquidation
- Small/medium/large caps :
 - Pre-insolvency (average 60 to 70% success) or safeguard where business is not totally in illiquidity or in order to prepare a formal restructuring plan (sale plan or reorganization plan);
 - Direct restructuring plans with Reorganisation proceedings when wagers are unpaid (AGS intervention).



Amicable restructuring proceedings (1/2)

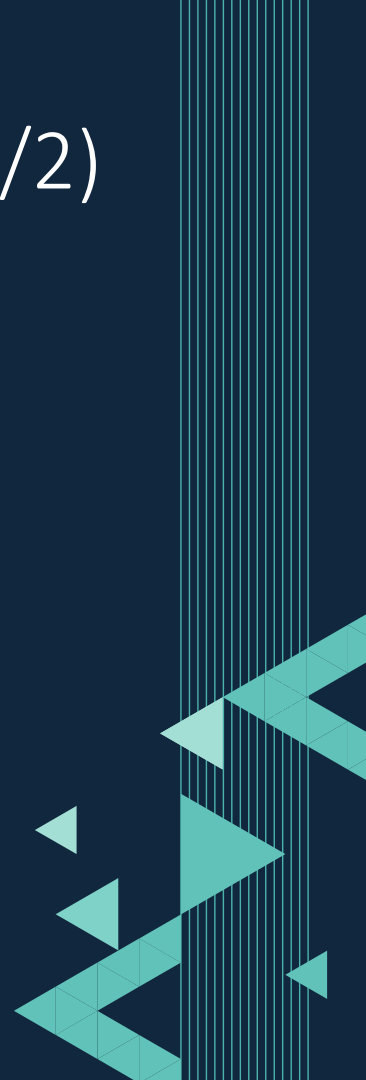
- 2 Confidential amicable restructuring proceedings, Court-lightly supervised :
 - Mandat ad hoc
 - Conciliation

driven by JA (Judicial Administrator)
- Confidential reinforcement during the conciliation procedure
- Debtor initiates before default, JA pilots discussions with stakeholders
- Independence of JA thanks to the President of the Court' decision
- Subordination clauses and absolute priority rule respected
- Exit: contractual agreement, protocols
- Settlement recorded or homologated by Court (unfair discrimination test)



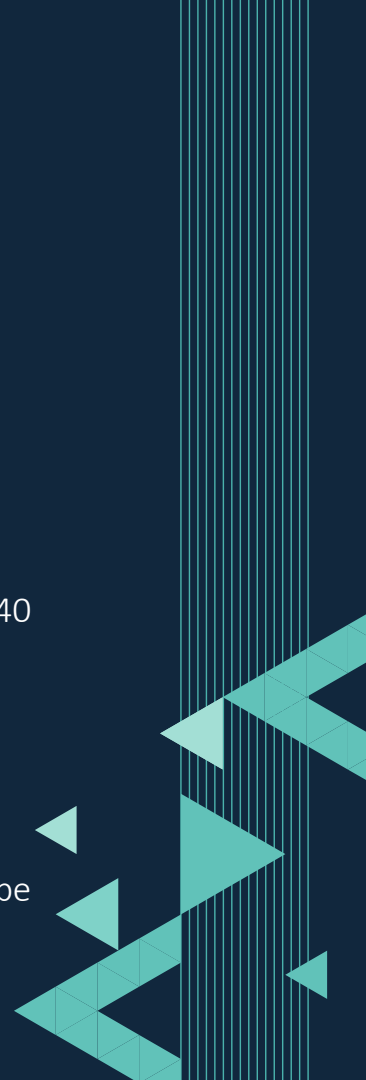
Amicable restructuring proceedings (2/2)

- No voting rules. In practice, settlement is adopted if there is unanimous agreement
- New Money privilege
- Sustainability of the measures adopted during the “Covid” crisis allowing to freeze certain debts during the conciliation period
- Possibility granted by the judge to postpone or reschedule on a case-by-case basis:
 - a. claims due for a maximum period of 2 years when the creditor (i) has noticed (*mis en demeure*) or sued the debtor, or (ii) has not accepted within the time limit set by the conciliator the request made by the latter to suspend the due date of his claim (*standstill*)
 - b. claims not due during the entire duration of the conciliation proceedings (for a maximum of 5 months), in the case of a creditor who has not accepted to suspend the due date of his claim (*standstill*).



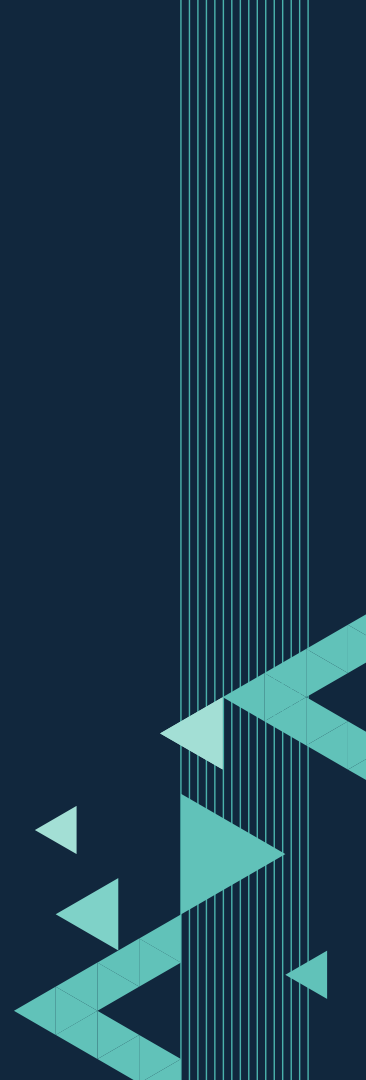
Classes of affected parties (1/5)

- Replace the creditors' committees;
 - Existence of a sufficient community of economic interest and their rank which is retained (it is no longer their quality (credit institution, principal supplier or bondholder))
- Constitution of classes of affected parties **is required** :
 - (i) for an accelerated safeguard procedure,
 - (ii) Threshold overrun of 250 employees and 20 million euros of net turnover, or 40 million euros of turnover,
 - (iii) For companies 'group when exceeding the threshold above
 - (iv) On debtor' request for a safeguard procedure
- Or **voluntary application** of classes of affected parties (decided by the JA or debtor)
- These classes include **equity security holders** if their rights are affected by draft plan, can be more than one class; e.g.: ordinary / preferred shares - share purchase warrant / convertible bonds



Classes of affected parties (2/5)

- For a secured creditor class:
 - do not take into consideration the value as in UK which provides that a secured creditor whose amount is not fully covered by the collateral then such creditor is entitled to vote both in the secured creditor class and in the unsecured creditor class.
 - Take into consideration the entire claim.
- Public creditors should be able to be integrated into one or more classes and thus have a plan imposed on them.
- Exclusion : claims arising from the employment contract, pension rights acquired under an occupational pension scheme and maintenance claims are not affected by the plan and cannot, therefore, lead to the inclusion of the creditor in a class of affected parties.



Classes of affected parties (3/5)

- Judicial administrator in conciliation/safeguard decide the **allocation method into classes and the calculation method for each class to express its vote.**
- Each party can appeal JA 's decision within 10 days.
- Allocation into classes depends on objective criteria as the “*a sufficient community of economic interest*” & “*verifiable objective criteria*”.
- *Cross class cram down* can be requested by the debtor or JA with debtor' agreement.
- Absolute priority rule & best interest rule .



Classes of affected parties (4/5)

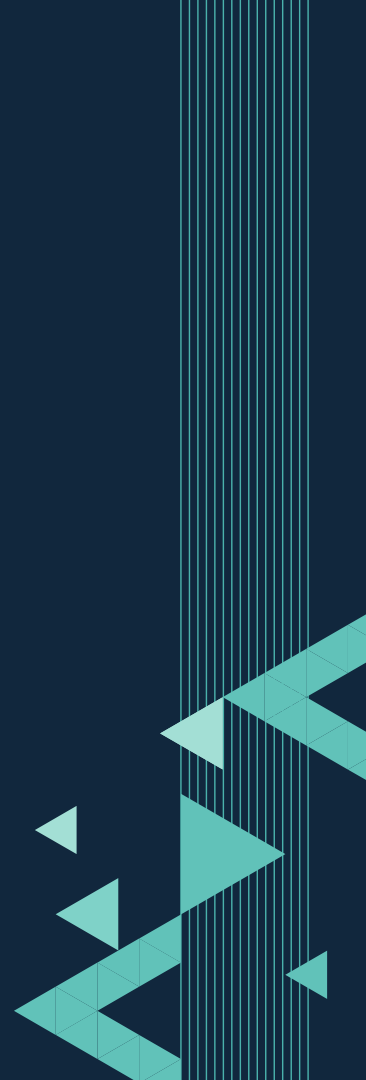
➤ Adoption of the drafted Plan:

- Plan proposed by the debtor.
 - **Voting rule** : 2/3 majority of members of each class
- Comply with the “**principle of equality**” - equal treatment among creditors in the same class
- Distinction between “***in the money***” creditors and “***out of the money***” creditors

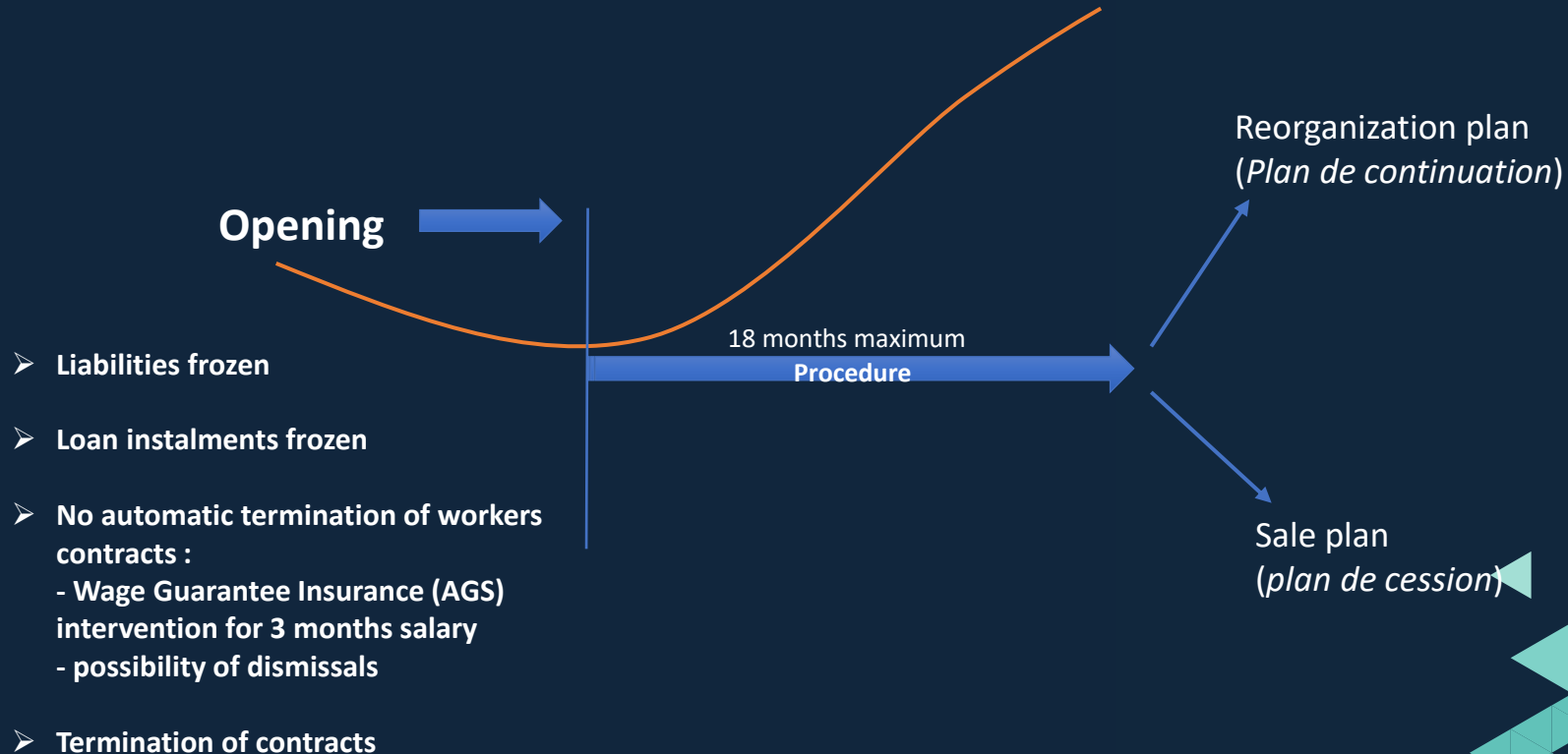


Classes of affected parties (5/5)

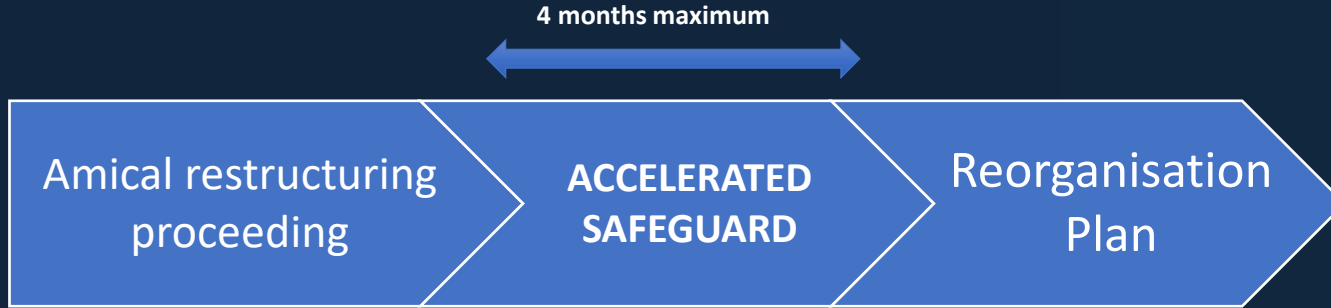
- Plan is adopted – unanimous vote:
 - Court will scrutinize that the plan complies with 5 criteria including the Best interest rule
- Plan is adopted – majority vote:
 - Case of dissident creditors - *Cross class cram down* by the court
- Plan is not adopted by each class
 - conversion into an insolvency proceeding (where a creditor can propose a plan).



EFFECTS OF THE STAY ON CASHFLOW



Accelerated safeguard reformed

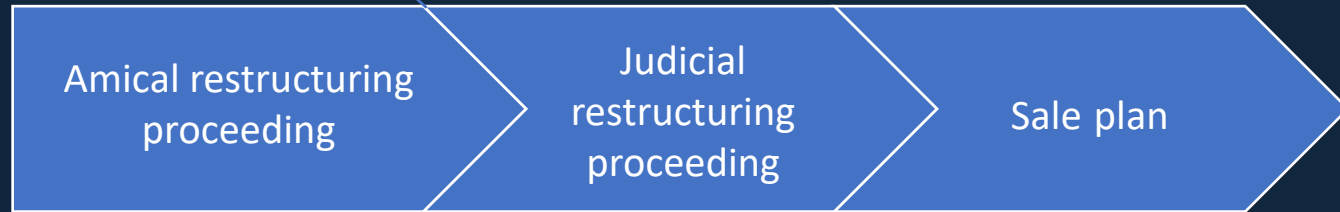


- Access to the accelerated safeguard proceedings is extended - Removal of the debtor's thresholds
- Only condition : debtor company's accounts have been certified by an auditor (Commissaire aux comptes) or drawn up by an accountant (expert comptable).
- affected parties classes and use of a cross-class cram-down,
- Scope of accelerated safeguard proceedings is now determined by reference to affected parties;
- Accelerated financial safeguard proceedings – does not longer exist.
- But ability to limit the effects of the new accelerated safeguard proceedings to financial creditors alone is preserved.

Pre-pack sale

Prepack sale presented to
creditors

15 days maximum



« Stalking horse style »
publication



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GIPC Course 2019 / 2020 Module A

Restructuring in the Netherlands, France, Germany

**Principles of German insolvency law and the new German
Scheme**

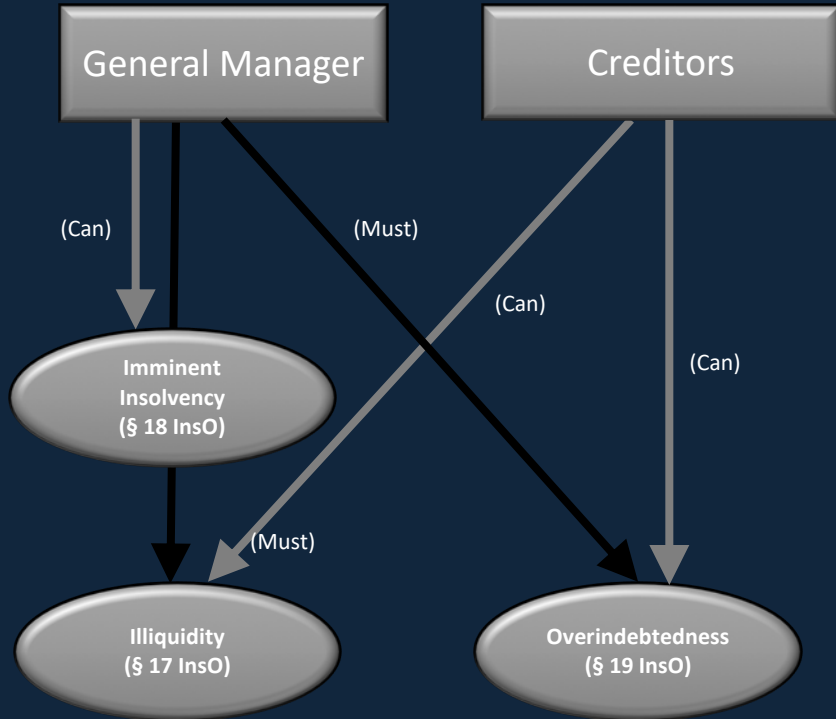


Overview

- German law generally provides for unitary insolvency proceedings, the outcome of which may be liquidation or reorganisation. The main purpose of the proceedings is to satisfy the creditors' claims in the best way possible.
- A special tool to reorganise a company is the insolvency plan (*Insolvenzplan*) – as the case maybe – as debtor-in-possession proceedings
- Insolvency proceedings are supervised by the court and are subject to several creditor protection rules
- The debtor acts through an insolvency administrator (IA) or through the management which is supervised by a trustee (*Sachwalter*)
- Since 01/2021 a reorganization under the new German Scheme (*StaRUG*) has become an additional option



Obligation to file for Insolvency, § 15a InsO



Neutral rule concerning the legal form:

- Legal Persons
- Associations without legal personality
- Even B.V., Ltd., etc. as long as COMI in Germany

Criminal liability due to deliberate/negligent infringements:

- Deferred, defective or delayed application
- Fine or arrest up to 3 years
- Employment ban up to 5 years

Illiquidity, § 17 InsO

The debtor is illiquid if he is
unable to meet his due and payable payment obligations.

(§ 17 Abs.2 S.1 InsO)

(Case law: at least 90 % within three weeks)



Overindebtedness, § 19 InsO

The debtor is overindebted if the debtor's assets no longer cover his payment obligations, unless the ability of the company to continue as a going concern within the next twelve months is predominantly likely under the circumstances
(§ 19 Abs. 2 Satz 1 InsO)

→ Two-fold Test:

1. Going Concern Forecast
2. If negative: Insolvency-based valuation of liquidation value (e.g. including hidden reserves and charges)

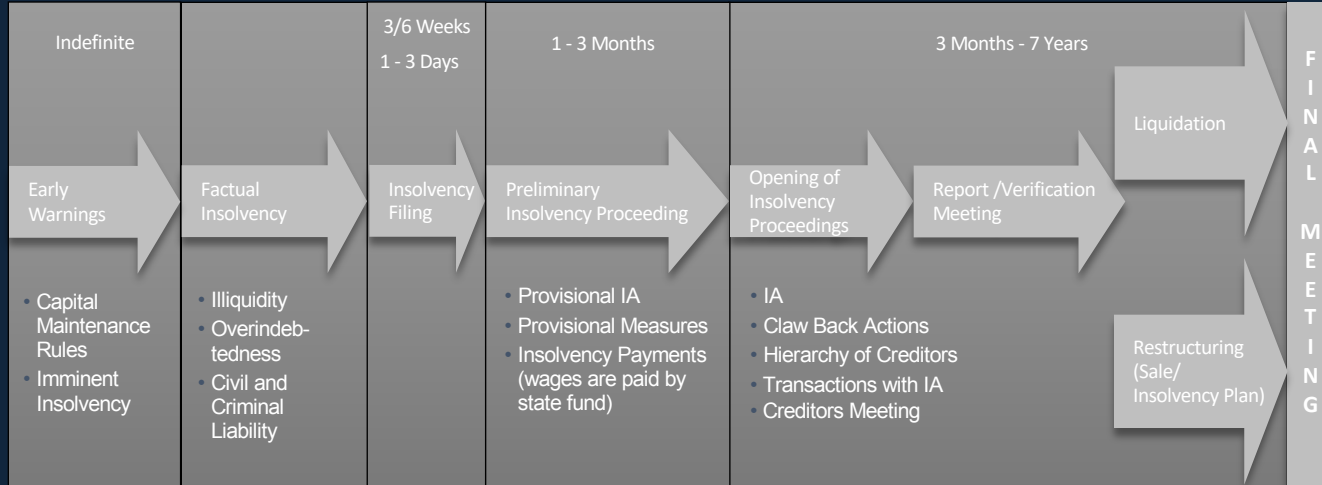


Impending Illiquidity, § 18 InsO

The debtor is impending illiquid if he is likely to be unable to meet his existing obligations to pay at the date of their maturity. In general, a forecast period of 24 months is to be taken as a basis.
(§ 18 Abs. 2 InsO)



Course of Insolvency Proceedings



General Legal Consequences of opened insolvency proceedings

- Stay on individual actions and enforcement measures initiated by creditors against the insolvent company.
- IA is charged with the administration of the debtor's assets and business. The management of the insolvent company is no longer in charge of the company affairs.
- Executory contracts generally remain in place but mutual obligations are suspended during the proceedings. The IA can decide to enter into the contract or to finally refuse fulfilment. Depending on his choice, the creditor's respective claim is either preferential or a mere insolvency claim.
- The administrator can challenge certain transactions entered into prior to the opening of insolvency proceedings which constitute an unfair preference and have an adverse effect on insolvency creditors as a whole ("claw back right").



Asset / Business Sale

- The IA ordinarily tries to use the 3 month period during state funded wages are paid, to sell the business or parts of it to an investor
- Thus, the sale of operations is often pre-arranged prior to the opening of main insolvency proceedings and only becomes effective upon such proceedings being formally opened
- In general, the sale of assets is free and clear of any liability on the part of the buyer, provided that the insolvency proceedings have actually been opened. This can be facilitated by carving out the profitable parts of the operations into an SPV, while retaining liabilities, redundant employees and nonprofitable parts of the business in an entity to be liquidated ("*smart way of cherry picking*")



Protective Shield Proceedings

- Preparatory procedure for a reorganization of the insolvent legal entity through an insolvency plan in combination with self-administration (*Eigenverwaltung*)
- No independent reorganisation procedure, but the establishment of special rules during the preliminary insolvency proceedings
- Essential characteristics:
 - Deadline for setting up the insolvency plan
 - Determination of the provisional trustee (*vorläufiger Sachwalter*)
 - Establishment of estate liabilities possible
 - Protective court orders against enforcement measures possible



Self Administration (*Eigenverwaltung*)

- In case of self-administration, debtors can manage and dispose of the insolvency assets themselves under the supervision of a (preliminary) trustee (*Sachwalter*)
- As of 1 January 2021 the requirements to be eligible for self-administration have increased.
- Required is a self-administration plan, which must include:
 - financial plan for a period of six months with a well-founded presentation of the sources of financing that are to ensure the continuation of ordinary business operations and the coverage of the costs of the proceedings during this period.
 - concept for the conduct of the insolvency proceedings, containing a presentation of the nature, extent and causes of the crisis, setting out the objective of self-administration and describing measures to achieve the objective.
 - description of the status of negotiations with creditors, persons involved in the debtor and third parties on the measures envisaged must be prepared.
 - debtor must present the arrangements it has made to fulfil its obligations under insolvency law.
 - a reasoned description of any additional or reduced costs that are likely to be incurred in the course of self-administration compared to regular proceedings.



Insolvency Plan

- The insolvency plan can be submitted either by the debtor or by the insolvency administrator only within pending insolvency proceedings
- The content of an insolvency plan can be freely arranged and include all provisions that could be agreed upon in an individual contract (e.g.: waivers and deferrals of claims or restrictions of security rights)
- The insolvency plan can also stipulate corporate structural measures such as reduction/increase of share capital, debt-to-equity swaps or contributions in kind. The plan must describe the proposed measures for reorganising the debtor and how the plan affects the rights of creditors and/or shareholders

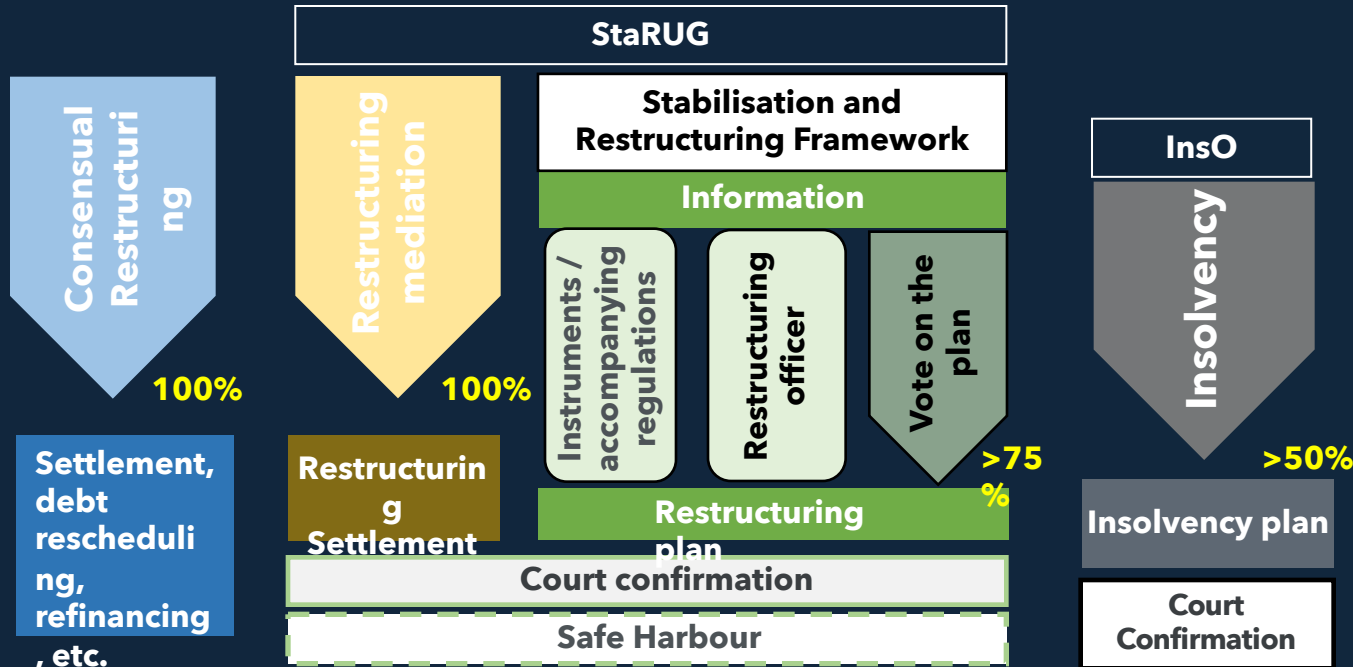


The German Scheme ("StaRUG")

- On January 1 the "Act on the Stabilization and Restructuring Framework for Enterprises" came into force.
- Implementation of the EU Restructuring Directive
- It enables non-insolvency reorganization for threatened insolvent companies



Overview of the new restructuring procedure under StaRUG



Overview - StaRUG

What can be regulated in the restructuring plan?



- Drafting of restructuring claims
- Separation entitlements
- Contractual covenants, also in other agreements
- Interference in company rights up to expropriation
- Fresh Money
- Interference with third-party collateral within the group



- Employee claims / pensions
- Tortious claims
- Interference in legal relationships for the future
- No intervention and no termination of ongoing contractual relationships





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Restructuring in Germany, France and The Netherlands

WHOA!: the Dutch scheme (and other Dutch insolvency law aspects)

Lucas Kortmann - RESOR



Dutch Insolvency law

Two insolvency proceedings :

- Liquidation proceedings - Bankruptcy (*faillissement*)
- Reorganisation proceedings – Suspension of payments (*surséance van betaling*)



Suspension of Payments (reorganisation)

- Temporary liquidity issues: foresee that cannot continue to pay debts when they fall due
- Only debtor can file
- Debtor partially in possession – jointly with administrator
- Not very successful (But: Steinhoff)



Bankruptcy

- Non-temporary liquidity issues: has ceased to pay debts as they fall due
- Creditors and debtor can file
- Debtor divested of powers – trustee in control



Bankruptcy: most commonly used to restructure

- Expedited business / asset sale (in bankruptcy)
- UK style pre-pack (similar steps and timeline)
- Employees (applicability TUPE a risk in pre-pack sale of business - CJEU)
- Sale "free and clear" requires consent of secured lenders



Flawed system of formal insolvency proceedings for reorganisation

- Only available in formal proceedings (negative stigma)
- Does not bind secured or preferential creditors
- No cram down of shareholders
- No ability to reduce workforce



Pre-insolvency proceedings: WFOA: Dutch Scheme, available since 2021

- Plan proceedings when likelihood of insolvency
- Good parts of Ch11 and UK schemes
- in line with EU proposal
- EIR optional (!)



WHOA (vs StaRUG, UK Scheme, CH 11)

- 67% per class, no head count
- Binds secured, preferred creditors and shareholders
- Cross class cram down if one in the money class votes in favour (absolute priority rule)
- Can also restructure group guarantees
- Ability to terminate long term contracts



WFOA (vs StaRUG, UK Scheme, CH 11)

- Limited court involvement - no court entry test
- Very fast - can be completed in 6 weeks
- Restructuring expert, if appointed, has exclusive power to offer plan
- Going Dutch = Cheap
- Very successful start in 2021: over 130 cases

