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The Reform of German Insolvency law

The law for the Further Facilitation of the Restructuring of Enterprises (ESUG)



Present Situation in Germany

In less than 1 % of all insolvency proceedings the debtor stays a debtor in possession

Year	Proceedings	Proceedings with Debtor in Possession	
		Absolute	Percentage
2005	39213	173	0,44%
2006	36843	147	0,40%
2007	29160	147	0,50%
2008	29291	160	0,55%
2009	32687	157	0,48%
2010	31998	214	0,67%



Present Situation in the Maritime Sector in Germany

- Prominent insolvency proceedings among German shipyards:
 - Sieta, Lindenu, Peenewerft
 - In none of these proceedings the debtor stayed in possession
 - Exception: SIAG Nordseewerke was a debtor in possession, but finally, the business was sold to a third party
- Increasing number of ship funds “One ship KGs” close to insolvency as charter rates remain stubbornly low



Weaknesses of German insolvency proceedings before ESUG

- Little incentive to file for insolvency early
- Debtor loses control on business operation to insolvency administrator
- Lack of creditor's and debtor's influence on the insolvency procedure
- Even after the reform in 1999, insolvency laws were mainly designed for the liquidation of the debtor
- Reservations against insolvency proceedings



Main Objective: Facilitation of Restructuring

- Strengthening of the position of debtor and creditors
- Court refraining from certain measures protecting the debtor's remaining assets from disposal
- Protective shield proceedings
- Debt-to-equity Swap
- Change-of-Control clauses
- Conclusion: encouragement to earlier filings



Strengthening of the position of debtor and creditors

- Former law:
 - debtor and creditors had little influence on the appointment of the preliminary insolvency administrator
- ESUG:
 - Court is obliged to appoint preliminary creditors' committee if some criteria are fulfilled
 - The preliminary creditor's committee may define certain requirements to be fulfilled by insolvency administrator. If committee unanimously selects insolvency administrator, court is, in general, bound.



Strengthening of the position of debtor and creditors

- Former law:
 - debtor and creditors had little influence on the insolvency proceedings in general
- ESUG:
 - Even in small proceedings, there can be a preliminary creditor's committee ("*vorläufiger Gläubigerausschuss*")
 - If preliminary creditor's committee agrees, debtor can always stay a debtor in possession ("*Eigenverwaltung*").
 - If debtor applies for DIP proceedings court can reject only if circumstances are known that DIP proceedings negatively affect creditor's position



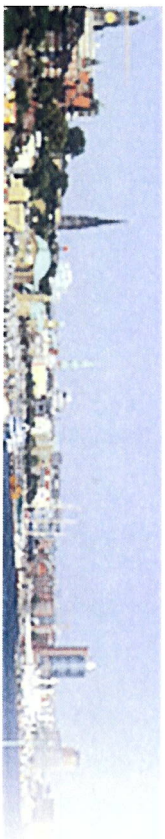
Court refraining from certain measures protecting the debtor's remaining assets from disposal

- Former law:
 - Courts often imposed a general prohibition of disposal even in preliminary proceedings or made disposals subject to the approval of the preliminary insolvency administrator
 - Limited confidence of the creditors
- ESUG:
 - More flexibility in the restructuring
 - Controlling by creditors' committee
 - Protective shield proceedings



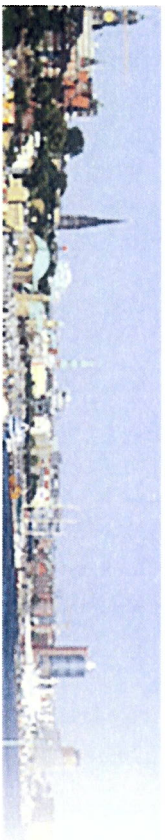
Protective Shield Proceedings

- Court grants protection from all enforcement procedures for up to three months if
 - Filing is made on the basis of facing threatening illiquidity or over-indebtedness, this verified by tax advisor etc.
 - Petition for self administration
 - Planned restructuring is not evidently futile
 - Supervision of a preliminary insolvency trustee (“*Sachwalter*”)
 - Debtor can withdraw filing, if his motion to stay in possession is to be denied



Debt-to-equity Swap (DES)

- Former law:
 - DES triggered liability for the creditor if courts later found that contributed claims were booked at an overvalue, therefore reluctance to use this tool
- ESUG:
 - Such liability is specifically excluded if approval of the insolvency plan by the insolvency court



Debt-to-equity Swap (DES)

- Capital decrease followed by a capital increase subject to an exclusion of the old shareholders' subscription rights
- Contribution in kind
- If insolvency plan is approved by the majority of creditors legal remedies are restricted
- Termination or withdrawal rights of third parties are barred (CoC-Clauses)



Limitation of change-of-control (Coc) clauses

- Former law
 - DES often leads to new majority ratios, which triggers CoC clauses
- ESUG:
 - In the event of a DES in insolvency proceedings, CoC clauses are void, § 225a IV 3 InSO



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Thank you!

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