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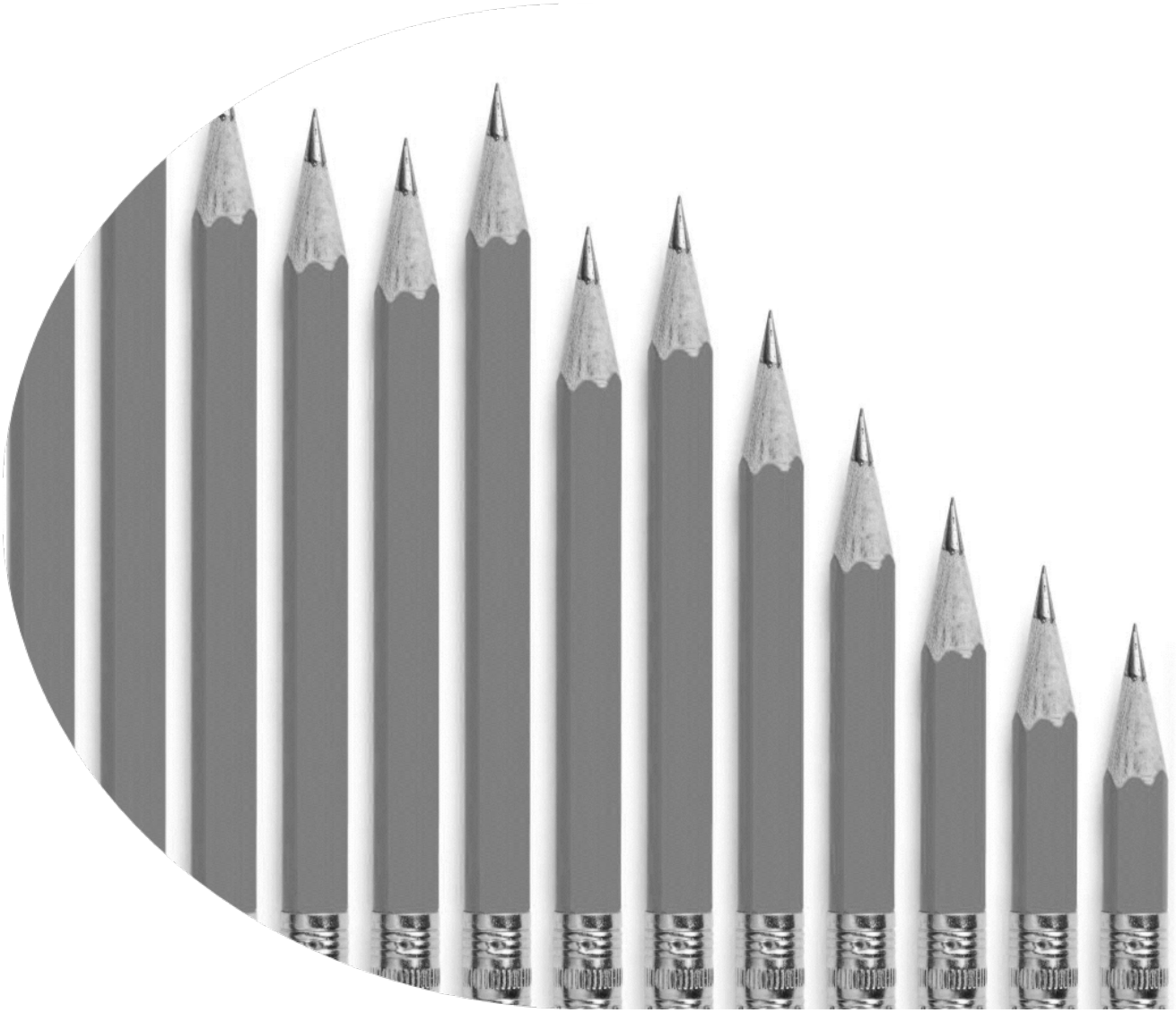
THE GERMAN STARUG-SCHEME

Act on the Stabilisation and Restructuring Framework for Businesses

23 December 2020

Contents

Bullet Point Summary



Bullet point summary of the changes to German restructuring and insolvency law

Introduction

The German Parliament (Bundestag) has recently passed a bill, which will bring significant changes to the German restructuring and insolvency landscape. The bill, also known by its German acronym "**SanInsFoG**" will implement:

- for the first time in Germany a pre-insolvency procedure, the "**StaRUG-Scheme**" which will be similar to the new UK Restructuring Plan or UK Scheme of Arrangement or the WHOA or so-called Dutch Scheme in the Netherlands;

- significant changes to the *Insolvenzordnung*, the German insolvency code, in particular a **re-shaping** of the *Eigenverwaltung*, i.e. the **German self-administration** or debtor in possession proceeding; and

- various other changes to **more than twenty different legal acts and codes**, including commercial, corporate, civil and procedural laws.

The "SanInsFoG" passed through Parliament on 17 December 2020 and **will enter into force as early as 1 January 2021**.

At the heart of the "SanInsFoG" lies the **StaRUG-Scheme**, a brand-new, sophisticated pre-insolvency rescue procedure which combines features of the UK Restructuring Plan or Scheme of Arrangement and the (also recently introduced) Dutch Scheme, with elements from the tried and tested German *Insolvenzplanverfahren*, the insolvency plan procedure.

The StaRUG-Scheme is in fact the **long-awaited addition to the German restructuring toolbox** as it allows a debtor to implement a plan outside formal insolvency proceedings with a cross-class cram-down mechanism and safeguarded by a moratorium of up to eight months. The result is a flexible restructuring procedure, available at an early stage and providing powerful instruments in particular to overcome obstructing minority creditors or to mitigate the effects on businesses located in Germany caused by the COVID-19 pandemic.

Below you will find a short bullet point summary of the new StaRUG-Scheme and some changes to the insolvency law which will be implemented by the "SanInsFoG".

General Features of the StaRUG-Scheme

- Debtor-in-possession rescue procedure in which a restructuring plan is put to vote in separate classes of creditors and/or shareholders

- A majority of 75% in value can bind a minority within each class, and the court has the power to impose the plan on dissenting classes (cross-class cram-down) if majority of classes have voted in favour, no creditor is worse-off in the relevant alternative scenario and a "relaxed" absolute priority rule has been adhered to

- Available at an early stage outside of formal insolvency proceedings if company is facing impending illiquidity (*drohende Zahlungsunfähigkeit*, i.e. overwhelming risk to become illiquid within 24 months)

- Moratorium of usually three to four and max. eight months and during which the realisation/enforcement of security provided by the debtor and the compulsory execution as regards the debtor's assets is prohibited

- Debt-equity-swaps and other corporate law measures possible within plan

- Ban on ipso-facto clauses

- Choice between a public proceeding and a private proceeding

- Shift of directors' duties to creditors as a whole once company is facing impending illiquidity (this feature is completely new to German law), which was still provided for in the draft law and was independent of lis pendens of the restructuring case, is no longer provided for in the StaRUG. Instead, shift of directors' duties to creditors as a whole applies during lis pendens of a restructuring case.

- No longer included are special termination rights for contracts and possibility to amend damage claims for early termination in the plan

Initiating the Plan / Procedure

- Initiation only requires the debtor's notice to the court combined with a restructuring concept and confirmation that company is facing impending illiquidity (but illiquidity or overindebtedness has not yet occured)

- Debtor may choose from a broad tool-kit of individual instruments required to successfully implement the restructuring concept

- Only some but not all instruments require the court's involvement, e.g. the establishment of a moratorium, restructuring plan requiring a cross-class cram-down

Content of the Plan

- High degree of flexibility as to the commercial content of the plan and debtor is generally free to choose who he will include in the plan (e.g. plan including financial creditors only possible)
- Binding effect on all types of capital providers included in the plan, such as secured and preferential creditors and shareholders
- Third party releases with regards to affiliates acting as guarantors or security providers possible

The Restructuring Practitioner

- The debtor is free to request the appointment of a restructuring practitioner, unless the appointment is mandatory
- The restructuring practitioner's role is, *inter alia*, to moderate the proceeding, to supervise the debtor's management, to keep the court informed about the ongoing processes and to exercise certain potential rights granted to the expert by the court
- Prior to appointing the restructuring practitioner, the court is hearing the debtor, the shareholder and the creditors. However, if certain requirements are met, the court must appoint the restructuring practitioner proposed by the debtor and, only if such proposal is not binding, the creditors may propose a restructuring practitioner.
- Additional mediation process possible in which the court can, upon request of the debtor, appoint a suitable person as recovery moderator (*Sanierungsmoderator*)

Financing and Safe Harbour

- Generally: New financing to debtor preparing or implementing a StaRUG-Scheme should comply with German concept of restructuring loan
- Safe harbour: the plan's legally binding arrangements and measures implementing such arrangements cannot be subject to avoidance in subsequent insolvency proceedings. This covers financing (including corresponding security) required by the plan itself subject to certain requirements
- No super-priority for "new money" in the possible event of a consequent insolvency proceeding

Directors' Duties

- Directors of the debtor have to work towards ensuring that the debtor conducts the restructuring case with the diligence of a prudent and conscientious director and protects the interests of the creditors

- Failure to adhere to these new obligations may result in accountability towards the company

International Aspects – Jurisdiction and Use by Foreign Debtors

- The public procedure will be placed on Annex A of the European Insolvency Regulation and will thus be recognisable within the EU (because of necessary legislation on EU level, this feature may not be available as early as the StaRUG-Scheme)

- The private procedure is outside the scope of the European Insolvency Regulation

Changes to the Existing Insolvency Law

- The modes of the existing debtor being granted court permission for debtor in possession proceedings within the general insolvency law (*Eigenverwaltung*) will become stricter to avoid unsuitable debtors making use of the *Eigenverwaltung* to the detriment of creditors

- Debtors who wish to use *Eigenverwaltung* will need to show to the satisfaction of the court that they have provided a detailed debtor in possession planning with a six months planning horizon

- Liability regimes for wrongful trading (*verbotene Zahlungen*) which are scattered throughout corporate law will be harmonised in one central insolvency law provision

- The mandatory insolvency ground of over-indebtedness (*Überschuldung*) will be reduced to a twelve month forward looking going-concern prognosis instead of the existing practice, which requires a prognosis for the current and the following year (i.e. up to 24 months)

- For COVID-19 cases, the twelve month forward looking going-concern prognosis will be reduced to only four months until 31 December 2021, allowing such debtors to avoid formal insolvency filings

- In addition, suspension of obligation to file for insolvency on the grounds of overindebtedness for enterprises, who have applied for financial aid from the state not without prospects of success, has been extended until January 31, 2021, provided certain requirements are met

Our restructuring and insolvency law team

Dr Franz Bernhard Herding
Partner – Frankfurt
Banking and Finance / Restructuring

Tel +49 69 2648 5712
franz-bernhard.herding@allenovery.com

Dr Sven Prüfer
Partner – Frankfurt
Corporate / Restructuring

Tel +49 69 2648 5381
sven.pruefer@allenovery.com

Dr Walter Uebelhoer
Partner – Munich
Banking and Finance / Restructuring

Tel +49 89 71043 3113
walter.uebelhoer@allenovery.com

Peter Hoegen
Senior Counsel – Frankfurt
Banking and Finance / Restructuring

Tel +49 69 2648 5905
peter.hoegen@allenovery.com

Dr Christopher Kranz, LL.M.
Counsel – Frankfurt
Banking and Finance / Restructuring

Tel +49 69 2648 5744
christopher.kranz@allenovery.com

Oliver Köhler
Associate – Frankfurt
Banking and Finance / Restructuring

Tel +49 69 2648 5968
oliver.koehler@allenovery.com

Moritz Probst
Associate – Frankfurt
Banking and Finance / Restructuring

Tel +49 69 2648 5522
moritz.probst@allenovery.com

Wencke Rusbüldt
Associate – Frankfurt
Corporate / Restructuring

Tel +49 69 2648 5484
wencke.rusbueldt@allenovery.com

Dr Jörg Weber
Associate – Munich
Banking and Finance / Restructuring

Tel +49 89 71043 3957
joerg.weber@allenovery.com

Act on the Stabilisation and Restructuring Framework for Businesses

(Business Stabilisation and Restructuring Act (*Unternehmensstabilisierungs- und -restrukturierungsgesetz*) – **StaRUG**)

Part 1: Early Crisis Detection and Crisis Management

Section 1

Early crisis detection and crisis management in limited liability entities

(1) The members of the corporate body responsible for managing a legal entity (directors (*Geschäftsleiter*)) continuously monitor developments that could jeopardise the continued existence of the legal entity. Where such developments are identified, the directors will take appropriate countermeasures and report to the bodies responsible for supervising the management (supervisory bodies) without undue delay (*unverzüglich*). Should the measures to be taken affect the remit of other bodies, the directors will procure the involvement of such other bodies without undue delay.

(2) In the case of entities without legal personality within the meaning of section 15a (1) sentence 3 and (2) of the German Insolvency Code (*Insolvenzordnung*; **InsO**), paragraph (1) applies *mutatis mutandis* to the directors of the members entrusted with the management of the entity.

(3) Any further obligations arising from other laws will remain unaffected.

Part 2: Stabilisation and Restructuring Framework

Chapter 1

Restructuring Plan

Division 1

Modification of legal relationships

Section 2

Legal relationships open to modification

(1) On the basis of a restructuring plan, the following legal relationships may be modified (*gestaltet*):

1. claims constituted against a person capable of restructuring (debtor) (restructuring claims); and

2. rights to the debtor's assets which, in the event of insolvency proceedings being opened, would entitle their holder to separate satisfaction (*Absonderung*), except where the assets concerned are financial collateral (*Finanzsicherheiten*) within the meaning of section 1 (17) of the German Banking Act (*Kreditwesengesetz*; **KWG**) or collateral provided to the operator of a system within the meaning of section 1 (16) KWG for the purpose of securing its claims from the system or to the central bank of a member state of the European Union or the European Central Bank (separate satisfaction rights).

(2) Where restructuring claims or separate satisfaction rights are based on a multipartite legal relationship between the debtor and several creditors, individual provisions in this legal relationship may also be modified by the restructuring plan. Sentence 1 also applies to the terms and conditions of debt instruments within the meaning of section 2 (1) no. 3 of the German Securities Trading Act (*Wertpapierhandelsgesetz*) and of contracts entered into on identical terms with a multitude of creditors. Where restructuring claims or separate satisfaction rights are based on different legal relationships and the holders of the claims or rights have made agreements among themselves and with the debtor concerning the enforcement of the claims or rights owed by the debtor and the relative ranking of the proceeds resulting from enforcement, the terms of such agreements may also be modified in the plan.

(3) If the debtor is a legal entity or an entity without legal personality, shares or membership rights of persons holding an equity interest in the debtor may also be modified in the restructuring plan, other provisions permitted under corporate law may be agreed, and shares or membership rights may be transferred.

(4) The restructuring plan may also modify rights of holders of restructuring claims owed to such holders under any liability assumed by an affiliate (*verbundenes Unternehmen*) within the meaning of section 15 of the German Stock Corporation Act (*Aktiengesetz*; **AktG**)

as guarantor, joint debtor or otherwise, or held by such holders in assets of that affiliate (intra-group third-party security); any interference with such rights must be adequately compensated. Sentence 1 half-sentence 2 applies *mutatis mutandis* to a limitation of the personal liability of a personally liable member of a debtor established as an entity without legal personality.

(5) The status of the legal relationships as at the date of submission of the plan offer (section 17) or, in the event of voting in the context of court proceedings for voting on the plan, the date of filing will be relevant (section 45). If the debtor obtains a prior stabilisation order (section 49), the date on which such initial order is issued will be relevant, rather than the date of the plan offer or the date of filing.

Section 3

Conditional restructuring claims and restructuring claims not yet matured; claims under mutual contracts

(1) Restructuring claims may be modified even if they are conditional or not yet matured.

(2) Restructuring claims under mutual contracts may be modified only insofar as the performance owed by the other party has already been rendered.

Section 4

Excluded legal relationships

The restructuring plan may not modify:

1. claims of employees under or in connection with the employment relationship, including rights under company pension commitments;

2. claims from intentional tortious acts; and

3. claims pursuant to section 39 (1) no. 3 InsO.

If the debtor is a natural person, this also applies to claims and separate satisfaction rights that are unrelated to the debtor's entrepreneurial activities.

Division 2

Requirements for the restructuring plan

Section 5

Structure of the restructuring plan

The restructuring plan consists of a descriptive part and a normative part. It must contain at least the mandatory information set out in the Schedule to this Act. The restructuring plan must be accompanied by the annexes required under sections 14 and 15.

Section 6

Descriptive part

(1) The descriptive part describes the bases and effects of the restructuring plan. The descriptive part contains all information relevant for the decision of the parties affected by the plan concerning their consent to the plan and for its confirmation by the court, including the causes of the crisis and the measures to be taken to remove the crisis. Where restructuring measures are envisaged that cannot or should not be implemented through the normative part of the plan, such measures must be specifically emphasised in the descriptive part.

(2) The descriptive part in particular contains a comparative calculation setting out the effects of the restructuring plan on the prospects of satisfaction of the affected parties. If the plan provides for a continuation of business, it must be assumed, for the purposes of determining the prospects of satisfaction without a plan, that the business will be continued. This does not apply where a sale of the business or its continuation on any other basis is without any chance of success.

(3) If the restructuring plan contains provisions interfering with the rights of creditors under intra-group third-party security (section 2 (4)), the descriptive part must also address the situation of the affiliate granting the security and the effects of the plan on that affiliate.

Section 7

Normative part

(1) The normative part of the restructuring plan determines how the legal position of the holders of the restructuring claims, the separate satisfaction rights, the rights under intra-group third-party security and the shares or membership rights (affected parties) is to be modified by the plan.

(2) Where restructuring claims or separate satisfaction rights are modified, it must be stated by what fraction they are to be reduced, for what period they are to be deferred, how they are to be secured and what other stipulations are to be made regarding them. Sentence 1 applies *mutatis mutandis* to modifications of rights under intra-group third-party security (section 2 (4)).

(3) Where ancillary contractual provisions or arrangements pursuant to section 2 (2) are modified, the normative part states in what way such provisions and arrangements are to be amended.

(4) Restructuring claims may also be converted into shares or membership rights in the debtor. It is not possible to convert them against the will of the affected creditors. The plan may in particular provide for a capital reduction or increase, contributions in kind, the exclusion of subscription rights or settlement payments to withdrawing persons holding an equity interest in the debtor. The plan may provide for a transfer of shares or membership rights. In addition to the foregoing, any other provision may be included that is permitted under corporate law. Section 225a (4) and (5) InsO is to be applied *mutatis mutandis*.

Section 8

Selection of affected parties

The selection of the affected parties must be performed in line with appropriate criteria that are to be stated and explained in the descriptive part of the plan. The selection is appropriate if:

1. the claims not included would probably be satisfied in full also in insolvency proceedings;

2. the differentiation applied in the selection process appears appropriate in view of the type of the debtor's economic difficulties to be overcome and the circumstances, in particular where modifications exclusively affect financial obligations and the security created to secure them or the claims of small-sum creditors, in particular consumers, small and medium-sized as well as micro enterprises remain unaffected; or

3. all claims with the exception of those specified in section 4 are included.

Section 9

Grouping of affected parties in classes

(1) When determining the rights of the affected parties in the restructuring plan, classes must be formed for affected parties with different legal positions. A distinction must be made between:

1. the holders of separate satisfaction rights;

2. the holders of claims which would have to be asserted as unsubordinated insolvency claims in the case insolvency proceedings were opened, together with any related interest and penalties (ordinary restructuring creditors);

3. the holders of claims which would have to be filed as subordinated insolvency claims pursuant to section 39 (1) nos. 4, 5 or (2) InsO in the case insolvency proceedings were opened (subordinated restructuring creditors), with a separate class to be formed for each ranking class; and

4. the holders of shares or membership rights.

If the normative part of the restructuring plan contains provisions interfering with the rights of creditors under intra-group third-party security, the affected holders will form separate classes.

(2) The classes may be subdivided further on the basis of economic criteria. The criteria for distinguishing these sub-classes must be appropriate. These criteria must be stated in the plan. Separate classes must be formed for small-sum creditors following the pattern set out in paragraph (1).

Section 10

Equal treatment of affected parties

(1) All affected parties within the same class must be offered equal rights.

(2) Treating the affected parties within one class differently is only permitted with the consent of all affected parties who will be negatively affected by the different treatment. In this case the restructuring plan must be accompanied by a declaration of consent of each affected party negatively affected by the different treatment.

(3) Any understanding between the debtor or third parties and individual affected parties under which the latter are granted a benefit not envisaged in the plan in return for their voting behaviour or otherwise in connection with the restructuring proceedings is void.

Section 11

Liability of the debtor

Unless otherwise provided for in the restructuring plan, satisfying the creditors in the manner provided for in the normative part will discharge the debtor of its residual obligations owed to the creditors under the restructuring claims and separate satisfaction rights included in the plan. Where the debtor is an entity without legal personality or a partnership limited by shares (*Kommanditgesellschaft auf Aktien*), sentence 1 applies *mutatis mutandis* to the personal liability of members with unlimited liability.

Section 12

New financing

The restructuring plan may contain provisions concerning commitments to grant loans or other credit as may be required in order to finance the restructuring on the basis of the plan (new financing). The granting of security for new financing will also be deemed new financing.

Section 13

Alteration of relationships under property law (*Sachenrecht*)

Where rights to property are to be created, altered, transferred or cancelled, the necessary declarations of intent of the parties involved may be included in the normative part of the restructuring plan. Where rights registered in the land register to a piece of land or to registered rights are concerned, such rights must be clearly defined, taking into account section 28 of the German Land Register Code (*Grundbuchordnung*). Sentence 2 applies *mutatis mutandis* to rights registered in the shipping register (*Schiffsregister*), shipbuilding register (*Schiffsbauregister*) or aircraft mortgage register (*Register für Pfandrechte an Luftfahrzeugen*).

Section 14

Viability declaration; schedule of assets; earnings and finance plan

(1) The restructuring plan must be accompanied by a substantiated declaration concerning the prospects that the imminent illiquidity of the debtor will be removed by the plan and that the debtor's viability will be ensured or restored.

(2) The restructuring plan must be accompanied by a schedule of assets setting out the assets and liabilities, including their values that would exist upon the plan taking effect.

In addition, the plan is to state the expenses and earnings expected in the period during which the creditors are to be satisfied, and the succession of earnings and expenses that is to ensure the liquidity of the business during this period. In this context, the claims not affected by the plan as well as the claims to be constituted under the plan in future must be taken into account, in addition to the restructuring claims.

Section 15

Other declarations to be included

(1) Where the debtor is an entity without legal personality or a partnership limited by shares, the restructuring plan must be accompanied by a declaration of the persons who, under the plan, are to be personally liable members of the entity, to the effect that they are willing to continue the business on the basis of the plan.

(2) Where creditors are intended to assume shares or membership rights or equity interests in a legal entity, an unincorporated association (*nicht rechtsfähiger Verein*) or an entity without legal personality, the restructuring plan must be accompanied by declarations of consent of each of these creditors.

(3) Where a third party assumed obligations *vis-à-vis* the creditors for the event the restructuring plan is confirmed, the plan must be accompanied by such third party's declaration.

(4) Where the restructuring plan contains provisions interfering with the rights of creditors under intra-group third-party security, the plan must be accompanied by the declaration of consent of the affiliate that provided the security.

Section 16

Check list for restructuring plans

The Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*) will publish a check list for restructuring plans adapted to the needs of small and medium-sized enterprises. This check list will be published on the www.bmjv.bund.de website.

Division 3

Voting on the plan

Subdivision 1

Offer and adoption of the plan

Section 17

Plan offer

(1) The debtor's offer directed to the affected parties to adopt the restructuring plan (plan offer) must contain the clear information that the plan, once adopted by a majority and

confirmed by court, will take effect also in relation to affected parties who do not accept the offer. The plan offer must be accompanied by the complete restructuring plan including annexes and a summary of the costs relating to the restructuring proceedings that have already incurred and those still to be expected, including remuneration for the restructuring practitioner.

(2) The plan offer must state with what claims or rights the respective affected party has been included in the restructuring plan, to which classes it is allocated and to which voting rights it is entitled based on the claims and rights owed to it.

(3) If the debtor did not give all affected parties the opportunity to jointly discuss the plan or the restructuring concept to be implemented through the plan prior to submitting the plan offer, the plan offer must contain the information that a meeting of the affected parties for discussion of the plan will be held upon request of one or more affected parties.

(4) Unless otherwise agreed in relation to individual affected parties, the plan offer must be made in written form (*Schriftform*). Unless otherwise stipulated by the debtor in the plan offer, adoption of the plan must also be made in written form.

Section 18

Interpretation of the plan offer

In case of doubt it is to be assumed that the plan offer is subject to the condition that all affected parties consent or that the plan is confirmed by court.

Section 19

Period for adoption

The debtor will set a period for adopting the restructuring plan. The period for adoption will be at least 14 days. The period may be shorter where the restructuring concept underlying the plan has been made available to all affected parties in text form (*Textform*) for at least 14 days.

Section 20

Voting at a meeting of affected parties

(1) The debtor may put the restructuring plan to the vote at a meeting of the affected parties. Such meeting will be convened in writing. The convocation period will be 14 days. If the debtor offers the opportunity of electronic participation, the convocation period will be 7 days. The convocation notice must be accompanied by the complete restructuring plan including annexes.

(2) The plan offer may provide that affected parties may participate without being physically present at the meeting and may exercise all or some of their rights by way of electronic communication (electronic participation).

(3) The meeting will be chaired by the debtor. The debtor must upon request provide each affected party with information on the restructuring plan and on the

circumstances insofar as they are relevant for a proper assessment of the plan, in the case of section 2 (4) sentence 1 including those of each subsidiary concerned. Affected parties will be entitled to propose amendments to the plan. Such proposals must be made available to the debtor in text form at least one day prior to the start of the meeting.

(4) Voting on the plan may take place at the meeting also if the contents of the plan are amended in individual points based on the discussion at the meeting.

(5) Each class of affected parties will vote separately. All other modalities of voting will be determined by the debtor. Where affected parties have exercised their voting right electronically, receipt of the vote cast electronically must be confirmed to those affected parties. Votes may be cast up to the end of the voting process without participation in the meeting.

Section 21

Discussion of the restructuring plan

(1) If voting is taking place outside of a meeting of affected parties and the conditions pursuant to section 17 (3) are met, a meeting of the affected parties for discussion of the plan is to be held upon the request of an affected party.

(2) Such meeting will be convened in writing. The convocation period will be at least 14 days. If the debtor offers the opportunity of electronic participation, the convocation period will be 7 days.

(3) Section 20 (3) applies *mutatis mutandis*.

(4) If the meeting is held after the expiry of a period set for the adoption of the plan, such period will be extended until the end of the day of the meeting or until the date set by the debtor by the end of the meeting. Where an affected party previously issued a statement on the plan offer, such statement will no longer be binding upon such party if it issues a new statement during the extension period.

Section 22

Record of voting

(1) The debtor will record the course of the plan adoption procedure and the voting result in writing without undue delay after expiry of the period for adoption or completion of the voting process. If the selection of affected parties, their grouping into classes or the allocation of voting rights has been a matter of dispute, this must be noted in the record.

(2) The record must be made available to the affected parties without undue delay.

Section 23

Court proceedings for voting on the plan

The debtor may put the restructuring plan to the vote in court proceedings to be conducted pursuant to sections 45 and 46; sections 17 to 22 will not apply in this case.

Subdivision 2

Voting right and majorities required

Section 24

Voting right

(1) The voting right will be determined:

1. in the case of restructuring claims, by reference to their amount, unless otherwise provided in paragraph (2);

2. in the case of separate satisfaction rights and intra-group third party security, by reference to the value; and

3. in the case of shares or membership rights, by reference to the share in the subscribed capital or assets of the debtor; limitations of voting rights or special or multiple voting rights will not be taken into account.

(2) For the purpose of determining the voting rights conferred by restructuring claims, such claims are recognised as follows:

1. in the case of conditional claims, at their value determined taking into account the likelihood of the relevant condition being fulfilled;

2. in the case of non-interest-bearing claims, at the amount calculated in application of section 41 (2) InsO by discounting to the day the plan is submitted;

3. in the case of claims for indefinite monetary amounts or expressed in foreign currencies or units of account, at the value to be determined in accordance with section 45 InsO;

4. in the case of claims for recurring performance, at the value determined in accordance with section 45 InsO.

(3) Claims secured by separate satisfaction rights or intra-group third-party security will only confer voting rights in a class of restructuring creditors insofar as the debtor is also personally liable for the secured claims and the holder of the separate satisfaction right waives such right or separate satisfaction would fail. As long as separate satisfaction has not actually failed, the claim is to be recognised at the anticipated default amount.

(4) If the voting right attributable to a claim or right is a matter of dispute, the debtor may for the purposes of voting apply the voting right it has allocated to the affected parties. In the voting record the debtor will note that, to what extent and for what reason the voting right was a matter of dispute.

Section 25

Required majorities

(1) In order for the restructuring plan to be adopted, it is necessary that in each class members representing at least three quarters of the voting rights in that class must consent to the plan.

(2) Affected parties holding a claim or right jointly will be treated as a single affected party for the purposes of voting. The same applies where a right is encumbered by a pledge or usufructuary right (*Nießbrauch*).

Section 26

Majority decision across classes

(1) If the majority required under section 25 is not achieved in a class, that class will be deemed to have consented if:

1. the members of that class are likely not to be placed at a disadvantage by the restructuring plan as compared to their situation without such plan;

2. the members of that class will receive a fair share in the economic value to be received by the affected parties under the plan (plan value); and

3. the majority of the voting classes consent to the plan with the required majorities; where only two classes have been formed, the consent of the other class will be sufficient; the consenting classes may not consist exclusively of equity holders or subordinated restructuring creditors.

(2) If the majority required under section 25 is not reached in a class to be formed under section 9 (1) sentence 3, paragraph (1), section 27 (1) and section 28 will apply to this class only if the envisaged compensation adequately compensates the holders of the rights under the intra-group third-party security for the loss of rights suffered or the loss of the liability of the personally liable member.

Section 27

Absolute priority

(1) A class will be deemed to have received a fair share in the plan value if:

1. no other affected creditor receives economic values exceeding the full amount of their claim;

2. neither an affected creditor who, without a plan, would have a subordinated claim to satisfaction compared to the creditors of that class in insolvency proceedings, nor the debtor or any person holding an equity interest in the debtor receives an economic value that is not fully compensated by a contribution to the debtor's assets; and

3. no affected creditor who would have an equal-ranking claim to satisfaction compared to the creditors of that class in insolvency proceedings is treated more favourably than these creditors.

(2) A class of persons holding an equity interest in the debtor will be deemed to have received a fair share in the plan value if, under the plan:

1. no affected creditor receives economic values exceeding the full amount of their claim; and

2. subject to section 28 (2) no. 1, no person holding an equity interest in the debtor who, without a plan, would rank equal to the members of the class retains an economic value.

Section 28

Derogation from the absolute priority rule

(1) A class of affected creditors will not be deemed not to have received a fair share in the plan value if an arrangement deviating from section 27 (1) no. 3 is appropriate in view of the type of the economic difficulties to be overcome and the circumstances. An arrangement deviating from section 27 (1) no. 3 will not be deemed appropriate if the group that has been outvoted represents more than half of the creditors' voting rights in the affected class.

(2) A class of affected creditors will not be deemed not to have received a fair share in the plan value if the debtor or a person holding an equity interest in the debtor retains an interest in the assets of the business contrary to section 27 (1) no. 2 where:

1. the cooperation of the debtor or the person holding an equity interest in the debtor in continuing the business is indispensable due to special circumstances related to the debtor or such person personally in order to realise the plan value and the debtor or the person holding an equity interest in the debtor undertakes to cooperate as required and to transfer the economic values in the event that the debtor or such person ceases to cooperate before the expiry of five years, or any shorter period set for implementation of the plan, for reasons for which the debtor or such person is responsible; or

2. the interference with creditors' rights is minor, in particular because rights are not reduced and their maturity is not postponed by more than 18 months.

Chapter 2

Stabilisation and restructuring tools

Division 1

General provisions

Subdivision 1

Tools of the stabilisation and restructuring framework; procedure

Section 29

Tools of the stabilisation and restructuring framework

(1) The procedural aids of the stabilisation and restructuring framework (tools) set out in paragraph (2) may be used in order to lastingly remove an imminent illiquidity within the meaning of section 18 (2) InsO.

(2) The following are tools of the stabilisation and restructuring framework within the meaning of paragraph (1):

1. conducting court proceedings for voting on the plan (court-ordered voting on the plan);

2. the preliminary examination by a court of questions relevant to the confirmation of the restructuring plan (preliminary examination);

3. a court order placing restrictions on individual enforcement actions (stabilisation); and

4. the confirmation of a restructuring plan by a court (confirmation of the plan).

(3) Unless otherwise provided for in this Act, the debtor may make use of each of the tools of the stabilisation and restructuring framework separately.

Section 30

Eligibility for restructuring

(1) The tools of the stabilisation and restructuring framework may be used by any debtor capable of entering into insolvency (*insolvenzfähig*), subject to paragraph (2). This applies to natural persons only insofar as they pursue entrepreneurial activities.

(2) The provisions of this chapter do not apply to financial sector entities within the meaning of section 1 (19) KWG.

Section 31

Notification of the proposed restructuring

(1) Use of the tools of the stabilisation and restructuring framework is conditional upon notification of the proposed restructuring to the competent restructuring court.

(2) The notification must be accompanied by:

1. the draft restructuring plan or, if such draft could not have been prepared and negotiated by the time on the basis of the status of the notified proposed restructuring, a concept for the restructuring which, based on a description of the type, extent and causes of the crisis, describes the goal of the restructuring (restructuring goal) as well as the measures envisaged to be taken to achieve the restructuring goal;

2. a description of the status of negotiations with creditors, persons holding an equity interest in the debtor and third parties regarding the envisaged measures; and

3. a description of the arrangements made by the debtor in order to ensure its ability to fulfil its obligations under this Act.

When making the notification, the debtor must also specify whether the rights of consumers or small and medium-sized as well as micro enterprises are envisaged to be affected, in particular because their claims or separate satisfaction rights are envisaged to be modified by a restructuring plan or the enforcement of such claims is envisaged to be stayed by a stabilisation order. It must also be specified whether it is to be expected that the restructuring goal can only be enforced against opposition by a class to be formed in accordance with section 9. Furthermore, previous restructuring matters must be specified, stating the court concerned and the case number.

(3) The restructuring matter becomes pending (*rechtshängig*) upon notification.

(4) The notification ceases to have effect if:

1. the debtor withdraws the notification;

2. the decision regarding confirmation of the plan becomes final and non-appealable (*rechtskräftig*);

3. the court terminates the restructuring matter pursuant to section 33; or

4. six months or, if the debtor has previously renewed the notification, twelve months have passed since the date of the notification.

Section 32

Obligations of the debtor

(1) The debtor will pursue the restructuring matter with the due care of a prudent and conscientious manager in recovery proceedings (*Sorgfalt eines ordentlichen und gewissenhaften Sanierungsgeschäftsführers*), safeguarding the interests of the general body of creditors. In particular, the debtor will refrain from taking any measures which are not compatible with the restructuring goal or which jeopardise the prospects of success of the

envisaged restructuring. As a rule, it is not compatible with the restructuring goal to satisfy or secure claims that are proposed to be modified by the restructuring plan.

(2) The debtor will notify the court of any material change relating to the subject matter of the notified proposed restructuring or the description of the status of negotiations. If the debtor has obtained a stabilisation order under section 49, it will also notify without undue delay any material changes relating to the planning of the restructuring. If a practitioner in the field of restructuring (restructuring practitioner) has been appointed, the obligations under sentences 1 and 2 will also apply *vis-à-vis* the restructuring practitioner.

(3) The debtor will be obliged as long as the restructuring matter is pending to notify the restructuring court without undue delay of the occurrence of illiquidity (*Zahlungsunfähigkeit*) within the meaning of section 17 (2) InsO. If the debtor is a legal entity or an entity without legal personality for the liabilities of which no natural person is liable as a direct or indirect member, over-indebtedness within the meaning of section 19 (2) InsO will be deemed equivalent to illiquidity.

(4) The debtor is obliged to notify the court without undue delay if there are no prospects of the proposed restructuring being implemented, in particular if, as a result of the apparent serious and final rejection of the submitted restructuring plan by affected parties, it cannot be expected that the majorities required for an adoption of the plan can be reached.

Section 33

Termination of the restructuring matter

(1) The restructuring court will terminate the restructuring matter *ex officio* if:

1. the debtor files a request for the opening of insolvency proceedings or insolvency proceedings have been opened over the debtor's assets;

2. the restructuring court is not competent for the restructuring matter and the debtor has not filed a request for referral within the deadline set by the restructuring court or has withdrawn the notification; or

3. the debtor commits a serious violation of its obligations to cooperate with and provide information to the court or a restructuring practitioner.

(2) In addition, the restructuring court will terminate the restructuring matter if:

1. the debtor has notified its illiquidity or over-indebtedness in accordance with section 32 (3) or other circumstances are known which show that the debtor meets the criteria for insolvency; the court may refrain from terminating the restructuring matter if opening insolvency proceedings would obviously not be in the interests of the general body of creditors in view of the status achieved in the restructuring matter; in addition, the court may refrain from terminating the restructuring matter if illiquidity or over-indebtedness results from the termination or other acceleration of a claim that, according to the notified restructuring concept, is envisaged to be modified by the plan, provided that it is more likely than not that the restructuring goal will be achieved;

2. it becomes apparent due to a notification under section 32 (4) or any other circumstances that the notified proposed restructuring does not have any prospects of being implemented;

3. circumstances are known to the court which show that the debtor has committed a serious violation of its obligations under section 32; or

4. in any previous restructuring matter:

   a) the debtor has obtained a stabilisation order or a confirmation of the plan; or

   b) termination has been made under number 3 or under paragraph (1) number 3.

Sentence 1 number 4 is not applicable if the cause of the previous restructuring matter has been successfully removed as a result of a sustainable recovery. If less than three years have elapsed since the end of the order period or the decision regarding the request for confirmation of the plan in the previous restructuring matter, it is to be assumed in case of doubt that no sustainable recovery has occurred. Debtor-in-possession insolvency proceedings will be deemed equivalent to making use of tools of the restructuring framework.

(3) The restructuring matter will not be terminated as long as the court has refrained from revoking a stabilisation order pursuant to section 59 (3).

(4) The debtor may bring an immediate appeal (*sofortige Beschwerde*) against the termination of the restructuring matter under paragraphs (1) to (3).

Section 34

Restructuring court; authorisation to issue legal ordinances

(1) The local court in whose district a higher regional court (*Oberlandesgericht*) is located has exclusive jurisdiction for decisions in restructuring matters as restructuring court for the district of the higher regional court. If this local court is not competent for regular insolvency matters, the local court that is competent for regular insolvency matters at the place where the higher regional court is located has jurisdiction.

(2) The governments of the federal states (*Länder*) are authorised, for the purposes of expedient furtherance or expedited conduct of restructuring matters, by legal ordinance:

1. to designate another local court competent for regular insolvency matters to have jurisdiction; or

2. to extend the jurisdiction of a restructuring court within any one federal state additionally to the district of one or more other higher regional courts.

The governments of the federal states may delegate such authorisation to the judicial administrations of the federal states by legal ordinance. Two or more federal states may agree to establish common departments within a local court for restructuring matters or to extend judicial districts for restructuring matters across state boundaries.

Section 35

Local jurisdiction

The restructuring court in whose district the debtor has its general place of jurisdiction has exclusive local jurisdiction. If the centre of the debtor's business activity is located

elsewhere, the restructuring court in whose district such place is located has exclusive jurisdiction.

Section 36

Single jurisdiction

The department that was competent for the first decision has jurisdiction for all decisions and measures in the restructuring matter.

Section 37

Group jurisdiction

(1) At the request of a debtor that is a member of a group of companies within the meaning of section 3e InsO (group debtor), the restructuring court seised will declare that it has jurisdiction over restructuring matters of other debtors within the same group (subsequent group proceedings), provided that the debtor has filed a permitted request in the restructuring matter and the debtor is not obviously of subordinate significance for the group of companies as a whole.

(2) Section 3a (1) sentences 2 to 4, (2), sections 3b and 3c (1), section 3d (1) sentence 1, (2) sentence 1 and section 13a InsO apply *mutatis mutandis*.

(3) At the request of the debtor and subject to the requirements of paragraph (1), the court competent for subsequent group proceedings in restructuring matters will declare that it has jurisdiction as insolvency court also for subsequent group proceedings in insolvency matters under section 3a (1) InsO.

Section 38

Applicability of the German Code of Civil Procedure (*Zivilprozessordnung*; ZPO)

Unless this Act provides otherwise, the provisions of the Code of Civil Procedure apply *mutatis mutandis* to proceedings in restructuring matters. Section 128a ZPO applies subject to the provision that the summons sent to parties attending meetings or hearings must inform these parties of the obligation not to knowingly make any audio and image or video recordings and to ensure by taking suitable measures that third parties will not be able to hear or see the audio and image or video transmission.

Section 39

Principles of the proceedings

(1) The restructuring court shall investigate *ex officio* all circumstances relevant to the proceedings in the restructuring matter, unless otherwise provided in this Act. In particular, the restructuring court may hear witnesses and experts for this purpose.

(2) The debtor must provide the restructuring court with any information required in order to decide on its requests and must assist the restructuring court in the fulfilment of its duties in all other respects.

(3) The restructuring court may render its decisions without an oral hearing. If an oral hearing is held, section 227 (3) sentence 1 ZPO will not be applied.

Section 40

Appellate remedies

(1) Decisions of the restructuring court will be subject to an appellate remedy only in those cases where this Act provides for an immediate appeal. The immediate appeal must be lodged with the restructuring court.

(2) The period within which an immediate appeal has to be brought will commence upon the announcement of the decision or, failing such announcement, upon its service.

(3) The decision regarding the appeal will only be effective when it becomes final and non-appealable. However, the court hearing the appeal may order immediate effectiveness of the decision.

Section 41

Service

(1) Documents will be served *ex officio* without the document to be served requiring certification. Service may be effected by posting the documents to the addressee under their address; section 184 (2) sentences 1, 2 and 4 ZPO apply *mutatis mutandis*. Where service is to be effected on domestic territory, the document shall be deemed to have been served three days after being posted.

(2) Service will not be made to persons with unknown residence. If such persons have a representative authorised to receive service, the documents will be served on such representative.

(3) If the court orders the debtor to perform the service of documents, such service shall be effected in accordance with sections 191 to 194 ZPO.

Subdivision 2

Restructuring law

Section 42

Notification of illiquidity and over-indebtedness; penal provision

(1) As long as the restructuring matter is pending, the obligation to file a request pursuant to section 15a (1) to (3) InsO and section 42 (2) of the German Civil Code (*Bürgerliches Gesetzbuch*; **BGB**) will be suspended. However, the parties required to file a request are obliged to notify the restructuring court without undue delay of the occurrence of illiquidity within the meaning of section 17 (2) InsO or over-indebtedness within the meaning of section 19 (2) InsO.

(2) The filing of a request for the opening of insolvency proceedings complying with the requirements of section 15a InsO will be deemed timely fulfilment of the notification requirement under paragraph (1) sentence 2.

(3) Whoever, in contravention of paragraph (1) sentence 2, does not notify the occurrence of illiquidity or over-indebtedness or does not make such notification in time will be punished with imprisonment of up to three years or a fine. If the perpetrator acts negligently, the punishment will be imprisonment for up to one year or a fine. Sentences 1 and 2 do not apply to associations (*Vereine*) and foundations (*Stiftungen*) that are subject to the obligation under paragraph (1) sentence 1.

(4) If the notification of the restructuring matter under section 31 (4) ceases to have effect, the obligations to file a request that have been suspended pursuant to paragraph (1) sentence 1 will be reinstated.

Section 43

Obligations and liability of the members of corporate bodies

(1) If the debtor is a legal entity or a person without legal personality within the meaning of section 15a (1) sentence 3, (2) InsO, the directors of such debtor will endeavour to procure that the debtor will pursue the restructuring matter with the due care of a prudent and conscientious director and will safeguard the interests of the general body of creditors. They will be liable to the debtor for any breach of this duty in the amount of any loss suffered by the creditors, unless they are not responsible for the breach of duty.

(2) Any waiver of the claims pursuant to paragraph (1) sentence 2 by the debtor or any settlement regarding these claims will be invalid insofar as the compensation is necessary in order to satisfy the creditors. This will not apply if the person liable to pay compensation enters into a settlement with its creditors in order to avoid insolvency proceedings being launched in respect of its assets, if the compensation obligation is stipulated in an insolvency plan or if an insolvency administrator is acting on behalf of the party entitled to compensation.

(3) Any claims pursuant to paragraph (1) sentence 2 will become time-barred after five years. If the debtor was a listed company at the time the breach of duty was committed, the claims will become time-barred after ten years.

Section 44

Prohibition of clauses granting default rights

(1) The fact that the restructuring matter is pending or that tools of the stabilisation and restructuring framework are used by the debtor does not as such constitute cause:

1. for the termination of any contractual relationships to which the debtor is a party;

2. for the acceleration of performance owed; or

3. for a right by the other party to refuse performance owed by such party or to demand adjustments to or other modification of the relevant contract.

Nor do these facts as such affect the effectiveness of the relevant contract.

(2) Any arrangements agreed contrary to paragraph (1) are invalid.

(3) Paragraphs (1) and (2) do not apply to transactions pursuant to section 104 (1) InsO and agreements regarding close-out netting pursuant to section 104 (3) and (4) InsO and financial collateral within the meaning of section 1 (17) KWG. This also applies to transactions which are subject to set-off of claims and performance under a system pursuant to section 1 (16) KWG.

Division 2

Court-ordered voting on the plan

Section 45

Discussion and voting meeting

(1) At the request of the debtor, the restructuring court will schedule a meeting to discuss the restructuring plan and the voting rights of the affected parties and subsequently to vote on the plan. The period for serving a summons will be at least 14 days.

(2) The request must be accompanied by the complete restructuring plan including annexes.

(3) The affected parties must be summoned to the meeting. The summons will contain a note to the effect that the meeting and voting may also be held if not all affected parties attend. The court may order the debtor to serve the summonses.

(4) Sections 239 to 242 InsO and sections 24 to 28 hereof apply *mutatis mutandis* to the proceedings. If there is a dispute regarding the voting rights granted to an affected party by a claim, a separate satisfaction right, any intra-group third-party security or a share or membership right and the parties involved are not able to reach agreement, the court will determine the relevant voting rights.

Section 46

Preliminary examination meeting

(1) At the request of the debtor, the court will schedule a separate meeting for a preliminary examination of the restructuring plan before the date of the discussion and voting meeting. This preliminary examination may be concerned with any questions relevant to the confirmation of the restructuring plan, in particular:

1. whether the selection of affected parties and grouping of the affected parties into classes meets the requirements of sections 8 to 9;

2. which voting rights are granted by a restructuring claim, a separate satisfaction right or a share or membership right; or

3. whether the debtor faces imminent illiquidity.

Section 45 (3) applies *mutatis mutandis*. The period for serving a summons will be at least seven days.

(2) The result of the preliminary examination will be summarised by the court in a note.

(3) Where expedient, the court may also schedule a preliminary examination meeting *ex officio*.

Division 3

Preliminary examination

Section 47

Request

At the request of the debtor, the restructuring court will conduct a preliminary examination even if the restructuring plan is not scheduled to be voted on in court proceedings. Such preliminary examination may be concerned with any questions relevant to the confirmation of the restructuring plan. In addition to the items specified in section 46 (1) sentence 2, this may in particular also include the requirements to be met by the proceedings for voting on the plan under sections 17 to 22.

Section 48

Procedure

(1) The affected parties concerned by the preliminary examination questions must be heard.

(2) The result of the preliminary examination will be summarised by the court in a note. The note should be issued within two weeks of the date the request was filed or, if a hearing is held, within two weeks of the date of this meeting. Section 45 (3) and section 46 (1) sentence 3 apply *mutatis mutandis* to the summons for the hearing meeting.

Division 4

Stabilisation

Section 49

Stabilisation order

(1) To the extent necessary to preserve the prospects of achieving the restructuring goal, the restructuring court will order at the request of the debtor that:

1. execution measures against the debtor will be prohibited or discontinued on an interim basis (stay of execution); and

2. rights to movable assets that might be asserted as a separate satisfaction right or right to segregation (*Aussonderungsrecht*) in the event that insolvency proceedings are opened may not be enforced by the creditor and that such assets may be used to

continue the debtor's business to the extent that they are of considerable significance for this purpose (stay of realisation).

(2) Claims that pursuant to section 4 may not be modified by a restructuring plan will not be affected by an order pursuant to paragraph (1) and its contractual effects. Further, the order may be directed at individual, several or all creditors.

(3) The order pursuant to paragraph (1) may also provide for a stay of the right of creditors to enforce rights under intra-group third-party security (section 2 (4)).

Section 50

Request

(1) The debtor must designate the requested stabilisation order pursuant to section 49 (1) in terms of its contents, the group of addressees and its duration.

(2) The debtor will attach a restructuring plan documentation to the request, comprising:

1. a draft restructuring plan updated as at the date of filing the request or a restructuring concept pursuant to section 31 (2) no. 1 updated as at such date;

2. a finance plan covering the period of six months and containing a reasonably substantiated description of the funding sources intended to ensure the continuation of the business during this period; funding sources that are not compatible with the restructuring goal will not be considered for this purpose.

(3) In addition, the debtor must declare:

1. whether it has defaulted (*Verzug*) on the fulfilment of liabilities under employment relationships or pension commitments or liabilities owed to tax authorities, social security agencies or suppliers, and specify to what extent and in relation to which creditors it has so defaulted;

2. whether and in which proceedings a stay of execution or realisation under this Act or under section 21 (2) sentence 1 no. 3 or 5 InsO has been ordered in its favour during the last three years before the date of the request; and

3. whether it has complied with its obligations under sections 325 to 328 or section 339 HGB for the last three completed financial years.

Section 51

Prerequisites of the stabilisation order

(1) The stabilisation order will be issued if the restructuring plan documentation submitted by the debtor is complete and convincing and no circumstances are known from which it can be inferred that:

1. the restructuring plan documentation is or the declarations under section 50 (3) sentence 2 are based on incorrect facts in material respects;

2. the restructuring has no prospects of success because there are no prospects that a plan implementing the restructuring concept would be adopted by the affected parties or be confirmed by the court;

3. the debtor is not yet in a state of imminent insolvency; or

4. the requested order is not necessary in order to achieve the restructuring goal.

The plan documentation will be deemed convincing if it is not apparent that the restructuring goal cannot be achieved on the basis of the envisaged measures. If the restructuring plan documentation has defects that can be remedied, the court will issue the order for a period of not more than 20 days and instruct the debtor to remedy the defects within this period.

(2) If circumstances are known from which it can be inferred that:

1. there are substantial payment arrears owed to the creditors referred to in section 50 (3) sentence 2 no. 1; or

2. the debtor has violated the disclosure requirements under sections 325 to 328 or section 339 HGB for at least one of the last three completed financial years,

the stabilisation order will be issued only if it can be expected in spite of these circumstances that the debtor is willing and able to align its management with the interests of the general body of creditors. This also applies if a stay of execution or realisation as described in section 49 (1) or provisional preservation measures under section 21 (1) sentence 2 no. 3 or 5 InsO have been ordered in favour of the debtor during the last three years before the date of filing the request, unless the cause of these orders has been successfully removed as a result of a sustainable recovery of the debtor.

(3) If no restructuring plan has been submitted by the time the stabilisation order is issued, the court may set a period for the debtor to submit the restructuring plan.

(4) The stabilisation order is to be served on all creditors concerned by it. Service may be waived in public restructuring matters (section 84) if the order is directed against all creditors with the exception of those referred to in section 4.

(5) The restructuring court will decide on the request for the issuance of the stabilisation order by way of a court order. If the court dismisses the request, the debtor may bring an immediate appeal against the order.

Section 52

Subsequent order, new order

Subject to the requirements of section 51 (1) and (2), a stabilisation order may be extended to cover additional creditors, the contents of an order or its duration may be extended (subsequent order) or, if the duration of the order has already been exceeded, it may be renewed (new order).

Section 53

Duration of an order

(1) A stabilisation order may be issued for a duration of up to three months.

(2) Subsequent or new orders may only be issued subject to the maximum duration of the order pursuant to paragraph 1, unless:

1. the debtor has submitted a plan offer to the creditors; and

2. no circumstances are known from which it could be inferred that the plan cannot be expected to be adopted within one month.

In this case, the maximum duration of the order will be extended by one month and the order will exclusively be directed against affected parties.

(3) If the debtor has requested the court to confirm the restructuring plan adopted by the affected parties, subsequent or new orders may be issued until the confirmation of the plan becomes final and non-appealable, but no longer than until the expiry of eight months after the initial order was issued. This does not apply if the restructuring plan is obviously not capable of being confirmed.

(4) Paragraph (3) does not apply if the debtor's centre of main interests has been transferred to Germany from another member state of the European Union within a three-month period prior to the date of the first use of tools of the stabilisation and restructuring framework and no publications are made under sections 84 to 86.

Section 54

Consequences of a stay of realisation

(1) If a stay of realisation has been issued, any interest owed must be paid to the creditor and the creditor must be compensated by current payments for any loss in value on account of the use. This does not apply to the extent that, in view of the amount of the claim and any other charge on the relevant asset, the realisation proceeds cannot be expected to be sufficient in order to satisfy the creditor.

(2) If the debtor, acting in line with contractual agreements concluded with the beneficiary, collects receivables assigned in order to secure a claim or if the debtor disposes of or processes movable assets that are subject to rights that might be asserted as separate satisfaction rights or rights to segregation in the event that insolvency proceedings are opened, any proceeds received thereby must be distributed to the beneficiary of such rights or must be held in a distinct form, unless the debtor agrees otherwise with such beneficiary.

Section 55

Contractual effects

(1) If, at the time the stabilisation order is issued, the debtor owes anything to a creditor under a contract, the creditor will not be entitled solely on the basis of overdue performance to refuse performance to be rendered by it during the duration of the order or

assert rights to terminate or modify the contract; this will not affect the right of the creditor to refuse to provide that part of the counter-performance that is to be rendered by it in relation to the debtor's overdue performance. If subsequent or new orders are issued, the date the initial order was issued will be decisive.

(2) Paragraph (1) does not apply if the debtor does not depend on the performance owed by the creditor in order to be able to continue its business.

(3) A creditor obliged to perform in advance will be entitled to render the performance owed by it against provision of security or concurrently (*Zug um Zug*) with the performance owed by the debtor. Paragraph (1) does not affect the right of lenders to terminate the loan agreement before the loan is disbursed on the grounds of a deterioration in the financial circumstances of the debtor or in the value of security granted for the loan (section 490 (1) BGB). Sentence 2 also applies to other credit commitments.

Section 56

Financial collateral, payment and settlement systems, close-out netting

(1) The stabilisation order does not affect the effectiveness of dispositions regarding financial collateral pursuant to section 1 (17) KWG or the effectiveness of a set-off of claims and performance under payment orders, orders between payment service providers or intermediaries or orders for the transfer of securities submitted to systems pursuant to section 1 (16) KWG. This also applies where a legal transaction of the debtor is effected and set off or financial collateral is created on the day on which the order is issued and the other party provides proof that they neither knew of the order nor should have known about it; if the other party is a system operator or participant in the system, the day on which the order is issued will be determined on the basis of the business day within the meaning of section 1 (16b) KWG.

(2) Transactions which may be the subject of an agreement regarding close-out netting under section 104 (3) and (4) InsO as well as agreements regarding close-out netting will remain unaffected by the stabilisation order and its effects. The claim resulting from close-out netting may become subject to a stay of execution and, to the extent permitted under paragraph (1), also to a stay of realisation.

Section 57

Liability of the members of corporate bodies

If the debtor is a legal entity or a person without legal personality within the meaning of section 15a (1) sentence 3, (2) InsO and obtains a stabilisation order on the basis of intentionally or negligently incorrect information, the director will be liable to compensate the affected creditors for any damage incurred by them as a result of the order. This does not apply if the director is not at fault. Sentences 1 and 2 also apply to the compensation of any damage incurred by a creditor because proceeds are not properly distributed or held as stipulated in section 54 (2). Section 43 (3) applies *mutatis mutandis* to claims under sentences 1 and 3.

Section 58

Insolvency filing

The proceedings regarding a request filed by a creditor to open insolvency proceedings over the debtor's assets will be suspended for the duration of the order.

Section 59

Revocation and termination of the stabilisation order

(1) The restructuring court will revoke the stabilisation order if:

1. requested by the debtor;

2. the notification pursuant to section 31 (4) has lost its effects or the requirements for termination of the restructuring matter pursuant to section 31 (4) no. 3, section 33 are met;

3. the debtor has failed to deliver a draft restructuring plan to the court after the expiry of a reasonable period of time granted for this purpose; or

4. circumstances are known from which it can be inferred that the debtor is not willing and able to align its management with the interests of the general body of creditors, in particular because:

   a) the restructuring plan documentation is based on incorrect facts in material respects; or

   b) the debtor's accounting and bookkeeping is so incomplete or deficient that it does not allow an assessment of the restructuring plan documentation, in particular the finance plan.

(2) The stabilisation order will be revoked on the basis of the reasons specified in paragraph (1) nos. 2 and 4 also at the request of a creditor affected by the order if such creditor shows to the satisfaction of the court that a reason for termination has occurred.

(3) The restructuring court may refrain from revocation if the continuation of the stabilisation order appears appropriate in order to ensure an orderly transition to insolvency proceedings in the interests of the general body of creditors. The court will set a maximum period of three weeks within which the debtor must furnish proof to the court that a request was filed for the opening of insolvency proceedings. The stabilisation order shall be revoked once this period has elapsed.

(4) The stabilisation order will cease once the restructuring plan is confirmed or confirmation of the plan is denied.

Division 5

Confirmation of the plan

Subdivision 1

Confirmation procedure

Section 60

Request

(1) At the debtor's request the court will issue a court order to confirm the restructuring plan adopted by the affected parties. The request may also be filed in the discussion and voting meeting. If voting on the plan was not effected in the context of a court procedure (section 45), the debtor must submit the request for confirmation of the restructuring plan together with the plan put to the vote, including its annexes, as well as the record of the voting result and all documents and other evidence showing how voting was effected and what the result was.

(2) Where the debtor is an entity without legal personality or a partnership limited by shares, the consent of all personally liable members is required for the request for confirmation of a restructuring plan that does not exempt the personally liable members from liability for the claims and rights modified by the plan. This does not apply if the personally liable members are:

1. legal entities; or

2. entities without legal personality where no personally liable member is a natural person and no personally liable member is itself an entity without legal personality where a personally liable member is a natural person or the chain of entities continues in this manner.

Section 61

Hearing

Before deciding on the confirmation of the restructuring plan the court may hear the affected parties. If voting on the plan was not effected in the context of a court procedure, the court must hold a meeting to hear the affected parties. Section 45 (3) and section 46 (1) sentence 4 apply *mutatis mutandis*.

Section 62

Conditional restructuring plan

If the restructuring plan provides that certain performance is to be rendered or other measures are to be taken prior to its confirmation, the plan will be confirmed only once these conditions are fulfilled and no grounds for refusal exist.

Section 63

Refusal of confirmation

(1) Confirmation of the restructuring plan must be refused *ex officio* if:

1. the debtor is not in a state of imminent illiquidity;

2. the provisions concerning the content and the procedural treatment of the restructuring plan as well as concerning the adoption of the plan by the affected parties have not been complied with in any material respect and the debtor is unable to remedy the non-compliance, or does not remedy it within a reasonable period set by the restructuring court; or

3. the claims allocated to the affected parties in the normative part of the plan and the other creditors' claims not affected by the plan evidently cannot be satisfied.

(2) If the restructuring plan provides for new financing, confirmation must be refused if the restructuring concept underlying the plan is not convincing or if circumstances are known which show that the concept is not based on the actual facts or does not have reasonable prospects of success.

(3) If voting on the plan was not effected in the context of a court procedure, the burden of proof regarding any doubts as to the proper adoption of the restructuring plan by the affected parties will be on the debtor. If the voting right of an affected party is a matter of dispute, the court will base its decision on the voting right to be determined pursuant to section 24.

(4) Confirmation must also be refused if the adoption of the restructuring plan has been procured using improper means, in particular by preferential treatment of an affected party.

Section 64

Protection of minorities

(1) At the request of an affected party who voted against the restructuring plan, confirmation of the plan is to be refused if the party filing the request is likely to be placed at a disadvantage by the restructuring plan as compared to their situation without the plan. If the debtor has obtained a stay of execution or realisation against the holder of a separate satisfaction right which has prevented such holder from realising this right, any reductions in the value of such right occurring during the duration of the order will not be considered when determining the position such holder would be in without a plan, unless the reduction in value had also have occurred in the absence of the order.

(2) The request pursuant to paragraph (1) is admissible only if the party filing the request objected to the plan and claimed already in the voting procedure that they are likely to be placed at a disadvantage by the plan compared to a situation without a plan. If voting on the plan was effected in a discussion and voting meeting held in court, the party filing the request must show to the satisfaction of the court, at the latest at this meeting, that they are likely to be placed at a disadvantage by the plan.

(3) The request pursuant to paragraph (1) is to be dismissed if the normative part of the restructuring plan provides for funds to be made available in the event that an affected party can prove that they would be placed at a disadvantage. Whether the party filing the request is to receive compensation from such funds must be decided outside the restructuring matter.

(4) If neither a meeting of affected parties (section 20) nor a discussion and voting meeting (section 45) was held, paragraph (2) sentence 1 applies only if the plan offer specifically noted the requirement that a party that is likely to be placed at a disadvantage by the plan must assert this fact in the voting procedure. If a meeting of affected parties was held, paragraph (2) sentence 1 applies only if the convocation notice specifically noted the requirement that a party that is likely to be placed at a disadvantage by the plan must assert this fact in the voting procedure. Paragraph (2) sentence 2 applies only if the summons specifically noted the requirement that a party that is likely to be placed at a disadvantage by the plan must show this to the satisfaction of the court at the latest at the discussion and voting meeting.

Section 65

Publication of decision

(1) If the decision on the request for confirmation of the restructuring plan is not announced at the hearing meeting or the discussion and voting meeting, it is to be announced in a special meeting to be scheduled as soon as possible.

(2) If the restructuring plan is confirmed, a copy of the plan or a summary of its material contents is to be communicated to the affected parties together with information on its confirmation; this will not apply to shareholders in a stock corporation or a partnership limited by shares holding an equity interest in the debtor. Listed companies must publish a summary of the material contents of the plan on their website. A copy of the plan or a summary of its material contents pursuant to sentence 1 will not be required to be communicated if the plan communicated before voting was adopted unchanged.

Section 66

Immediate appeal

(1) Each affected party may file an immediate appeal against the order confirming the restructuring plan. The debtor may file an immediate appeal if confirmation of the restructuring plan has been refused.

(2) An immediate appeal against the confirmation of the restructuring plan is admissible only if the party filing the appeal:

1. objected to the plan in the voting procedure (section 64 (2));

2. voted against the plan; and

3. shows to the satisfaction of the court that they will be placed at a significant disadvantage by the plan compared to a situation without the plan and that this disadvantage cannot be compensated by means of a payment from the funds referred to in section 64 (3).

(3) Paragraph 2 nos. 1 and 2 apply only if the convocation notice or the summons to the meeting specifically noted the requirement of objection and rejection of the plan. If neither a meeting of affected parties (section 20) nor a discussion and voting meeting (section 45) was held, paragraph (2) nos. 1 and 2 apply only if the plan offer specifically noted the requirement of objection and rejection of the plan.

(4) At the request of the party filing the appeal the court will order the suspensive effect of the appeal if implementing the restructuring plan would result in serious, and in particular irreversible disadvantages for the party filing the appeal that are disproportionate to the advantages of an immediate implementation of the plan.

(5) The court hearing the appeal will dismiss the appeal against the confirmation of the restructuring without undue delay at the request of the debtor if it is deemed preferential that the confirmation of the plan becomes final and non-appealable as soon as possible because the disadvantages of a delayed implementation of the plan override the disadvantages for the party filing the appeal; redress proceedings will not be available. This will not apply in the event of an especially serious violation of law. If the court hearing the appeal dismisses the appeal in accordance with sentence 1, the debtor must compensate the party filing the appeal for any damage incurred by such party as a result of the implementation of the plan; the reversal of effects arising from the restructuring plan cannot be claimed as damages. The regional court (*Landgericht*) that dismissed the appeal will have exclusive jurisdiction for any actions for damages in accordance with sentence 3.

Subdivision 2

Effects of the confirmed plan; monitoring implementation of the plan

Section 67

Effects of the restructuring plan

(1) As soon as the restructuring plan is confirmed, the effects stipulated in the normative part will occur. This also applies in relations with affected parties who voted against the plan or did not take part in the voting although they were properly included in the voting procedure.

(2) If the debtor is an entity without legal personality or a partnership limited by shares, any discharge of the debtor of liabilities also serves as a discharge of its personally liable members, unless otherwise provided for in the restructuring plan.

(3) The restructuring plan does not affect the rights restructuring creditors have against joint debtors and guarantors of the debtor as well as the rights of creditors to objects not forming part of the debtor's assets or any rights deriving from a priority notice relating to such objects, with the exception of rights under intra-group third-party security which were modified pursuant to section 2 (4). However, the debtor will be discharged by the plan of any claims of the joint debtor, guarantor or other party entitled to recourse in the same way as the debtor is discharged of the claims of the creditor.

(4) If a creditor has received better satisfaction than they would be entitled to under the restructuring plan, this will not constitute any restitution obligation.

(5) If restructuring claims are converted into shares or membership rights in the debtor, the debtor may, following confirmation of the restructuring plan by the court, not assert

any claims against the previous creditors on account of an over-valuation of the claims in the plan.

(6) Any procedural defects relating to the voting on the plan as well as any absence of intent in the offer and adoption of the plan will be deemed remedied once the restructuring plan has been confirmed and has thus become final and non-appealable.

Section 68

Other effects of the restructuring plan

(1) Where rights in objects are to be constituted, altered, transferred or cancelled or shares in a limited liability company (*Gesellschaft mit beschränkter Haftung*) are to be assigned, the declarations of intent of the affected parties and the debtor which are included in the restructuring plan will be deemed to have been made in the prescribed form.

(2) The resolutions or other declarations of intent of the affected parties and the debtor which are included in the restructuring plan will be deemed to have been made in the prescribed form. Convocations, announcements and other measures required under corporate law in connection with the preparation of resolutions of the affected parties will be deemed to have been effected in the prescribed form.

(3) The above will apply *mutatis mutandis* to undertakings included in the restructuring plan on which a measure pursuant to paragraph (1) or (2) is based.

Section 69

Reinstatement of deferred or waived claims

(1) If restructuring claims were deferred or partly waived on the basis of the normative part of the restructuring plan, such deferral or waiver will no longer be binding upon the creditor in respect of whom the debtor materially defaults in performing the plan. The debtor will be deemed to have materially defaulted only if the debtor has not paid a due debt although the creditor has issued a warning in writing, setting a grace period of at least two weeks.

(2) If insolvency proceedings are opened over the debtor's assets before the plan has been performed in full, the deferral or waiver within the meaning of paragraph (1) will no longer be binding upon any of the creditors.

(3) The restructuring plan may contain provisions that derogate from paragraph (1) or (2). However, the restructuring plan may not derogate from paragraph (1) to the detriment of the debtor.

Section 70

Contested claims and defaulted claims

(1) Contested restructuring claims will be subject to the provisions of the restructuring plan as applicable to them in the amount in which they are subsequently determined, but not exceeding the amount assumed as a basis in the plan.

(2) If a restructuring claim has been contested in the voting procedure or if the amount of the defaulted claim of a holder of a separate satisfaction right has not yet been determined, the debtor will not be deemed to be in default in performing the restructuring plan within the meaning of section 69 (1) if the debtor, until such time as the claim amount is finally determined, takes into account the claim at the amount applied for the purposes of deciding on the voting right for voting on the plan. If the restructuring court has not decided on the voting right, the restructuring court will, at the request of the debtor or of the creditor, subsequently determine to what extent the debtor has to provisionally take such claim into account.

(3) If the final determination of the claim shows a shortfall in the debtor's payments, the debtor must pay the amount of the shortfall. The debtor will be deemed to have materially defaulted in performing the restructuring plan only if the debtor fails to pay the shortfall although the creditor has issued a warning in writing, setting a grace period of at least two weeks.

(4) If the final determination of the claim shows an overpayment by the debtor, the debtor may claim restitution of the overpaid amount only to the extent that such amount also exceeds that portion of the claim owed to the creditor under the restructuring plan that has not yet matured.

Section 71

Execution under the restructuring plan

(1) Restructuring creditors whose claims were not recorded in the confirmation order as being disputed may levy execution against the debtor under the confirmed final and non-appealable restructuring plan in the same way as under an enforceable judgment. Section 202 InsO applies *mutatis mutandis*.

(2) Paragraph (1) also applies to execution against a third party who, by written statement submitted to the restructuring court, has undertaken responsibility together with the debtor for performance of the plan without reserving the defence of failure to pursue remedies (*Einrede der Vorausklage*).

(3) If a creditor asserts the rights due to them in the event of a material default of the debtor in performing the plan, the creditor must show to the satisfaction of the court that a warning was issued and a grace period expired, but is not required to submit any further proof of the debtor's default, in order for the execution clause to be issued in respect of such rights and for execution to be levied.

(4) If an enforceable title was previously issued for the claim underlying a provision contained in the plan, the confirmed final and non-appealable restructuring plan will replace such title; further execution under the previous title is thus no longer permitted.

Section 72

Monitoring of the plan

(1) The normative part of the restructuring plan may provide that satisfaction of the claims owed to the creditors under the normative part is to be monitored.

(2) Such monitoring is to be effected by a restructuring practitioner.

(3) If the restructuring practitioner finds that claims the satisfaction of which is monitored are not or cannot be satisfied, the restructuring practitioner will notify the registration court and the creditors who have claims against the debtor under the plan without undue delay.

(4) The restructuring court will order that monitoring is to be discontinued if:

1. the claims the satisfaction of which is monitored have been satisfied or their satisfaction has been ensured;

2. three years have elapsed since the date on which the restructuring plan became final and non-appealable; or

3. insolvency proceedings are opened over the assets of the debtor or the opening of insolvency proceedings is refused for lack of assets.

Chapter 3

Restructuring Practitioner

Division 1

Appointment *ex officio*

Section 73

Appointment *ex officio*

(1) The restructuring court will appoint a restructuring practitioner if:

1. in the context of the restructuring, the rights of consumers or small and medium-sized as well as micro enterprises are envisaged to be affected, because their claims or separate satisfaction rights are envisaged to be modified by the restructuring plan or the enforcement of such claims and separate satisfaction rights is envisaged to be stayed by a stabilisation order;

2. the debtor requests a stabilisation order which, with the exception of the claims excluded pursuant to section 4, is to be directed against all or substantially all creditors;

3. the restructuring plan provides for monitoring satisfaction of the claims owed to the creditors (section 72).

The court may refrain from making an appointment in individual cases if the appointment is not required in order to protect the rights of the parties or is obviously disproportionate.

(2) An appointment will also be made if it is foreseeable that the restructuring goal can only be reached against the will of the holders of restructuring claims or separate satisfaction rights, without whose consent to the restructuring plan a confirmation of the plan is possible only subject to the requirements of section 26. This does not apply where the only affected parties involved in the restructuring are financial sector entities. Affected parties who, as legal successors, have assumed the claims created by financial sector entities or are

affected with respect to claims under instruments that are negotiable on the money or capital market are deemed equal to financial sector entities. Uncertificated instruments issued on identical terms are deemed equivalent to instruments that are negotiable on the money or capital market.

(3) The court may appoint a restructuring practitioner in order to conduct reviews as an expert, in particular:

1. regarding the requirements for confirmation pursuant to section 63 (1) no. 1, (2) and section 64 (1); or

2. regarding the adequacy of compensation in the event of interference with intra-group third-party security or limitation of the liability of members with unlimited liability.

Section 74

Appointment

(1) A tax adviser, auditor or lawyer who is experienced in restructuring and insolvency matters or other natural person with a similar qualification who is suitable in the individual case and independent of the creditors and the debtor and who is to be selected from the group of all persons prepared to assume this office is to be appointed restructuring practitioner.

(2) In the process of selecting a restructuring practitioner pursuant to section 73 (1) and (2), the restructuring court will consider proposals by the debtor, the creditors and persons holding an equity interest in the debtor. Should the debtor have presented a certificate issued by a tax adviser, auditor or lawyer who is experienced in restructuring and insolvency matters or a person with a similar qualification which confirms that the debtor fulfils the requirements specified in section 51 (1) and (2), the court may only deviate from the proposal made by the debtor if the proposed person is obviously not suitable; reasons must be provided for this view. Should affected parties who hold, or are likely to hold, more than 25 percent of the voting rights in each of the classes of holders of restructuring claims or separate satisfaction rights formed or to be formed under section 9, submit a joint proposal and the court is not bound under sentence 2, the court may only deviate from the joint proposal made by the affected parties if the proposed person is obviously not suitable; reasons must be provided for this view.

(3) Where the restructuring court accepts a proposal by the debtor under paragraph (2) sentence 2 or by the affected parties under paragraph (2) sentence 3, it may appoint an additional restructuring practitioner and confer on them the duties to be performed by such restructuring practitioner; this does not apply to the duties under section 76 (2) no. 1 half-sentences 1 and 2.

Section 75

Legal position

(1) The restructuring practitioner is under the supervision of the restructuring court. The court may at any time request individual information or a report on the status.

(2) The restructuring court may dismiss the restructuring practitioner for cause. The dismissal may be ordered *ex officio* or at the request of the restructuring practitioner, the

debtor or a creditor. If requested by the debtor or a creditor, the dismissal will only be ordered where the practitioner is not independent which is to be shown to the satisfaction of the court by the requesting party. The restructuring practitioner is to be heard before the decision is taken.

(3) The practitioner may bring an immediate appeal against the dismissal. The requesting party may bring an immediate appeal against an order rejecting the request.

(4) The restructuring practitioner will perform their duties with due care and diligence. The practitioner will perform their duties impartially. Should the practitioner culpably breach the duties incumbent on them, they are obliged to pay damages to the damaged parties. The claim to compensation for the damage caused by a breach of duty on the part of the restructuring practitioner becomes time-barred in accordance with the provisions of the regular limitation period as defined in the German Civil Code. The claim becomes time-barred no later than three years from the date on which the restructuring matter ceased to be pending. If an order has been issued for the plan to be monitored, the date of completion of the monitoring of the plan will be decisive instead of the date on which the restructuring matter ceased to be pending.

Section 76

Duties

(1) Should the restructuring practitioner identify circumstances which justify the termination of the restructuring matter under section 33, they must notify the restructuring court thereof without undue delay.

(2) Where the requirements set out in section 73 (1) nos. 1 or 2 or (2) are met:

1. the restructuring practitioner is to decide how the restructuring plan is put to the vote; where the vote is not passed in court proceedings, the practitioner will chair the meeting of the affected parties and document the vote; the practitioner examines the claims and separate satisfaction rights, intra-group third-party security and shares or membership rights of the affected parties; where restructuring claims, separate satisfaction rights, intra-group third-party security or shares or membership rights are disputed or doubtful in terms of their grounds or amount, the practitioner will notify the other affected parties thereof and will work towards clarification of the voting right by way of a preliminary examination under sections 47 and 48;

2. the court may confer on the practitioner the power:

   a) to examine the economic situation of the debtor and supervise its management;

   b) to demand from the debtor that incoming funds can only be received by and payments can only be made by the practitioner;

3. the court may instruct the debtor to notify the practitioner of payments and to only effect payments outside the ordinary course of business if the practitioner gives its consent.

(3) Should a stabilisation order be issued for the benefit of the debtor:

1. the practitioner will verify on an ongoing basis whether the criteria for the order continue to exist or whether a cause for revoking the order exists; for this purpose, the practitioner will examine the circumstances of the debtor;

2. the practitioner has the right to assert the reasons for revoking the order.

(4) Where the debtor submits a restructuring plan for confirmation, the practitioner will comment on the declaration under section 14 (1). Should the practitioner be appointed prior to the voting on the plan, the opinion will be provided to the affected parties in the form of an additional attachment. The report referred to in sentence 1 will also comment on any doubts as regards the existence or amount of restructuring claims, separate satisfaction rights, intra-group third-party security or shares or membership rights under paragraph (2) no. 1 half-sentence 4 or any related disputes.

(5) The debtor is obliged to provide the requested information and to grant inspection of its books and business documents to the practitioner and assist them in fulfilling their duties.

(6) The restructuring court may order the restructuring practitioner to perform the service of documents incumbent on the court. The practitioner may use third parties, in particular their own staff, to serve the documents and to file them. The practitioner shall submit the notices prepared by them in accordance with section 184 (2) sentence 4 ZPO for inclusion in the court files without undue delay.

Division 2

Appointment upon request

Section 77

Request

(1) At the request of the debtor, the restructuring court will appoint a restructuring practitioner to facilitate negotiations between the parties involved (optional restructuring practitioner). Creditors shall have this right jointly if they hold or are likely to hold more than 25 percent of the voting rights in a class and if they undertake to assume the costs of the appointment jointly and severally.

(2) The request may be aimed at assigning one or several duties under section 76 to the practitioner.

Section 78

Appointment and legal position

(1) Section 74 (1) applies *mutatis mutandis* to the appointment of the optional restructuring practitioner.

(2) Should the creditors who are anticipated to collectively represent all classes included in the restructuring plan propose a candidate for the office of optional restructuring practitioner, the court may only deviate from such proposal if the candidate is obviously not

suitable or, where the practitioner is to be appointed exclusively for the purpose of facilitating negotiations between the parties involved, if the debtor rejects the proposal; reasons must be provided for any deviation.

(3) Section 75 applies *mutatis mutandis* to the legal position of the optional restructuring practitioner.

Section 79

Duties

The optional restructuring practitioner assists the debtor and the creditors in developing and negotiating the restructuring concept and the plan based thereon.

Division 3

Remuneration

Section 80

Claim to remuneration

The restructuring practitioner has a claim to remuneration (fees and expenses) in line with the following provisions. Agreements on the remuneration will only take effect if the following provisions on the permissible content and procedures are observed.

Section 81

Standard remuneration

(1) Insofar as they become personally active, the restructuring practitioner will receive fees based on appropriate hourly rates.

(2) Where support by qualified employees is required, the restructuring practitioner will receive fees based on appropriate hourly rates for their work too.

(3) In determining the hourly rates, the restructuring court will consider the size of the business, nature and scope of the economic difficulties faced by the debtor as well as the qualification of the restructuring practitioner and of the qualified employees. The hourly rate may equal up to EUR 350 for the personal activity of the restructuring practitioner and up to EUR 200 for the work performed by the qualified employees.

(4) The restructuring court determines the hourly rates when appointing the restructuring practitioner. The court simultaneously determines, based on time budgets which take reasonably into account the likely effort involved and the qualification of the practitioner and the qualified employees, a maximum fee amount. For this purpose, the restructuring court will hear the person to be appointed and those persons who owe expenses under no. 9017 of the schedule of costs to the German Court Fees Act (*Gerichtskostengesetz*) (expense debtors).

(5) The appointment of an optional restructuring practitioner is to be made only after payment of the court fee for the appointment under no. 2513 of the schedule of costs to the German Court Fees Act and an advance payment on the expenses under no. 9017 of the schedule of costs to the German Court Fees Act has been made. If an appointment is made *ex officio*, the restructuring court should also decide on each request by the debtor to use a tool of the stabilisation and restructuring framework only after payment of the court fee for the appointment under no. 2513 of the schedule of costs to the German Court Fees Act and an advance payment on the expenses under no. 9017 of the schedule of costs to the German Court Fees Act has been made.

(6) Should the time budgets used as a basis in determining the maximum amount not be sufficient for a proper performance of the duties and powers, the practitioner will notify the restructuring court without undue delay of the reason and scope of the required increase. In such case, the restructuring court will take a decision on adjusting the budget without undue delay after hearing the expense debtors. Paragraph (5) applies *mutatis mutandis*.

(7) Section 5 (2) sentence 1 no. 2 and sections 6, 7 and 12 (1) sentence 2 no. 4 of the German Judicial Remuneration and Compensation Act (*Justizvergütungs- und -entschädigungsgesetz*) apply *mutatis mutandis* to the reimbursement of expenses.

Section 82

Determination of remuneration

(1) At the request of the restructuring practitioner, the restructuring court, following termination of the appointment of the restructuring practitioner, will determine the remuneration by order.

(2) When determining the remuneration under paragraph (1), the restructuring court also decides who is to bear the expenses under no. 9017 of the schedule of costs to the German Court Fees Act and in which amount. The expenses shall be imposed on the debtor. In deviation from sentence 2, where an optional restructuring practitioner has been appointed at the request of creditors, the expenses shall be imposed on the creditors which filed the request, unless incurred for tasks assigned to the restructuring practitioner by the restructuring court *ex officio* or at the request of the debtor.

(3) The restructuring practitioner and each expense debtor may bring an immediate appeal against any determination of the hourly rate under section 81 (4), the determination or adjustment of the maximum amount under section 81 (4) and (6) and the determination of the remuneration.

(4) At the request of the restructuring practitioner, an appropriate advance payment is to be made if the restructuring practitioner has incurred or is likely to incur considerable expenses or if the remuneration to be expected for work already performed exceeds an amount of EUR 10,000.

Section 83

Remuneration in special cases

(1) In special cases, hourly rates exceeding the maximum amounts of section 81 (3) may be determined as the basis of fees, in particular if:

1. all anticipated expense debtors give their consent;

2. no other suitable person agrees to assume the office; or

3. the duties conferred on the restructuring practitioner, given the special circumstances of the restructuring matter, come close to the duties conferred on a custodian (*Sachwalter*) in debtor-in-possession insolvency proceedings, in particular because a general stabilisation order is issued or all or substantially all creditors and persons holding an equity interest in the debtor are included in the restructuring plan, with the exception of the creditors to be excluded under section 4.

In the case of sentence 1 no. 3 a remuneration in accordance with other principles, in particular a calculation based on the value of the claims against the debtor included in the restructuring plan or the assets of the business, may come into consideration.

(2) If the restructuring practitioner is appointed at the request and on proposal of all anticipated expense debtors and the restructuring practitioner and all expense debtors submit an agreement on the remuneration, the court is to use this agreement as a basis for calculating the remuneration, unless the agreement results in an inappropriate remuneration.

Chapter 4

Public Restructuring Matters

Section 84

Request and first decision

(1) In proceedings relating to restructuring matters, public announcements are only made if the debtor so requests. The request is to be made before, and may only be withdrawn until, the first decision in the restructuring matter is taken. Article 102c section 5 of the Introductory Act to the German Insolvency Code (*Einführungsgesetz zur Insolvenzordnung*) applies *mutatis mutandis* to the request.

(2) Where the debtor has requested that public announcements be made in the proceedings relating to the restructuring matter, the first decision issued in the restructuring matter must state:

1. the grounds on which the international jurisdiction of the court is based; and

2. whether jurisdiction is derived from article 3 (1) or (2) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19; L 349, 21.12.2016, p. 6), as amended.

The information specified in article 24 (2) of Regulation (EU) 2015/848 must be publicly announced. Article 102c section 4 of the Introductory Act to the German Insolvency Code is to be applied *mutatis mutandis*.

Section 85

Special provisions

(1) In addition to the information specified in section 84 (2) sentence 2, the following information must be publicly announced:

1. time and place of court meetings;

2. the appointment and dismissal of a restructuring practitioner;

3. all court decisions issued in the restructuring matter.

(2) If public announcements pursuant to paragraph (1) are made, it is not necessary to serve summonses for meetings on shareholders, limited liability shareholders of a limited partnership and bondholders. If the debtor is a listed stock corporation, section 121 (4a) of the German Stock Corporation Act (*Aktiengesetz*) applies *mutatis mutandis*.

Section 86

Public announcement; authorisation to issue legal ordinances

(1) Public announcements are made by way of a central and nationwide online publication; public announcements may be effected by means of excerpts. The announcement is deemed made once two more days have passed since the publication date.

(2) The Federal Ministry of Justice and Consumer Protection is authorised to provide for, by means of legal ordinance subject to the consent of the Bundesrat, the details of the central and nationwide online publication. In this context, in particular deletion periods are to be provided for, as are regulations ensuring that the publications:

1. remain intact, complete, factually correct and up to date;

2. can be traced to their source at any time.

(3) Public announcements shall suffice as evidence of service on all parties involved even if additional individual service is prescribed by the present Act.

Section 87

Restructuring forum; authorisation to issue legal ordinances

(1) Affected parties may request other affected parties in the Federal Gazette's (*Bundesanzeiger*) restructuring forum to exercise their voting rights in a voting on the plan in a certain way, to grant proxy or to support a proposal to amend the restructuring plan that was submitted.

(2) The request must include the following information:

1. name and address of the affected parties;

2. the debtor;

3. the restructuring court and the case number of the restructuring matter;

4. the proposal for exercising voting rights, for granting proxy or amending the plan; and

5. the date of the meeting of the affected parties or the expiry of the period for accepting the plan offer.

(3) The request may refer to an explanation provided on the website of the requesting party and its electronic address.

(4) In the Federal Gazette's restructuring forum, the debtor may refer to a statement regarding the request on their website.

(5) The Federal Ministry of Justice and Consumer Protection is authorised to provide for, by means of legal ordinance that is not subject to the consent of the Bundesrat, the exterior design of the restructuring forum and further details, in particular on the request, the reference, the fees, the deletion periods, the claim to deletion, cases of abuse and inspection.

Section 88

Applicability of article 102c of the Introductory Act to the German Insolvency Code

In public restructuring matters article 102c sections 1, 2, 3 (1) and (3), sections 6, 15, 25 and 26 of the Introductory Act to the German Insolvency Code apply *mutatis mutandis*.

Chapter 5

Right of Avoidance and Liability Law

Section 89

Legal acts performed while the restructuring matter is pending

(1) The assumption of a contribution *contra bonos mores* to a delayed filing for insolvency or a legal act committed with the intent to prejudice creditors cannot be based solely on the fact that a person involved in the legal act had knowledge that the restructuring matter was pending or that the debtor made use of tools of the stabilisation and restructuring framework.

(2) Should the court, following a notification of illiquidity or over-indebtedness, not terminate the restructuring matter under section 33 (2) sentence 1 no. 1, paragraph (1) also applies to knowledge of the illiquidity or over-indebtedness.

(3) If the debtor has notified an illiquidity or over-indebtedness under section 32 (3), any payment made in the ordinary course of business, in particular payments required for continuing ordinary business activities and preparing and implementing the notified proposed restructuring, is deemed compatible with the due care of a prudent director until the restructuring matter is terminated under section 33 (2) sentence 1 no. 1. This does not apply to payments that can be withheld until a decision which is expected for the foreseeable future is issued by the restructuring court, without such withholding resulting in disadvantages for the continuation of the restructuring project.

Section 90

Consequences and implementation of the plan

(1) The provisions of a confirmed final and non-appealable restructuring plan and legal acts performed in the context of implementing such plan, with the exception of claims with a ranking in line with section 39 (1) no. 5 InsO and the provision of security that is voidable pursuant to section 135 InsO or section 6 of the German Act on the Avoidance of Legal Acts by a Debtor outside Insolvency Proceedings (*Anfechtungsgesetz*; **AnfG**), are only voidable until a sustainable restructuring is implemented if the confirmation was issued based on incorrect or incomplete information provided by the debtor and the other party was aware thereof.

(2) Should the normative part of the restructuring plan provide for the transfer of all or substantially all of the debtor's assets, paragraph (1) shall only apply insofar as it is ensured that the creditors who are not affected by the plan are able to obtain satisfaction, with priority over the affected parties, from the consideration that is appropriate in view of the value of the assets transferred.

Section 91

Calculation of periods

The time during which the restructuring matter is pending will not be included in the calculation of the periods pursuant to sections 3 to 6a AnfG or pursuant to sections 88, 130 to 136 InsO.

Chapter 6

Employee Participation; Creditors' Committee

Section 92

Participation rights under the German Works Constitution Act

The debtor's obligations *vis-à-vis* the employee representation bodies and their participation rights under the German Works Constitution Act (*Betriebsverfassungsgesetz*) will not be affected by this Act.

Section 93

Creditors' committee

(1) If, in a restructuring matter, the claims of all creditors, with the exception of the claims specified in section 4, are to be modified by a restructuring plan and the restructuring matter has the characteristics of an overall procedure, the court may establish a creditors' committee. Section 21 (2) sentence 1 no. 1a InsO applies *mutatis mutandis*. Creditors who are not affected by the plan may also be represented on the committee.

(2) If a creditors' committee has been established, the joint proposal by the affected parties pursuant to section 74 (2) sentence 3 will be substituted by the unanimous resolution by the creditors' committee.

(3) The committee members will support and monitor the debtor's management activities. The debtor will notify the committee of the extent to which the tools of the stabilisation and restructuring framework have been used.

(4) The creditors' committee members have a claim to remuneration for their work and to compensation for reasonable expenses. The remuneration amount will be determined in line with section 17 of the German Fee Ordinance under Insolvency Law (*Insolvenzrechtliche Vergütungsverordnung*).

Part 3: Recovery Mediation

Section 94

Request

(1) At the request of a debtor capable of restructuring, the court will appoint a suitable person who is experienced in the relevant line of business and independent of the creditors and the debtor as recovery mediator (*Sanierungsmoderator*). This does not apply if the debtor is obviously illiquid. If the debtor is a legal entity or an entity without legal personality for the liabilities of which no natural person is liable as a direct or indirect member, sentence 2 will also apply in the event of an obvious over-indebtedness.

(2) The request must state:

1. the purpose of the company; and

2. the type of the economic or financial difficulties.

A list of creditors and a list of the assets as well as a declaration by debtor to the effect that they are not illiquid must be attached to the request. If the debtor is a legal entity or a person without legal personality for the liabilities of which no natural person is liable as a direct or indirect member, the declaration must also state that no over-indebtedness has occurred.

(3) The request must be addressed to the court that is competent for restructuring matters.

Section 95

Appointment

(1) The recovery mediator is appointed for a term of up to three months. At the request of the mediator which requires the consent of the debtor and the creditors involved in the negotiations, the term of appointment may be renewed for up to three more months. Should the confirmation of a recovery settlement (*Sanierungsvergleich*) under section 97 be applied for within such term, the term of appointment will be renewed until the decision on the confirmation of the settlement is taken.

(2) The appointment will not be publicly announced.

Section 96

Recovery mediation

(1) The recovery mediator mediates between the debtor and their creditors by identifying a solution to overcome the economic and financial difficulties.

(2) The debtor grants the mediator access to their books and records and provides the mediator with the requested expedient information.

(3) Once a month, the recovery mediator will report in writing to the court on the progress of recovery mediation. The report must at any rate provide information on:

1. the type and causes of the economic and financial difficulties;

2. the group of creditors and other parties involved in the negotiations;

3. the subject matter of negotiations; and

4. the objective and the likely progress of negotiations.

(4) The recovery mediator will notify the court of any illiquidity of the debtor of which the recovery mediator has become aware. If the debtor is a legal entity or an entity without legal personality where none of its personally liable members are a natural person, the same shall apply for the debtor's over-indebtedness.

(5) The recovery mediator is under the supervision of the restructuring court. The restructuring court may dismiss the recovery mediator for cause. The recovery mediator is to be heard before the decision is issued.

Section 97

Confirmation of a recovery settlement

(1) A recovery settlement which the debtor concludes with their creditors and which may involve third parties may be confirmed by the restructuring court at the request of the debtor. The confirmation will be withheld if the recovery concept underlying the settlement:

1. is not convincing or not based on the actual circumstances; or

2. has no reasonable prospects of success.

(2) The recovery mediator will comment in writing on the requirements of paragraph (1) sentence 2.

(3) A recovery settlement agreed under paragraph (1) is only voidable subject to the requirements of section 90.

Section 98

Remuneration

(1) The recovery mediator is entitled to an appropriate remuneration. Such remuneration is calculated based on the time and resources required to perform the duties in connection with the recovery mediation.

(2) Sections 80 to 83 apply *mutatis mutandis*.

Section 99

Dismissal

(1) The recovery mediator will be dismissed:

1. at own request or at the request of the debtor;

2. *ex officio* if the restructuring court was notified by the mediator that the criteria for the insolvency of the debtor are met.

(2) If the mediator is dismissed under paragraph (1) no. 1, the court will appoint another mediator at the request of the debtor.

Section 100

Transition to the stabilisation and restructuring framework

(1) If the debtor makes use of tools of the stabilisation and restructuring framework, the recovery mediator will remain in office until the term of appointment expires, they are dismissed under section 99 or a restructuring practitioner is appointed.

(2) The restructuring court may appoint the recovery mediator as the restructuring practitioner.

Part 4: Early Warning Systems

Section 101

Information on early warning systems

Information on the availability of tools provided by public authorities for the purpose of early identification of crises (early warning) will be published by the Federal Ministry of Justice and Consumer Protection on its website at www.bmjv.bund.de.

Section 102

Information and warning duties

When preparing annual financial statements for a client, tax advisers, tax agents (*Steuerbevollmächtigte*), auditors, sworn accountants (*vereidigte Buchprüfer*) and lawyers must inform the client that a potential ground for insolvency under sections 17 to 19 InsO has occurred and of the related duties of directors and members of supervisory bodies, where there are obvious indications to that effect and they must assume that the client is not aware that the criteria for insolvency are potentially met.

Schedule

(to section 5 sentence 2)

Information Required to be Disclosed in the Restructuring Plan

In addition to the information required under sections 5 to 15, the restructuring plan must contain at least the following information:

1. Company name or first and last name, date of birth, registration court and registration number under which the debtor is registered in the commercial register, line of business or occupation, business establishments or place of residence of the debtor, and the principal place of business if there is more than one establishment;

2. the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets, a description of the economic situation of the debtor and the position of employees, and a description of the causes and the extent of the economic difficulties of the debtor;

3. the affected parties, which must be named individually or described with sufficiently specific designation of their claims or rights;

4. the classes into which the affected parties have been grouped for the purpose of adopting the restructuring plan, and the voting rights attributable to their claims and rights;

5. the creditors, holders of separate satisfaction rights and holders of shares or membership rights which are not included in the restructuring plan, together with a description of the reasons why they were not included; a description by reference to categories of the same types of creditors, holders of separate satisfaction rights and holders of shares or membership rights is sufficient, provided that this does not make it more difficult to review appropriate differentiation pursuant to section 8;

6. name and address of the restructuring practitioner, if appointed;

7. the effects of the proposed restructuring on employment relationships, dismissals and arrangements regarding short-time work arrangements (*Kurzarbeit*) as well as the modalities of informing and consulting the employee representation bodies;

8. where the restructuring plan provides for new financing (section 12), the reasons why such financing is necessary.

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