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German Court Erases Shareholder Holdout Plays Against German Restructuring Schemes: Shareholders’ Consent Not Required if Only Alternative is Insolvency

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At a Glance

The Higher Regional Court of Stuttgart (the“court”) has ruled on one of the most controversial questions in German restructuring law in recent years: directors of German private limited companies (*GmbH*) do *not* need shareholders’ consent to file for StaRUG proceedings — at least where the only relevant alternative to StaRUG proceedings is insolvency.[1]

This decision is the first decision of a Higher Regional Court on this topic. With its detailed reasoning, it overrules lower courts’ jurisprudence which had held that shareholder approval *was* required for a StaRUG filing of a *GmbH*. The latest decision brings the position of GmbHs in line with existing case law on public corporations (*AG*).

This judgment also demonstrates that German higher courts take commercially well-reasoned views; this may signal that a shift of directors’ duties to in-the-money stakeholders could become established German restructuring law in the future.

It remains to be determined whether shareholders’ consent to a StaRUG filing is required if formal insolvency proceedings are *not* the only alternative to the StaRUG.

The court’s commercial and practical approach

The decision gives practical and reliable guidance to deal with holdout strategies of out-of-the-money shareholders which are often incompatible with the StaRUG's overall goal of facilitating going-concern restructurings.

The court reasoned that shareholders might be inclined to oppose a StaRUG simply to avoid the risk of an intra- or cross-class cram-down wiping out their equity. Mandatory shareholder approval would therefore introduce a counter-intuitive veto right, thereby severely restricting the StaRUG's scope and improving shareholders' leverage even where creditors are the true economic owners of the company. Giving shareholders such power could be value-destructive and would contradict the European Restructuring Directive, which does not contemplate a blocking position for out-of-the-money stakeholders. Equally, shareholders should not need the protection of a comprehensive veto right under legislation or the company's articles of association, given that their position would be sufficiently protected by and under the StaRUG rules on a (cross-class) cram-down.

As a result, shareholder approval is not required in cases where insolvency is the likely alternative to the StaRUG. The court left open whether shareholder approval may be required if the likely alternative scenario is not insolvency.

Clear answer to a side-tracked debate in the German restructuring landscape

The court's judgment explicitly opposed a recent ruling of the District Court of Berlin[2] which required shareholders' consent for a filing of StaRUG proceedings for a *GmbH*. This differs from the approach for a German *AG*, where the courts have consistently said that shareholder approval is neither required nor practical.[3]

Importantly, the court's reasoning did not differentiate between public and private companies (*AG vs GmbH)*, but instead looked only at the shareholders' economic interest in the company in the next best alternative and whether there actually is — at the point of the filing for a StaRUG — a credible and implementable alternative *other than* insolvency.

Impact

The ruling strengthens the StaRUG as a majority-led restructuring tool. It gives directors and constructive stakeholders clear guidance and a less risky path to a StaRUG to push through a going-concern transaction against out-of-the-money

shareholders, even if the articles of a company require their consent. The court's ruling, that (where the relevant alternative is insolvency) voting rules under the StaRUG supersede applicable corporate governance rules, indicates that directors should generally be empowered to protect the company's solvency. This is first and foremost in the interests of the in-the-money stakeholders. Directors' duties can therefore no longer be viewed as in the shareholders' interest only. This may accelerate the debate around a shift of directors' duties in Germany more widely.

Conversely, for shareholders to rely on existing corporate governance rules providing for a consent right for StaRUG filings (or an alleged statutory consent requirement), it will now be key to provide the company with a potential counterproposal to substantiate an alternative route and counter the argument that insolvency is the next best alternative. This must be done no later than when the company files for StaRUG.

What will suffice for the shareholders' counterproposal to constitute a relevant alternative, and how to deal with other stakeholders' (lack of) support for an alternative transaction, will be the key questions to answer for German jurisprudence as the StaRUG continues to grow to a well-tested and efficient restructuring tool.

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1. OLG Stuttgart decision dated 21 August 2024 — 20 U 30/24 BeckRS 2024, 22200. ↩

2. LG Berlin, decision dated 31 May 2023 — 100 O 18/23. ↩

3. See e.g., the restructuring court of Nuremberg in *LEONI* (decision dated 21 June 2023 – RES 397/23) and the restructuring court Dresden in *Softline* (decision dated 9 August 2023 – 573 RES 1/23). ↩

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