Northwestern Journal of International Law & Business

Volume 43
Issue 1 *Fall*

Article 3

Fall 2022

An Innovative Framework: Evaluating the New German Business Stabilization and Restructuring Law (StaRUG)

Andreas Rauch

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Andreas Rauch, *An Innovative Framework: Evaluating the New German Business Stabilization and Restructuring Law (StaRUG)*, 43 NW. J. INT'L L. & BUS. 93 (2022).
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Cover Page Footnote

B.A. 2019, University of California, Riverside; J.D. 2023 (expected), Northwestern Pritzker School of Law. I am grateful to Professor Clinton Francis for his supervision, and the editors and staff of the Northwestern Journal of International Law and Business for their thoughtful advice and insight.

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Vol. 43, No. 1
Northwestern Journal of International Law & Business

An Innovative Framework: Evaluating the New German Business Stabilization and Restructuring Law (StaRUG)

Andreas Rauch*

Abstract:

This comment examines the contours and features of Germany's new restructuring framework, the Unternehmensstabilisierungs- und -restrukturierungsgesetz ("StaRUG"), and argues that this new law represents an effective—albeit radical—departure from Germany's previous, conservative insolvency regime. Passed in response to a 2019 EU Directive aimed at modernizing restructuring law Union-wide, and integrated into the German legal system against the backdrop of the COVID-19 pandemic, StaRUG and its ancillary reforms in other areas of German law create a restructuring proceeding that places a premium on a debtor's continued business operations. Thus, in a striking shift from the traditional German approach to business distress, which strongly emphasized creditor rights, the new StaRUG focuses on value preservation and rehabilitation of the debtor. Mirroring many of the provisions of the U.S. Bankruptcy Code's Chapter 11, the new StaRUG proceeding offers debtors and creditors a flexible, accountable, and stable forum through which to resolve business insolvency.

After laying out the features of the new StaRUG scheme and related reforms to German business law, this comment identifies nine general mechanisms and features necessary to a successful and fair business reorganization framework. StaRUG's performance is measured against these metrics and compared to similar provisions in Chapter 11. In its adoption of certain key mechanisms from Chapter 11 and the rejection of others, StaRUG strikes a unique balance between debtor protection and creditor satisfaction that promises fairer, more efficient outcomes in German business law. And, while a comprehensive real-world evaluation is yet some way off, this note concludes that StaRUG should serve as a model for future reforms to other, international restructuring frameworks.

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* B.A. 2019, University of California, Riverside; J.D. 2023 (expected), Northwestern Pritzker School of Law. I am grateful to Professor Clinton Francis for his supervision, and the editors and staff of the Northwestern Journal of International Law and Business for their thoughtful advice and insight.

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I. INTRODUCTION

The advent of the COVID-19 pandemic threw the world economy into significant disarray, ushering in a new paradigm for business and finance. The resulting economic challenges led to a global spike in restructuring activity to stave off business insolvency and failure, and, as enterprises struggled to survive, legislatures the world over attempted to mitigate the downturn. This was especially clear in Germany, where the Bundestag (German parliament) hurriedly enacted a comprehensive overhaul of the country's outdated, rigid insolvency scheme.[1] Following a year of reactive legislation and a long-standing European Union ("E.U.") push for reforms in Union-wide restructuring law, the new legislation came as little surprise. Its effects, however, represent a radical shift in German commercial law; among the coterie of changes, the bill includes a bold new scheme that is at the cutting edge of modern restructuring law. Germany's model, enacted through the Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz ("SanInsFoG")[2] as the Unternehmenstabilisierungs- und -restrukturierungsgesetz ("StaRUG"),[3] incorporates unique elements of the German legal system alongside influences from tried and tested frameworks such as the U.S. Bankruptcy Code[4] (hereinafter "the Code") to constitute a proactive and theoretically effective restructuring framework.

This comment attempts to do two things. First, it briefly surveys the developments that have occurred in Germany through this legislation passed at the end of 2020. Part II analyzes these developments in context of the unique prior German approach to insolvency law and as a product of a comprehensive E.U. push to modernize and standardize insolvency and rehabilitative frameworks across member states. Key here is the confluence of factors that led to these reforms: (1) a desire within the EU for modernization; (2) a perceived need within Germany to overhaul an outdated and rigid insolvency system; and, (3) by coincidence, a pandemic that exposed these challenges by increasing global economic pressure. Part III

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[1] Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz [SanInsFoG] [Act on the Further Development of Restructuring and Insolvency Law], Dec. 22, 2020, BUNDESGESETZBLATT, Teil I [BGBL I] at 3256 (Ger.), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Fortentwicklung_Insolvenzrecht.html.

[2] Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts, Dec. 2020, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_SanInsFoG.pdf;jsessionid=76E1F63432F07B10C2BB0B80FD15A8AB.2_cid334?__blob=publicationFile&v=4

[3] In English: business stabilization and restructuring law. Gesetz über den Stabilisierungs- und -restrukturierungsrahmen [StaRUG] [Law on the Stabilization and Restructuring Framework], Dec. 22, 2020, BUNDESGESETZBLATT, Teil I [BGBL. I] at 3256, last amended by Gesetz [G], Aug. 10, 2021, BGBl. I at 3436, art. 38 (Ger.), http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl120s3256.pdf

[4] 11 U.S.C. §§ 101–1527.

offers a cursory view of the changes made by SanInsFoG, which constitute important developments in the German legal approach to economic rehabilitation and insolvency.

This context in turn lays the foundation for a preliminary evaluation of the new restructuring scheme. In Parts IV and V, this comment examines the new German model, particularly StaRUG,[5] and compares it to the Code's paradigmatically effective, comprehensive restructuring framework. The Code's provisions attempt to remedy value destruction and economic freefall via an ordered, rehabilitative legal process, just as StaRUG does. This comment identifies the key features of the Code's Chapter 11[6]—which most closely approximates the reorganization-oriented approach taken by StaRUG[7]—that render it so effective. Finally, it compares these provisions to those in StaRUG to assess the German law's viability.

Specifically, this comment focuses on StaRUG's approach to nine features integral to a successful restructuring law: (1) centralized and available case information, (2) effective judicial case administration, (3) provision for continued debtor operations, (4) a claim centralization mechanism for creditors, (5) equitable classification and plan voting, (6) a clear plan-formation process, (7) robust restructuring instruments, (8) debtor viability post-restructuring as a main goal, and (9) effective integration with other areas of the law.

Together, these provide for a useful baseline against which to evaluate StaRUG; through direct comparisons to counterpart provisions in the Code, this comment highlights differences in approach and implementation for these various components. As mentioned above, Chapter 11 has long offered an efficient, effective rehabilitation framework *precisely* because the Code attempts to resolve the issues underlying each feature.[8] Put differently—these nine features were chosen as they collectively approximate what one might

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[5] *Id*.

[6] 11 U.S.C. §§ 1101–1195.

[7] While both the Code and StaRUG apply to all "bankruptcies" or similar liquidations or reorganizations of a debtor's estate, StaRUG's provisions are aimed at business debtors, and at reorganizing them into a viable, post-confirmation enterprise. Unless otherwise indicated, all references to the Bankruptcy Code are thus to its business reorganization provisions (found mainly in Chapter 11). *Id.*

[8] *See* Part V., *infra*. Broadly speaking, each of the nine features is correlated with some of the most salient provisions of the Code and Chapter 11 in particular. Features 1. and 2. are addressed, generally, by the Code and broader provisions of U.S. law through the establishment of the bankruptcy process and the Bankruptcy Court system. Features 3. through 7. deal with particulars of the bankruptcy or the Chapter 11 process and are thus found either in the Code's general and administrative provisions or in Chapter 11 itself. Features 8. and 9. describe a restructuring system's approach to post-proceeding enforcement and to operation alongside other areas of the law, and are, as such, found either in provisions of the code detailing plan enforcement or in individual substantive requirements, as well as more broadly within the American legal corpus. Thus, all nine features are found in some fashion in the Code or in associated law; citations to examples of such provisions are provided in Part V.'s normative discussion.

expect from a workable, fair, protective, and feasible restructuring framework.

To be sure, StaRUG is still grounded in the conservative German approach to commercial law, marked by a longstanding preference for creditor-focused insolvency and liquidation. It is also, however, a modern system aimed at accountability, robust debtor and creditor protections, and an ultimate preservation of the business and its economic value. Although its efficacy in practice remains to be seen, on paper, StaRUG has all the hallmarks of a comprehensive, effective system.

II. ORIGINS: DIRECTIVES, LEGAL REFORMS, AND PANDEMIC DOWNTURN

The Bundestag's enactment of the SanInsFoG occurred almost a year into the most economically devastating pandemic in recent memory, with the legislative body passing the law at its final session on December 18, 2020.[9] The new law was enacted only partially because of this crisis, however; the pandemic's main effect was the urgency with which the law was passed, the draft[10] having been presented on September 19, 2020 and taking effect three months later on January 1, 2021. The main driver for the law was to ensure conformity with recent E.U. policy mandating restructuring reforms across the Union. As intended, SanInsFoG thus pulled Germany's conservative, outdated bankruptcy scheme onto the cutting edge of the law.

SanInsFoG enacted the European Parliament and Council Directive (EU) 2019/1023 ("Directive"),[11] which itself enshrined a revolutionary shift in the Union's attitude towards insolvency and legal resolutions of economic difficulties. With an implementation deadline of July 17, 2021,[12] the Directive seeks to "remove [legal] obstacles"[13] to the free movement of capital and effective resolution of business difficulties presented by the patchwork of restructuring and other insolvency and pre-insolvency schemes among E.U. Member States. The drafters emphasized "[p]reventive solutions [as] a growing trend in insolvency law," as well as the need for a unified

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[9] Kirsten Schümann-Kleber et al., Act on the further development of restructuring and insolvency law (Restructuring and Insolvency Law Further Development Act – SanInsFoG), GÖRG LEGAL UPDATE (Dec. 29, 2020), https://www.goerg.de/en/insights/publications/29-12-2020/act-on-the-further-development-of-restructuring-and-insolvency-law-restructuring-and-insolvency-law-further-development-act-saninsfog.

[10] Referentenentwurf [Reference Draft], Deutsches Bundesministerium der Justiz und für Verbaucherschutz: Entwurf eines Gesetzes zur Fortentwicklung des Sanierungs- und Insolvenzrechts, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_SanInsFoG.pdf;jsessionid=76E1F63432F07B10C2BB0B80FD15A8AB.2_cid334?__blob=publicationFile&v=6(Ger.).

[11] Council Directive 2019/1023, 2019 O.J. (L 172) 18.

[12] And a potential extension of one year for states experiencing difficulties in implementation. *Id*.

[13] *Id.* ¶ 1.

system that offers debtors flexibility and facilitates recovery rather than punishment.[14] The Directive accordingly offers a robust framework to allow more "developed" and restructuring-focused legal systems to enact updates and ensure uniformity, and provides less-developed, insolvency-focused legal systems a model for an entirely new restructuring process.

The Directive is a product of E.U. legislators' intuition that the amalgam of different systems, with differentially effective mechanisms for preempting and addressing insolvency, presented an obstacle to a uniform, E.U.-wide culture of commercial rehabilitation. Some systems, such as the French *conciliation* scheme,[15] offered a preventive restructuring framework fairly like that envisioned in the Directive. Others, notably those of Germany and the Netherlands, lacked such features, and insolvency proceedings were the only option once an enterprise experienced impending or current illiquidity.

This rigidity, codified in the German Insolvency Law (*Insolvenzordnung*, or InsO)[16] was a virtual death sentence for illiquid or over-indebted businesses. It was also an inescapable fate, as German law imposed an affirmative duty on directors facing illiquidity to file insolvency or risk criminal liability. Accordingly, the Directive's drafters sought a move towards a preventive model prioritizing rehabilitation over simple creditor satisfaction and supporting creditor recovery by ensuring a debtor's survival. This sea-change, although radical, was intended to overhaul European bankruptcy law and vault it into the 21st century.

III. UPDATING THE LAW: SANINSFOG'S CONTENTS

The result of this push for reform was the "SanInsFoG," which effected the Directive and the E.U.'s goal of modernized insolvency and pre-insolvency frameworks, through three major changes to existing German law. Figure A broadly highlights the key changes implemented by SanInsFoG.

[14] *Id.* ¶ 4.

[15] *See* Adam Gallagher & Aude Rousseau, French Insolvency Proceedings: La révolution A Commencé, 33-NOV Am. Bankr. Inst. J. 20 (2014).

[16] Insolvenzordnung [InsO] [Insolvency Law], Oct. 5, 1994, BUNDESGESETZBLATT, Teil I [BGBL. I] at 2866, last amended by Gesetz [G], Aug. 10, 2021, BGBl. I at 3436, art. 35 (Ger.), https://www.gesetze-im-internet.de/inso/index.html.

Figure A.

Affected Law	**Pre-SanInsFoG Legal Scheme**	**Post-SanInsFoG State of the Law**
Insolvency Law (InsO)	• Heavy focus on creditor satisfaction • Proceeding initiated as a liquidation, convertible to plan-focused proceeding • Case managed day-to-day by insolvency administrator and creditor's committee	• New provisions designed to accommodate StaRUG proceeding • Greater focus on rehabilitation • Expanded Debtor-in-Possession case management • New provisions concerning novel, complex forms of equity
Restructuring Scheme	• Some provisions regarding Debtor-in-Possession management and rehabilitation, but largely missing	• New, comprehensive restructuring framework (StaRUG)
Other Areas of German Law	• Provision solely for Insolvency proceedings under InsO • Strict insolvency filing requirements and stringent eligibility requirements for relief	• Provisions extended to cover new StaRUG scheme • Lowered filing obligations and relaxed access to protective tools (largely concerning COVID-19 economic relief)

A. A New Restructuring Scheme

First and most significantly, SanInsFoG established the new StaRUG framework, a comprehensive restructuring scheme intended to pre-empt insolvency by providing a judicially supervised procedure to bind creditors to a restructuring plan. StaRUG forms the bulk of SanInsFoG's provisions as well as the most radical departure from existing German law and the most direct response to Directive 2019/1023's goals. This comment will explore StaRUG's provisions in greater detail through comparison to the Code.

B. Changes to the InsO

Second, SanInsFoG enacted a series of changes to the InsO. As mentioned above, Germany's existing insolvency code was rather rigid in nature; since enactment in 1999, no substantive additions had been made to the law. The original InsO had created a unified system for handling insolvencies, based on the Insolvenzverfahren ("insolvency proceeding").

Such proceedings were liquidations by default[17] but could be converted to more reorganization-focused proceedings, memorialized by an insolvency plan, with creditor consent.[18] A proceeding could only commence upon a showing that a debtor was "legally insolvent,"[19] overindebted,[20] or in danger of "imminent legal insolvency."[21] The debtors' management and leadership could file with the local court pursuant to their legal obligation, as could the shareholders if subject to such an obligation, or the creditors themselves, should such involuntary insolvency best serve their interest in repayment.[22] The court could immediately institute preliminary measures such as appointing an interim creditors' committee and an interim insolvency administrator, implementing a broad range of protective orders[23] for the preservation of the debtor's assets, and, upon opening the proceeding, appointing the final insolvency administrator.[24] With court participation in the actual proceeding limited to further protective orders, delegating the management of the case, and issuing the final orders regarding the creditor-approved insolvency plan, the pre-SanInsFoG InsO was conducted almost exclusively through the insolvency administrator and the creditors' committee. Throughout this process, the continuation and rehabilitation of the debtor's enterprise was considered secondary to creditor satisfaction.[25]

SanInsFoG's changes to the InsO are intended to modernize and to integrate the new StaRUG scheme. The new provisions allow the same court to hear both a StaRUG and insolvency case in the same matter[26] and exercise jurisdiction over other claims related to that debtor.[27] The law also further inserts references to third-party securities included in the debtor's assets ("*gruppeninterne Drittsicherheiten*") and either includes or exempts these from the insolvency plan's impairment of creditor rights, depending on the

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17 *Id. at § 1.*

18 *Id. at § 217.*

19 Legal insolvency is defined in InsO as an inability to pay debts as they come due.

20 InsO §§ 17; 19, 1994 BGBl I 2868. Defined as a situation where the debtor's assets are insufficient to cover any existing obligations. An inability to pay debt is presumed when a debtor has stopped payment thereupon. For purposes of over-indebtedness, the valuation of assets is determined on a going-concern basis.

21 *Id. at § 18*. Imminent legal insolvency refers to situations in which it is probable that the debtor will not be able to satisfy their obligations as they come due.

22 *Id. at § 14—15*. A debtor-side obligation and right to file covers any member of the company's leadership or, in unincorporate business organizations, any member or shareholder subject to personal liability.

23 *Id. at § 20*.

24 *Id. at § 27*.

25 The statute is replete with qualifiers about how provisions apply if the plan includes a continuation of the business. This scenario is framed as an exception, or at least as a circumstance that must be specified and not presumed and underscores the focus on liquidation and satisfaction of creditors. Preservation and continuation of the business past such debt satisfaction is an ancillary concern. See, for instance, InsO §§ 135; 220; 230.

26 SanInsFoG art. 5 § 1, 2020 BGBl. I 3281.

27 *Id.* at art. 5 § 2.

situation.[28] Finally, SanInsFoG significantly overhauls the InsO's provisions governing debtor-in-possession ("DIP") status. The law inserts six new sections considerably expanding the previous version's rather limited DIP provisions.[29] The InsO changes thus mirror the Directive-mandated shift toward a more rehabilitative, debtor-protective system by creating space for the StaRUG proceeding, expanding InsO to cover complex, novel classes of creditor claims, and embracing a comprehensive DIP framework.

C. Ancillary Changes to Other Statutes

Third, SanInsFoG modernizes many other provisions of German law, such as the Code of Civil Procedure, the Courts Constitution Act, the Stock Corporation Act, the Civil Code, the Limited Liability Companies Act, and various statutes passed in response to COVID-19 specifically.[30] As with the changes to the InsO, these alterations harmonize and integrate the StaRUG scheme into existing law. Laws such as notice statutes,[31] insolvency reporting regulations,[32] and court cost provisions[33] now cover StaRUG proceedings. These additions thus ensure that the German legal framework seamlessly adopts this monumental shift in commercial law. SanInsFoG also addresses COVID-19-related economic difficulties by facilitating access to protective measures, lowering the eligibility requirements for insolvency and restructuring in cases of COVID-19-related financial distress, and continuing the suspension of insolvency filing obligations for debtors who have received government financial aid as part of COVID-19 stimulus packages.[34] These ancillary changes directly support the Directive's implementation by facilitating the shift to a restructuring scheme and adding robust legal tools to mitigate the economic effects of the COVID-19 pandemic.

IV. STARUG: SUBSTANTIVE PROVISIONS

Comparing StaRUG to the Code requires a baseline exposition of

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[28] See, among others, SanInsFoG art. 5 §§ 24–28, 2020 BGBl. I 3284. This addition acknowledges the increasing complexity of debtor estates and attempts to address such complex new types of claims in a more nuanced way.

[29] *Id. at* art. 5 §§ 37–39. The prior DIP provision simply granted the debtor the right to administer their own estate under the auspices of an insolvency monitor, but did not provide for extensive planning, preliminary DIP status prior to entry into insolvency proper, or measures for a transition into formal insolvency as a DIP. InsO § 270 et seq., 1994 BGBl I 2901.

[30] *See generally* SanInsFoG, 2020 BGBl. I 3281. The table of contents is indicative of the law's breadth of scope.

[31] SanInsFoG art. 7, 2020 BGBl. I 3289.

[32] SanInsFoG art. 9, 2020 BGBl. I 3290-91.

[33] SanInsFoG art. 11, 2020 BGBl. I 3294-96.

[34] SanInsFoG art. 10, 2020 BGBl. I 3292-94. This Article deals with changes to the COVID-19-Insolvenzaussetzungsgesetz, or CovInsAG, passed March 27, 2020. CovInsAG, 2020 BGBl.I S. 569 (official English translation available at https://www.gesetze-im-internet.de/englisch_covinsag/index.html).

StaRUG's substantive provisions. This comment briefly summarizes the law's 102 sections according to its four Parts,[35] themselves divided unevenly into Chapters.[36] This summary is necessarily succinct, as the provisions are further explored through comparison to similar provisions in the Code in Part V.

A. Early Crisis Detection and Management

StaRUG first imposes an early crisis detection and response obligation on limited liability entities, mandating that a company's management monitor situations that could threaten the company's continued existence. Management in such situations must take immediate countermeasures and report such developments to the board of directors.[37] This initial duty sets the stage for StaRUG's substantive provisions regarding pre-insolvency filing and underscores the forward-looking policy behind StaRUG's provisions.

B. The Stabilization and Restructuring Framework

The hefty second part, which contains the substantive provisions of the restructuring framework, is divided into six chapters. These chapters discuss, in turn, (1) the restructuring plan; (2) further stabilization and restructuring enforcement and implementation tools; (3) the restructuring practitioner; (4) a reservation for future additions; (5) avoidance powers and liability; and (6) employee participation and a creditors' advisory council.

1. Chapter 1: The Restructuring Plan

StaRUG's provisions begin with the restructuring plan itself, establishing it as the central goal of a proceeding. Thus, StaRUG prioritizes the comprehensive and viable reorganization of the debtor entity.

The first division governs the modification (*Gestaltung*) of legal relationships between a debtor and creditors. StaRUG allows a plan to modify any "restructuring claims" against a debtor and any rights to separate satisfaction in the event of insolvency proceedings.[38] This broad modifiability extends to multi-party agreements among creditors and the debtor, claims against partnerships or other non-corporate entities, and restructuring claims against subsidiary entities.[39] Notably, a plan may affect

[35] Here labeled "A" through "D."
[36] StaRUG, 2020 BGBl. I 3256.
[37] StaRUG, 2020 BGBl. I 3258.
[38] StaRUG § 2, 2020 BGBl. I 3258-59. The right to separate satisfaction is one found in the provisions of the InsO, which allows a creditor to separate their claim to certain assets within the debtor's estate out from the insolvency process and receive satisfaction outside the purview of the general insolvency proceeding.
[39] StaRUG § 2, 2020 BGBl. I 3258–59. Claims by holders in assets of a subsidiary are referred to as intra-group third-party securities. All debtor-creditor relationships are evaluated as of the date of filing or the date of a previously-issued stabilization order by the court if such

conditional or not-yet-matured claims and, in the case of mutual contracts, may only modify claims to the extent the other party has performed.[40] Finally, StaRUG prohibits modification of employment or pension-related claims, intentional tort claims, and claims for restitution, fines, and other penalties.[41]

Division 2 sets out the requirements for a viable plan. Every plan must include a descriptive part[42] and a normative part.[43] The descriptive part must include calculations demonstrating the effects of the plan and contrasting creditor outcomes under a restructuring and a liquidation.[44] The descriptive part also memorializes the selection of affected parties, which must meet certain criteria.[45]

This division also discusses class formation, permitting classes to be formed according to a party's legal position or as otherwise necessary.[46] Furthermore, all impaired parties within a class receive equal treatment unless all negatively affected parties consent to different treatment.[47] StaRUG prohibits plan support or other voting agreements if the consideration for such an agreement is not specified in the plan.[48] Through these provisions, StaRUG succinctly provides for organized classification, equal treatment, and transparency between classes and the debtor to ensure a fair voting process.

The last few plan-related provisions allow for new financing and the modification of relationships under property law,[49] and require declarations that the plan is viable. The parties to the plan must also certify that the plan will remove the debtor's imminent illiquidity and make extensive disclosures calculating the debtor's assets and their proposed application in satisfying creditor claims.

Division 3 provides for plan voting, outlining both plan proposal and adoption[50] as well as voting rights and the requisite majorities for confirmation.[51] The plan proposal or offer must outline each party's claims

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an order was issued.

[40] StaRUG § 3, 2020 BGBl. I 3259.

[41] StaRUG § 4, 2020 BGBl. I 3259. § 4 no. 3 excludes claims pursuant to InsO § 39(1) no.3, which covers the enumerated mandatory payments.

[42] StaRUG § 6, 2020 BGBl. I 3259. This part establishes all the information necessary for the impaired parties to make their decision,and must include any measures which might be necessary for the restructuring but are not included as part of the plan.

[43] StaRUG § 7, 2020 BGBl. I 3259. This part lays out the modifications to legal relationships, as well as changes in the business's capital structure.

[44] StaRUG § 6(2), 2020 BGBl. I 3259.

[45] StaRUG § 8, 2020 BGBl. I 3259–60. *See* also Part V. 4., *infra*.

[46] StaRUG § 9, 2020 BGBl. I 3260. *See* Part V. 5., *infra*. Any classification not based on the enumerated criteria must be detailed in the plan.

[47] *Id.*

[48] *Id.*

[49] This modification must be disclosed in detail in the plan's normative section.

[50] StaRUG § 17–23, 2020 BGBl. I 3261–62.

[51] StaRUG § 24–28, 2020 BGBl. I 3262–63.

or rights, the classification scheme and corresponding allocation of voting rights within each class, and offer parties the opportunity to meet and discuss the plan upon request.[52] The plan is then subject to approval by all affected parties or by court confirmation,[53] and the offer must set out an approval time period of at least 14 days, subject to prior notice.[54] This division provides for voting at a meeting of the affected parties, with 14 days' notice that includes the entirety of the plan; voting by the classes is possible until the end of the specified voting period.[55]

If voting occurs outside this meeting, an affected party may request a further meeting for discussion of the plan among affected parties, again with a 14-day notice requirement.[56] The debtor has an obligation to memorialize the proceedings of the entire adoption procedure, including any disputes about classification or voting, and make this record immediately available to all affected parties.[57] There is also an option for voting during a court proceeding.[58]

The allocation of voting rights occurs according to the value of a party's claim.[59] There are various provisions clarifying valuation, and this section also limits voting on third-party security or separate satisfaction rights to those claims for which the debtor is personally liable.[60] The plan must be approved by at least three quarters of voting rights in each class,[61] and cram-down is possible if fair and the plan has been approved by a majority of classes.[62]

Section 27 lays out the priority rules, under which a class is deemed to receive a fair share of the value of the plan if: (1) no other affected creditor receives more than the full amount of their claim; (2) no class subordinate to the class in question, nor the debtor, or any equity interest in the debtor, receives an economic value that is not fully compensated by a contribution to the estate; and (3) no pari-passu creditor class is treated more favorably

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[52] StaRUG § 17, 2020 BGBl. I 3261.

[53] StaRUG § 18, 2020 BGBl. I 3261.

[54] StaRUG § 19, 2020 BGBl. I 3261. This period can be shorter if the plan follows a restructuring concept, the text of which has been provided to all affected parties for at least 14 days.

[55] StaRUG § 20, 2020 BGBl. I 3261. Notice can be shortened to 7 days if electronic participation is possible.

[56] StaRUG § 21, 2020 BGBl. I 3262. Again, notice can be shortened to 7 days if electronic participation in the meeting is possible.

[57] StaRUG § 22, 2020 BGBl. I 3262.

[58] StaRUG § 23, 2020 BGBl. I 3262. *See infra*.

[59] StaRUG § 24, 2020 BGBl. I 3262. For further discussion, *See* Part V.5., *infra*.

[60] StaRUG § 24, 2020 BGBl. I 3262.

[61] StaRUG § 25, 2020 BGBl. I 3262.

[62] StaRUG § 26, 2020 BGBl. I 3262-63. *See infra* Part V. 5., for a more granular discussion of approval and cram-down. Cram-down refers to a court judgment approving the plan over the objections of creditors.

than the class in question.[63] Finally, there are exceptions from the pari-passu requirement for cases where adherence thereto is not economically feasible and where the affected dissenting class does not include at least half of the total creditor voting rights.[64]

2. Chapter 2: Further Stabilization and Restructuring Enforcement and Implementation Tools

Chapter 2 includes all the protective measures that courts may use to support the new StaRUG proceeding and prevent imminent illiquidity, or otherwise attempt to preserve value as much as possible. As such, these provisions focus on the court's role in providing for a smooth, value-preserving restructuring proceeding.[65]

The first division enumerates various stabilization tools. These include court-supervised voting, preliminary plan examination by the court for viability, stabilization through stays on outside claims, and court confirmation of the plan.[66] The division further provides for initiation of the proceeding, outlining eligibility,[67] filing requirements,[68] duty of care of the debtor,[69] and conditions under which the court will terminate a restructuring proceeding.[70] Section 34 designates the court in a state's main judicial district as the exclusive jurisdiction competent to hear restructuring matters,[71] and further details the scope of that jurisdiction.[72] Further, this subdivision

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63 StaRUG § 27, 2020 BGBl. I 3263. Equity interests are considered to have received fair value if no affected creditor receives value greater than the full amount of their claim, and no equity interest in the debtor who would rank equal to the class in question without a plan retains any economic value.

64 StaRUG § 28, 2020 BGBl. I 3263. For equity interests, this means where the debtor or any equity holders retain an interest in the assets as long as cooperation of the debtor or equity holder is indispensable and that person agrees to cooperate or otherwise transfer the economic value of their interest should their cooperation cease before the end of five years; alternatively, such a deviation from absolute priority is allowed where any interference with creditors' rights is minor — where rights are not reduced and the maturity of repayments is not postponed by more than 18 months.

65 StaRUG Ch. 2, 2020 BGBl. I 3263-73.

66 StaRUG § 29, 2020 BGBl. I 3263.

67 StaRUG § 30, 2020 BGBl. I 3264.

68 StaRUG § 31, 2020 BGBl. I 3264.

69 The debtor must act with the care of a prudent and conscientious business officer in restructuring, meaning compliance with the goals of the plan and adherence to the prohibitions on separately satisfying claims that are otherwise subject to the plan. StaRUG § 32, 2020 BGBl. I 3264.

70 StaRUG § 33, 2020 BGBl. I 3264–65. These situations generally involve a case's conversion to insolvency liquidation, a lack of subject matter jurisdiction, or violations of court orders by the debtor.

71 StaRUG § 34, 2020 BGBl. I 3265. This division also provides that each state legislature may alter this jurisdiction by changing which court may hear a matter or extending a court's jurisdiction to cover other districts.

72 StaRUG §§ 36–37, 2020 BGBl. I 3265.

applies the Code of Civil Procedure to restructuring proceedings,[73] grants the court broad investigative power,[74] provides for appeals within the scope of the proceedings,[75] and details notice requirements.[76] Division 1 finally imposes on the debtor a duty to notify the court of illiquidity or imminent illiquidity under pain of criminal penalties,[77] and removes the pending restructuring proceeding as justification for default on any contracts.[78]

Division 2 concerns court-ordered plan voting, and provides for a court-scheduled and supervised meeting on the debtor's motion for purposes of such voting.[79] StaRUG lays out guidelines for a meeting in which the court examines the plan for statutory compliance and confirms debtor eligibility for restructuring, creditor voting rights, and proper classification.[80] Perhaps appropriately, the subsequent third Division briefly allows a debtor to request a preliminary examination and permits affected parties to comment on the proposed plan prior to voting.[81]

Division 4 provides a stay of claims against the debtor (the "stabilization order") for up to three months.[82] The court can order stays as necessary for the goals of the restructuring, except for claims that statutorily fall outside the plan.[83] The debtor must request this stay and provide extensive financial and legal disclosure regarding the relief sought through a stay.[84] In turn, a court will grant the request only in cases of imminent insolvency where the requested order is necessary to implement the case-specific goal of a feasible, factually supported plan.[85] The division further protects a debtor from breach on any executory contracts,[86] preserves creditors' security interests in collateral,[87] suspends any pending insolvency proceedings filed against the debtor,[88] and places liability for the damages resulting from an erroneous or bad faith request for a stay on the debtor's directors.[89]

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[73] StaRUG § 38, 2020 BGBl. I 3266.
[74] StaRUG § 39, 2020 BGBl. I 3266.
[75] StaRUG § 40, 2020 BGBl. I 3266.
[76] StaRUG § 41, 2020 BGBl. I 3266.
[77] StaRUG §§ 42–43, 2020 BGBl. I 3266–67.
[78] StaRUG § 44, 2020 BGBl. I 3267.
[79] StaRUG § 45, 2020 BGBl. I 3267.
[80] StaRUG § 46, 2020 BGBl. I 3267.
[81] StaRUG §§ 47-48, 2020 BGBl. I 3267.
[82] StaRUG §§ 49–59, 2020 BGBl. I 3267–70.
[83] StaRUG § 49, 2020 BGBl. I 3267-68.
[84] StaRUG § 50, 2020 BGBl. I 3268.
[85] StaRUG § 51, 2020 BGBl. I 3268. This section sets out the conditions for a stay. Additionally, any defects in these prerequisites can be remedied within a 20-day period during which the court may order a temporary stay.
[86] StaRUG § 55, 2020 BGBl. I 3269.
[87] StaRUG § 56, 2020 BGBl. I 3269.
[88] StaRUG § 58, 2020 BGBl. I 3270.
[89] StaRUG § 57, 2020 BGBl. I 3270.

The chapter's final division lays out plan confirmation,[90] which the debtor can request following acceptance by a vote upon presenting the plan and voting record to the court.[91] The court may order a hearing prior to ruling on the request unless voting was not done in the context of a court procedure, in which case a hearing is mandatory.[92]

The court cannot confirm a plan if the debtor ceases to be in danger of imminent illiquidity, there are procedural or substantive defects to the prerequisites for confirmation, or any claims outlined in or unaffected by the plan cannot be satisfied.[93] Similarly, a court will refuse confirmation if new financing is provided and the plan appears unfeasible or if there are improprieties, such as preferential treatment, leading up to plan adoption.[94] Negatively impaired parties may request that confirmation be denied if they are likely disadvantaged under the plan as compared to outside the plan, as long as the requesting party raised this issue and objected during plan voting.[95] Any party affected by the plan, including the debtor, can immediately appeal the plan and the court can immediately suspend confirmation, if that party can show serious and disproportionately disadvantageous harm.[96]

Upon confirmation, any changes in the normative part take immediate effect,[97] and claims against the debtor are discharged.[98] Notably, any grounds for appeal, such as procedural defects in plan voting or reliance on incorrect information in approving the plan, are considered remedied upon confirmation.[99] Finally, StaRUG provides for monitoring to ensure that designated claims spelled out in the plan's normative portion are carried out. Such monitoring is the responsibility of a restructuring practitioner for a period of three years post-final-confirmation, or until these claims are fully satisfied or a renewed insolvency is opened against the debtor.[100]

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[90] StaRUG §§ 60–72, 2020 BGBl. I 3270-73.

[91] StaRUG § 60, 2020 BGBl. I 3270.

[92] StaRUG § 61, 2020 BGBl. I 3270.

[93] StaRUG § 63, 2020 BGBl. I 3271.

[94] StaRUG § 63, 2020 BGBl. I 3271. The debtor bears the burden of proof regarding the procedural soundness of out-of-court plan voting.

[95] StaRUG § 64, 2020 BGBl. I 3271. A debtor can defend against this request if the plan contemplates payments to the affected party. The requirement that an objecting creditor have raised their objection during voting is also qualified by certain notice requirements which the debtor must have met when announcing the vote

[96] StaRUG § 66, 2020 BGBl. I 3271–72.

[97] StaRUG § 67, 2020 BGBl. I 3272. Contractual terminations only take effect once the order is final and non-appealable.

[98] StaRUG § 67, 2020 BGBl. I 3272. Note that claims against joint debtors and the debtor's guarantor's survive discharge. The debtor is not liable to his co-debtors or guarantors for restitution sought for claims against them by the creditors.

[99] StaRUG § 67, 2020 BGBl. I 3272. There are further provisions in sections 68–71 describing the reinstatement of regular contractual rights upon confirmation.

[100] StaRUG § 72, 2020 BGBl. I 3273.

Chapter 3 introduces this restructuring practitioner,[101] an administrator who oversees the proceeding and performs important functions like chairing meetings, investigating and reporting on the status of the parties involved or the restructuring, and offering recommendations and observations on the appropriateness of a plan.[102] The court can appoint the practitioner as necessary;[103] however, appointment is mandatory in given situations. Notably, a practitioner can be appointed when a successful restructuring hinges on plan confirmation but none of the affected parties give consent, or where the court wishes to investigate the procedural and substantive soundness of certain aspects of the plan.[104] The debtor may nominate a competent and experienced tax advisor, auditor, or lawyer, from whom the court may deviate only if it determines that the nominee is unsuitable.[105] The court may also appoint a practitioner at the request of the debtor, or of creditors jointly constituting 25 percent or more of the voting rights in a class.[106] Practitioner compensation is determined at the court's discretion.[107]

StaRUG's remaining miscellaneous provisions concern a debtor's right of avoidance and liability in the context of restructuring proceedings[108] and clarify the interaction with employment law.[109] Further, they provide for a court-appointed creditor committee for purposes of deciding on a restructuring practitioner, or to supervise the debtor's operations and ensure its compliance with the restructuring concept.[110]

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[101] StaRUG §§ 73–83, 2020 BGBl. I 3273–76.

[102] StaRUG § 76, 2020 BGBl. I 3274–75.

[103] StaRUG § 73, 2020 BGBl. I 3273-74. Specifically, a court may appoint a practitioner when the rights of smaller enterprises are affected and the court is concerned about fairness of treatment, a stabilization order is directed against all creditors, or when the plan provides for post-confirmation claim monitoring. The practitioner can be dismissed for cause, either at the court's discretion or by request of a debtor or a creditor. Dismissal by request is only possible where the practitioner is not independent; prior to dismissal, the practitioner can appeal to the court.

[104] StaRUG § 73, 2020 BGBl. I 3273-74. The court determines if the restructuring plan is necessary for a successful outcome.

[105] StaRUG § 74, 2020 BGBl. I 3274. Creditors holding more than 25 percent of the voting rights in each class may propose an alternative if the court rejects the debtor's nomination.

[106] The requesting creditors must assume the costs of the practitioner jointly and severally. Again, the court may deviate from the requested practitioner only if they are shown to be unsuitable. StaRUG §§ 77–78, 2020 BGBl. I 3275.

[107] StaRUG §§ 80–83, 2020 BGBl. I 3275–76.

[108] StaRUG §§ 89–91, 2020 BGBl. I 3277–78. Chapter 4 deals with public restructuring matters, but is not in effect until July 17, 2022. Avoidance in Germany is subject to the provisions of the Anfechtungsgesetz and is thus mostly excluded from StaRUG itself. *See* infra Part V.4.

[109] StaRUG § 92, 2020 BGBl. I 3278.

[110] StaRUG § 93, 2020 BGBl. I 3278. The committees are entitled to compensation for their participation.

C. Recovery Mediation

One of StaRUG's innovations is the creation of a recovery mediation process. The court can appoint a preliminary recovery mediator, upon debtor request, tasked with mediating a solution between the debtor and creditors.[111] The mediator is court-supervised, reports monthly, and serves for a renewable three-month term.[112] The mediator has access to debtor financial information and is authorized to negotiate an out-of-court recovery settlement between the parties that is then subject to court confirmation.[113] A failure to settle will result in a continuation of the restructuring proceeding.[114]

D. Early Warning Systems

Part 4 briefly provides for future government publication of early warning tools[115] and obligates tax professionals, auditors, sworn accountants, and lawyers to keep their clients informed about the dangers and reporting requirements for insolvency.[116]

V. STARUG AS AN EFFECTIVE RESTRUCTURING FRAMEWORK: COMPARING THE NEW GERMAN LAW AND THE U.S. BANKRUPTCY CODE

StaRUG's strengths are best understood in comparison to a tried-and-tested framework like the Code, and focusing on certain indicators can help predict StaRUG's potential efficacy. The following nine metrics are a focused, if brief, approximation of the most critical structures for satisfying creditors and promoting the eventual rehabilitation of a distressed enterprise. The desired result in both the Code and StaRUG is a high-level, quasi-contractual relationship between the various parties involved in the debtor's business that allows them to receive sufficient compensation to justify such modifications. The following indicators are, accordingly, those most indicative of a successful restructuring framework.

[111] The mediator must be appointed before the use of any recovery tools. StaRUG §§ 94–100 2020 BGBl. I 3278–79.

[112] StaRUG § 95, 2020 BGBl. I 3279.

[113] StaRUG §§ 96–97, 2020 BGBl. I 3279.

[114] StaRUG § 100, 2020 BGBl. I 3279.

[115] StaRUG § 101, 2020 BGBl. I 3279.

[116] StaRUG § 102, 2020 BGBl. I 3279. These grounds for insolvency are laid out in InsO §§ 17–19.

Figure B.

Selected Feature	Bankruptcy Code Approach	StaRUG Approach
Information centralization and availability	Plan and disclosure statement requirements, and professional responsibility of candor to the court.	Statutory continued reporting obligation during the proceeding, extensive disclosure filings; Court empowered to investigate any matter during the proceeding.
Judicial involvement and case administration	Involved judicial case management; appointment of trustee as administrator of debtor estate.	Limited court involvement; reliance on restructuring practitioner and debtor-in-possession for estate administration.
Continued enterprise operation and debtor–in–possession	Presumption in favor of trustees as estate manager; suspicion of debtor's ability to operate business fairly.	Presumption in favor of debtor-in-possession estate management; greater trust placed in debtor's ability to operate enterprise fairly.
Centralization of claims against the debtor	High centralization: Proceeding includes all claims against debtor; all claims are centralized in Bankruptcy Court.	Lower centralization: Debtor allowed to select claims affected by the proceeding; excluded claims can be addressed in other statutory proceedings.
Equitable classification of claims and voting	Provisions for classification are similar to StaRUG; however, dual threshold for plan approval in a class (value and amount of claims). Cram-down possible with single impaired class approval.	Provisions for classification are similar to the Code; however, voting rights are determined solely on the basis of value. Cram-down only possible if a majority of classes approve.
A clear and enforceable restructuring plan	Broad provision for implementation of the plan; great court discretion in effecting the plan.	More specific provisions regarding plan enforcement, including restructuring practitioner and monitoring.
Availability of robust restructuring instruments	Similar to StaRUG, widely available instruments; protective stay is automatic.	Similar to Code, widely available instruments; protective stay must be requested by debtor and granted by court (not automatic).
Prioritizing debtor viability post-restructuring	Premium on preserving a business; court can take any measures necessary to affect the plan and protect general goal of rehabilitation.	Premium on preserving the business; focus on realizing a case-specific "restructuring concept."
Integration with other areas of the law	Strong internal cross-references and operation alongside state law.	Explicit references to other codes and provisions; express integration with larger legal scheme.

A. Information Centralization and Availability

First, any successful restructuring framework must include a method for centralizing information and ensuring that the involved parties, including the court, have adequate information about the legal, commercial, and economic relationships between parties. A bankruptcy can be seen as a collective action problem,[117] a situation where a lack of information and alignment of interests has impaired coordination between parties and where legal structure is needed to resolve informational and incentive gaps. The plan represents the culmination of this effort at ensuring informational availability, and the degree to which a legal system promotes transparency in a restructuring can determine its overall efficacy.

StaRUG's informational requirements are ubiquitous, centering mainly on the plan itself, reporting requirements to the court and other restructuring administrators, reporting requirements by the restructuring practitioner or recovery mediator if one is appointed, and regular service by the debtor or by the court on affected parties. Generally, the debtor has a duty to provide the restructuring court with any information required for the performance of its duties, and specifically in connection with any debtor requests.[118] There are further provisions specifically requiring providing information to creditors, notably through the plan,[119] at the voting meeting for the plan,[120] and to the restructuring practitioner[121] and the recovery mediator,[122] who then report to the court.[123] There is also a general, post-confirmation reporting obligation so that the general public and all affected parties can access the plan and its terms.[124]

StaRUG's requirements provide for much greater transparency than the informational requirements of the Code, which focus largely on disclosure in the plan, disclosure statements,[125] and initial filings of financial statements and other schedules.[126] Of course, a debtor must be forthcoming with the court considering general rules of civil and bankruptcy procedure as well as

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[117] The collective action problem in reorganizations has been analogized to the "common pool problem," wherein self-interested creditors are incentivized to take as much from a debtor as possible. Formal bankruptcy rules attempt to remedy this and ensure an equitable distribution of a debtor's assets. For an overview, *See* Susan Block-Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy as Applied to the Standard for Commencement of a Bankruptcy Case*, 42 AM. U. L. REV. 337, 343-45 (1993).

[118] StaRUG § 39(2), 2020 BGBl. I 3266.

[119] StaRUG pt 2 ch. 1 div. 2, 2020 BGBl. I 3259–61.

[120] StaRUG § 20(3), 2020 BGBl. I 3261.

[121] StaRUG § 76(5), 2020 BGBl. I 3275.

[122] StaRUG § 96(2), 2020 BGBl. I 3279.

[123] In fact, a "serious violation" of the debtor's obligation to support the court and practitioner's efforts to provide requisite information can result in termination of the proceeding. StaRUG § 33(1)3., 2020 BGBl. I 3265.

[124] StaRUG § 65(2), 2020 BGBl. I 3271.

[125] 11 U.S.C. §§ 1125(a)–(c).

[126] Fed. R. Bankr. P. 1007.

ethical obligations by debtor's counsel, but the Code doesn't explicitly impose further disclosure obligations. Even if StaRUG's heightened disclosure obligations are simply a function of the greater amount of "moving parts" in the proceeding—the more distant court involvement leading to scenarios like debtor-chaired creditor meetings or the appointment of a restructuring practitioner to administer the proceeding—the German system requires more of debtors than the Code. Given the strict attitude of German law towards disclosure and insolvency filing by company management, it is unsurprising that StaRUG focuses harsh scrutiny on a debtor. This scrutiny translates into heightened requirements and a system that promotes creditor interests and is more oriented towards creditor satisfaction than towards debtor protection at all costs. StaRUG thus adequately performs on this metric, and represents a modern, transparent, and highly administrable restructuring framework.

B. Judicial Involvement and Case Administration

Second, an effective restructuring framework must provide for judicial involvement both as a neutral arbiter to ensure fairness in the proceedings and adherence to procedure, but also as the ultimate authority in managing the restructuring.[127] Ultimate court authority is indispensable to a viable restructuring law and is thus a feature of both StaRUG and the Code. The primary discrepancies on this metric thus arise through considerable variance between the Code and StaRUG's approaches to case administration and degree of judicial involvement.

Where the Code operates through the robust Bankruptcy Court system and anoints bankruptcy judges the ultimate arbiter and case manager,[128] StaRUG devolves the court's authority onto several parties. The court, of course, carries ultimate authority over the proceeding, including over preliminary measures, and can hear appeals of the confirmation of the restructuring plan itself. Beyond those similarities, however, a StaRUG court plays a much more limited role. Although the court has authority to investigate all relevant circumstances related to the case, including expert and witnesses,[129] many of the day-to-day administrative functions remain with the debtor or with a practitioner. The debtor can chair meetings, can be designated by the court as responsible for service, and generally drives the

[127] This role is inherent in courts' roles as both judges and administrators in restructurings—for example, the U.S. Bankruptcy Court system. This central role has its roots in the U.S. Constitution's Bankruptcy Clause and is considered so critical that it has been the subject of several Supreme Court cases. See, e.g., *Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1775 (2022)(writing that "Bankruptcy cases involve both traditional responsibilities and extensive administrative ones," and detailing the development of the allocation of these responsibilities throughout the Bankruptcy Court and U.S. Trustee system).

[128] *See* 28 U.S.C. § 1334 (providing district court and thereby Bankruptcy Court jurisdiction over bankruptcy matters).

[129] StaRUG § 39(1), 2020 BGBl. I 3266.

proceedings forward by motion. The court only enters the picture in response to motions or incidents where the creditors or a restructuring practitioner report an irregularity.[130] The court's role is so dependent on debtor initiative, in fact, that the court can only preliminarily examine the plan and schedule a plan voting meeting upon a debtor's request.[131] Although bankruptcy under the Code is largely motion driven as well, StaRUG provides for a more hands-off court that allows a debtor much greater leeway to conduct its own case. The inclusion of standards of conduct[132] further underscore the reliance on the debtor in administering the case.

One of StaRUG's most significant introductions is the restructuring practitioner, appointed either upon debtor request or of the court's own initiative in certain situations requiring closer supervision. Although the prior InsO provides for an insolvency administrator tasked with the orderly disposition of assets in the insolvency proceeding, the restructuring practitioner occupies a far more prominent position in the proceeding. Unlike a U.S. Trustee, the restructuring practitioner does not operate on behalf of the estate[133] but rather as an agent of the court; they are under duties of due care, diligence, and impartiality.[134] Although they take the place of the debtor in some parts of the proceeding, notably in chairing inter-party meetings, their role is, more broadly, to ensure progression and transparency during the proceeding.[135] They are also tasked with monitoring the execution of the plan to the extent that this is mandated by the plan itself.[136] StaRUG thus deviates from the Code significantly by placing the onus for a fair case administration on a non-judicial third party. In contrast, the Code divides[137] fairness of process into fairness in dealing with the estate, as entrusted to the U.S. Trustee, and administrative fairness, as entrusted to the court. StaRUG instead *presumes* a debtor-in-possession, emphasizes fairness as a function of proper case administration rather than post-petition debtor conduct, and creates a dedicated position to ensure that the case is fairly and effectively handled. This greater investment in ensuring a fair and effective case underscores StaRUG's strength as an administrable restructuring system.

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[130] StaRUG § 76(5), 2020 BGBl. I 3275.

[131] StaRUG § 60, 2020 BGBl. I 3270.

[132] The law often refers to directors and management acting with the care of a reasonable and conscientious professional, reflecting the InsO's provisions. *Id.*

[133] 11 U.S.C. § 1106; *See* also 11 U.S.C. § 704 (laying out the duties of the Trustee in a Chapter 7 liquidation, which are incorporated by reference through section 1106 into Chapter 11 proceedings).

[134] StaRUG § 75 (4), 2020 BGBl. I 3274.

[135] StaRUG § 76; 79, 2020 BGBl. I 3272–75.

[136] StaRUG § 72(2), 2020 BGBl. I 3273.

[137] *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022) (detailing the division of judicial labor and case administration between the bankruptcy courts proper and the U.S. Trustee).

C. Continued Enterprise Operation and the Debtor–In–Possession

Third, any successful restructuring requires the continued operation of the debtor's enterprise during the pendency of the restructuring. When times are tough and margins are thin, any interruption of business catastrophically destroy value and impede rehabilitation. Effective restructuring systems must prioritize continued business operation to avoid illiquidity and value-destructive liquidation.

StaRUG is generally silent on the operation of the debtor's business, thus permitting debtors to freely conduct their business in the ordinary course, and outside the ordinary course with the permission of the restructuring practitioner or the court.[138] Apart from the aforementioned duties of care and conscientiousness governing management and directors in distressed entities in general, StaRUG permits a debtor broad discretion. Indeed, this presumption that a debtor will remain in possession and control of its estate or business reflects the confidence that the German law places in the court and its agents to administer a fair process.

By contrast, then, the Bankruptcy Code's inclusion of trustees as managers of the estate betrays a suspicion of a debtor's motivations and ability to operate for the benefit of the creditors rather than in their own interest. Once again, StaRUG is characterized by more distant court oversight and less direct intervention/management in favor of more stringent rules to establish transparency, accountability, and efficiency. This different approach seems to run counter to the German insolvency and restructuring tradition's creditor-oriented approach. However, this might be explained by the significant criminal and procedural penalties that loom in the background for any entity contemplating malfeasance in the context of a recovery proceeding. In that sense, the German system appears to overlap with the Bankruptcy Code's aim of providing a fresh start to the "honest but unfortunate debtor."[139]

StaRUG's fundamental focus on continued enterprise operation thus places it directly in contrast to the prior, insolvency-only regime. It is therefore well-suited to effectively address restructuring situations while preserving a business's value—an integral feature of an effective restructuring regime.

D. Centralization of Claims Against the Debtor

Fourth, a restructuring system requires a centralized system for dealing

[138] StaRUG § 76(2)3., 2020 BGBl. I 3275. StaRUG curiously only mentions approval by the restructuring practitioner; since the practitioner reports to the court, however, it can be assumed that court approval is needed in situations where payments occur outside the ordinary course and there is no practitioner appointed.

[139] *Grogan v. Garner*, 498 U.S. 279, 287, 111 (1991). When interpreting the Bankruptcy Code, courts have repeatedly referred to this hypothetical debtor in attempting to limit the application of the Code to good faith proceedings.

with various claims.[140] The multi-faceted nature of a restructuring, stemming from the multiplicity of parties each asserting their own, often contradictory interests, means that all claims must be centrally addressed to permit ultimate, comprehensive discharge. A failure to address all claims would impair availability of the requisite information and coordination for a final and rehabilitative reorganization. A restructuring system without a centralization of claims against the debtor would thus also fail to finally and comprehensively resolve the debtor's economic difficulties.

StaRUG's approach to claims is indeed less centralized than that of the Code, providing for greater flexibility for the debtor in selecting and addressing claims to be modified, at the expense of complete satisfaction and discharge. StaRUG enables a debtor to select affected parties and include them in the descriptive part of the plan.[141] Any exclusions are of those parties either excluded by law,[142] the necessity of the debtor's economic situation,[143] or those that would likely be satisfied in a separate insolvency proceeding.[144] StaRUG also foresees outside claims against the debtor—claims perhaps not related to the insolvency but not excluded as a matter of law or not brought by affected parties—through its provisions about court-ordered stays.[145] The court can enforce such stays against certain of these outside claims, but the lack of an automatic stay against all claims means that the restructuring only covers some claims. The level of centralization is thus much lower than that in the Code, in which *all* claims against the debtor are addressed and eventually discharged,[146] and during which the automatic stay covers all claims except for those exempted by motion.[147] Thus, StaRUG provides for the centralization of only a subset of claims facing the debtor and does not provide the complete coverage that the Bankruptcy Code does.

However, despite this apparent shortcoming, StaRUG's reduced centralization can be explained by understanding its place among other, existing legal structures. The InsO continues to play a large role in the German bankruptcy system, as evidenced by the extensive changes made by SanInsFoG. Other codes, notably the *Anfechtungsgesetz* ("AnfG"), the Law on the Avoidance of Legal Acts by a Debtor Outside an Insolvency

[140] For instance, in the U.S. Context, "the purpose of the Bankruptcy Code is to centralize disputes about a debtor's legal obligations." *Envisage Dev. Partners, LLC v. Patch of Land Lending, LLC.*, No. 17-cv-03971-CRB, 2017 U.S. Dist. LEXIS 168281, at *18 (N.D. Cal. Oct. 11, 2017.)

[141] StaRUG § 8, 2020 BGBl. I 3259–60.

[142] StaRUG § 4, 2020 BGBl. I 3259.

[143] StaRUG § 8(2), 2020 BGBl. I 3260.

[144] StaRUG § 8(1), 2020 BGBl. I 3260.

[145] StaRUG § 49–59, 2020 BGBl. I 3267–70.

[146] With some exceptions for claims not dischargeable as a matter of law. The debtor has a duty to file a list of creditors in their disclosures upon initially filing for bankruptcy. *See* 11 U.S.C. § 521(a)(1)(a); *See also* 11 U.S.C. § 1106 (imposing a duty to comply with "section 521(a)(1) of this title" on the trustee, and thereby on a debtor-in-possession).

[147] 11 U.S.C. § 362.

Proceeding,[148] govern which claims can and cannot be brought in connection with a proceeding.[149] The German legal system is built on the interplay between various codes and so, despite StaRUG's apparent exclusion of certain claims, such claims are dealt with under other legal schemes. It remains to be seen whether this delegation of authority over a debtor's claims impairs the orderly and final disposition of claims as would occur under discharge provided by the Code.[150] Cumulatively, however, it appears that StaRUG at least attempts to address the most pressing claims against the debtor and requires a detailed plan that outlines how these will be addressed. In conjunction with other statutes, StaRUG thus offers a theoretically effective means of claim centralization.

E. Equitable Classification of Claims and Voting

Fifth, an organized and fair restructuring proceeding requires an equitable classification and priority rule system.[151] Such a framework would also have to incorporate a robust and fair voting process. Both features are imperative, given that a distressed business likely has insufficient assets to satisfy all claimants and classification can thus determine recovery or total forfeiture. A well-defined, equitable classification scheme is key in protecting creditor rights and ensuring due process. In turn, effective voting must offer a realistic means for plan approval while also ensuring that a creditor's voting share is commensurate to their interest in the estate. This means that any effective voting must balance the often-countervailing pressures of a debtor seeking approval on the one hand and protection of creditors through a high burden, on the other. In addition, an effective voting scheme must also adequately protect small creditors while not undervaluing the relative weight and impact that any plan has on large creditors.

StaRUG's classification and voting schemes differ in the extent to which they resemble the Code and therefore vary in their effectiveness. Class formation is relatively similar to the Code; StaRUG broadly requires divergent interests be placed into different classes, and specifically requires

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[148] Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens [AnfG] [Law on the Avoidance of Legal Acts by a Debtor Outside an Insolvency Proceeding], Oct. 5, 1994, BUNDESGESETZBLATT, Teil I [BGBL. I] at 2911, last amended by Gesetz [G], March 29, 2017, BGBl. I at 655, art. 3 (Ger.), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_Reform_InsolvenzRecht.pdf;jsessionid=7E6B294FA051BC49E7B119AAAD9EE74A.2_cid289?__blob=publicationFile&v=4.

[149] The AnfG specifically governs avoidance actions by a debtor against other parties. Although this is not a creditor proceeding, it does fall in the category of restructuring-related claims that are not centralized under StaRUG.

[150] 11 U.S.C. § 1141(c).

[151] A common maxim in bankruptcy jurisprudence is that "equity is equality and equality is equity"—highlighting the need for placing all creditors on the same footing in order to satisfy the Bankruptcy Code's goal of equitable handling of claims. *See* Centergas, Inc. v. Conoco, Inc. (In re Centergas, Inc.), 172 B.R. 844, 853 (Bankr. N.D. Tex. 1994).

separate classes for subordinated and unsubordinated claims according to their status in an insolvency proceeding.[152] It also separately classifies equity interests.[153] Affected parties within a group are to be treated equally.[154] This is similar to the Code's provisions that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."[155] Classification of claims in both systems thus attempts to place similar claims together for ease of organization and satisfaction, and to ensure that approval by a class means that the plan's modifications have received consent by a certain constituency.

StaRUG differs on voting rights, however, focusing exclusively on value as the relevant determining metric.[156] Acceptance by a class is pegged at 75 percent of the voting rights in that class consenting to the plan. A failure of all classes to accept the plan can be resolved through cram-down[157] if the majority of classes have properly consented. A cram-down requires that any dissenting class receive a fair economic value for its claim and would not be disadvantaged compared to its position without a plan. This contrasts with the Code, which establishes a dual threshold for approval by a class amounting to two-thirds in value and more than one-half in number of the class.[158] The cram-down requirements under the Code more closely resemble StaRUG, as their fair and equitable value and no unfair discrimination requirements resemble the StaRUG § 9(1)1.[159] and 2.,[160] and the StaRUG § 10 equal treatment requirements, respectively. However, the Code in fact only requires approval by one impaired class for a cram-down,[161] whereas StaRUG requires that a majority of other classes, or one class if there are only two classes, accept the plan.[162]

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[152] Once again, referencing the InsO in determining fairness under StaRUG.

[153] StaRUG § 9, 2020 BGBl. I 3260.

[154] StaRUG § 10, 2020 BGBl. I 3260.

[155] 11 U.S.C. § 1122(a). Of course, since the U.S. system views the entire restructuring/insolvency process as falling under the same legal scheme, there is no separate provision referring to claims in cases of an insolvency proceeding. Since such claims would by necessity not be "substantially similar" to each other, the effect of StaRUG § 9 is functionally equivalent to the Bankruptcy Code § 1122(a).

[156] StaRUG § 24, 2020 BGBl. I 3262. There are slight differences in voting right allocation depending on whether a party is a restructuring claimant, a third-party security holder, or an equity holder of the debtor. All, however, focus on claim or equity interest value as the relevant metric.

[157] StaRUG § 26, 2020 BGBl. I 3262–63.

[158] 11 U.S.C. § 1126(c). The requirement for a class of interests is just two-thirds in amount, which is a lower threshold overall than StaRUG's approval. Both requirements for approval under § 1126 are subject to a qualification that none of the approvals or rejections or the solicitation thereof occurred in bad faith. 11 U.S.C. § 1126(e).

[159] Requiring that creditors not be disadvantaged compared to their treatment without a plan.

[160] Requiring that creditors receive fair economic value for their claim.

[161] 11 U.S.C. § 1129(a)(10).

[162] StaRUG § 26(1)3., 2020 BGBl. I 3263.

This divergence in approaches may indicate the difficulty of ascertaining fairness in the context of voting. At first glance, StaRUG seems to fall short due to its requirement that approval within a class rest solely on valuation of the claim,[163] especially when compared to the dual threshold required under Bankruptcy Code § 1126(c).[164] However, StaRUG has a much higher threshold for a cram-down, requiring majority approval across classes in addition to in-class protections—a more onerous burden than the Code's corresponding requirement that just one impaired class approve the plan. An ideal plan from a creditors' perspective might incorporate StaRUG's higher requirement for a cram-down with the Code's heightened requirement for approval within a class; counterfactuals aside, however, this is an area where both schemes attempt to balance expedience with creditor protections. StaRUG's voting model is thus at least theoretically feasible and seeks to effectively resolve inherent voting issues.

F. A Clear and Enforceable Restructuring Plan

Sixth, an effective restructuring, as mentioned above, must culminate in a clear and enforceable plan. The plan serves as a quasi-contract between all the parties, a binding agreement that potentially significantly alters legal relationships. It must therefore clearly and unambiguously lay out the debtor and creditors' obligations. The plan must also be financially feasible and enforceable to avoid further value destruction or another slide into future illiquidity. As such, any restructuring scheme must adequately provide for future monitoring and plan enforcement.

StaRUG scores highly on this metric as, similarly to the Code, there are extensive provisions outlining the requisites for a confirmable plan.[165] In this sense, StaRUG approximates the Code's provisions requiring an extensive normative section[166] and disclosure of "adequate information."[167] Both schemes also importantly provide for enforcement and implementation of the plan: StaRUG does so through extensive provisions governing operation of the confirmed plan on creditors' rights and by providing for the restructuring practitioner and for monitoring as necessary.[168] The Code in turn requires a plan to "provide adequate means for the plan's implementation" and enumerates a variety of business and legal mechanisms to accomplish that goal.[169] Bankruptcy Code § 1142 also requires further compliance by the debtor and any entity intended to effect the plan with court orders, thus

[163] This advantages larger claims at the expense of smaller claims' voting rights.

[164] 11 U.S.C. § 1126(c).

[165] These include including a descriptive and a normative part, financial disclosures, viability declarations, and an earnings and finance plan. StaRUG pt.2 ch.1 div.2, 2020 BGBl. I 3259.

[166] 11 U.S.C. § 1123(a)–(b).

[167] 11 U.S.C. § 1125(a).

[168] StaRUG pt.2 ch. 2 div. 5 subdiv. 2, 2020 BGBl. I 3272–73.

[169] 11 U.S.C. § 1123(a)(5).

establishing broad, lasting authority by the court in ensuring plan execution.[170] As such, both legal schemes require detailed plans with actionable terms that are meant to ensure an effective restructuring.

G. Availability of Robust Restructuring Instruments

Seventh, an effective system must provide the tools by which the court or another administrative entity, and through them the debtor, can protect the estate and implement the plan. This includes provisions regarding other outside claims, tools for the preservation of the estate and its value, and special positions established by law or at judicial behest to administer or execute the restructuring proceeding. Strong case administration is crucial to a speedy and professional proceeding, and any system attempting to deal with the complexities of a business restructuring must be well-equipped to do so.

As mentioned above, both systems include provisions for stays, avoidance actions, and court orders for the enforcement of plan provisions beyond the confirmation of the plan. These are all aimed at realizing the goals of the particular case, most notably through the broad authority granted to the court[171]—especially through the restructuring practitioner[172] in StaRUG. Both systems also provide for appeals[173] from the plan; together with the long-term nature of the court's orders, this means that from filing to far beyond confirmation, a case is properly administered and executed. Such judicial empowerment is key to an effective restructuring framework.

H. Prioritizing Debtor Viability Post-Restructuring

Eighth, an effective restructuring law must aim at the debtor's long-term viability following the end of the proceeding or the confirmation of a plan. This is usually done post-confirmation by providing for monitoring mechanisms, or pre-confirmation by restricting plan confirmability to situations where the plan is feasible and has a positive outlook for the debtor. A restructuring that simply results in further economic distress for the debtor is delaying the inevitable. Such a situation seriously impairs both economic value and creditor rights; therefore, any restructuring law must place a premium on business preservation and future survival.

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[170] 11 U.S.C. § 1142(a).

[171] "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105; *See also* StaRUG § 29, 2020 BGBl. I 3263–64 (providing that the court is empowered to use the "instruments" of the stabilization and restructuring framework, which are plan confirmation, conducting plan voting, stabilization orders or stays, and preliminary plan examination. Broad court authority to conduct the proceeding is found in individual sections and supplements this broad authority to use StaRUG "instruments.")e

[172] StaRUG pt. 2 ch. 3, 2020 BGBl. I 3273–76.

[173] StaRUG § 40, 2020 BGBl. I 3266; the U.S. system provides for bankruptcy appeals to the associated district court through 28 U.S.C. § 158, and therefore up the judicial appellate ladder.

As discussed,[174] the wealth of restructuring tools provided for in StaRUG as well as the provisions for post-proceeding monitoring, extensive disclosures, and feasibility declarations all point to debtor viability as a central concern. In fact, StaRUG consistently emphasizes the "restructuring concept" (*Restrukturierungskonzept*), a description of the goal of the restructuring (*Restrukturierungsziel*) and the measures to accomplish that goal, as the standard by which a debtor's situation or requested court action is to be measured.[175] Similarly, the Code has, as a goal for Chapter 11 restructurings, collective creditor relief that also discharges a debtor's burdensome obligations and "permits the debtor to continue to operate while devising a plan for its rehabilitation or survival."[176] Both of these legal schemes thus place a premium on business preservation. This is particularly notable in the case of the German law which, despite clearly expressing the aforementioned concern for creditor rights, has shifted focus to preserving the debtor's business rather than liquidating or otherwise satisfying creditors at any cost. The changes to the InsO mirror this shift as well, signaling that German lawmakers see value preservation and rehabilitation as instrumental to ensuring creditor protection.

I. Integration with Other Areas of the Law

Finally, an effective restructuring law must be well integrated with other statutes and regulations. Since a restructuring inherently interferes with the rights and legal relationships between parties, it also implicates areas such as property law, contract law, criminal law, and financial law. Although a restructuring scheme should stand on its own two feet in providing the framework for an effective and fair process, it must also be sufficiently integrated to coordinate this impairment of the involved parties and secure a satisfactory resolution of the debtor's economic troubles.

StaRUG is but one piece of a larger puzzle, as evidenced in the first place by its enactment as part of a comprehensive overhaul of German insolvency law. Furthermore, the statute's constant cross-references to other laws including InsO, the aforementioned AnfG, the Code of Civil Procedure (*Zivilprozessordnung*),[177] the Stock Corporation Act (*Aktiengesetz*),[178] and others related to financial rights and liability indicate that StaRUG fits snugly

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[174] *See* the discussion of Chapter 2, *supra* at Part IV.B.2.

[175] StaRUG § 31, 2020 BGBl. I 3264. This section concerns notice to the appropriate court of a proposed restructuring, highlighting that this concept must guide the restructuring from the very beginning of the process.

[176] WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW & PRACTICE § 91:1 (3d ed. 2023).

[177] Zivilprozessordnung [ZPO] [Code of Civil Procedure], last amended by Gesetz [G], Oct. 5, 2021, BGBl I at 4607, art. 3 (Ger.), http://www.gesetze-im-internet.de/englisch_zpo/index.html.

[178] Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl I at 1089, last amended by Gesetz [G], Aug. 10, 2021, BGBl. I at 3436, art. 61 (Ger.), http://www.gesetze-im-internet.de/englisch_aktg/.

into the existing framework. The Bankruptcy Code generally, and Chapter 11 specifically, similarly operates alongside the remainder of the U.S. Code but also in conjunction with state law and with the Federal Rules of Bankruptcy Procedure as an integrated system. Chapter 11, in particular, works in conjunction with Chapter 7, and many cross-references, such as those to Chapter 7 valuation in Chapter 11's provisions on plan confirmation,[179] underscore the integration of business reorganizations into the greater scheme of commercial and personal law. Both systems therefore seamlessly support and rely on related legal structures to ensure a smooth and effective resolution of a debtor's troubles and secure their survival and creditor satisfaction.

VI: A VIABLE MODEL: IS STARUG AN EFFECTIVE RESTRUCTURING FRAMEWORK?

The goals of the drafters of Directive 2019/1023 are fully manifest in the new StaRUG scheme, which represents an innovative and much-needed addition to the previously outdated German legal system. As a transparent, forward-looking framework with ample tools for judicial implementation of a feasible and fair plan, StaRUG draws heavy inspiration from the tried-and-tested provisions of the U.S. Bankruptcy Code. Well-integrated into the complex statutory interplay that is German law, StaRUG manages to provide a centralized yet selective and efficient forum for dealing with claims against a debtor.

Perhaps most radically, it renders a traditionally creditor-focused system, one concerned only with claim satisfaction, to a model prioritizing business survival and reorganization as a means towards such satisfaction. In doing so, StaRUG places much responsibility and faith in the debtor, an innovative attitude that approaches the Bankruptcy Code's aim of rehabilitating the debtor as an equally important result as fairly addressing claims.

The economic volatility of the past two decades, and particularly since the end of 2019, has only further underscored the need for a robust, efficient, value preservative bankruptcy system. In theory, StaRUG provides just that, and its implementation in Germany over the coming years will prove an interesting test for what is, on paper, a promising restructuring framework.

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[179] 11 U.S.C. § 1129.