



## Focus on ESUG – Part 1: Overview

In 2012, the so-called ESUG was introduced in Germany to legally ease financial restructurings and insolvencies. A working knowledge of the new restructuring arsenal is beneficial for international investors in order to achieve successful distressed transactions in Germany. With our new series “Focus on ESUG” we set out to show what powerful tools German restructuring and insolvency law has to offer post ESUG and what potentials for strategic investment this provides for both distressed companies and investors.

ESUG is not a singular comprehensive statutory approach by the German legislator, i.e. it is not a new restructuring tool in itself. In fact, it is an amendment to various sections within the German insolvency code (InsO) which was introduced in 1999. The main reason for this is the fact that insolvency regimes in other European countries are increasingly referred to as a frame of reference when it comes to restructuring (or investing in) internationally oriented companies or groups of companies in a situation of crisis/distress. Consequently, ESUG addresses these criticisms levied at the “unpredictable” German insolvency system by making the most notable changes to the parts of the insolvency code that enable/facilitate restructuring and going concern.

### Greater Influence/Options for (Investing) Creditors

- > *Earlier creditor involvement facilitates timely positioning:* creditors can vote on the appointment of a provisional creditor committee for the provisional proceedings, i.e. before the official opening of insolvency proceedings.
- > *Greater influence over the selection of the insolvency practitioner:* the (provisional) creditor committee can make a binding proposal as to the appointment of the (provisional) insolvency administrator.
- > *Proceedings with a debtor in possession are more accessible:* the creditors decide on the opening of debtor in possession (DIP-) proceedings and the appointment of the custodian.
- > *Greater control over the parties involved:* availability of a wide range of tools to control the management in DIP-proceedings and the custodian.

## Greater Influence/Options for the Management

> *Breathing new life into the DIP-concept:* given the mistrust of German courts to keep debtors in possession, DIP-proceedings have been the exceptional case; under ESUG the ways in which the court and/or opposing creditors can veto against such proceedings have been narrowed significantly.

> *Seamless planning and transition from out of court restructuring scenarios to restructurings under the insolvency code:* the court can order DIP-proceedings already for the provisional phase.

> *Bring your own (provisional) administrator/custodian:* more influence on the appointment of the insolvency administrator/custodian; whose involvement in the out of court counseling is not a mandatory criterion for exclusion anymore.

> *Fast and anonymous execution of insolvency plans:* under the protection (e.g. foreclosure prohibition) of a non-public provisional DIP-proceeding the management of the debtor and its counsels can work out a restructuring plan in max. 3 months ("protective shield-proceedings").

## Less Influence for Opposing Parties

> *No surprises:* the debtor, his counsel and/or the creditors can opt against administrator led proceedings and „bring“ their own custodian.

> *Plenty of rope:* the custodian and the court have mere monitoring functions.

> *No deviations from the original/initial restructuring concept:* in insolvency plan proceedings opposing creditors can be "cut-off" by majority vote (cram-down); at the same time legal remedies available to creditors who have thus been outvoted have been reduced.

## Conclusion

The primary objective in major restructurings is the avoidance of the obligatory opening of insolvency proceedings. However, not always is it possible to avoid insolvency scenarios. In these cases international participants in restructuring procedures involving German entities can be expected to profit from the changes made by ESUG – and they already have. Its major achievement is that restructuring a company under the rule of German insolvency law became a more transparent and less unpredictable process; smooth transitioning from out of court to insolvency restructurings is a new reality under German jurisdiction.



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