

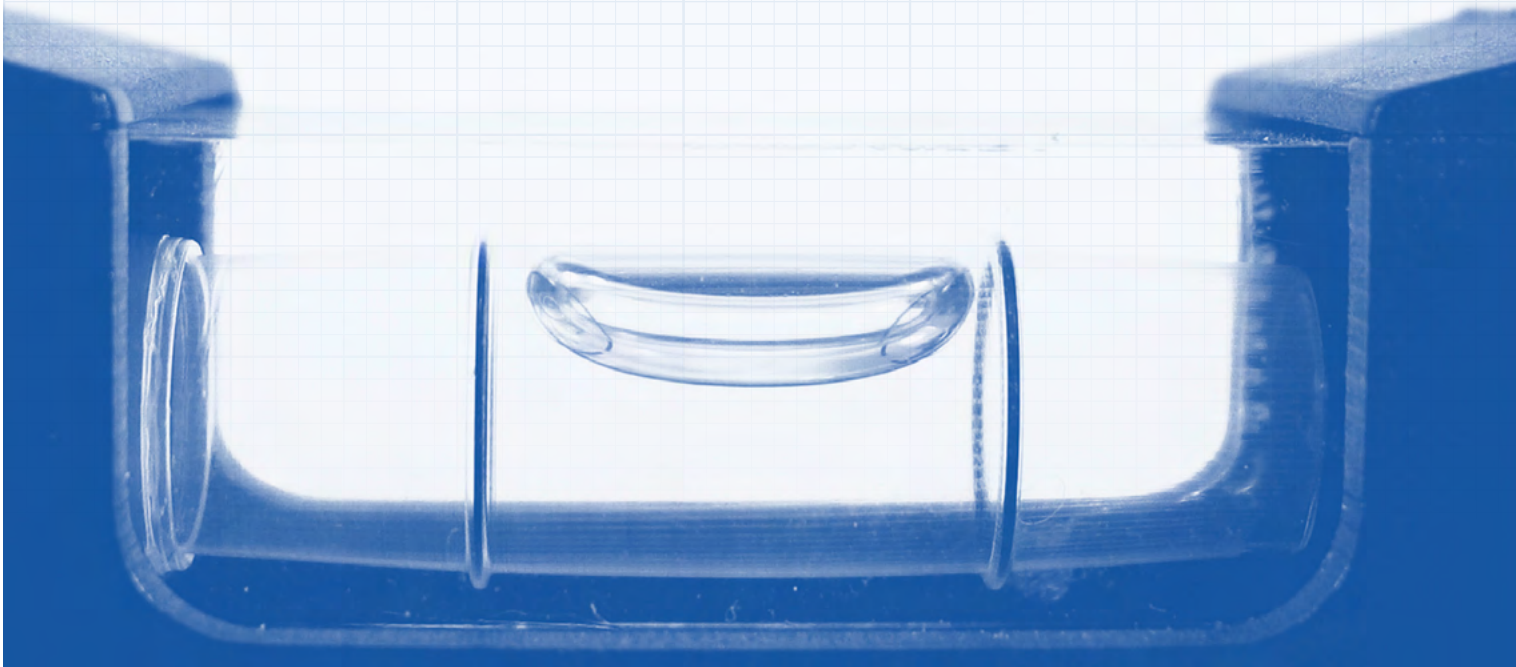
C L I F F O R D
C H A N C E

Composition and Pre-insolvency Procedures in Europe: All Change?

Contents

Current market developments	4
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The UK markets and the rise of schemes of arrangement	8
Innovative and pioneering schemes	14
APCOA: a pioneering scheme	15
Codere: most innovative scheme of 2015	20
Russian Standard Bank: schemes as a solution to regulatory capital issues	27
<hr/>	
German market and the protective shield	30
<hr/>	
Spanish evolution of pre-insolvency mechanisms	34
<hr/>	
Restructuring market: the Dutch practice and the legislative catch up	38
<hr/>	
Italian transformation and wide choice of pre-insolvency and post insolvency restructuring mechanisms	42
<hr/>	
France - an accelerated approach to business rescue	48
The End is where we start	54
Table summarising key aspects of local compositions	55
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Current market developments





Adrian Cohen

Coordinating Partner for the European Restructuring and Insolvency Practice

Since the financial crisis, there has been a seemingly never-ending evolution of the insolvency regimes across the key European Member States.

Legislative frameworks have been pushed to their limits whilst the economic environment has been in a prolonged state of distress. In this regard, the developments are in keeping with the effects of previous recessions, where legislatures have been prompted to address areas wanting in times of distress. But now, as the dust starts to settle, and we have an opportunity to reflect on what has gone before and anticipate what is to come

next, it is not difficult to see that there has been a fundamental shift from the incidence of formal insolvency procedures to an emphasis on restructuring or pre-insolvency procedures. This has been recognised in the Recast European Regulation on Insolvency Proceedings which has extended its scope to include pre-insolvency processes. Annex A has also been expanded to include for example 4 new types of Spanish pre insolvency procedures; 2 new French accelerated safeguard procedures; and 3 more Italian restructuring/composition type arrangements. In addition, the Recast Regulation no longer limits secondary proceedings to winding up proceedings only, and allows secondary processes to make use of the rescue style proceedings. These changes do not come into operation until June 2017, but in many ways they reflect the development that has already taken place at a national level and which has shifted the emphasis to pre-insolvency procedures. The reason for such changes are perhaps best explained by the crucial recognition that value may be preserved by allowing viable businesses to restructure. This has been recognised at a supranational level, and

“...empirical evidence indicated that efficient pre-insolvency frameworks are associated with higher levels of entrepreneurship and deleveraging which have a good impact on financial stability and promote economic activity.”

is one of the key themes of the European Union's growth strategy which identifies the ability to restructure viable businesses as a key aspect of the strategy for growth.¹

A discussion paper "The Economic Impact of Rescue and Recovery Framework in the EU" published by the European Commission in September 2015 has also underlined the importance of pre-insolvency regimes. In that paper empirical evidence indicated that efficient pre-insolvency frameworks are associated with higher levels of entrepreneurship and deleveraging which have a good impact on financial stability and promote economic activity. The paper measures the efficiency of early rescue and recovery and comes up with a European league table in conjunction with its own calculation and an external study conducted by INSOL.

As can be seen from the table the UK ranks at the top of the table for its pre-insolvency framework, with Italy and France not far

behind. The discussion paper suggests that some of the high levels of efficiency are attributable to recent law reforms taking place in EU Member States, whilst those that lag behind tend to be associated with procedures that are difficult to access and have expensive preventative procedures.

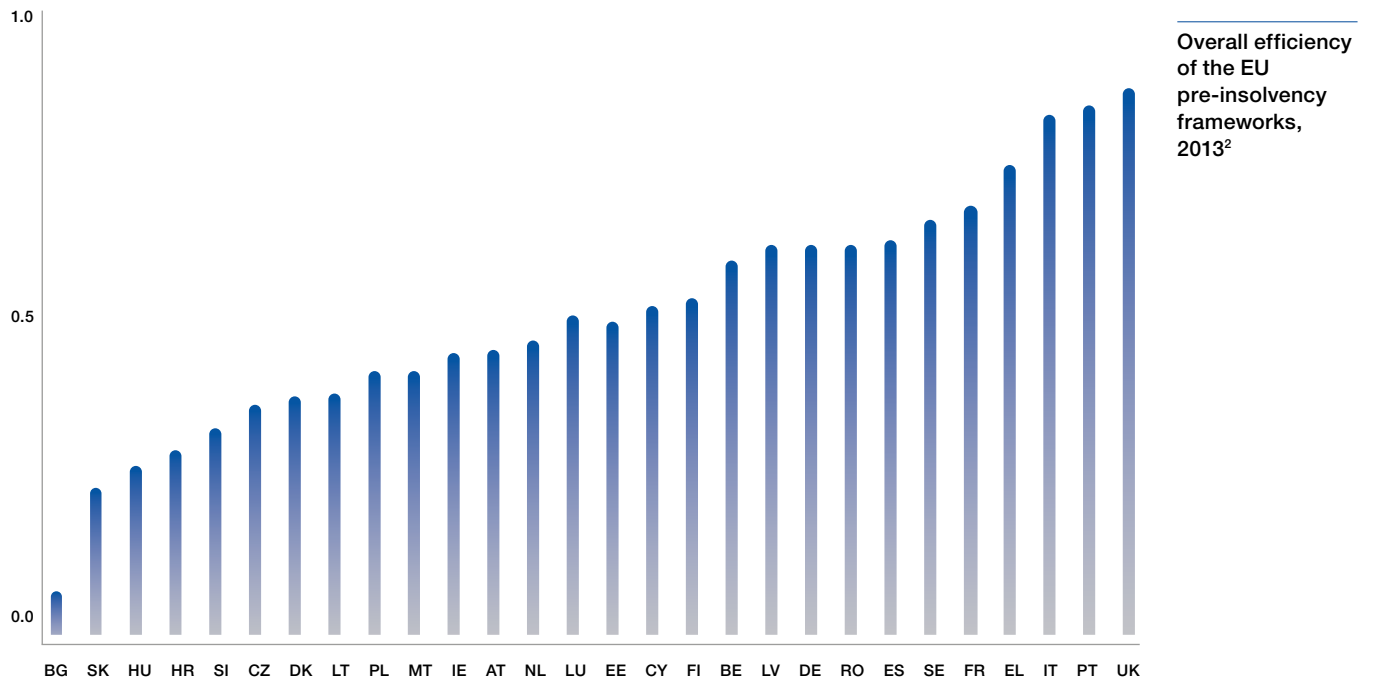
In addition, an evaluation of the implementation of the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency was published by the Directorate General Justice & Consumers of the European Commission on 30 September 2015 which considered the different ways EU Member States had implemented the recommendations for preventative restructuring procedures and second chance provisions. The evaluation concludes that there is still much to be done and that differences in the approach and procedures available in the different Member States results in legal uncertainty and additional costs for investors, whilst also

presenting barriers to efficient restructuring including cross border cases. As a result we understand that a legislative solution is being considered.

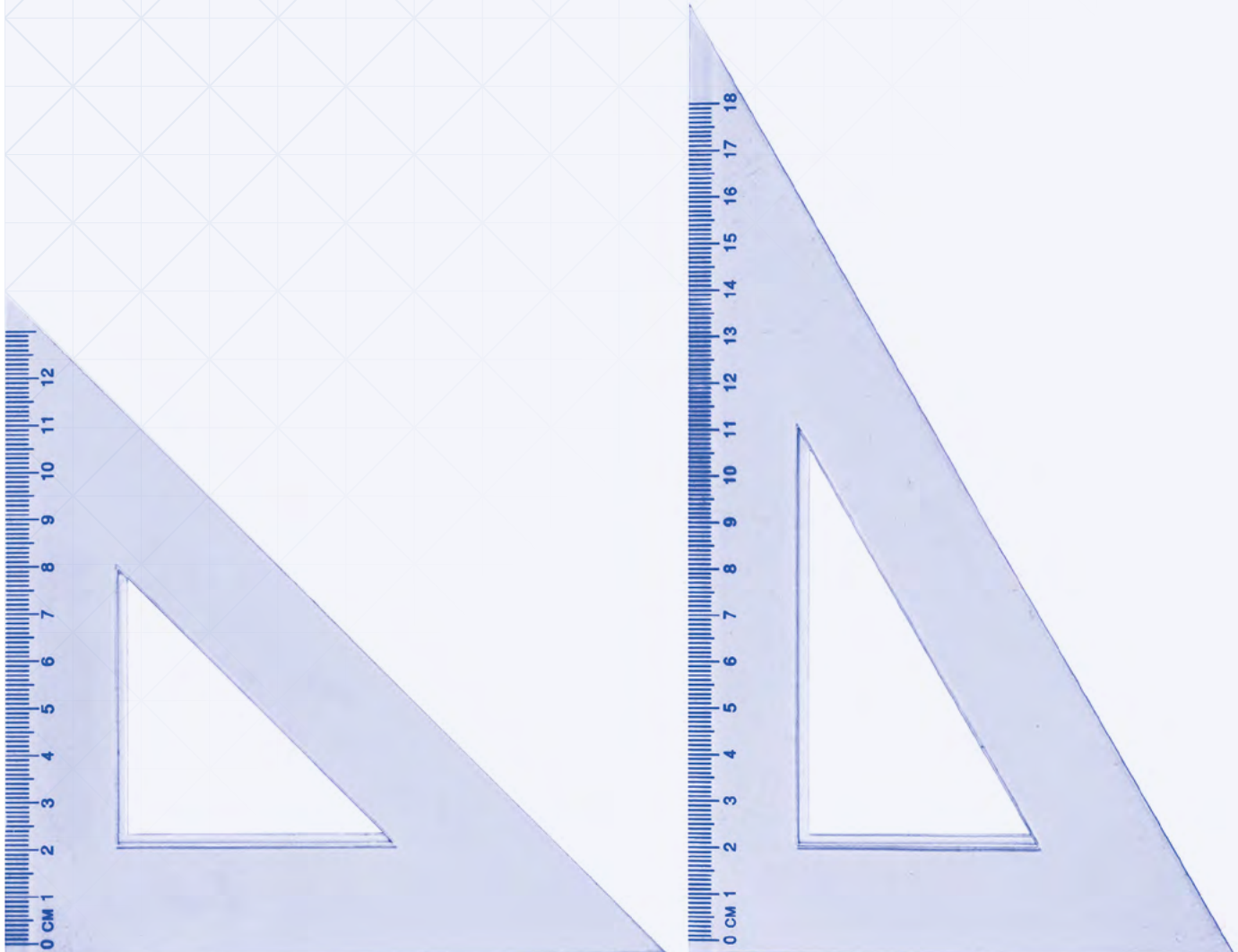
In this playbook, Adrian Cohen, Co-ordinating Partner of our European Restructuring and Insolvency Practice, talks to some of our colleagues from around the network about the new pre-insolvency procedures that have been introduced and the impact which those procedures are having in practice. For the purpose of this playbook we have selected 5 key European jurisdictions: France, Germany, Italy, Spain and the Netherlands.

1. See the European Commission's Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU) and the revisions being made to the European Regulation insolvency proceedings (EC 1346/2000).

2. Reproduced from the European Economy Discussion Paper 004 / September 2015: The Economic Impact of Rescue and Recovery Frameworks in the EU.



The UK markets and the rise of schemes of arrangement




“...in the context of complex international group restructurings (which take place through what we might call the lender engaged market), we have seen an increase in the use of formal techniques (not necessarily insolvency procedures) to implement restructurings.”

By way of introduction, Adrian explains what has been happening in the last year in the UK and the current issues in the UK market.

In the UK, in terms of legislation, apart from radical changes in the rescue and recovery procedures available to banks, investment firms and bank group companies, the principal insolvency legislation has remained intact over the last few years. The emphasis in the UK for restructurings has always been on consensual arrangements, but over the last couple of years, especially in the context of complex international group restructurings (which take place through what we might call the lender led market), we have seen an increase in the use of formal techniques (not necessarily insolvency procedures) to implement restructurings.

The biggest development in this regard for complex high value restructurings has been the use of schemes of arrangement. Adrian asks Philip Hertz, co-head of our restructuring and insolvency group, to explain further about the use of schemes.



“...a scheme
would still be available
to restructure the
English law debt of
a Spanish company”



Philip Hertz

Global Head of the Restructuring and Insolvency group

Adrian Cohen in conversation with Philip Hertz

AC: Philip can you briefly describe what a scheme of arrangement is and how they work in practice?

PH: A scheme is a statutory procedure which allows a company to make an arrangement with its shareholders or creditors (or any class of them) which, if approved by the required majority and sanctioned by the court, will be binding on all of them, whether or not they voted in favour of the scheme. The relevant law is set out in Sections 895-901 of the Companies Act 2006. Schemes have been used for over 140 years in the UK for a number of different purposes, for example the implementation of takeovers and mergers. Since 2008, following the onset of the financial crisis, schemes have increasingly been applied as a tool to implement debt restructurings.

One of the main advantages of a scheme is that it can be used by a company to restructure its debts without the need for unanimity in circumstances where this would otherwise be required under the terms of the relevant credit documentation. It can be used as a holistic tool to deal with all a company's debt or – in conjunction with other methods – to deal with only a part of the debt where unanimity is required and not available for whatever reason. It is necessary to produce scheme documentation which includes the scheme's rules and a short explanation setting out in simple terms to all creditors why the scheme is required and detailing its commercial effects. An application is made to a court for permission to call meetings of creditors. The scheme documentation is then sent to creditors who are called to vote on the scheme at a specifically convened meeting. The scheme must be approved by creditors representing 75 percent in value of the debt and a majority in number of the creditors. If approved by the required majority, the scheme must be sanctioned at a formal UK court hearing and an office copy of the court order is delivered to the registrar of companies for registration.

“One of the main attractions of a scheme is that it is not a formal insolvency proceeding, it is derived from the companies legislation and it is used in many restructurings to avoid a formal insolvency.”

AC: What will the UK courts consider when deciding whether to sanction the scheme?

PH: In exercising its powers of sanction, the court will want to see: (i) that the creditors were fairly represented by those who attended the meeting, that the majority of relevant creditors are acting in good faith and are not simply coercing the minority in order to promote their own interests, and (ii) that the arrangement is such that an intelligent and honest person, who may be affected by the scheme might reasonably approve. However, the court will not dwell on the substance of the commercial terms of the arrangement since, if it has been approved by a majority of creditors, as in such cases, the scheme is assumed to be a good deal for creditors generally.

AC: How long does it take to get a scheme approved?

PH: Clearly, the overall timing of a scheme implementation will depend on the length of commercial negotiations and complexities of the restructuring but, normally, there is a period of five to seven weeks between scheme

documents being posted to creditors and the scheme becoming effective. Bearing this in mind and the fact that as mentioned above the required documentation is not generally speaking burdensome, the cost involved can be considerably less than that involved in other restructuring options. For very complex cases, involving debts of significant magnitude, the court will want to ensure that creditors have had sufficient time to consider the terms of the restructuring.

AC: What are the main advantages of a scheme in the context of a restructuring?

PH: One of the main attractions of a scheme is that it is not a formal insolvency proceeding, it is derived from the companies legislation and it is used in many restructurings to avoid a formal insolvency. The fact that a scheme is not an insolvency proceeding means that the jurisdictional requirements for the English courts are much lower than the threshold required for insolvency proceedings. Schemes are not dependent upon the companies having either a centre of main interest (COMI) or their establishment in England

and Wales. The European Regulation on Insolvency Proceedings does not apply to schemes. For schemes the threshold for jurisdiction is that the overseas company has a sufficient connection with England and Wales. This can be satisfied, for example, by simply having English law governed finance documents or creditors based in England. While it may be easier to launch a scheme, it should be remembered that because they are not covered by the European Insolvency Regulation, schemes do not benefit from automatic standalone recognition under the Regulation, although they may benefit from recognition if they are used in conjunction with a formal insolvency process.

Schemes of arrangement have been successfully applied to companies across a number of European jurisdictions including Metrovacesa (a Spanish entity), Telecolumbus, Rodenstock GmbH, and APCOA (German entities), Icopal (a French entity), SEAT PG (an Italian entity) and companies in the Vivacom group (Bulgarian and Dutch entities) in addition to companies incorporated in the US and even in Kuwait. So long as it can

“So long as it can be shown that the overseas company has sufficient connection with England for an English court to have jurisdiction over it, it can be subject to a Scheme to deal with its creditors.”

be shown that the overseas company has sufficient connection with England for an English court to have jurisdiction over it, it can be subject to a scheme to deal with its creditors. Once jurisdiction has been established, for example by reason of a English law governed loan agreement, the English court will consider two further questions before it will approve a scheme with respect to an overseas company:

(i) Could the same outcome be achieved by an equivalent or similar procedure available locally? If the answer is yes, the English court is unlikely to sanction the application of the English scheme for an overseas company. That said, if the debt to be schemed is English law debt, an English scheme would still be available – so for example notwithstanding developments in Spain (see below), a scheme would still be available to restructure the English law debt of a Spanish company. The reason is that English case law maintains that English law debt cannot be discharged or compromised as a matter of English law, by a "foreign process".

(ii) Is there a reasonable prospect that a local court will recognise the scheme?

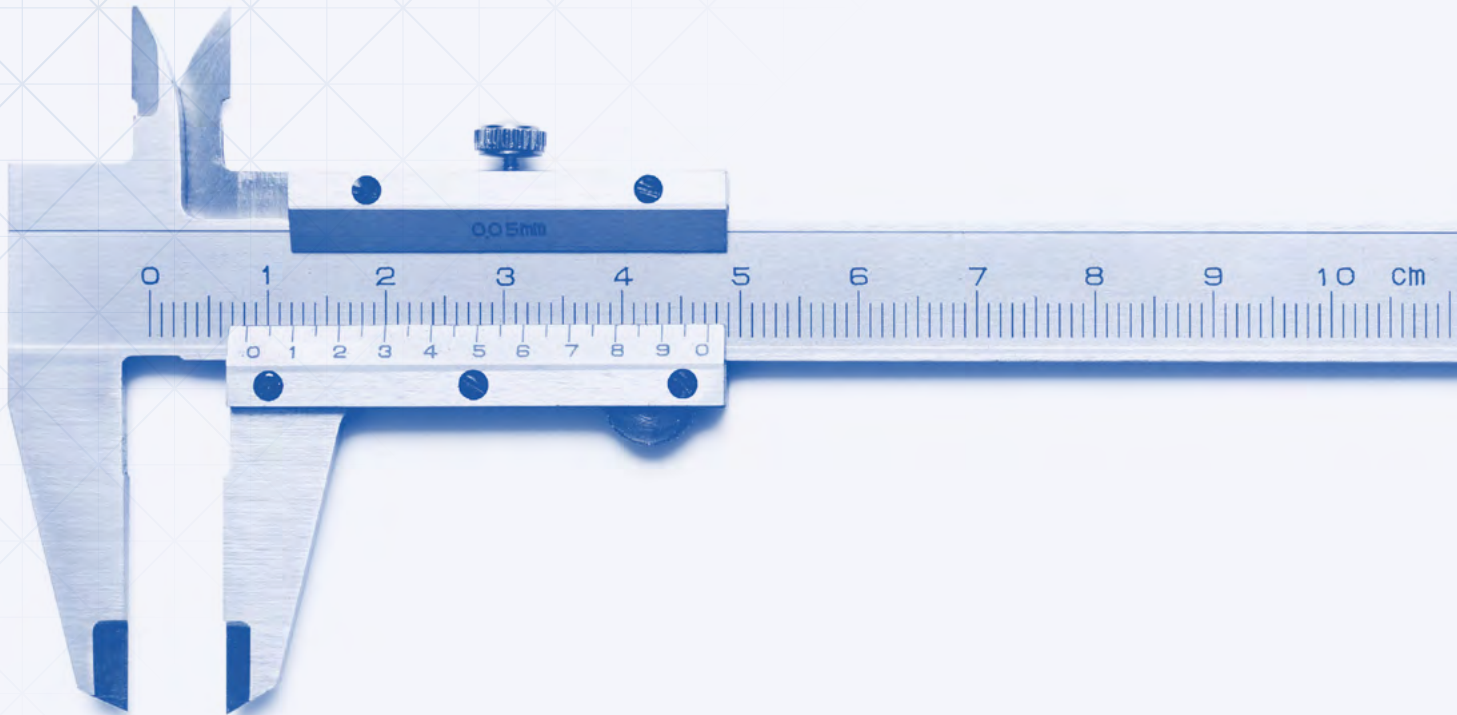
If the answer is no, the English court is unlikely to sanction a scheme since to do so would bind creditors within the English jurisdiction, but leave creditors outside England and Wales free to enforce their rights under the underlying contractual arrangements. Here, formal court recognition is not required, simply a reasoned expert foreign legal opinion.

In terms of recognition, there has been much debate in the English court regarding whether schemes are also outside of the scope of the Recast Judgments Regulation. Most of the decisions to date proceed on the assumption that the Recast Judgments Regulation does apply to schemes and the English courts have jurisdiction to sanction the schemes on the basis that one of the provisions in Chapter II applies. These provisions relate to either (i) where the parties have pre-selected the jurisdiction; or (ii) where the defendants (in the case of schemes, a number of scheme creditors) are domiciled in England and Wales. The application of the Recast Judgment Regulation would assist in the automatic recognition of the English scheme of arrangement in other EU Member States without imposing any COMI/

establishment burdens. At present, in terms of recognition outside of England and Wales, the English Court operates on the basis of expert evidence provided from prominent academics from the local jurisdiction where the effectiveness of the English scheme may be necessary.

So in summary, the principal advantages of a scheme of arrangement are that they: (i) allow a restructuring to take place on the basis that three quarters in value of the creditors (or classes of creditors) and a majority in number are in agreement – so they can bind a minority; (ii) can be used to compromise secured creditors; and (iii) as mentioned above they are not restricted by the same jurisdiction limitations that attach to formal insolvency proceedings. As a result, we have seen an increased use of schemes in an international context i.e. for international companies.

Innovative and pioneering schemes



APCOA A pioneering scheme

Clifford Chance's pioneering restructuring of the APCOA group is a key example of this which saw for the first time an English scheme being applied to facilities governed by German law, where there had been a deliberate change to English law purely for the purposes of accessing the scheme.

APCOA Restructuring overview

The restructuring essentially involved the rescheduling of €660m of APCOA's senior debt.

Lenders agreed that approximately 55% of such debt would be structurally subordinated by way of a hive-up to a new holding company for the Group which would ultimately be owned by lenders.

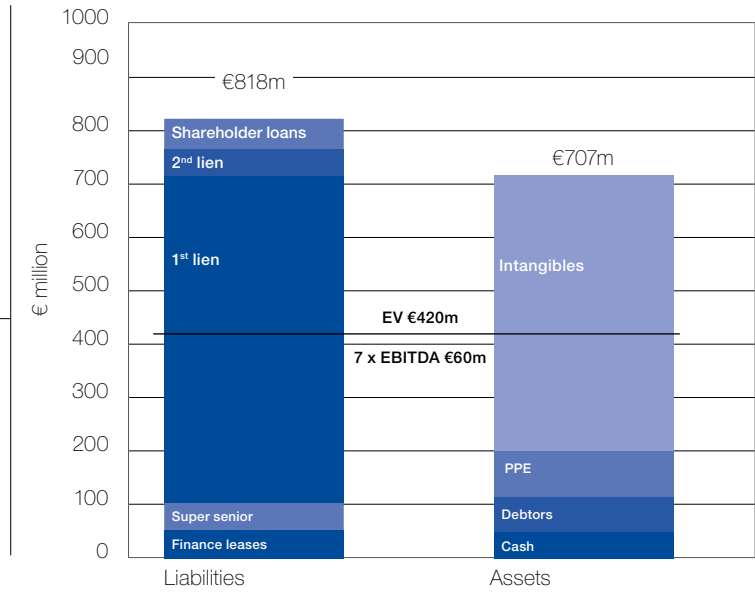
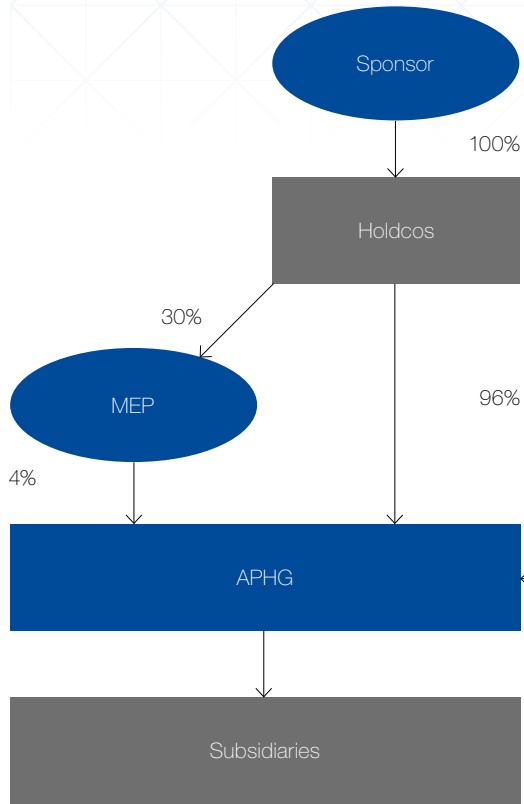
This resulted in a significant deleveraging of the operating group, enabling a more sustainable debt structure going forward.

Outstanding bridging finance (€34m) was repaid in full whereas outstanding second lien debt (€65m) was exchanged for 7% cash or warrants at the option of the holder.

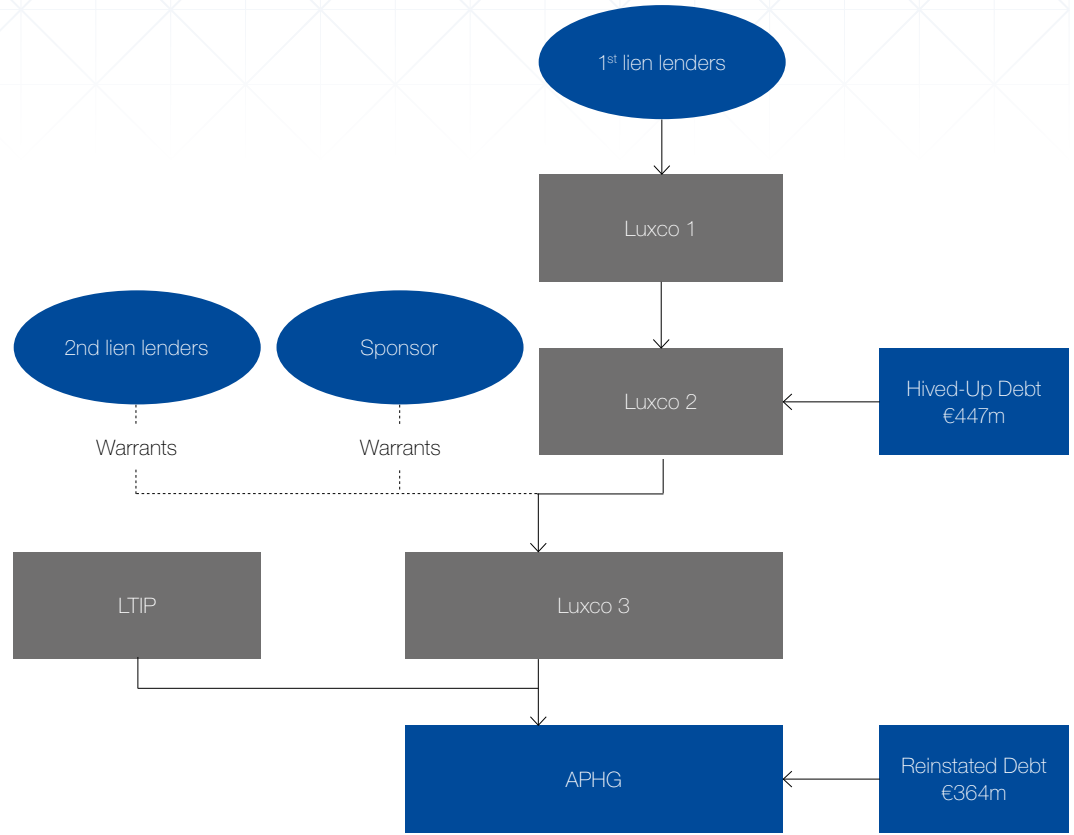
As creditor support for the restructuring was not unanimous, schemes of arrangement were needed to facilitate its implementation.

The diagrams that follow illustrate how the APCOA group was restructured.

The old APCOA structure



The new APCOA structure





The APCOA Schemes

The extension schemes:

The scheme sought to extend the maturity date in the facilities agreement governing the debts. A key issue was whether the English Court would accept jurisdiction by virtue of the governing law and jurisdiction clauses being changed to English law and the English Court under the majority lender provisions in the facility agreement. The English Court accepted jurisdiction, based on:

- the advice given by independent foreign law experts;
- lenders' awareness that the governing law and jurisdiction clauses were changed to facilitate an English scheme;
- 87% lender support for the schemes;
- the limited nature of the schemes; and
- the fact that the lenders were sophisticated and had sought independent advice.

The restructuring schemes:

These faced opposition from a lender who held approximately 7% of the senior debt. The lender argued that it was in a different creditor class; that the votes of lenders who were also bridging finance providers should be discounted due to their collateral interest; that there was not sufficient connection to the jurisdiction; and that certain scheme obligations constituted "new obligations" which could not be forced upon it.

The court found:

- turnover arrangements entered into by the lenders were without any real substance and had in any case been terminated prior to the commencement of the scheme proceedings, so this did not give rise to a separate class;
- the objecting lender's point relating to collateral interests was not accepted, as the bridging facility was relatively small and because senior lenders gave evidence confirming that their motivation for approving the scheme was not primarily based on the repayment of the bridging finance;

- the cross-border element was not an issue in this instance, though the Court would be wary of accepting jurisdiction if the choice of law had been entirely alien to the parties' previous arrangements or if the change had no discernible rationale; but
- due to a lack of authority on the "new obligations" point, the scheme would have to remove these before it could be sanctioned. As a compromise, the schemes were amended to provide that only lenders willing to assume the new obligations would be obliged to do so.

The scheme for APCOA was sanctioned in December 2014



Philip Hertz
Partner, London

AC: Can a scheme be applied to restructure other financial arrangements such as bonds?

PH: Yes, English law provisions relating to schemes are extremely flexible and can be applied in all circumstances involving a company and its creditors. There is a technical issue that arises with respect to bonds relating to the fact that in a bond structure it is the paying agent/trustee who is the issuer's formal creditor and not the individual bondholder. That said, when applying the scheme for the first time to an issuer and its bondholders, we were able to establish that the bondholders had direct rights of requesting delivery of definitive bonds, thus successfully involving bondholders in the scheme in their capacity as ultimate creditors in the bond structure. There have been a number of recent examples of US bond debt being restructured in this way, in the cases of Magyar Telecoms, New World Resources, DTEK Finance and

most recently the Codere Group; Iain White can best explain what happened in that case.

“The restructuring of the Codere Group, is perhaps one of the best examples of how US bond debt could be restructured using an English scheme.”



Iain White
Partner, London

Codere: most innovative scheme of 2015

The restructuring of the Codere Group, is perhaps one of the best examples of how US bond debt could be restructured using an English scheme. It was not however all plain sailing. The Group is engaged in multi-national gaming activities. The parent company, Codere S.A., is incorporated and listed in Spain, although the Group has subsidiaries throughout Latin America, as well as in Italy and Spain. The Group's principal financing came from two series of notes (the Existing Notes) issued by a Luxembourg subsidiary of Codere S.A., Codere Finance (Luxembourg) S.A. (Codere Lux) and guaranteed by other subsidiaries within the Group. The Existing Notes were each governed by New York law and subject to the jurisdiction of the New York Courts. The Group had experienced financial difficulties since 2012. By 2014, it had ceased

to pay interest on the Existing Notes and was reliant on creditor forbearance for its continued operation.

In September 2014, following lengthy negotiations, the key terms of a restructuring were agreed between the Group and in excess of 97% of the Existing Noteholders. The terms of the restructuring were complex but in very broad summary provided for the exchange of the Existing Notes into new notes and shares in Codere S.A. and the injection of approximately US\$380 million of new money.

Implementation of the restructuring through a consensual process required the unanimous consent of the Existing Noteholders. However, as is common with notes publicly traded through the clearing systems, Codere was not in a position to identify all of the Existing Noteholders. Indeed, even by the end of the very long restructuring process, over 1% remained unidentified. In addition, certain of the Existing Noteholders simply chose not to participate in the process,

“It was clear that a UK scheme could, in principle, deliver the restructuring, however, previous precedent required that a foreign company seeking to implement a scheme must demonstrate that it had a substantive connection with the English jurisdiction.”

presumably taking the view that, given their very small holdings, engagement in the restructuring process wasn't worth their time or resources.

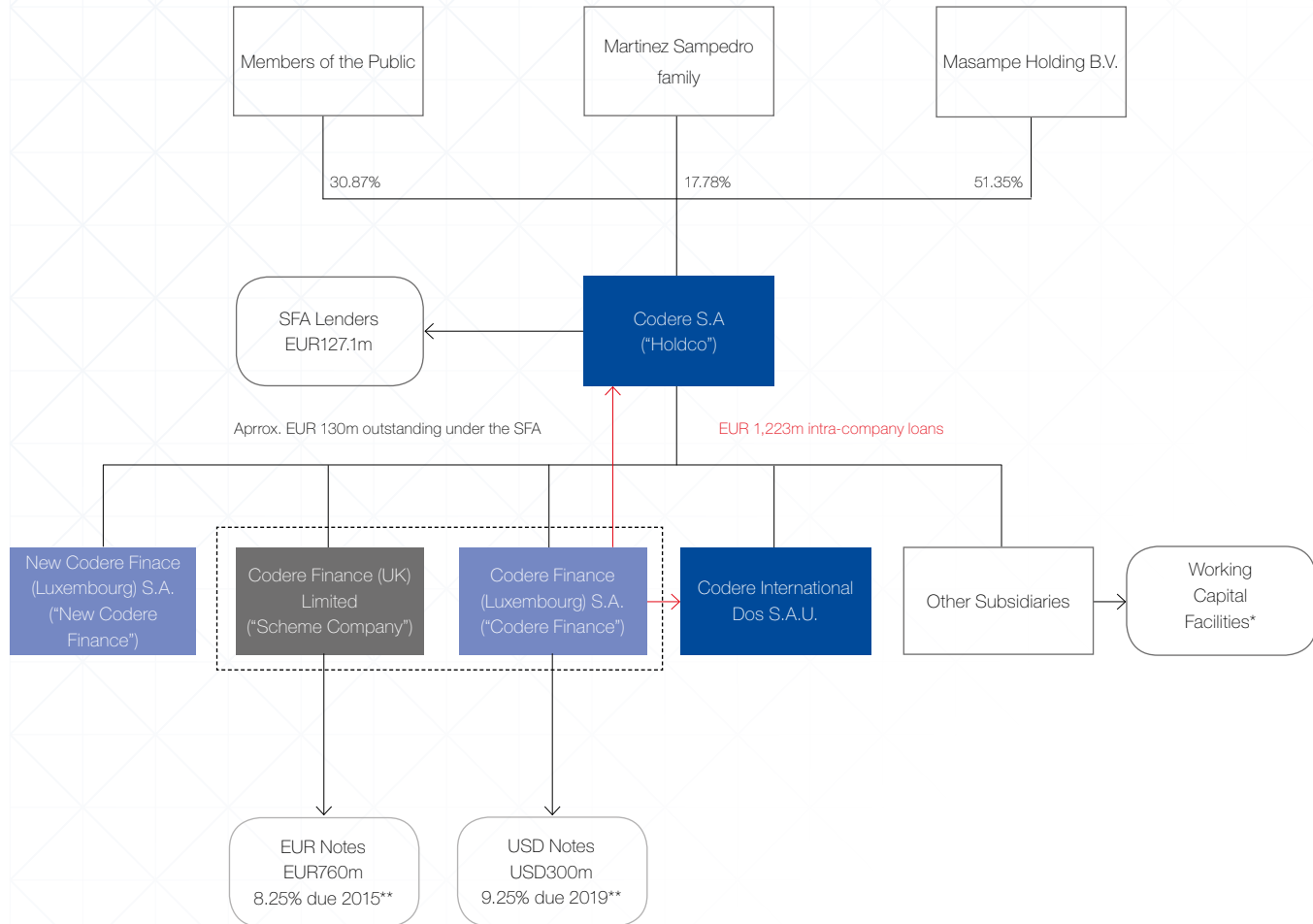
Consequently, the Group sought legal advice in each of the jurisdictions in which it carried out its principal activities to ascertain the options available to implement the proposed restructuring with less than 100% support. It became clear that such jurisdictions either (a) did not have a Group-wide procedure available that would bind in a dissenting minority and/or (b) such proceedings were only available within a formal insolvency. Formal insolvency proceedings would have had dire consequences for the Group. In particular there was a serious risk that gaming licences granted to it by local regulatory authorities (without which the Group could not carry on its gaming activities) would be immediately terminated thereby eliminating the Group's ability to generate income and destroying future value for the Group and its stakeholders. It was clear that a UK scheme could, in principle, deliver the restructuring,

however, previous precedent required that a foreign company seeking to implement a scheme must demonstrate that it had a substantive connection with the English jurisdiction. Whilst the Group did have some existing connections with this jurisdiction, there was a concern that such connections would be insufficient to satisfy the Court and the Group's ability to augment those connections (as was done in previous cases) was constrained by tax concerns.

Given these issues, more innovative ways had to be found in order to deliver the restructuring using a UK scheme. The option landed upon was to create an English incorporated special purpose vehicle, Codere Finance (UK) Limited (Codere UK), whose purpose would be to accede as a co-issuer of the Existing Notes with a full primary, joint and several obligation to meet each of the liabilities outstanding under the Existing Notes. The accession of Codere UK was permitted under the Existing Notes indentures, provided that more than 50% of the Existing Noteholders consented to

it. Codere UK would then propose a UK scheme for the purpose of compromising not only its obligations under the Existing Notes, but those of its co-issuer Codere Lux, as well as the guarantors thereof (such scheme to be recognised in the United States by means of an order of recognition under Chapter 15 of the United States Bankruptcy Code). Codere UK would not be required to demonstrate that it had sufficient connection with the jurisdiction as, by virtue of being an English incorporated company, the English Court would clearly have jurisdiction.

Simplified pre-restructuring Codere structure



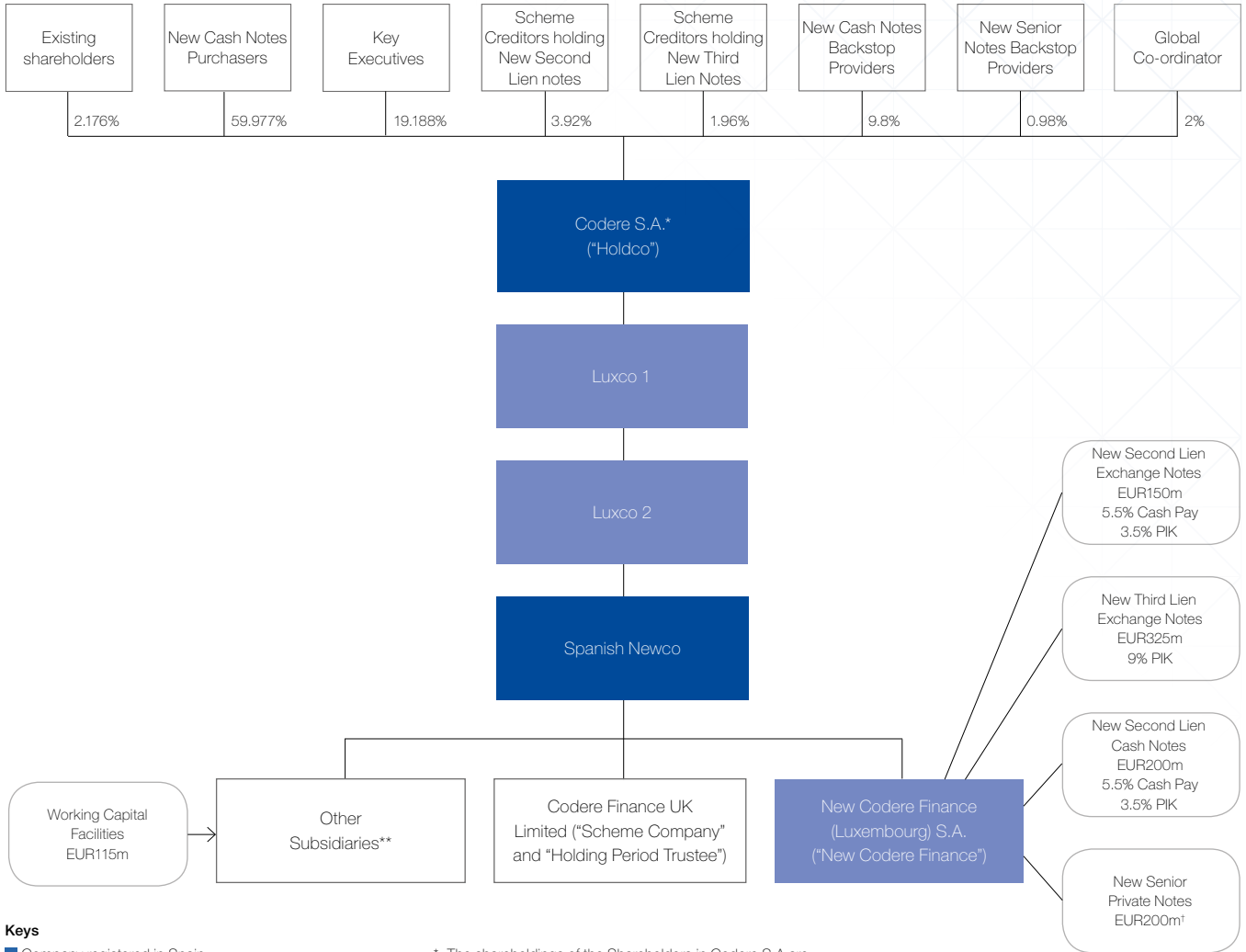
Keys

- Company registered in Spain
- Company registered in Luxembourg
- Company registered in England and Wales

* Approx. EUR115m outstanding under the Working Capital Facilities

** Approx. EUR1,214m outstanding under the Notes

Simplified post-restructuring structure



Keys

- Company registered in Spain
- Company registered in Luxembourg

* The shareholdings of the Shareholders in Codere S.A are rounded to three decimal places

** In order to implement the restructuring, Codere Finance will be sold to a third party. Following the restructuring the intention is for it to be wound up

† The New Senior Private Notes will be transferred to Luxco 2

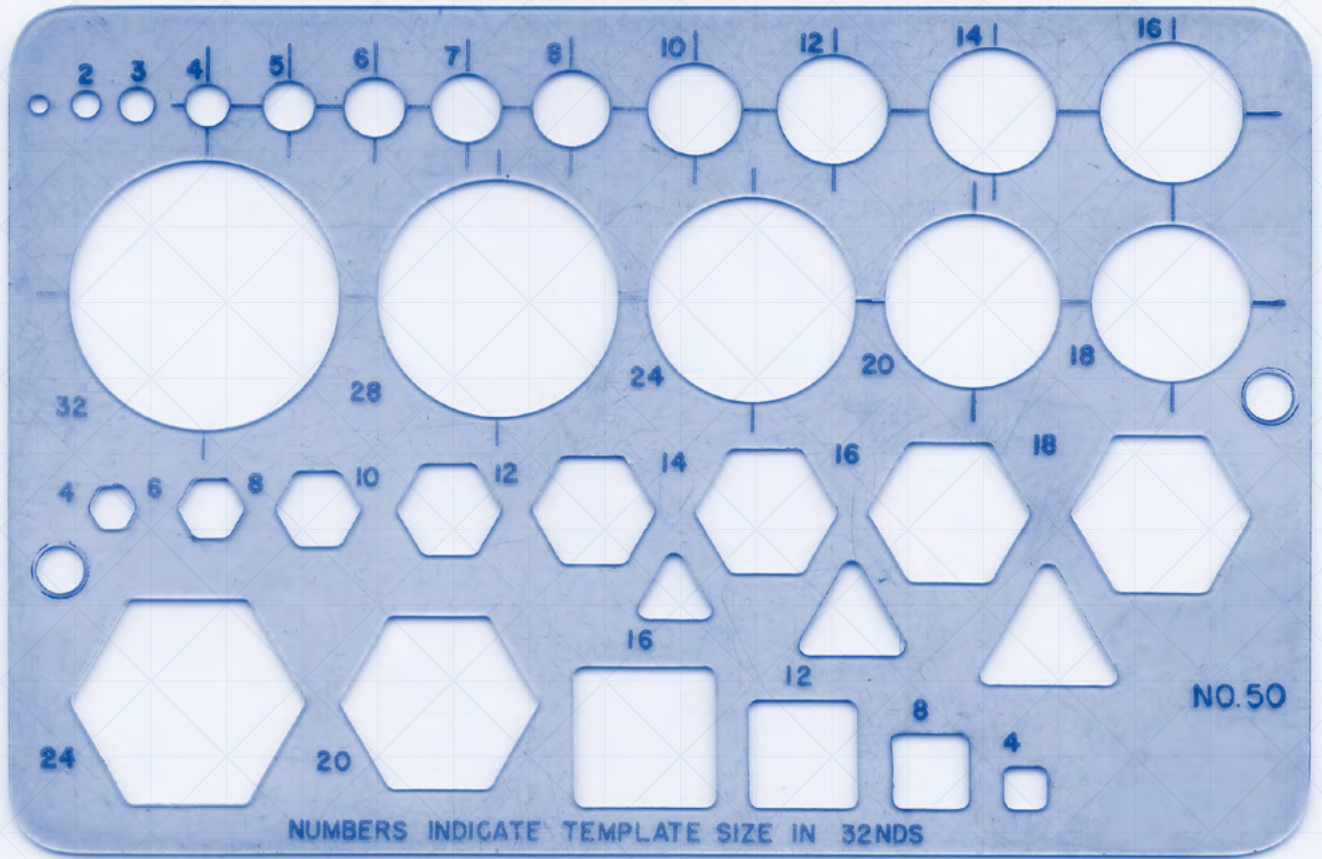


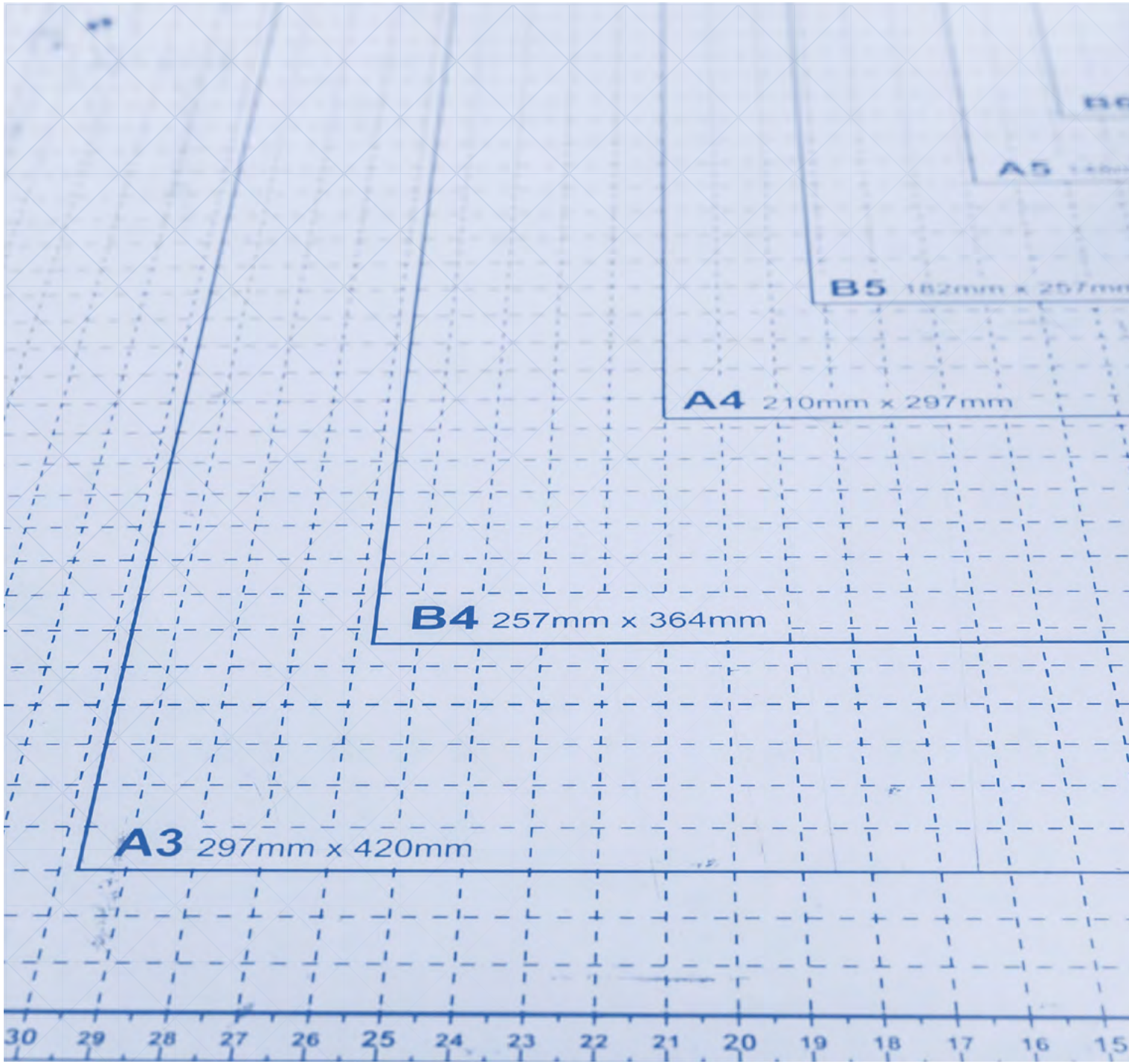
The terms of the restructuring, together with the proposed steps for delivering such restructuring (i.e. through the accession of Codere UK for the express purpose of implementing a subsequent scheme) was agreed by in excess of 97% of the Existing Noteholders under the terms of a Lock-Up Agreement.

Whilst the question of jurisdiction was clear, the question which remained was whether the Court would exercise its inherent discretion to sanction the scheme given the deliberate steps taken to invoke its scheme jurisdiction. At the first Court hearing (held for the purpose of seeking the Court's permission to convene the meeting of creditors to vote on the scheme), the answer to that question did not have to be determined but the Judge at that hearing commented that the transactions seemed to constitute an extreme form of forum shopping. At the second hearing however, the scheme was ultimately sanctioned on the basis that:

- there was no alternative proceeding available to the Group in any jurisdiction outside of England;
 - there was commercial justification for pursuing a less conventional method of establishing UK scheme jurisdiction;
 - this was not a scheme company "forum shopping" by itself to avoid its liabilities. On the contrary the scheme had been devised with the agreement of the scheme creditors;
 - the alternative to the scheme was formal insolvency proceedings, with all of the attendant dismal consequences for the Group and the creditors;
 - the scheme had been unanimously supported at the scheme meeting (with c.99% of creditors actually voting and voting "yes"). There was no opposition to the scheme;
 - independent expert opinion from each of the principal jurisdictions had confirmed that the scheme (with the benefit of the US Chapter 15 recognition order) was likely to be recognised; and
- 90 scheme creditors, representing 97% percent by value of the Existing Notes had written to the Court to support the scheme and expressly submit to the jurisdiction of the English Court for that purpose.

"In doing so it was recognised that there can be good kinds of forum shopping."





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A4 210mm x 297mm

B5 182mm x 257mm

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John MacLennan
Partner, London

Russian Standard Bank: schemes as a solution to regulatory capital issues

Another example of the innovative use of the scheme was in the case of Russian Standard Bank's restructuring (RSB) where the scheme company was not RSB itself but rather a special purpose financing vehicle, Russian Standard Finance S.A. (RSF).

John MacLennan advised RSB (a bank with over 30 million depositors in Russia) he comments: RSF is a Luxembourg incorporated special-purpose vehicle established to provide financing for RSB. RSF issued several series of English law governed notes and used the proceeds of those notes to make loans to RSB. Repayment of the notes was ultimately dependent on RSB.

A deterioration in RSB's regulatory capital position meant that the amounts due to relevant note holders could be written down in full unless steps were taken to restructure the notes and remedy RSB's capital position. Therefore, a scheme was used to implement a restructuring whereby the note holders received an immediate payment and new senior notes issued by a holding company of RSB. The benefit to RSB was the removal from its balance sheet of the amounts outstanding under the loans provided by RSF, which remedied the bank's capital position and removed the risk of intervention by the bank's regulators. The scheme was sanctioned by the English Court on 22 October 2015. The use of the English law scheme of arrangement in this situation is a novel way of amending an overseas bank's regulatory capital position. As noted earlier a scheme has advantages over other means of restructuring debt which involve creditor participation, such as a consent solicitation or the use of existing contractual amendment provisions.

However, leaving the use of schemes – sometimes in conjunction with other procedures such as company voluntary arrangements, or pre-pack administrations – aside, little has changed in terms of the insolvency tools available to restructure in the UK. A recent Call for Evidence was published by the Insolvency Service seeking views on whether any changes to the UK regime are desirable (given the EU's promotion of a formal restructuring framework and giving a second chance to businesses). In August 2015, the Insolvency Service published the responses it had received from stakeholders and also its own response to a questionnaire from the EU Commission where it noted that the UK's existing restructuring regime is already in keeping with the general themes of the Commission's Recommendation.

As can be seen from the table for the last 5 years it shows a reduction in the overall number of administrations: from 2835 in 2010 to 1730 in 2014. Likewise for CVAs there has been a reduction from 765 in 2010 to 563

in 2014. This is not surprising, especially in the context of an improvement of the general economy. Further statistics just released by the Insolvency Service on 29 January 2016 show a further decrease in administrations and CVAs to lowest levels since 2003 and 1994 respectively. The Insolvency Service does not however have data on schemes of arrangement that are used in a restructuring context but anecdotal evidence indicates that they are the restructuring tool of choice for complex international restructurings.

In terms of current issues, whilst, in the UK, we are enjoying a welcomed period of albeit limited growth within the general economy, there are still a number of significantly overleveraged businesses that will need to be restructured in the future. Complex capital and debt structures will continue to be more prevalent and the diversity of stakeholders and their strategies is something that is definitely here to stay. Not to mention the fact that the cross border dynamic will continue to loom large over future restructurings.

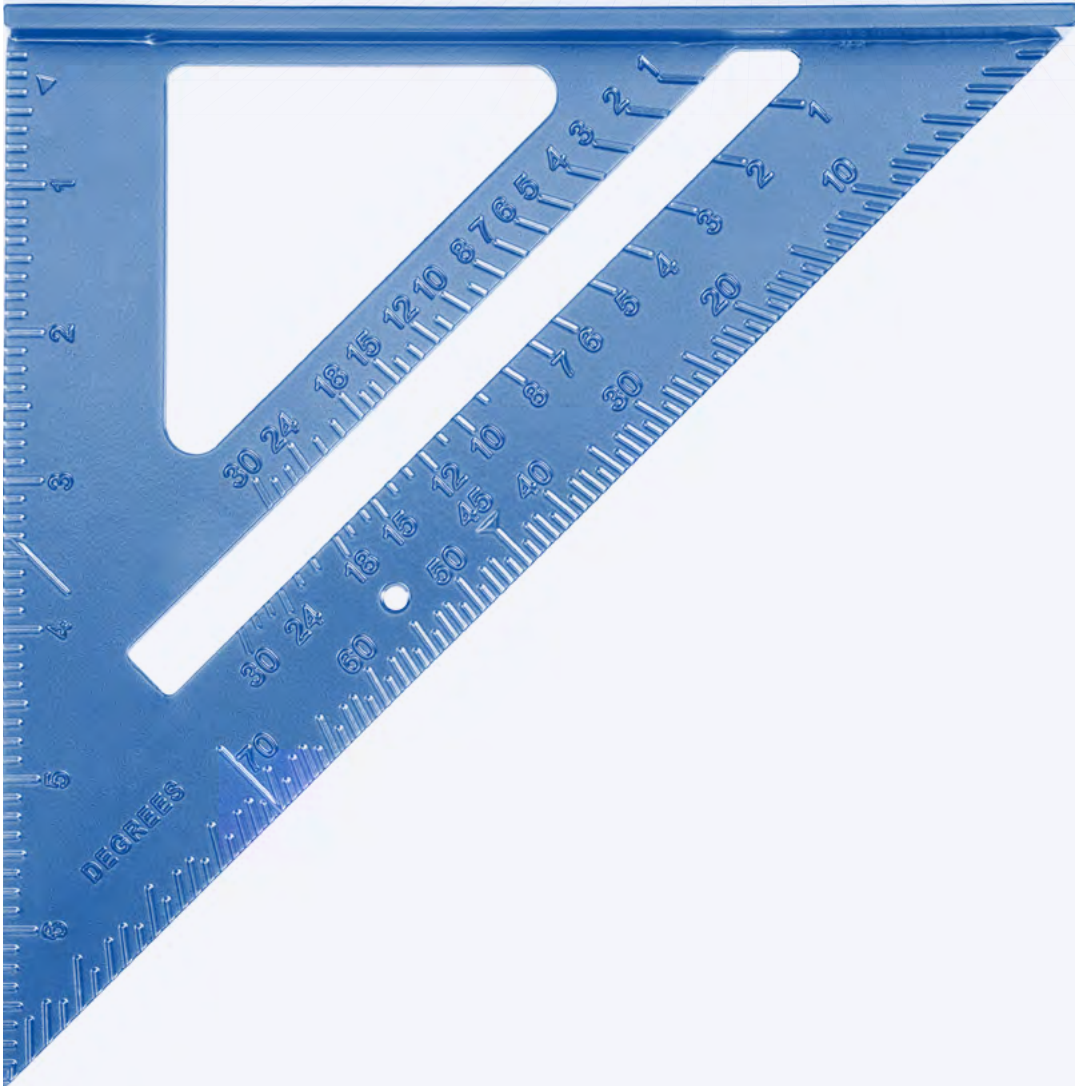
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“Complex capital and debt structures will continue to be more prevalent and the diversity of stakeholders and their strategies is something that is definitely here to stay. Not to mention the fact that the cross border dynamic will continue to loom large over future restructurings.”

In terms of data, information provided by the UK government focuses on the formal insolvency procedures designed to facilitate a restructuring

Year	Administrations	CVAs
2010	2835	765
2011	2808	767
2012	2532	839
2013	2365	577
2014	1790	563

German market and the protective shield





Stefan Sax
Partner, Frankfurt

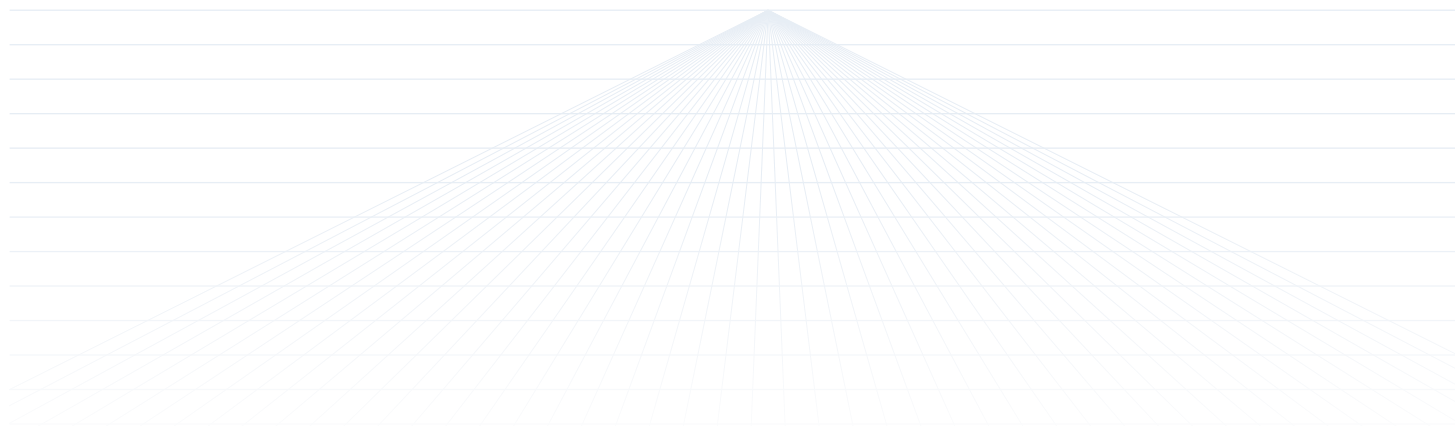
Adrian asked our partners in our European restructuring and insolvency teams the extent to which new pre-insolvency procedures have been used in their jurisdictions.

Stefan Sax, head of our restructuring and insolvency team in Frankfurt, notes: Unlike other European jurisdictions (e.g. a *scheme of arrangement* under English law or *conciliation and procédure de sauvegarde* under French law), German

law does not provide any special legal regime or reorganisation option for debtors facing financial difficulties or any out-of-court restructurings in the pre-insolvency period. In Germany, there are pre-insolvency proceedings covering only certain types of debt (bonds). However, since debtors are usually not financed solely by bonds, this option is often not sufficient in practice.

Consequently, it is fair to say that under German law there is no regulated composition or reorganisation procedure available outside of a formal insolvency process. However, as a particularity of German insolvency law there are two phases of the insolvency process which may assist in a restructuring context:

- a. preliminary insolvency proceedings (*vorläufiges Insolvenzverfahren*) between the filing for insolvency and the final opening of insolvency proceedings; and
- b. the (main) insolvency proceedings, which are initiated by court order for the opening of insolvency proceedings



The closest we get in Germany to the pre-insolvency procedures of other jurisdictions in Europe is the protective shield procedure (*Schutzschirmverfahren*), which arises during the preliminary insolvency proceedings stage. This usually lasts up to three months. The purpose of such proceedings is to allow the insolvency court to gather all the information necessary to determine if the prerequisites for commencing insolvency proceedings (i.e. a reason for insolvency and the existence of sufficient assets to cover the costs of the proceedings) are met. In general, the filing of a petition, and thus the beginning of preliminary proceedings does not affect the legal relationship between the creditors and the debtor by triggering a moratorium. In practice, the insolvency court will, however, take any measures to protect the debtor's estate against any adverse change in the debtor's position until a decision with respect to the petition has been taken. The insolvency court usually orders those measures immediately after the filing and these orders include either self-administration supported by a custodian (*Sachwalter*) or the appointment of a preliminary insolvency administrator.

The protective shield proceedings can only be initiated if the debtor is not yet cash flow insolvent (*zahlungsunfähig*). Within the

proceedings, the debtor will be granted a certain period of time, not exceeding three months, to work out the details of an insolvency plan without risking the proceedings being disturbed by individual enforcement measures due to a court order for the prohibition or cessation of enforcement. Additionally, the debtor can apply to court for approval to create preferential claims against the insolvency estate which generally have to be satisfied in full (but ranks only after secured old creditors). This may provide comfort to creditors, existing suppliers and potential new contractual counterparties with the result that new investments can be made, promoting the process of restructuring.

Adrian Cohen in conversation with Stefan Sax

AC: Have the protective shield proceedings been used much in practice?

SS: According to a study of the Boston Consulting Group (*Moldenhauer/ Herrmann/ Wolf/ Drescher, Zwei Jahre ESUG – Hype weicht Realität, März 2014*), which examined all insolvency proceedings taking place in the first two

years following the reforms in 2012, there have been just about 100 protective shield proceedings out of about a total of 20,000 insolvency proceedings in the last two years, i.e. only 0.5%.

AC: What types of entities use the protective shield proceedings?

SS: The "typical" entity using the protective shield proceedings is rather large. It has an average annual turnover of EUR 15 million and 150 employees. There is no information currently available about the particular sectors affected by those proceedings.

AC: Have we been involved as a firm, in any of these proceedings?

SS: We have provided advice to creditors in some of the large cases. For example, in respect of IVG, we advised the lender in relation to the DIP-financing. We also advised the lender in DC Druckchemie on the debt to equity conversion mechanisms. In addition, we have also given advice to the sponsors in SIC.

AC: Is there a general perception that the procedures could be used more?

SS: It may be too early to say, as it's only a couple of years since the procedure was introduced. Besides, since the procedure is not applicable for legal entities which are already cash flow insolvent (*zahlungsunfähig*) and so in many cases, it is simply too late to initiate a protective settlement procedure. Finally, the procedure does not provide a sufficient package for entities with an international group structure.

AC: Looking to the future - do you think that use of these procedures will increase?

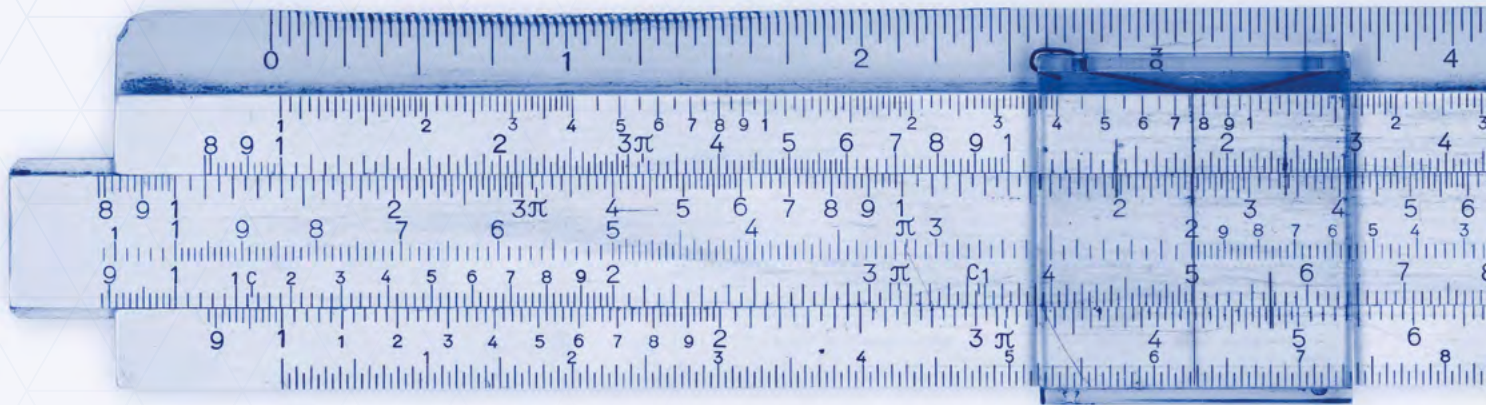
SS: According to the Boston Consulting Group study, the tendency of using the procedure has been stagnating since the third quarter of 2013. This may be down to the fact that conditions in the economy generally have improved, however we also think that there will be not much of an increase in its use unless the legislation is amended further to accommodate the needs of the larger companies, as they are the main users of the protective shield proceedings.

The reason the procedure is suited to debtors of a certain size may be that a significant amount of professional input is required to initiate the process (i.e. time and expenses in order to obtain the required restructuring certificate (*IDW S 9*)). A reduction of the complexity of the procedure rules as well as the adaption to out-of-court restructurings with regard to the settlement of debts would be a step in the right direction. A definite upside of the protective shield proceedings is that its duration is significantly shorter than the duration of a "regular" insolvency proceeding. In practice, however, we see some cases where protective shield proceedings did not succeed and were transferred into regular insolvency proceedings afterwards, causing additional delay, costs and a decrease of value of the enterprise.

AC: Is there any scope for the protective shield procedures to be used in relation to overseas companies?

SS: No. As already mentioned, the protective settlement procedure cannot sufficiently provide a route for entities having a complex international group structure with an effective procedure (with regard to cost and timing) as secondary insolvency proceedings in the relevant other jurisdictions would be required. We have had complex restructuring cases in Germany with entities having an international group structure such as APCOA, Telecolumbus and Rodenstock in the past but we have used pre-insolvency proceedings of other jurisdictions in particular, the English scheme of arrangement.

Spanish evolution of pre-insolvency mechanisms





Iñigo Villoria
Partner, Madrid

Adrian Cohen in conversation with Iñigo Villoria

AC: Moving now from Germany, to Spain where in the last few years there has been a significant amount of development, especially in the use of pre-insolvency procedures. Iñigo Villoria heads our restructuring and insolvency team in Spain.

Iñigo can you tell us a little about those procedures?

IV: Yes of course. The pre-insolvency procedures have been around since 2009 (Art 5 bis and Art 4 of the Spanish Insolvency Act) and they have been used by mainly large or medium sized companies. We have been actively involved in pre-insolvency proceedings in relation to a number of companies, mainly in the real estate sector, but also

in the manufacturing and entertainment sectors. The pre-insolvency procedure has been popular because it allows businesses to continue, unlike some of the more formal insolvency procedures. There are a range of different pre-insolvency procedures available in Spain. These are set out in the table that follows.

AC: Have the pre-insolvency procedures been used for restructuring overseas incorporated companies?

IV: They have only been used for Spanish companies so far, but it is worth noting that in the respect, they have also been used in relation to the Spanish subsidiaries of international groups. The demand for overseas companies is limited, mainly because other jurisdictions have restructuring procedures of their own available.



Spanish evolution of pre-insolvency mechanisms

Type of process	Key aspects	Voting thresholds
Out of court protected refinancing	Refinancing can involve the taking of new security Avoids claw back risk	60% total liabilities or 51% of financial liabilities
Court sanctioned refinancing	Refinancing can postpone the repayment of debts for up to 5 years, facilitate debt to PPL swaps up to 5 years Avoids claw back risk and crams down dissenting creditors Refinancing can postpone the repayment of debt for up to 10 years, facilitate write-offs and debt for PPL swaps up to 10 years, debt for equity swaps, assignment of assets as payment Avoids claw back risk and crams down dissenting creditors	60% unsecured liabilities 65% secured liabilities 75% unsecured liabilities 80% secured liabilities



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Type of process	Key aspects	Voting thresholds
Formal arrangement post insolvency (convenio)	<p><i>Convenio</i> can postpone the repayment up to 3 years, facilitate write-offs up to 20%</p> <p>Crams down ordinary and subordinate dissenting creditors</p>	<p>Liabilities voting for the arrangement exceeding liabilities voting against it</p>
	<p><i>Convenio</i> can postpone the repayment up to 5 years, facilitate write-offs up to 50%, debt for PPL swaps up to 5 years for non labour or public creditors</p> <p>Crams down ordinary and subordinate creditors, as well as secured creditors of the class (labour, public, financial, commercial) meeting the voting threshold</p>	<p>50% ordinary liabilities</p> <p>60% secured liabilities of the same class</p>
	<p><i>Convenio</i> can postpone the repayment up to 10 years, facilitate write-offs over 50%, debt for PPL swaps up to 10 years for non labour or public creditors and any other condition legally available</p> <p>Crams down ordinary and subordinate creditors, as well as secured creditors of the class (labour, public, financial, commercial) meeting the voting threshold</p>	<p>65% ordinary liabilities</p> <p>75% secured liabilities of the same class</p>



Restructuring market: the Dutch practice and the legislative catch up




Ilse van Gasteren
Counsel, the Netherlands

Adrian Cohen in conversation with Ilse van Gasteren

AC: Moving now to the Netherlands, Ilse van Gasteren, counsel in our restructuring team, will tell us a little about the pre-insolvency practices there.

IG: Although there is a form of composition available in the Netherlands, this is a post insolvency mechanism and is rarely used in practice. Dutch law does not yet have a pre-insolvency composition procedure. This means that all amendments (loans, shareholder structures etc) require 100% consent, unless otherwise agreed in advance. There is, however, draft legislation available, aiming at the implementation of a Dutch out-of-court composition, which is a process similar to the UK scheme, with some US Chapter 11

elements. Implementation is expected during 2016. Nor does Dutch law have a formal procedure similar to the English pre-pack administration. However, again, draft legislation has been prepared and will hopefully be implemented soon (hopefully at the beginning of 2016). In the past years, the majority of local courts in the Netherlands have already applied this draft legislation, so a number of Dutch pre-packs have been implemented. Not all have been successful, unfortunately. Due to opposition in the market, mainly aimed at lack of transparency and violation of employee rights, at the moment courts are more and more reluctant to apply the draft legislation, so parties are hoping for implementation soon. Restructurings which cannot be implemented on a consensual basis have in the past years been implemented by a sale through share pledge enforcement, whereby a release of rights under the Intercreditor Agreement are used to



leave behind shareholders and the part of the debt that is not in the money. We had a leading role (acting for the Senior Lenders) in the first such enforcement, Schoeller Arca. This enforcement route has been implemented (or used to come to consensual solutions) many times ever since.

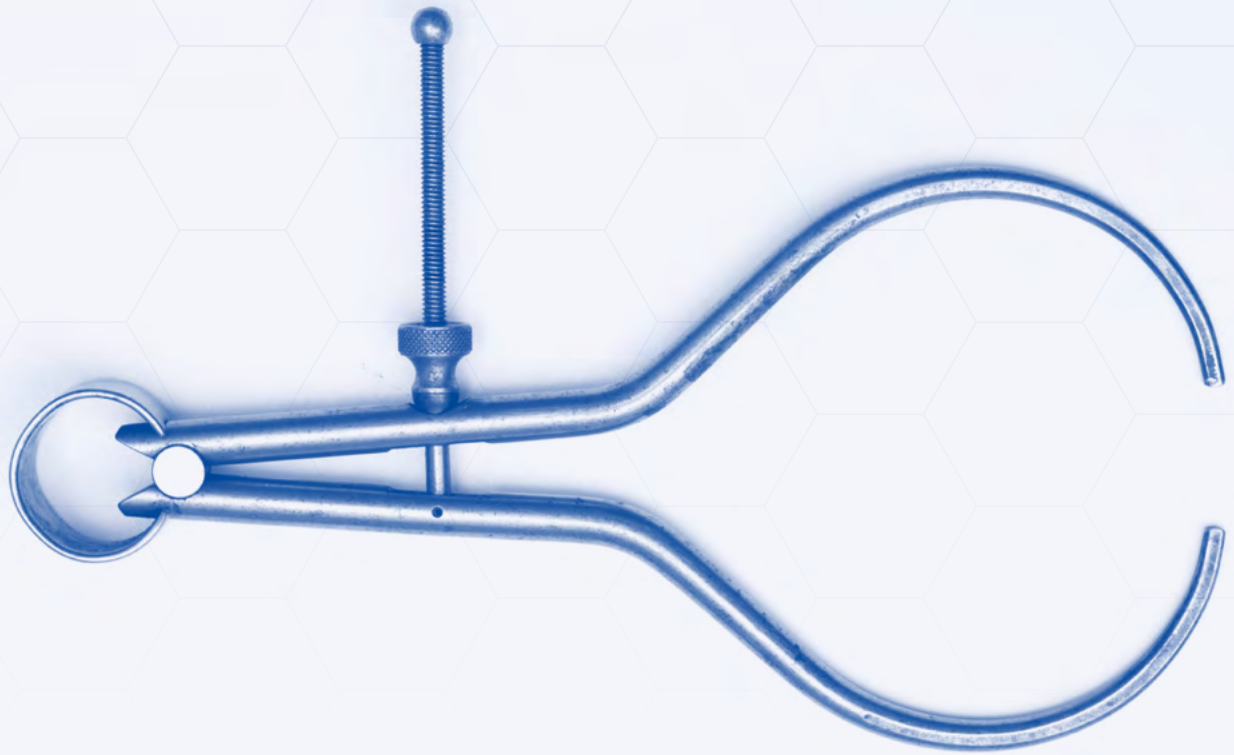
We have been involved in many, if not almost all, enforcement restructurings in the Netherlands. There have been some significant ones as I have already mentioned, such as Schoeller Arca, and the LyondellBasell restructuring, which was a combination of a US Chapter 11 and a Dutch share pledge enforcement and in which we acted for LyondellBasell. Recently, we acted for the mezzanine lenders in DRC enforcement process. Also, the sale of the various Imtech divisions out of the Imtech bankruptcy estate were implemented through share pledge enforcements where we acted for the Lenders.

AC: So, Ilse, it sounds like Dutch restructurings mainly take place in an enforcement setting to date, do you think this will change once the new legislation comes into effect?

IG: Yes, I hope that the new legislation brings with it greater flexibility, as some of the pre-pack style restructurings have not been that successful. The new scheme legislation will in our view help break through a deadlock at shareholder/junior/senior level where the facilities are governed by Dutch law and, specifically, also in structures where there is no holding share pledge or intercreditor arrangement to allow for a share pledge enforcement route. Pre-packs will be also be useful, especially if the restructuring also requires a substantial reduction in employees and/or important lease agreements (for example) because these liabilities can be reduced by using a formal Dutch insolvency procedure.

AC: Have any of the existing enforcement Dutch techniques been used for any overseas companies?

IG: No, this is because a share pledge enforcement cannot be applied to a foreign company. We will have to wait and see whether changes proposed under the new legislation, including the introduction of Dutch schemes and pre-packs means that the Netherlands is a place where international restructurings can be achieved.



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Italian transformation and wide choice of pre-insolvency and post insolvency restructuring mechanisms





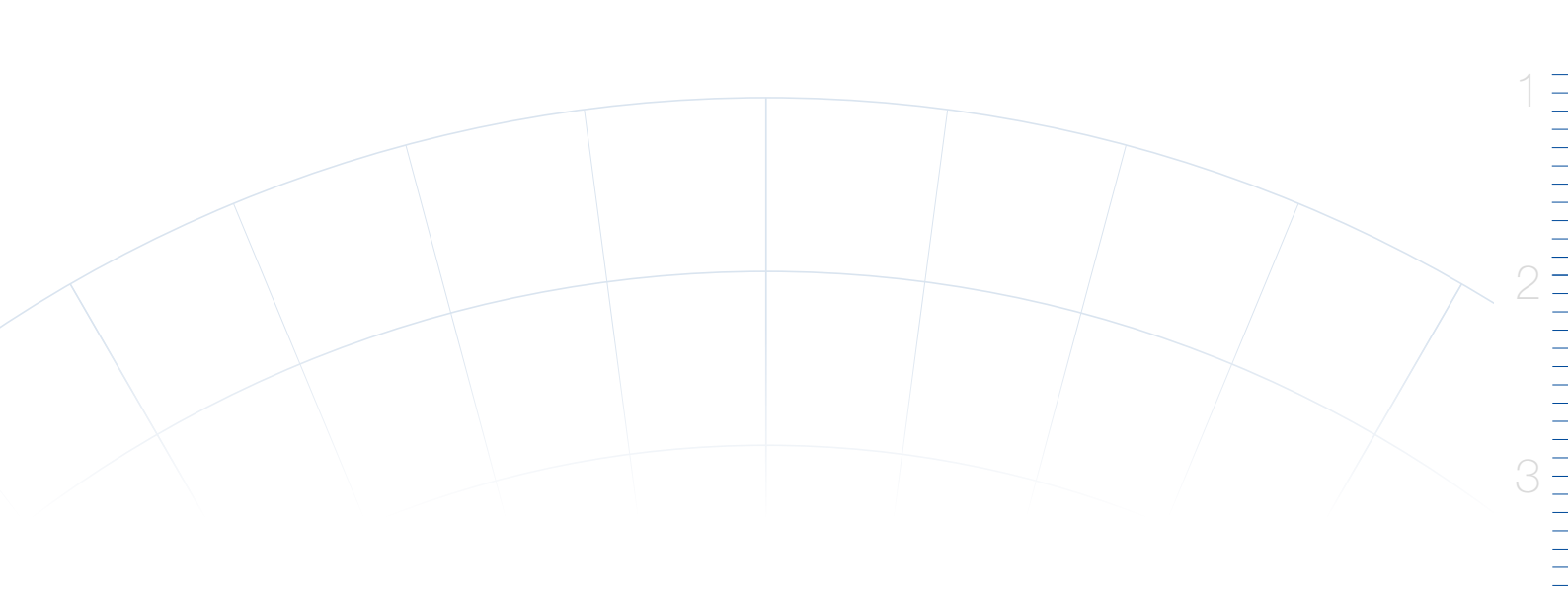
Adrian Cohen asks Fabio Guastadisegni, partner in our restructuring team in Milan, about the developments in Italian pre-insolvency proceedings:

Since the financial crisis, the Italian market has witnessed a wide use of pre-insolvency proceedings. Enterprises have sometimes taken advantage of gaps in the legislation and tended to over-use them. In particular, this has been the case for reorganisation plans (Piani di Risanamento, pursuant to art. 67, paragraph 3, let. d) of the Italian Bankruptcy Law) and, more recently, for pre-packed arrangements (Concordato Preventivo, pursuant to art. 160 of the Italian Bankruptcy Law). These recurring technical problems and inefficiencies were highlighted to the legislature and therefore considerable improvements have been made to the Italian Bankruptcy Law, with resulting continuous amendments. Set out in the tables that follow are summaries of the pre-insolvency procedures available now in Italy.

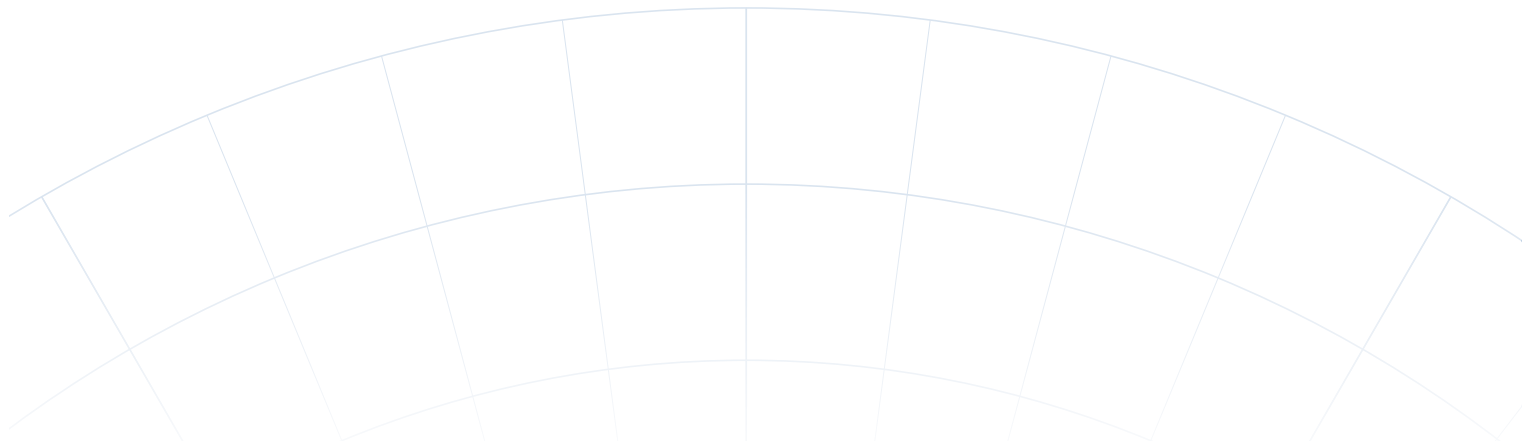
Fabio Guastadisegni
Partner, Milan

Pre-insolvency procedures in Italy

Type of process	Key aspects	Voting thresholds
Pre-bankruptcy Composition <i>(Concordato preventivo)</i>	<ul style="list-style-type: none"> Payment of at least 20% of unsecured creditors Creditors with priority or pledge or mortgage must be no worse off than in a winding up Debtor has protection of between 60 and 120 days to draft the plan but is subject to reporting requirements A competitive bid process automatically opened for the purchase of the debtor's assets Concurrent proposals for composition may be made by creditors if payment to unsecured creditors falls below 40% (in the case of pre-bankruptcy composition) or 30% (in the case of pre-bankruptcy composition with business continuity) 	50% majority of each creditor class voting must be expressed in writing
Out of Court reorganization plans under Article 67 <i>(Piani di risanamento)</i>	No general moratorium, creditor protection plan must be assessed as reasonable by experts to avoid claw back	Not prescribed
Debt Restructuring Agreement under Article 182 bis <i>(Accordi di Ristrutturazione dei Debiti)</i>	<ul style="list-style-type: none"> Feasibility of repayments must be confirmed by independent expert 60 day stay Full payment of those not party to the agreement within 120 days of court's validation Super priority for rescue finance Subordination of shareholders in relation to loans made in the context of restructuring 	60% majority of creditors must sign the agreement (no voting)



Type of process	Key aspects	Voting thresholds
Debt Restructuring for companies having more than 50% of total debt with banks and financial intermediaries under Article 182 septies	Restructuring agreement can cram down financial creditors, where they make up at least 50% of the total debt as long as it represents the best alternative	75% financial creditors must sign the agreement (no voting)
Post bankruptcy composition	The proposal may provide for creditors with priority or pledge or mortgage not be paid in full but they must be no worse off than in a winding up	Majority
Large companies post bankruptcy administration	<p>More than 200 employees and debts at least 2/3 value of the assets and income or for extraordinary procedure more than 500 employees, debts not lower than 300,000 Euros and actual prospects of recovery</p> <p>Judicial commissioner appointed recovery plans to be submitted within 55 days, once approved plan is carried out by the commissioner under the supervision of the Minister</p>	50% majority only in the case of a "concordant" during the process



AC: What types of entities use these pre-insolvency procedures?

FG: They are widely used by businesses of all shapes and sizes, across all sectors. In the last five years we have assisted in a number of restructuring transactions. For example, in relation to the Article 182-bis procedure (debt restructurings) we have advised lenders in a number of cases such as Util; Seves; and Giochi Preziosi. For Seves, the world's leading manufacturer of electric insulators and glass blocks for architectural and interior design, it was the third time it had been restructured (this time by way of article 182-bis restructuring agreement) involving the sale of the company to Triton. The restructuring was very complex due to the particular lending structure, the simultaneous acquisition of the group by Triton, the existence of various layers of debt, and the need to coordinate the restructuring agreement (governed by Italian law) and all the other finance documents (governed by English

law). As a result part of the complexity is derived from various conflicts of law issues.

Likewise, for the Giochi Preziosi group, which is the Italian leader in the toy market and the fourth largest European group operating in the sector, we advised the lenders on a transaction involved the restructuring of €250 million of term facilities, the granting of a new €30 million revolving credit line in addition to a new €27.5 million bridge loan and to the existing €37 million bilateral lines of credit. We also advised the pool of banks composed in relation to the restructuring of the indebtedness of the listed company EEMS Italia arising under a €110 million Facilities Agreement implemented through the restructuring procedure set out under Article 182-bis of the Italian Bankruptcy Law. We acted on the corporate aspects of the restructuring, having advised on the swap of part

of the senior loan into preferred equity instruments. This last corporate aspect is particularly innovative since it represents the first case of issue of a participative instrument by a listed company. Another example is in relation to Cantiere Del Pardo where again we advised the banks but this time in relation to the restructuring by way of "*concordato preventivo*" of senior and mezzanine facilities to the Cantiere del Pardo/Dufour Group. This is one of the first high profile pre-packed in-Court restructurings in Italy. The restructuring plan under the new "*concordato preventivo*" procedure has been used as a contingency plan in order to propose a pre-packed restructuring under the protection of the "*concordato preventivo*" procedure.

AC: Have you seen a dramatic change in the use of the different restructuring mechanisms since the introduction of the new pre-insolvency restructuring procedure?

FG: Yes. Although reorganisation plans are still used, we have recently seen a decrease, the main reason is that, especially in the context of complex restructuring transactions, debt restructuring arrangements (Accordi di Ristrutturazione del Debito, pursuant to article 182-bis of the Italian Bankruptcy Law) and pre-packed arrangements are more appealing because they can give additional protections (e.g. automatic stay of any enforcement actions and super priority of new financing). The widespread use of pre-insolvency proceedings depends of course on the current market conditions and accordingly we are likely to see a decrease in practice if financial conditions are more favourable in the future. Anyway, pre-insolvency proceedings are likely to remain a valuable alternative to the ordinary (and more complex) insolvency procedures.

FG: Italian Law does not provide for pre-insolvency procedures to be implemented by overseas companies. In principle, Italian pre-insolvency proceedings would be available only for companies whose centre of main interests is located in Italy. But they have been used in conjunction with other procedures, taking place in other jurisdictions. For example, we advised the Senior Lenders and the Senior Coordinating Committee in relation to the reorganisation of the capital structure of Seat Pagine Gialle. That was one of the largest Italian debt corporate restructurings ever, and we used the out-of-court Italian procedure under article 63 of the Italian Bankruptcy Law together with an English scheme of arrangement in order to bring about a successful restructuring.

AC: Have any local composition/pre-insolvency procedures been used for overseas companies?

France – an accelerated approach to business rescue

“...and the total number of consensual proceedings opened in 2014 has outgrown the crisis level of 2009.”



Reinhard Dammann, head of our restructuring and insolvency team in Paris notes:

French law provides for two types of consensual proceedings: mandat ad hoc and conciliation proceedings, which are totally confidential proceedings (subject to the homologation order of a conciliation agreement).

Mandat ad hoc proceedings are available to debtors (and upon the sole initiative of debtors) which face any type of difficulties without being actually cash-flow insolvent.

Conciliation proceedings are only available to debtors which: (i) may not be cash-flow insolvent, or may only have been cash-flow insolvent for less than 45 days; and (ii) have to face actual or foreseeable legal, economic or financial difficulties.

You may have seen a study made by Deloitte/Altare based on a panel of 17 courts, it appears that the number of consensual proceedings has been rising at a fast pace between 2011 and 2014 and the total number of consensual proceedings opened in 2014 has outgrown the crisis level of 2009.

Reinhard Dammann
Partner, Paris



This increase in the opening of conciliation proceedings can partially be attributed to an increase in the opening of mandat ad hoc proceedings. Indeed, the opening of conciliation proceedings usually follows a mandat ad hoc proceeding, thus allowing the parties to benefit from a court approval of the restructuring agreement they started to negotiate during the mandat ad hoc proceeding (according to the Deloitte/Altare report, 82% of companies opening a conciliation proceeding have benefited from such a formal approval ("homologation") of the conciliation agreement by the court since 2010).

Safeguard proceedings are collective public proceedings (i.e. triggering a stay of payments and an obligation to continue ongoing contracts) which are available to debtors which are not cash-flow insolvent.

Safeguard was introduced in France in 2005. The number of safeguard proceedings has grown since 2010 but remains relatively

limited (around 1500 per year, on a total of approximately 60,000 insolvency proceedings per year; i.e. 3% of opening of insolvency proceedings).

Accelerated financial safeguard ("AFS") and accelerated safeguard ("AS") are available to debtors which are either solvent or insolvent (provided, in the later case, that they were not insolvent for more than 45 days at the time conciliation proceedings were opened). The opening of a conciliation proceeding is a prerequisite for the opening of such proceedings. AFS and AS proceedings have been introduced in French law (respectively in 2010 and 2014) in order to facilitate the adoption of pre-packaged restructuring plans negotiated with a majority of creditors in the framework of a confidential conciliation. Contrary to consensual proceedings (mandat ad hoc and conciliation) where the unanimous consent of creditors is necessary, a cram-down of opposing creditors is possible in AFS and AS (majority of 2/3 in each committee).

We can assume that less than 15 AFS have been opened in France since its creation in 2010. This number appears relatively small but does not necessarily mean a "lack of success". Indeed, the advantage of AFS also consists in the sole "possibility" that such proceedings may be opened (and thus a deal be imposed to creditors), incentivising creditors to accept on a voluntary basis a restructuring in the framework of a conciliation.

“...the advantage of AFS also consists in the sole “possibility” that such proceeding may be opened (and thus a deal be imposed on creditors), incentivising creditors to accept on a voluntary basis a restructuring in the framework of a conciliation.”

Type of process	Key aspects	Voting thresholds
Safeguard	Debtor not insolvent Automatic stay on payment and restriction of creditors rights	66 ² / ₃ % majority Two committees: <ul style="list-style-type: none"> Financial institutions Trade creditors Separate bondholder Committee (if applicable)
Accelerated Safeguard	<ul style="list-style-type: none"> Fast track Only available to entities of certain size (at least 20 employees; €3m turnover or €1.5m balance sheet) Needs approval within 3 months 	66 ² / ₃ % majority (same committees as above)
Accelerated Financial Safeguard	<ul style="list-style-type: none"> Fast track Not cash flow insolvent Only involves finance creditors Minimum thresholds for balance sheet and employees Approval by creditors and court sanction within 1 month/renewable once) 	66 ² / ₃ % majority of finance creditors
Judicial Rehabilitation	Debtor is insolvent, but business appears viable	66 ² / ₃ % majority (same committees as above)

AC: Those are some interesting statistics, Reinhard can you let us know a little about what type of entities use them (i.e. small/medium/large/particular sectors)

RD: Yes, of course, consensual proceedings (mandat ad hoc and conciliation) are mainly opened by large companies. Such situations can be explained in particular as small size enterprises seem to ignore the existence and benefit of such proceedings and the role of courts (preferring to stay away from courts).

Safeguard proceedings are mainly used by small and medium sized firms with less than 10 employees (73% of the openings in 2014 – Deloitte-Altaires), being mainly retail (23%) and services firms (36%). It has however to be noted that safeguard proceedings have been used in the past years by major group companies in France (Eurotunnel, Thomson, Coeur Defense etc), thus (i) concerning a high number of debts to be restructured and (ii) impacting a large number of employees.

ASF are designed for larger companies as the aim of the proceeding is to restructure financial debts only. The ASF is indeed only applicable to companies which have a balance sheet total of at least € 25 million or € 10 million when the company controls a company which employs over 150 people or has an annual turnover of over € 20 million or has a balance sheet total exceeding € 25 million.

AS proceedings are only applicable to companies of a certain size (20 employees, € 3 million in turnover or total assets in its balance sheet of at least € 1.5 million), which again will exclude small companies from being able to benefit from this type of proceeding.

The Paris office has been involved in major mandat ad hoc and conciliation matters (confidential) and safeguard matters, starting with the Eurotunnel file in 2005, Coeur Défense, Thomson and SAUR.

These are landmark cases which led to the modification of French law: for example, the composition of the creditors committee following the Eurotunnel matter, the first pre-packaged plan in the Thomson Technicolor case (which led to the creation of AFS). SAUR was the first lender-led filing in France.

In France, all major debt restructuring cases go first through the mandat ad hoc/conciliation/safeguard routes. The success rate of these proceedings is relatively high (around 70% of the procedures opened led to a debt restructuring plan).

AC: Do you think that use of these procedures will increase in the future?

RD: The attractiveness of such proceedings is designed to increase again (which is in line with the recommendations of the EU Commission dated 12 March 2014).

But for the time being, we observe a slight decrease in the number of such proceedings since economic conditions appear to have improved.

AC: Have any local composition/pre-insolvency procedures been used for overseas companies?

RD: Safeguard proceedings have been widely used by French courts for important cases, including for debt restructuring of foreign groups of companies (Eurotunnel, Coeur Defense, Belvedere, Emtec etc.). We note that, during the last couple of years, following the Interedil decision, French courts have become more restrictive with respect to the rebuttal of the presumption of the location of the registered office.

French consensual proceedings, like scheme of arrangements, are not included in the scope of the European insolvency regulation.

Private international law is in theory more liberal with respect to the jurisdiction of French courts to open proceedings. Since the consensual proceedings do not allow for a cram-down (contrary to the scheme of arrangement), they have not been widely used for debt restructuring purposes. In particular, the benefit of conciliation applies in relation to French companies (e.g. new money privilege, the limitation of the risks related to hardening period in case of subsequent opening of insolvency proceedings etc).

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The end is where we start...



Adrian Cohen
Partner, London

It remains to be seen how quickly the European Commission will seek to progress its legislative proposal for a more harmonised approach to restructuring procedures and second chance provisions and whether this will result in further changes at a national level in composition and pre-insolvency measures within each of the Member States to ensure compliance. One thing is for certain, notwithstanding all the changes, practitioners will continue to explore innovative techniques, and whilst they may not always be found where we may expect them, restructurings will continue to be achieved and the main focus for some years to come.

Key aspects of local compositions and how they compare to English schemes of arrangement

	UK	Germany
Are local composition arrangements available?	✓	✓
What are they?	Schemes of arrangement Company Voluntary Arrangements (CVA)	Insolvency Plan
Are they available pre and post insolvency?	✓	✗ (post insolvency only)
What majority of creditors needs to vote/agree in favour?	Schemes: 75% in value, over 50% in number in each class CVA: 75%; cannot bind secured creditors without consent	50% in value of each class of creditors
Can the Court impose a restructuring (i.e. cram down)?	No	Yes, if non concurring class, no worse off than in liquidation
Have local compositions ever been used in parallel with English schemes?	N/A	Not yet tested
Would the local court recognise an English scheme of arrangement?	N/A	✓
Have local compositions been used to restructure overseas companies?	✓ Scheme examples include Germany, France, US, Spain, Italy, Bulgaria, The Netherlands and Kuwait	Not yet tested but unlikely. Local procedures only available if German COMI/ establishment

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	France	Italy
Are local composition arrangements available?	✓	✓
What are they?	<ul style="list-style-type: none"> ▪ Safeguard ▪ Accelerated safeguard ▪ Accelerated financial safeguard ▪ Rehabilitation 	<ul style="list-style-type: none"> ▪ <i>Concordato preventivo</i> ▪ Debt restructuring arrangements under Art 182 Bis ▪ Reorganisation plans (pre and post-insolvency)
Are they available pre and post insolvency?	✓	✓
What majority of creditors needs to vote/ agree in favour?	66 ^{2/3} in value in each of the classes	<ul style="list-style-type: none"> ▪ <i>Concordato preventivo</i>: 50% in value in majority of classes ▪ Out of court (Art 67): not prescribed ▪ Restructuring arrangements (Art 182 bis): 60% must sign ▪ Debt restructuring with 50% debt due to finance creditors (Act 182 septies): 75% finance creditors ▪ Post bankruptcy composition: majority ▪ Large companies post administration: 50% majority
Can the Court impose a restructuring (i.e. cram down)?	Yes but only for rescheduling of debt for up to 10 years	Yes; if non concurring class is no worse off than in liquidation
Have local compositions ever been used in parallel with English schemes?	Not tested	Yes, in the case of SEAT Pagine
Would the local court recognise an English scheme of arrangement?	✓	✓*
Have local compositions been used to restructure overseas companies?	<p>✓</p> <p>(e.g. Eurotunnel/ Coeur Defense) – subject to meeting French COMI/establishment requirements)</p>	Not yet tested. Local procedures only available if Italian COMI/ establishment

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Spain	The Netherlands	UK
✓	Dutch scheme legislation hoped to be effective in 2016	✓
<ul style="list-style-type: none"> ▪ Refinancing agreements out of court and court sanctioned ▪ Convenio 	<ul style="list-style-type: none"> • (draft) Dutch scheme • Post insolvency composition 	Schemes of arrangement Company Voluntary Arrangements (CVA)
✓	✓	✓
<ul style="list-style-type: none"> ▪ Out of court protected refinancing: 60% all creditors or 51% financial creditors ▪ Court sanctioned refinancing between 60-75% unsecured 65-80% secured ▪ Convenio: 50% majority or between 50%-65% liabilities and between 60%-75% secured (depends on nature of cram down) 	<ul style="list-style-type: none"> ▪ (draft) Dutch scheme: 50% +1 votes representing at least 2/3 of relevant debts or shares, ▪ Post insolvency composition: 50% +1 votes representing at least 50% of the unsecured claims, alternative cram down possible with 75% majority votes and court approval 	Schemes: 75% in value, over 50% in number in each class CVA: 75%; cannot bind secured creditors without consent
Yes; if non concurring class is no worse off than in liquidation	Not yet (draft scheme legislation includes option for court to declare scheme universally binding)	No
Not yet tested	Not yet tested	N/A
✓*	✓*	N/A
Not yet tested. Local procedures only available if Spanish COMI/ establishment	Local insolvency procedures only available if Dutch COMI/ establishment. Dutch enforcement process (Schoeller Arca) is used for restructuring of overseas companies with Dutch holdco structures.	✓ Scheme examples include Germany, France, US, Spain, Italy, Bulgaria, The Netherlands and Kuwait

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* Where we do not have a presence, we have a list of recommended law firms with particular expertise in those relevant countries.

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