

C L I F F O R D

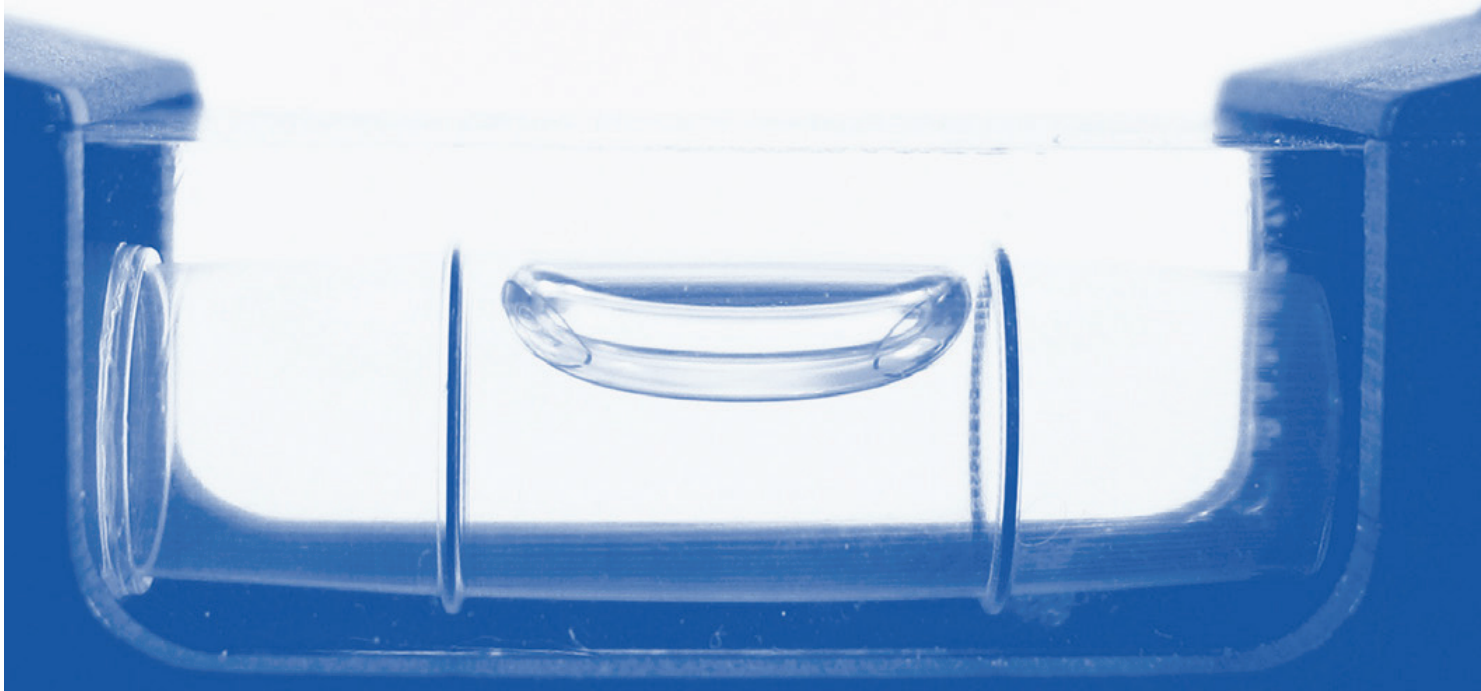
C H A N C E



RESTRUCTURING SOLUTIONS IN EUROPE
PROMOTING AND EMBRACING CHANGE

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Adrian Cohen
Partner, London

Introduction

International law reform in the context of Restructuring and Insolvency has been gathering pace for a number of years. The World Bank Doing Business Report 2018, identifies 19 different jurisdictions which have introduced reorganisation procedures since 2013/14. The focus is very much on the development of pre-insolvency and restructuring regimes rather than formal insolvency proceedings. They are designed to encourage investment with clear, efficient and cost-effective rules on restructuring. Recent reforms have taken place in Poland, Belgium, Italy and Spain. And there is still more to come in the UK and the Netherlands. In the UK, for example the government has recently announced significant reforms in corporate insolvency and restructuring which include: (i) a standalone moratorium; (ii) a new restructuring plan (which includes cross class cram down); and (iii) the prohibition of termination provisions based on insolvency events. In the Netherlands a draft bill is being worked upon to introduce a restructuring plan to cram down dissenting creditors.

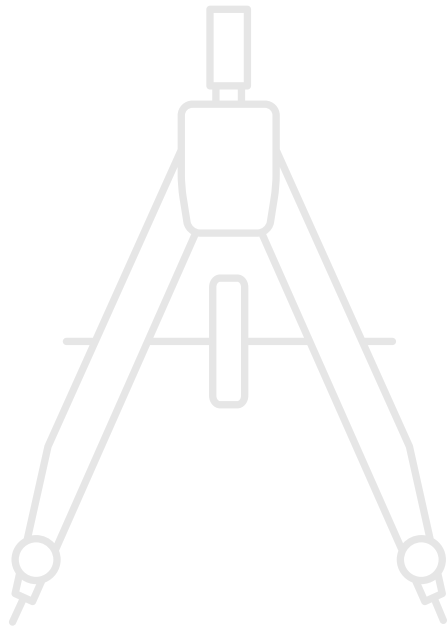
Key issues

- Compositions and pre-insolvency procedures are available in the UK; France, Germany, Spain and Italy.
- The Dutch legislator is working on a draft bill that will introduce the possibility of proposing a restructuring plan to cram down dissenting creditors and or shareholders, being a combination of both English Schemes of Arrangements and the US Chapter 11, expected implementation 2019/2020.
- Statutory procedures derived from local insolvency law and in the case of the UK, companies legislation.
- Compromise or arrangements for company with its shareholders and/or creditors which:
 - avoid the need for unanimity, prevent “hold outs”, in some cases the ability to “cram down” a dissenting class
 - bind 100% of shareholders or creditors if the requisite majorities approve.
- Possibilities for using composition and pre-insolvency procedures in certain European Member States for companies incorporated elsewhere, but jurisdictional requirement for COMI/establishment.
- Benefits from automatic recognition under European Insolvency Regulation.
- In the UK no COMI/establishment requirement for schemes of arrangement, but lower jurisdictional threshold of “sufficient connection” – but no automatic recognition elsewhere.
- What will happen post Brexit?
- New UK restructuring plan: coming soon?

CURRENT MARKET DEVELOPMENTS

“International law reform in the context of restructuring and insolvency has been gathering apace for a number of years.”

– Adrian Cohen



At an EU level developments have also continued over the last few years, for example in November 2016, the European Commission published a proposal for the harmonisation of preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures. The text for an EU directive on preventive restructuring frameworks has been agreed by the EU Commission, the Council and the Parliament which includes mechanisms for a pre-insolvency stay to support negotiations for a restructuring plan, debtor in possession procedures to facilitate restructurings, including the ability to cram down dissenting creditors and protection for new financing and interim financing.

In June 2017 changes also came into effect to broaden the scope of the European Insolvency Regulation in the form of a Recast Regulation. The Recast (amongst other things) extends its scope to apply to pre-insolvency measures, introduces mechanisms for co-ordinating group procedures and provides for streamline claims forms and introduces mandatory insolvency registers.

In addition, Working Group V (Insolvency Law) of UNCITRAL has recently finalised a new Model Law providing for the recognition and enforcement of insolvency related judgments. This model law will require formal adoption by those States seeking to benefit from it, but will no doubt provide a useful framework for adopting States in recognising insolvency related judgments.

Speculation and Uncertainty

Of course since the UK decided to leave the European Union in June 2016, there has been a huge amount of speculation and uncertainty as to what the cross border landscape will look like after March 2019. As the negotiation progresses, uncertainty continues for cross border restructuring and insolvency cases and in particular how recognition and co-operation between the UK and the EU Member States will operate. From a practical perspective, the availability of flexible restructuring and insolvency regimes in individual jurisdictions, with an understanding how they operate, will no doubt continue to play a significant role in restructurings in the future. Of course we cannot predict the exact nature of cross border cases of the future, but experience has shown that change can often provide the impetus for new solutions and opportunities.

In this playbook, Adrian Cohen, Partner in our restructuring team in London, talks to some of our colleagues from around the network about the development of pre-insolvency procedures and the impact which those procedures are having in practice. For the purpose of this publication we have selected 5 key European jurisdictions: France; Germany, Italy, Spain and the Netherlands.

“The text for an EU Directive on preventive restructuring frameworks is due to be adopted by the EU parliament in March 2019 it includes the ability to cram down dissenting creditors.”

– Adrian Cohen

THE UK MARKETS
THE CONTINUED USE OF
SCHEMES OF ARRANGEMENT





Philip Hertz

Partner, London

Global Head of the Restructuring and Insolvency Group

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.

“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 and formal insolvency procedures.

The biggest development in this regard for complex high value international restructurings has been the continued popularity of schemes of arrangement.” Adrian asks Philip Hertz, Head of our Global Restructuring and Insolvency Group to explain further about the use of schemes.

Adrian: Philip can you briefly remind us about what a scheme of arrangement is and how they work in practice?

Philip: 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 since Victorian times 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.

THE UK MARKETS

THE CONTINUED USE OF SCHEMES OF ARRANGEMENT



“As a non-insolvency procedure, a scheme can also be used for solvent, distressed or insolvent entities whether or not their COMI is in the UK.”

– Philip Hertz

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 debts or in conjunction with other methods to deal with only a part of the debt where unanimity is required and not available. As a non-insolvency procedure, it can also be used for solvent, distressed or insolvent entities whether or not their COMI is in the UK. 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% in value of the debt and a majority in number of the creditors. If approved by the required majority, the scheme must also 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.

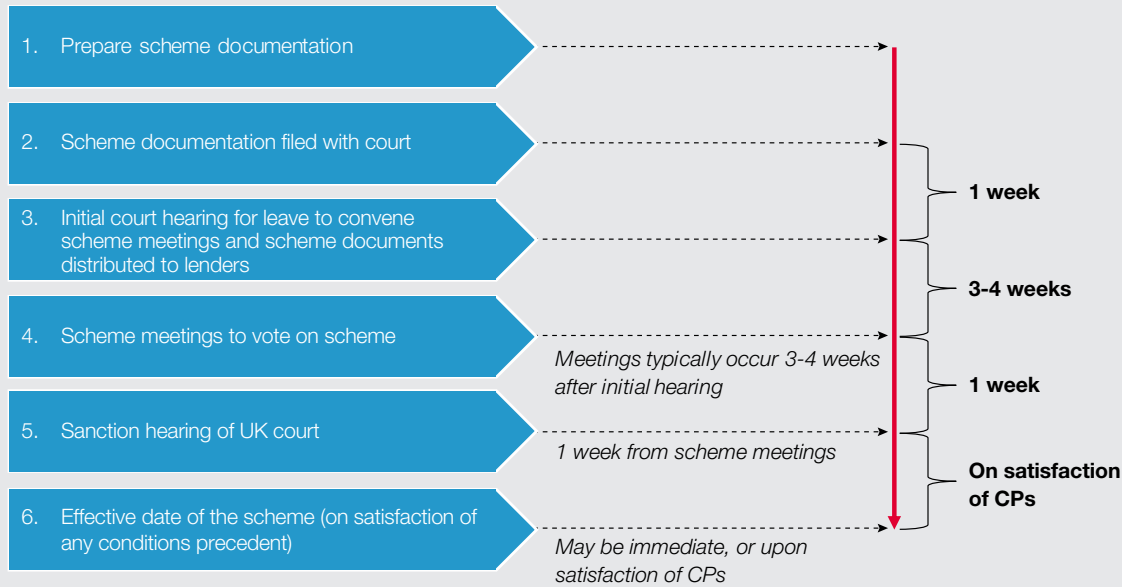
Adrian: What will the UK courts consider when deciding whether to sanction the scheme?

Philip: In exercising its powers of sanction, the court will want to see:

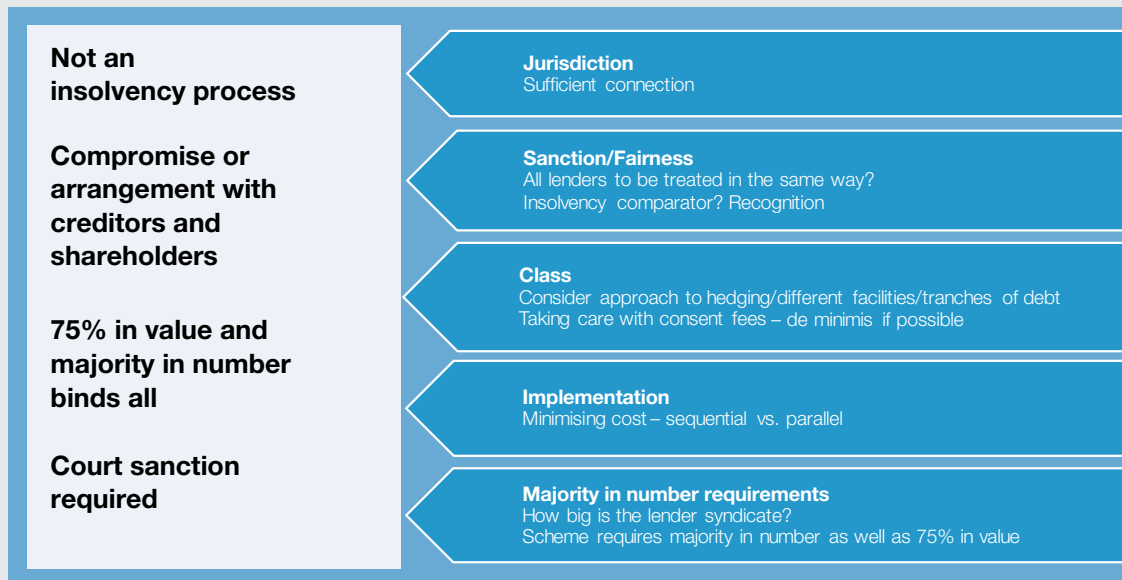
- (a) that the creditors were fairly represented by those who attended the meeting, that the majority of relevant creditors are acting in good faith and are not simply coercing the minority in order to promote their own interests, and
- (b) that the arrangement is such that an intelligent and honest 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.

Indicative Scheme Timetable

Key Steps



Key aspects of a scheme of arrangement



THE UK MARKETS

THE CONTINUED USE OF SCHEMES OF ARRANGEMENT

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

Philip: 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, so this may prolong the timetable.

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

Philip: One of the main attractions of a scheme as explained above 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 relatively low and simply requires 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 in Germany, Spain, France, Italy, the Netherlands and the Ukraine. They have also been used for companies incorporated in the US and Kuwait. So long as it can be shown that the overseas company has sufficient connection with the England for an English court to have jurisdiction over it, it can be subject to a scheme to deal with its creditors. Clifford Chance's pioneering use of an English scheme of

arrangement for an overseas company was in the restructuring of the APCOA group. That case saw for the first time an English scheme being applied to facilities originally governed by German law, where there had been a deliberate change to English law, purely for the purposes of accessing the scheme.

Once jurisdiction has been established, for example by reason of an 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:

- (a) 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” (Rule in Gibbs).
- (b) 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 have avoided answering this question and 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 Judgments Regulation at present would assist in the automatic recognition of the English scheme of arrangement in other European Member States without imposing any COMI/establishment burdens.

“Whilst schemes in an international context after Brexit may rely on a different basis for recognition purposes, they will still remain a valuable restructuring tool.”

– Philip Hertz

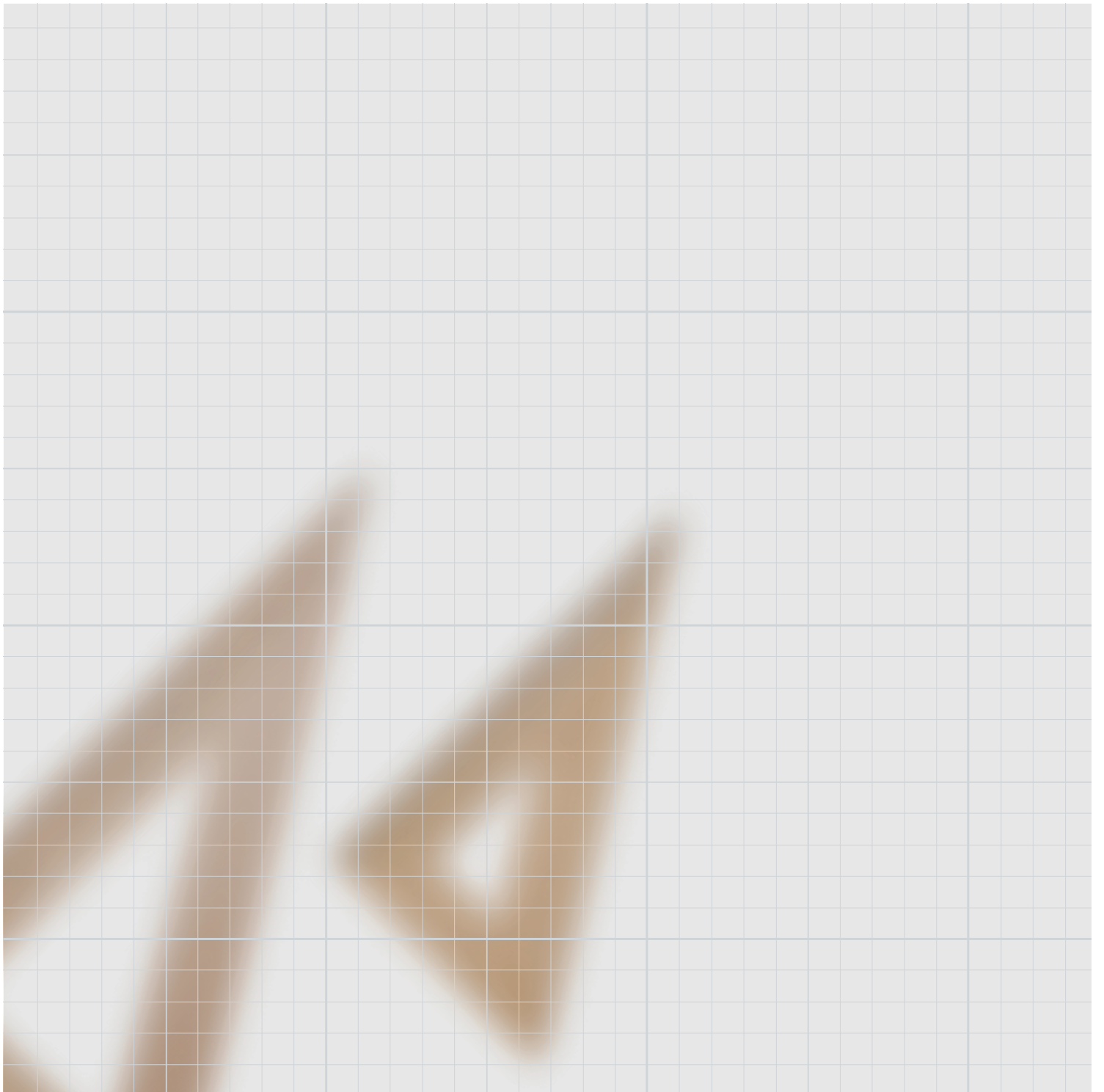
THE UK MARKETS

THE CONTINUED USE OF SCHEMES OF ARRANGEMENT

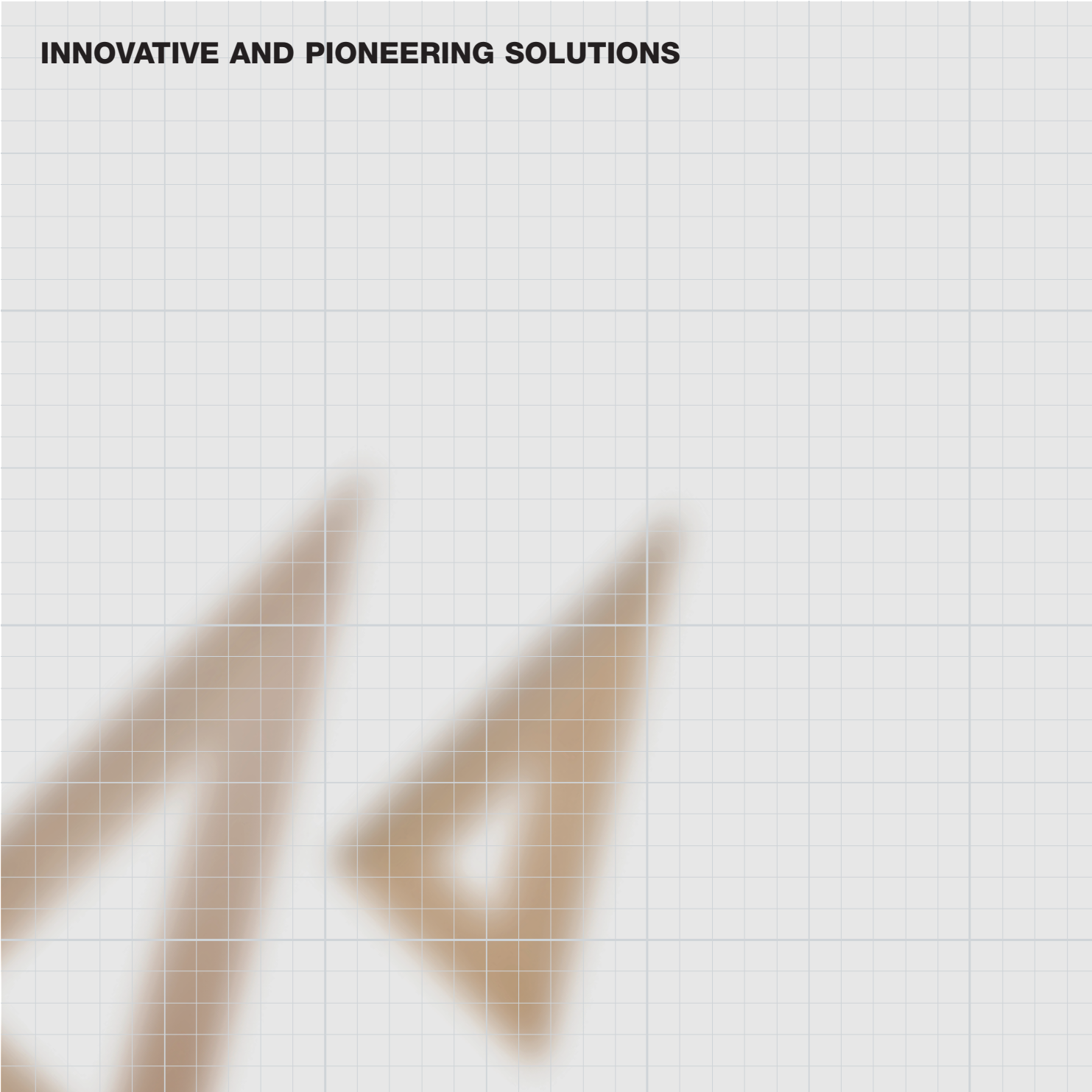
The impact of Brexit on schemes

Of course, after Brexit, the Recast Judgments Regulation (or similar replacement) may no longer be available. This may not matter because 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. As to whether local law opinions may change in a post-Brexit era it remains to be seen, but there is no reason to think that this will be the case, especially as many local law opinions are based on private international law, that will not change. In other words they proceed on the basis that where the contract is English law governed, their jurisdiction will recognise that this can be amended by an English procedure such as a scheme irrespective of whether or not the scheme sanction order would be recognised as a “judgment” under the Recast Judgments Regulation.

So in summary, even after Brexit, the principal advantages of a scheme of arrangement remain: (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. So whilst schemes in an international context after Brexit may rely on a different basis for recognition purposes, they will still remain a valuable restructuring tool.



INNOVATIVE AND PIONEERING SOLUTIONS





Jeanette Best
Senior Associate, London

Clifford Chance's restructuring of the Co Op group is a key example of a scheme being used to address regulatory capital issues. In 2017 the Co Operative Bank (the Bank) embarked upon a restructuring and recapitalisation exercise. The exercise came about as a result of statutory and operating losses incurred by the Bank since 2012 and the impending maturity of £400m Notes (the Notes) issued by the Bank.

Jeanette Best, Senior Associate in the Restructuring and Insolvency team in London comments: "The main objective was to raise additional capital to help the Bank meet its regulatory loss absorbing and capital capacity by cancelling the liabilities under the Notes and obtaining an injection of new equity. The likely alternative to the restructuring and recapitalisation was thought at the time to have been a mandatory write down and special resolution proceedings under the Banking Act 2009.

The schemes of arrangement proposed to both the Bank's members and creditors formed a fundamental part in the restructuring and recapitalisation exercise. Under both the members' scheme and the creditors' scheme, the scheme's primary purpose was to provide a mechanism to grant authority to the Bank to execute restructuring deeds and other restructuring implementation documentation to bind the creditors and members to those arrangements. In this respect, the scheme enabled the documentation to be entered into as long as the requisite 75% in value of creditors and members agreed, thus avoiding the need for unanimous consent. In the end 97.12% in number and 99.88% in value of scheme creditors voted in favour. In the members' scheme 96% in number and 90.02% in value were in favour. For the purposes of the creditors' scheme, the Bank sought to convene a single meeting of scheme creditors on the basis that although there were differences between the contractual terms of the two separate Note issues (different maturity rates, different interest rates and different minimum denominations) – those differences were insufficient to make

INNOVATIVE AND PIONEERING SOLUTIONS



“Metinvest used the English scheme process three times. The first two occasions were simply to buy some time, but the third comprised interlocking schemes for both notes and PXF facilities.”

– Adrian Cohen

it impossible for them to consult together. In fact, their claims and rights were to be approached in the same way under the schemes. For the purposes of the scheme it was proposed that the ultimate beneficial holders of the Notes be treated as creditors entitled to vote as contingent creditors, rather than the note trustee. This followed a number of recent cases, including an earlier scheme for the Bank itself, which was used to extend maturity dates. Similarly, the Bank sought to convene a single meeting of scheme shareholders, again on the basis that the rights of the shareholders were the same or not so dissimilar to make it impossible to them to consult together with a view to their common interest.”

Philip Hertz adds: “Perhaps one of the most innovative aspects of the Co Op scheme was the fact that certain retail bondholders were carved out of the scheme and their interests addressed by way of a consent solicitation process. In this respect, for complex cases, it can be seen that schemes can be useful in conjunction with other techniques and provide a solution to distressed situations”.

Bond restructurings

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

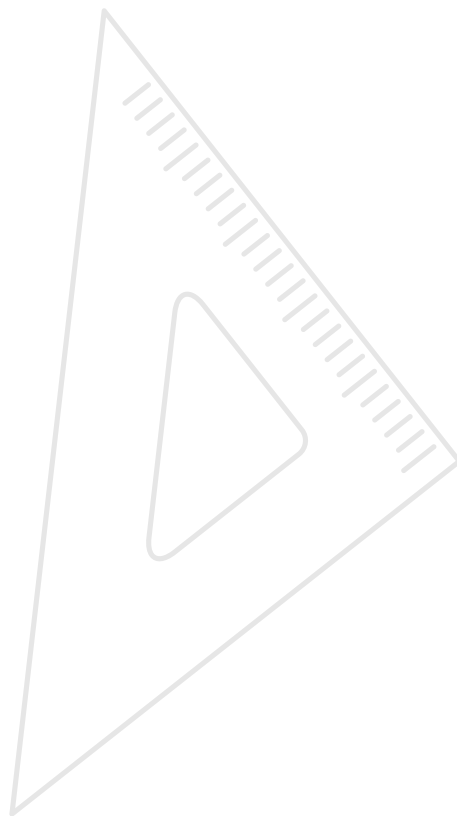
Philip: Yes, English law provisions relating to schemes are extremely flexible and can be applied in all circumstances involving a company and its creditors. There is a technical issue that arises with respect to bonds relating to the fact that in a bond structure it is the paying agent/trustee who is the issuer’s formal creditor and not the individual bondholder. That said, as mentioned above in relation to the Co Operative Bank scheme 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. In this regard the requisite majority may be achieved by splitting the voting rights to favour a scheme, and generally speaking the court will not intervene unless the vote splitting is dishonest or a sham.

Perhaps one of the best examples of how US bond debt can be restructured using an English Scheme was the recent restructuring of the Codere Group. In that case, a complex restructuring provided for the exchanges of US law governed notes and shares in Codere SA and the injection of new monies, used an English Scheme of arrangement to implement the deal.

Clifford Chance advised on the restructuring which saw a specially incorporated vehicle in the UK (Codere UK) accede as a co issuer to the existing notes. Codere UK then proposed an English scheme for the purpose of compromising the obligations under the existing notes and those of its co issuer and guarantors. The UK incorporated SPV provided a clear jurisdictional basis for the English court to sanction a scheme. Whilst the English Court recognised that it was not a conventional approach to establishing scheme jurisdiction, it was also recognised that there was commercial justification and overwhelming creditor support which justified sanctioning the scheme. The scheme then sought recognition under Chapter 15 of the US Bankruptcy Code.

Adrian: Yes, I was also involved recently in a significant bond restructuring, the Metinvest scheme is another good example of the use of an English scheme to effect the replacement of bonds and where recognition under Chapter 15 of the US Bankruptcy Code was also needed.

By way of background, Metinvest was the largest vertically integrated mining and steel business in the Ukraine. It was impacted by political instability and a decline in steel prices. The company was funded using a series of notes in addition to 4 syndicated PXF facilities. The notes and PXF facilities had recourse by way of guarantees against group companies and PXF had security over bank accounts. Metinvest used the English scheme process three times. The first two occasions were simply to buy some time, but the third comprised interlocking schemes for both notes and PXF facilities. The schemes basically allowed for replacing notes due on 2016, 2017 and 2018 with new notes due 2021 and an amendment and restatement of the PXF facilities. It was also a term of the restructuring that enhanced security be provided. The Metinvest scheme also sought recognition in the US using Chapter 15 of the US Bankruptcy Code.



INNOVATIVE AND PIONEERING SOLUTIONS



Melissa Coakley
Senior Associate, London

Restructurings without schemes of arrangement

In some instances, schemes of arrangement are not available to implement non-consensual aspects of the restructuring. This may be due for example to jurisdictional issues or class issues. Therefore, sometimes you have to look for other restructuring tools – in this regard the COMI/Nexus of the obligors to the relevant jurisdiction, the governing law and jurisdiction provision of the debt instruments and the likelihood of effective recognition in each relevant jurisdiction are all to be taken into account.

Melissa Coakley, Senior Associate in the restructuring team in London comments: “In the recent restructuring of the Abengoa Group, which had debtors in multiple jurisdictions principally Spain, England, the US and Mexico and a huge number of debt instruments, governed principally by English, Spanish and NY law, an innovative solution was arrived at using a combination of interlocking restructuring tools from a number of different jurisdictions”.



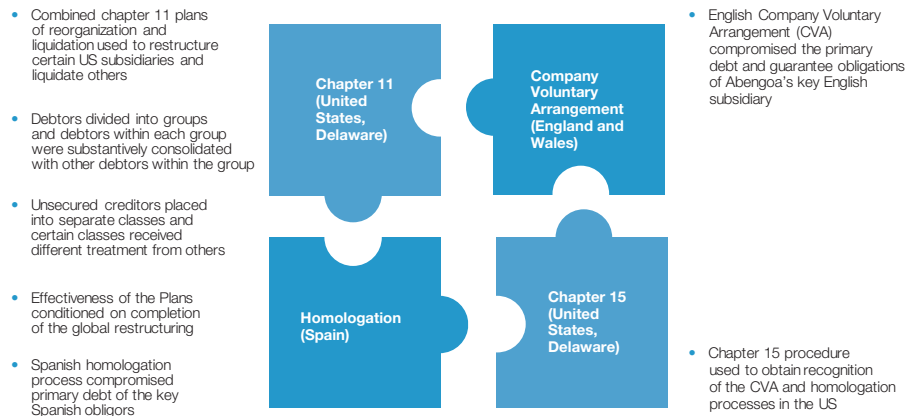
Iain White
Partner, London

Iain White, Partner in the restructuring team in London notes: “This was one of the most complex restructurings I have ever been involved with. The final solution was dependent upon interlocking Chapter 11 proceedings in the US, homologation in Spain and a Company Voluntary Arrangement in the UK. As seen in the diagram below, the restructuring used aspects from each jurisdiction’s restructuring toolbox to deal with the different debtors, and debt within the group”.

Iain continues: “Whilst the solution was particularly complex, I think that for large international groups with challenging balance sheets, this kind of co-ordinated approach could become the norm”.

“For large international groups with challenging balance sheets, this kind of co-ordinated approach could become the norm.”

– Iain White



INNOVATIVE AND PIONEERING SOLUTIONS



John MacLennan
Partner, London

“Company Voluntary Arrangements have recently become very fashionable again, especially when dealing with retailers and casual dining companies in distress.”

– John MacLennan

Company Voluntary Arrangements (CVAs)

On the domestic front, John MacLennan, Partner in the Restructuring and Insolvency team in London notes: “Company Voluntary Arrangements have recently become very fashionable again, especially when dealing with retailers and casual dining companies in distress. This is as a result of debtors in these sectors being able to arrive at a statutory compromise with 75% of creditors. The target creditors for their CVAs have been landlords, who have been invited to vote on proposals which effectively comprise their claims to rent, in some cases by up to 75%. While a CVA affects all unsecured creditors of the debtor, the non-landlord creditors are usually kept whole. As long as the proposal is voted upon by the requisite majority, it is binding on all creditors (even those who choose not to vote or vote against it). In this respect the CVAs ability to bind a dissenting minority has the same effect as a scheme, save that a CVA cannot be used to compromise secured debt claims, unless the secured creditors agree. This is why we sometimes see CVAs being used in conjunction with schemes, where schemes are used to compromise secured financial creditors. Another significant difference, which explains why the CVA is limited in an international context, is that for a CVA to be proposed the entity must have its centre of main interests in England or Wales. Notwithstanding this, and as previously mentioned, CVAs may have a part to play in conjunction with other procedures, as they are used to compromise English law debt”.

In terms of data, information provided by the UK government focuses on the formal insolvency procedures designed to facilitate a restructuring (see the table below).

Summary tables

New company insolvencies in England and Wales ^{1,2} (seasonally adjusted) ³							
	Number of insolvencies					% change – 2018 Q4 on:	
	2017 Q4	2018 Q1	2018 Q2 p	2018 Q3 p	2018 Q4 p	2018 Q3	2017 Q4
Total new company insolvencies	4,547	4,458	3,936	4,321	4,725	9.3	3.9
Underlying total insolvencies⁴	3,559	3,977	3,844	4,321	3,949	-8.6	11.0
Compulsory liquidations	620	783	760	752	822	9.3	32.6
Creditors' voluntary liquidations ²	3,553	3,206	2,738	3,087	3,470	12.4	-2.3
<i>Underlying CVLs</i>	2,565	2,725	2,646	3,087	2,694	-12.7	5.0
Administrations	318	365	344	388	367	-5.6	15.1
Company voluntary arrangements	55	102	94	94	66	-29.8	20.0
Receiverships	0	1	0	0	0	n.a.	n.a.

Source: Insolvency Service and Companies House.

p = provisional, r = revised, n.a. = not applicable

¹ Longer series back to 2008 are presented in the accompanying detailed tables.

² Excludes creditors' voluntary liquidations following administration (see section 2.1).

³ The series for compulsory liquidations, company voluntary arrangements and receiverships do not require seasonal adjustment.

In terms of current issues, there are still a number of significantly overleveraged businesses that will need to be restructured in the future. Particular sectors such as retail, services, construction and healthcare appear to be most at risk at present. Complex capital and debt structures will continue to be more prevalent and the diversity of stakeholders and their strategies is something that is here to stay. Not to mention the fact that the cross-border dynamic will continue to loom large over future restructurings.

INNOVATIVE AND PIONEERING SOLUTIONS



David Towers
Partner, London

“The new restructuring plan, which is proposed to be a separate process included in the UK insolvency legislation, provides for even greater flexibility than a scheme of arrangement.”

– David Towers

Coming soon in the UK: a New Restructuring Plan

As mentioned above, new Corporate Insolvency Reforms were announced by the UK government in August 2018. They include: (i) a standalone (28 day) moratorium which is extendable for companies facing the prospect of insolvency; (ii) the introduction of legislation to prohibit reliance on termination clauses in contracts which are based on insolvency events; and (iii) a new restructuring plan.

Perhaps the most significant aspect of the announcement is the introduction of a new restructuring plan. To those familiar with the existing restructuring regime they will recognise that it closely resembles a scheme of arrangement.

David Towers, Partner in our restructuring team in London comments: “The new restructuring plan, which is proposed to be a separate process included in UK insolvency legislation, provides for even greater flexibility than a scheme of arrangement. Under the proposals, the UK courts may approve a restructuring plan – and by doing so override the votes against in other classes of creditors (and we assume shareholders) – if at least one creditor class, which is affected by the plan, votes in favour by a 75% majority in value. In other words, the restructuring plan could effect a “cross class cram down”. The main provisos are that (i) the affected creditors must be better off under the plan than the best alternative and (ii) the restructuring plan must ensure that a dissenting class is satisfied in full before a more junior class (i.e. that the claims of senior classes of creditors must be satisfied under the plan in full before more junior classes receive any distribution). This takes its inspiration from the absolute priority rule used in the US Chapter 11 procedure. However, the UK reforms are to go further by allowing the court discretion not to adhere to the absolute priority rule in all cases. So, where it can be justified on the basis that it is “necessary to



achieve the aims of the restructuring and it is just and equitable in the circumstances” a restructuring plan may still be approved by the court even though it does not adhere to the absolute priority rule.

Additional creditor protection under the proposed restructuring plan is provided by the fact that the creditors must be better off under the plan than the “next best alternative”. This would take the form of a valuation and comparing what is being offered under the plan to the alternative should the restructuring not be agreed. This will often be the administration or liquidation value, but it is not to be prescribed by the legislation. This reflects the approach in the jurisprudence relating to valuation in the context of schemes and whilst a flexible approach is to be welcomed, it may also provide disgruntled creditors with opportunities to challenge the restructuring plan based on the approach to valuation. Creditors will also benefit from an additional safeguard of being able to present a counter proposal for restructuring in certain circumstances. The complex rules on voting for cross class cram down are also being grappled with in relation to the EU Directive on preventive restructuring frameworks, which includes the ability for one class to bind all classes, subject to various tests including the ‘best interest test’, the ‘fairness test’ and either the ‘absolute priority rule’ or in certain circumstances, a majority of all classes themselves, being met. Such tests are defined in the EU Directive and are undoubtedly inspired by US Chapter 11 reorganisation procedure.

The UK restructuring plan procedure will be contained in the insolvency legislation and will follow the application style of a scheme including two court hearings – one to formulate the class composition, the second to approve the plan. It will sit alongside the other procedures already available under the Insolvency Act 1986 and schemes of arrangement under the Companies Act 2006.

Adrian now asks our partners in our European restructuring and insolvency teams the extent to which pre-insolvency procedures are being used in their jurisdictions.

GERMAN RESTRUCTURINGS EMBRACE CHANGE IN APPROACH





Stefan Sax
Partner, Frankfurt

“The closest we get in Germany to the pre-insolvency procedures is the protective shield procedure which arises during the preliminary insolvency proceedings stage.”

– Stefan Sax

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, 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 insolvency 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

GERMAN RESTRUCTURINGS EMBRACE CHANGE IN APPROACH



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.” Protective shield proceedings are a type of preliminary debtor-in-possession proceedings – all protective shield proceedings are at the same time preliminary debtor-in-possession proceedings, but there are many preliminary debtor-in-possession proceedings which are not protective shield proceedings because they do not promote an insolvency plan. The latter end up in most cases in effecting a sale of the business operations out of the insolvency proceedings.

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

Stefan: In August 2018, the German government published the results of an evaluation of the law reforms by which protective shield proceedings were introduced in February 2012. The evaluation is based on a statistical analysis of all preliminary debtor-in-possession proceedings initiated between February 2012 until February 2017, being 1609 in total and from 825 interviews with restructuring experts. Preliminary debtor-in-possession proceedings made up 3.5% of all insolvency proceedings initiated during that timeframe and 28% of the preliminary debtor-in-possession proceedings concluded with an insolvency plan. That means that regular preliminary debtor-in-possession proceedings are much more popular than protective shield proceedings.

As the protective shield proceedings are not available in case of cash-flow insolvency (*Zahlungsunfähigkeit*), during the last few years debtor’s intent to use regular self-administration proceedings during the preliminary insolvency proceedings supported by a custodian (*Sachwalter*) as an alternative to protective shield proceedings.

Adrian: What types of entities use the protective shield proceedings or the regular self-administration during the preliminary insolvency proceedings?

Stefan: The “typical” entity using the protective shield proceedings or the regular self-administration during the preliminary insolvency proceedings is rather large. It has an average annual turnover of EUR 5.2 million and 50 employees. As a practical illustration, out of the 50 largest company insolvencies in 2017 (based on their turnover), 64% were self-administration proceedings. There is no information currently available about the particular sectors affected by those proceedings.

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

Stefan: We have provided advice to creditors in some of the large cases. A good example is the self-administration of the German airline AirBerlin, the largest self-administration proceeding in the last year. After the filing petition of AirBerlin plc & Co. KG with its registered office in Berlin by mid of August 2017, we have advised a range of national and international lessors of airplanes in all kind of insolvency-related questions including disposals of airplanes, assessment of securities and their treatment under insolvency law as well as the conclusion of security realisation agreements (*Verwertungsvereinbarungen*). In addition, we have also assisted Easyjet in the M&A transaction when Easyjet acquired a range of airplanes out of insolvency.

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

Stefan: It may be too early to say, as it’s only been a couple of years since the procedure was introduced. Besides, since the protective shield 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 protective shield procedure does not provide a sufficient package for entities with an international group structure. However, also according to the government’s evaluation, there is a clear trend to use more regular self-administration proceedings than protective shield proceedings.

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

Stefan: We have noted that the tendency of using the protective shield procedure has been stagnating over the last years and this perception is confirmed by a study of the Boston Consulting Group (*Moldenhauer/Wolf, Sechs Jahre ESUG – Durchbruch erreicht, April 2018*). 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



GERMAN RESTRUCTURINGS EMBRACE CHANGE IN APPROACH



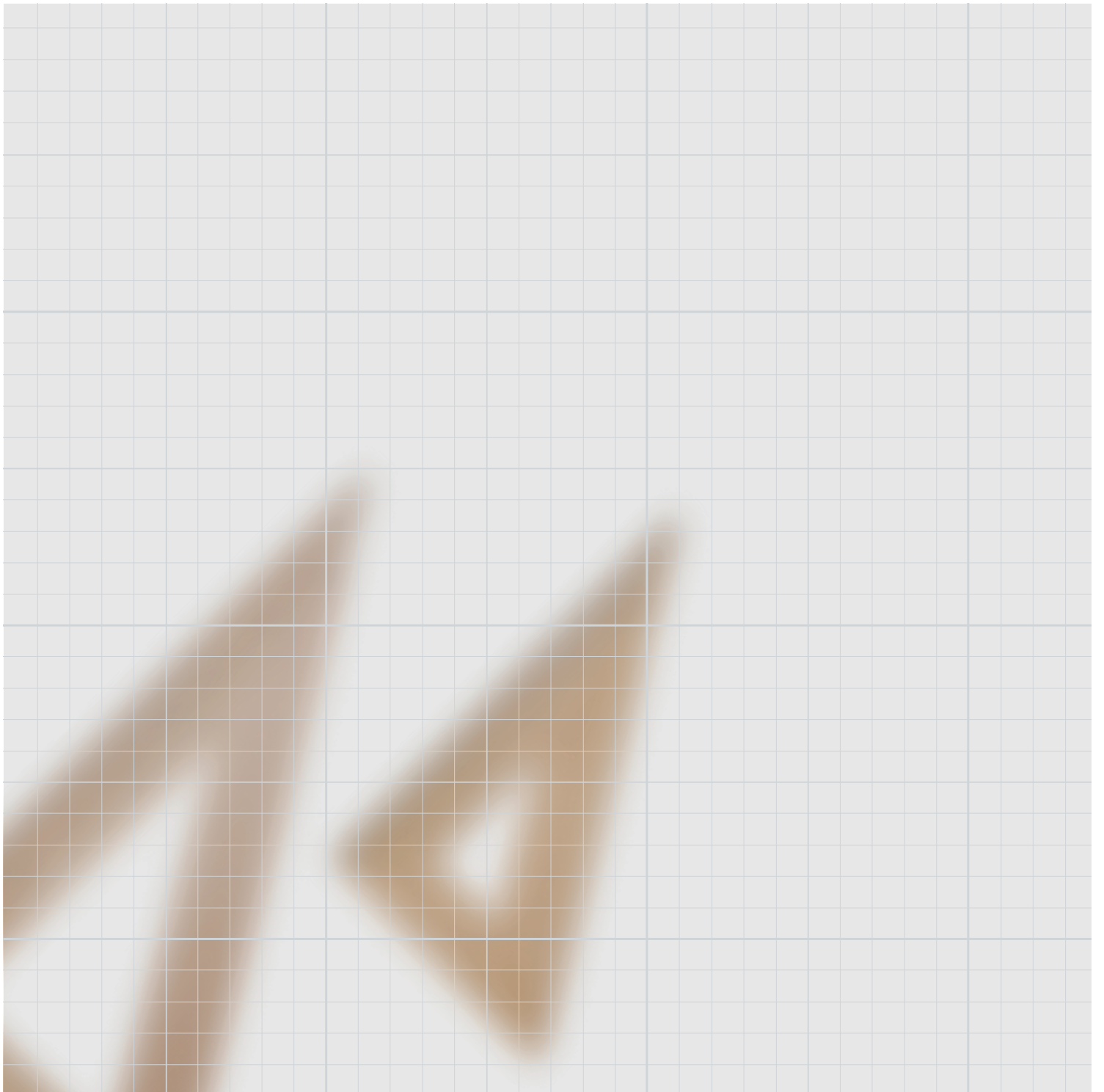
the main users of the protective shield proceedings. The reason the procedure is suited to debtors of a certain size may be that a significant amount of professional input is required to initiate the process (i.e. time and expenses in order to obtain the required restructuring certificate (*DW S 9*)). 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.

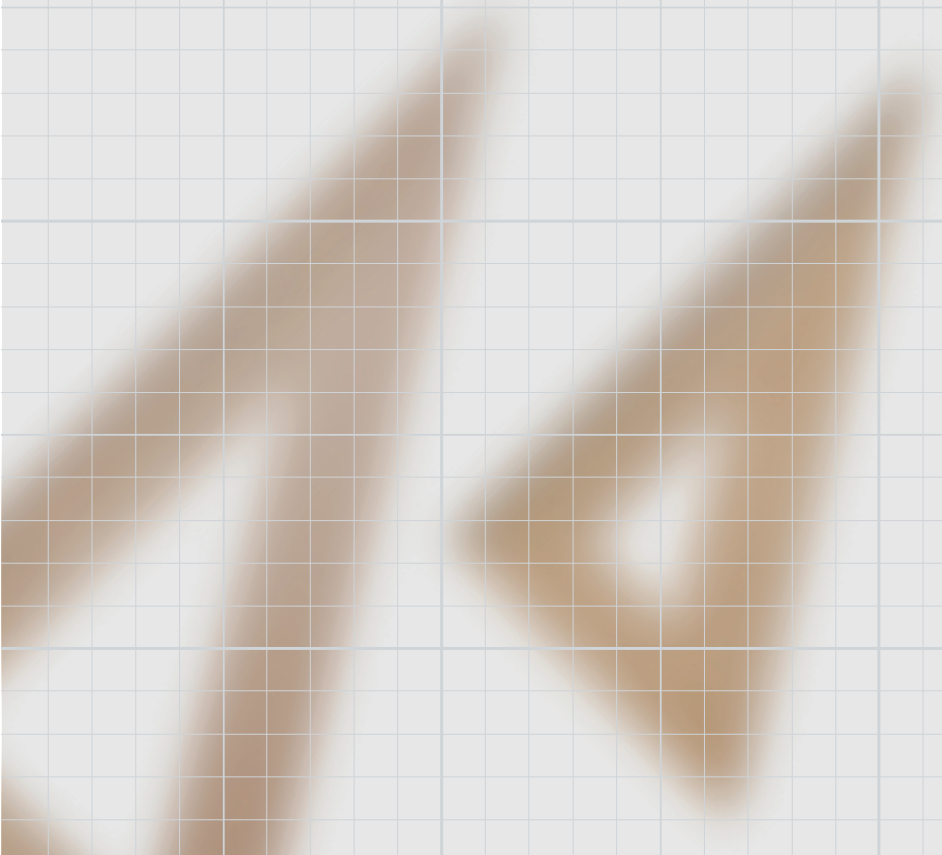
As already mentioned above, in contrast, practice shows that larger debtors recently tend to use regular self-administration proceedings already during the preliminary insolvency proceedings. Typically, a reputable restructuring or insolvency lawyer would then take over the CEO position within the debtor supported by a custodian (*Sachwalter*). Practice has shown also that this type of regular self-administration proceedings is more flexible compared to the protective shield proceedings.

Adrian: Is there any scope for the protective shield or self-administration procedures to be used in relation to overseas companies?

Stefan: 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, Telecombus and Rodenstock in the past but we have used pre-insolvency proceedings of other jurisdictions in particular, the English scheme of arrangement. The recent insolvency of the Austrian airline NIKI Luftfahrt GmbH showed that even between the jurisdictions of Austria and Germany there was a conflict of jurisdictions resulting in two Member States assuming each their own jurisdiction. This is a very good example for the lack of clarity under the existing law.



SPANISH OFFERS TRIED AND TESTED PRE-INSOLVENCY MECHANISM





Iñigo Villoria
Partner, Madrid

“Pre-insolvency procedures have been popular because they allow businesses to continue, unlike some of the more formal insolvency procedures.”

– Iñigo Villoria

Adrian: 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?

Iñigo: Yes of course. The pre-insolvency procedures have been around since 2009, although the refinancing through Additional Provision 4 of the Spanish Insolvency Act (*homologation*), as we know it now, started to apply in May 2012. In the following 5 years there were about 140 Court *homologation* decisions in Spain, most of them affecting several companies of the same group.

We have been actively involved in these pre-insolvency proceedings, most of them in the real estate sector. They have been popular because they allow businesses to continue, unlike some of the more formal insolvency procedures. Only 24 companies subject to homologation (4%) have filed for insolvency later.

There are a range of different pre-insolvency procedures available in Spain.

SPANISH OFFERS TRIED AND TESTED PRE-INSOLVENCY MECHANISM

Pre-insolvency procedures in Spain

Type of process	Key aspects	Voting thresholds
Protected refinancing	Avoids claw back risk	Out of court: 60% total liabilities Court sanctioned: 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 Cram down of secured liabilities	60% unsecured liabilities 65% of secured liabilities
	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 Cram down of secured liabilities	75% unsecured liabilities 80% of secured liabilities
Formal arrangement in insolvency (<i>convenio</i>)	<i>Convenio</i> can postpone the repayment up to 3 years, facilitate write-offs up to 20% Cramps down ordinary and subordinate dissenting creditors	Liabilities voting for the arrangement exceeding liabilities voting against it

Type of process	Key aspects	Voting thresholds
	<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 dissenting creditors</p> <p>Cram down by class (labour, public, commercial or secured creditors)</p>	<p>50% ordinary liabilities</p> <p>60% of the 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 dissenting creditors</p> <p>Cram down by class (labour, public, commercial or secured creditors)</p>	<p>65% ordinary liabilities</p> <p>75% of the liabilities of the same class</p>

SPANISH OFFERS TRIED AND TESTED PRE-INSOLVENCY MECHANISM

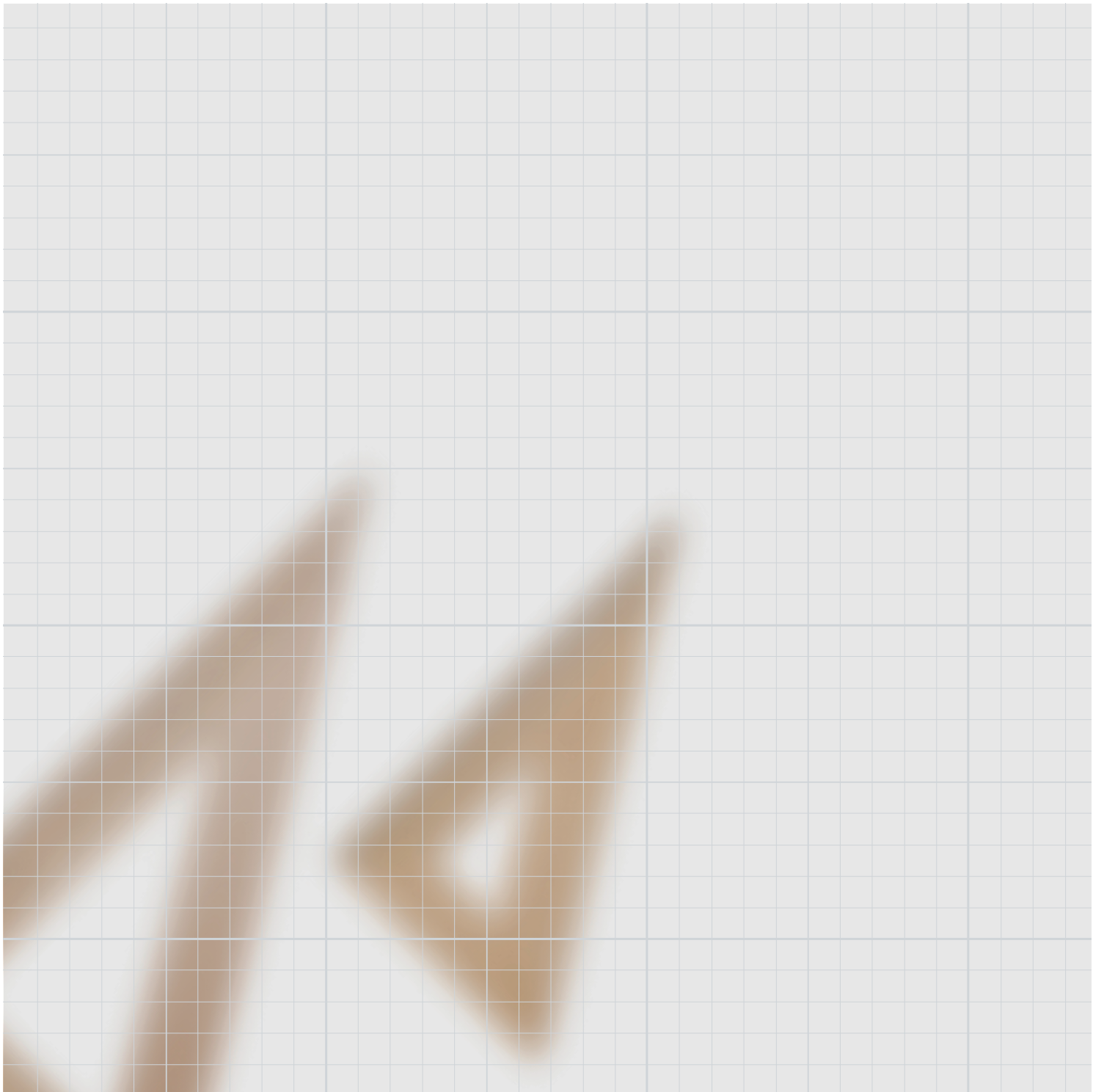


Adrian: Can you tell me about the most recent restructuring deals in Spain?

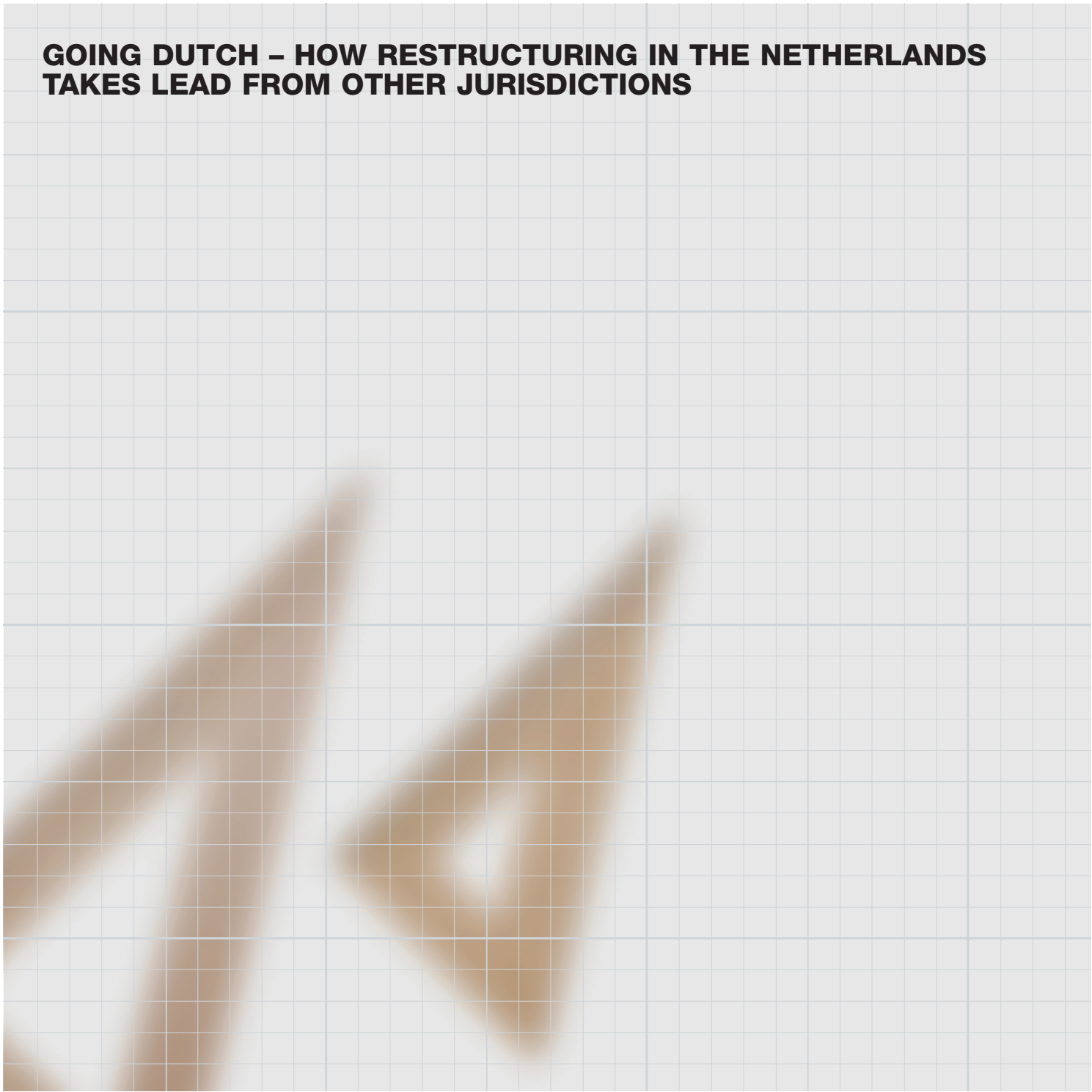
Iñigo: The most quoted examples in which we have been involved are Abengoa and Isolux. Abengoa managed to reach an agreement with the majority of financial creditors, although the Court support to the restructuring was limited. Isolux had to file for insolvency after having obtained a Court sanction for the refinancing.

Adrian: What are the main pitfalls of the Spanish restructuring tools?

Iñigo: One of the main problems of the Spanish *homologation*, as opposed to the English law scheme, is the lack of effects in relation to cross guarantees, which remain as they are, regardless of the *homologation* of the main obligor's debt. Another material difference has to do with directors' fiduciary duties: they are not aimed at protecting the creditors, even in cases where the equity is worth nothing.



GOING DUTCH – HOW RESTRUCTURING IN THE NETHERLANDS TAKES LEAD FROM OTHER JURISDICTIONS





Ilse van Gasteren
Partner, The Netherlands

“Draft legislation is available, aimed at implementing a Dutch out of court composition procedure which is similar to the UK scheme with US Chapter 11 elements.”

– Ilse van Gasteren

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

Ilse: Although there is a form of composition available in the Netherlands, this is a post-insolvency mechanism and is rarely effectively used in practice. Dutch law does not yet have a pre-insolvency composition procedure. This means that all amendments (maturity dates, prepayment schedules, shareholder structures etc.) currently require 100% consent, unless otherwise agreed in advance. There is, however, draft legislation available, seeking to implement a Dutch out-of-court composition, which is a process similar to the UK scheme, with US Chapter 11 elements. Expectations are that the draft bill will come into force in 2020. 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. In the past years, the majority of local courts in the Netherlands have already applied draft legislation with respect to pre-pack administrations, so a number of Dutch pre-packs have been implemented. Not all have been successful, unfortunately. Last year, Dutch practice with respect to pre-packs encountered serious setbacks following a decision from the European Court of Justice resulting in Dutch courts no longer anticipating the draft legislation while the Dutch legislator is thoroughly reviewing and revising the Dutch pre-pack. In the meantime, restructurings which cannot be implemented on a consensual basis are being 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 and remains the preferred option whilst the draft composition and pre-pack legislations have not yet been implemented.

We have been involved in many, if not almost all, enforcement restructurings in the Netherlands. There have been some significant ones, such as Schoeller Arca as I have already mentioned, and the LyondellBasell restructuring, which

GOING DUTCH – HOW RESTRUCTURING IN THE NETHERLANDS TAKES LEAD FROM OTHER JURISDICTIONS



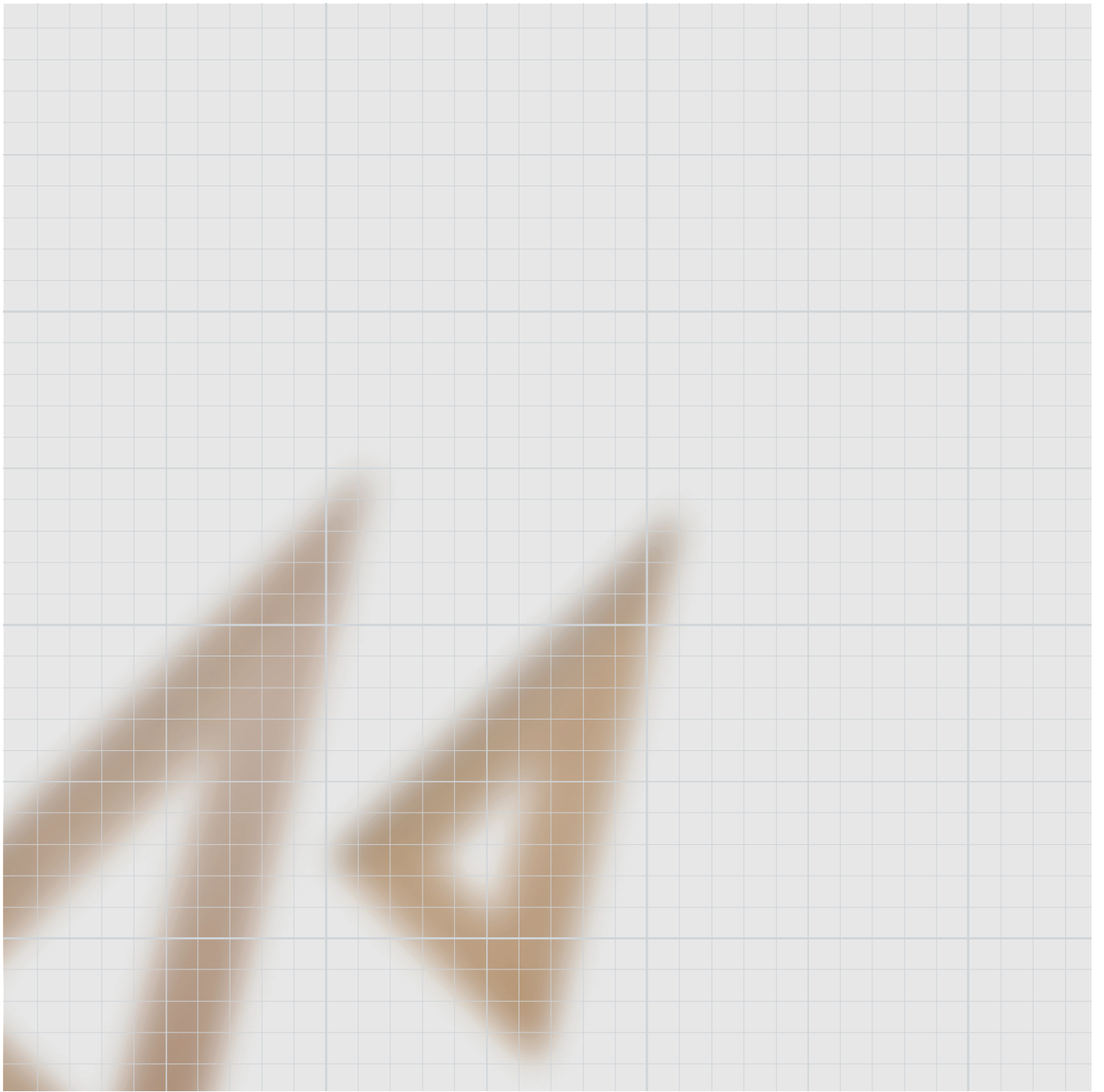
was a combination of a US Chapter 11 and a Dutch share pledge enforcement and in which we acted for LyondellBasell. Dutch law enforcement sales were used in the bankruptcies of Macintosh, Unlimited Sports Group and McGregor, where we had a leading role. The sale of the various Imtech divisions out of the Imtech bankruptcy estate were also implemented through share pledge enforcements, where we acted for the Lenders.

Adrian: 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?

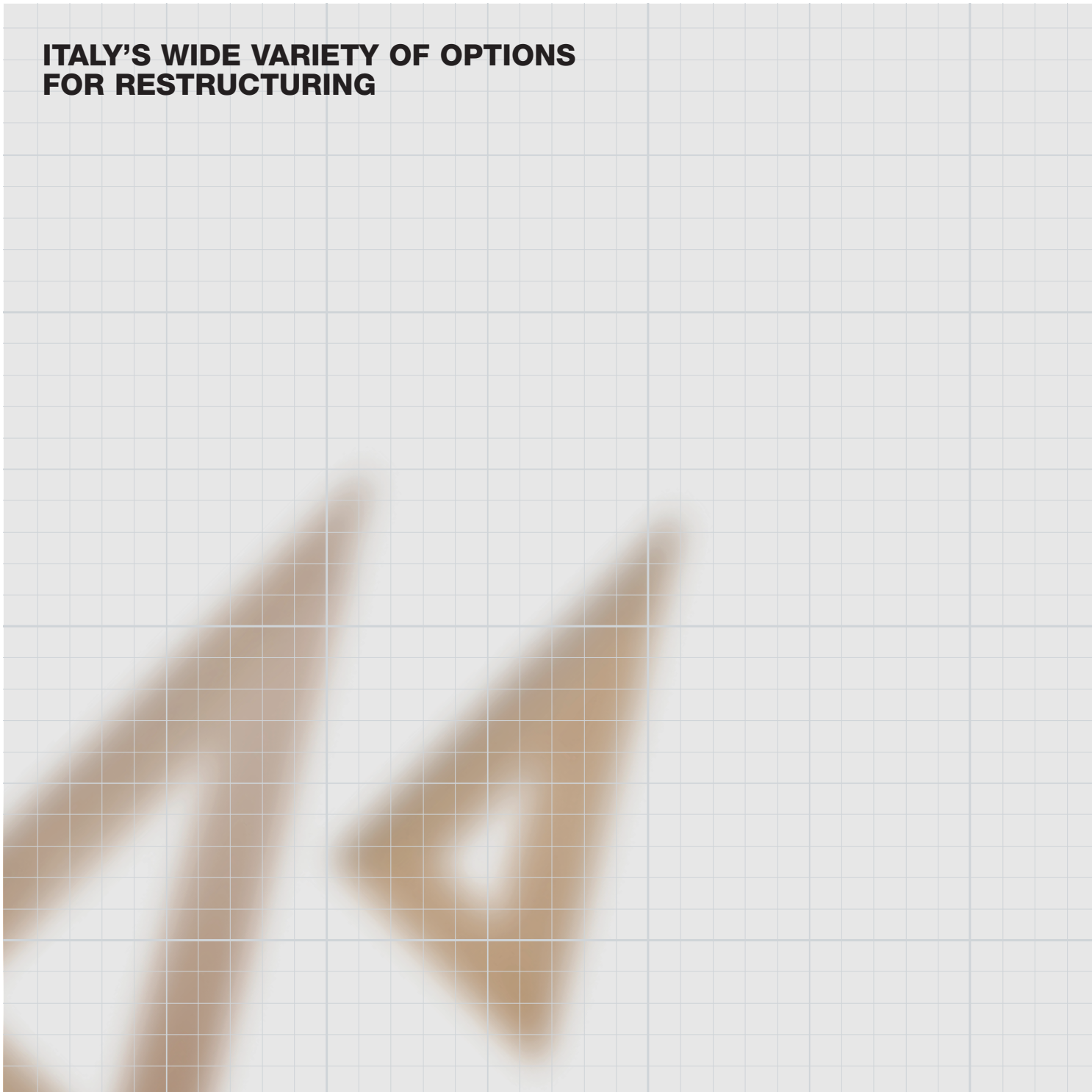
Ilse: Yes, I hope that the new legislation brings with it greater flexibility, as some of the pre-pack style restructurings have not been that successful. The new composition legislation will in our view help break through a deadlock at shareholder/junior/senior level where the facilities are governed by Dutch law or where a company has its centre of main interests in the Netherlands and, specifically, also in structures where there is no holding share pledge or intercreditor arrangement to allow for a share pledge enforcement route (Schoeller Arca). 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.

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

Ilse: Because a Dutch law 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 compositions and pre-packs means that the Netherlands is a place where international restructurings can be achieved.



ITALY'S WIDE VARIETY OF OPTIONS FOR RESTRUCTURING





Fabio Guastadisegni
Partner, Milan

“The Italian Market has witnessed a wide use of pre-insolvency proceedings.”

– Fabio Guastadisegni

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

Fabio: 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.

Please note that the Law 155/2017 came into force on 14 November 2017, and pursuant to that, the Government is required to adopt, within the following twelve months, a comprehensive and organic reform of insolvency proceedings and the rules governing business crisis. Law 155/2017 proposes to supplement the current insolvency procedures and schemes for businesses and other debtors by introducing a new out-of-court procedure to assist a debtor in his dealings with creditors. The new out of court procedure is aimed at promptly identifying and solving the crisis before it becomes irreversible, thus making the commencement of insolvency or restructuring proceedings the last resort (the so called “*Alert Procedure*”). Moreover, it introduces specific provisions regulating the cases of crisis/insolvency of group of companies, with harmonisation of their restructuring.

A draft of such reform was issued on December 2018 and it is currently under discussion before the competent parliament commissions. The new Insolvency Code is therefore expected to be enacted in the first part of 2019.

ITALY'S WIDE VARIETY OF OPTIONS FOR RESTRUCTURING

Pre-insolvency procedures in Italy

Type of process	Key aspects	Voting thresholds
Pre-bankruptcy Composition (<i>Concordato preventivo</i>)	<p>Payment of at least 20% of unsecured creditors</p> <p>Creditors with priority or pledge or mortgage must be no worse off than in a winding up</p> <p>Debtor has protection of between 60 and 120 days to draft the plan but is subject to reporting requirements</p> <p>A competitive bid process automatically opened for the purchase of the debtor's assets</p> <p>Concurrent proposals for composition may be made by creditors if payment to unsecured creditors falls below 40 % or 30% if the pre-bankruptcy composition is continuing</p>	51% majority of the credits admitted to vote and majority of classes voting (if any)
Out of Court reorganization plans under Article 67 par 3 let d) (<i>Piani di risanamento</i>)	<p>No general moratorium, creditor protection plan must be assessed as reasonable by experts to avoid claw back</p> <p>Protection from claw-back actions (<i>azione revocatoria</i>): deeds, payments and guarantees granted on the debtor's assets under the reorganization plan are not subject to claw-back</p>	Not prescribed

Type of process	Key aspects	Voting thresholds
Debt Restructuring Agreement under Article 182 bis (<i>Accordi di Ristrutturazione dei Debiti</i>)	<p>Feasibility of repayments must be confirmed by independent expert</p> <p>60 days stay</p> <p>Full payment of those not party to the agreement within 120 days of court's validation</p> <p>Super priority for rescue finance</p> <p>Subordination of shareholders in relation to loans made in the context of restructuring, except for shareholder loans granted to implement a judicially approved pre-bankruptcy agreement or debt restructuring agreement that are treated as super senior for up to 80% of their total amount.</p>	60% majority of credits (no voting)
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 credits 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>	51% majority only in the case where the company is admitted to a <i>concordato</i> proceedings during the process

ITALY'S WIDE VARIETY OF OPTIONS FOR RESTRUCTURING



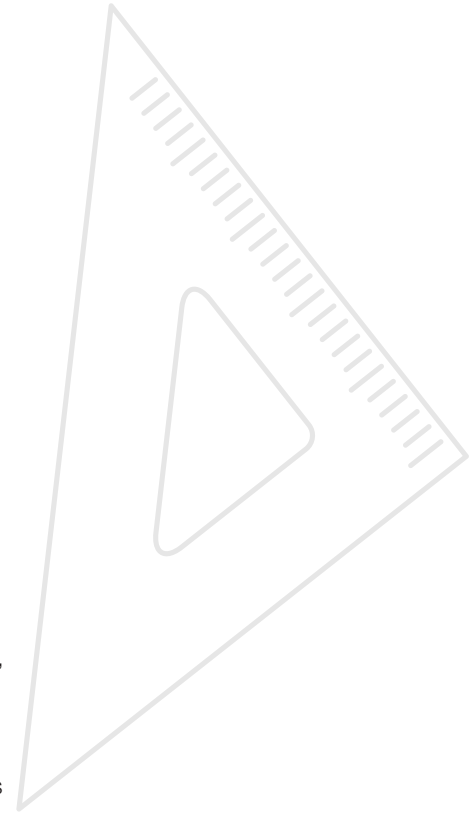
“Interestingly, the number of consensual proceedings keeps increasing at a fast pace at a national level.”

Although a draft of the new Italian Insolvency Code has already been circulated, the general elections in Italy took place in March 2017 and have slowed down the process. The new insolvency code is expected to be enacted in the first part of 2019

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

Fabio: 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 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.



In relation to *concordato preventivo* proceedings, we have advised lenders in a number of cases such as Limoni, Ferretti, Lotto and Stonefly. Currently, we are assisting a leading bank institution, in the *concordato preventivo* proceedings commenced by Waste Italia, an Italian company in the waste disposal market, which our client (with others) funded in 2014. There are a number of bankruptcy and criminal law issues arising from these proceedings, whereby the bankruptcy courts may scrutinise an intercreditor agreement for the first time in Italy. We are also advising Rome's municipal transport company, ATAC S.p.A., on its ground-breaking restructuring procedure before the Rome Bankruptcy Court. The restructuring is by far the largest ever court-based restructuring in Italy, involving a company with over 11,000 employees, turnover of around €1 billion and debt of € 1.4 billion.

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

Fabio: Yes. Although out of court 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. Anyway, pre-insolvency proceedings are surely to remain a valuable alternative to the ordinary (and more complex) insolvency procedures.

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

Fabio: 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 reorganisation plan under article 67 of the Italian Bankruptcy Law together with an English scheme of arrangement in order to bring about a successful restructuring.

**FRANCE – BUSINESS RESCUE IN
AN ACCELERATED FORM**





Reinhard Dammann
Partner, Paris

Reinhard Dammann, Head of our Restructuring and Insolvency team in Paris notes that 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).

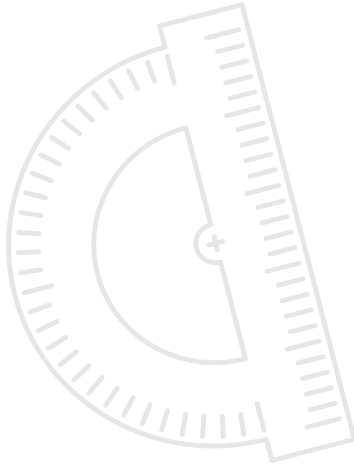
Mandat ad hoc proceedings are available to debtors (and upon the sole initiative of debtors) which face any type of difficulties without being actually cash-flow insolvent.

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 recent study made by Deloitte/Altarea based on a panel of 16 large courts, it appears that the number of consensual proceedings has been rising at a fast pace between 2011 and 2016, to slightly decrease in 2017. Interestingly, the number of consensual proceedings keeps increasing at a fast pace at a national level (including small courts), with a 43% increase between 2016 and 2017.

This increase in the opening of *conciliation* proceedings can partially be attributed to an increase in the opening of *mandat ad hoc* proceedings. Indeed, 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.

FRANCE – BUSINESS RESCUE IN AN ACCELERATED FORM



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

Safeguard proceedings were introduced in France in 2005. The number of safeguard proceedings opened has been decreasing since 2013 and remains relatively limited (less than 1200 in 2017, out of a total of approx. 55.000 insolvency proceedings per year; i.e. 2% of opening of insolvency proceedings) (See the Deloitte-Altare Report at page 11).

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 were 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).

Less than 30 AFS and AS have been opened in France since their creation in 2010. Only 3 were opened in 2017 (See the Deloitte-Altare Report at page 26). This number appears relatively small but does not necessarily mean a “lack of success”. Indeed, the advantage of AFS and AS also consists in the sole “possibility” that such proceeding 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*. Another characteristic of such proceedings is that they tend to be used in large restructurings.

Pre-insolvency procedures in France

Type of process	Key aspects	Voting thresholds
Safeguard	<p>Debtor not insolvent</p> <p>Automatic stay on payment and restriction of creditors rights</p>	<p>66²/₃% majority</p> <p>Two committees: Financial institutions Trade creditors (Separate bondholder Committee)</p>
Accelerated Safeguard	<p>Fast track</p> <p>Only available to entities of certain size (at least 20 employees; €3m turnover or €1.5m balance sheet)</p> <p>Needs approval within 3 months</p>	<p>66²/₃% majority (same committees as above)</p>
Accelerated Financial Safeguard	<p>Fast track</p> <p>Not cash flow insolvent</p> <p>Only involves finance creditors</p> <p>Minimum thresholds for balance sheet and employees</p> <p>Approval by creditors and court sanction within 1 month/renewable once)</p>	<p>66²/₃% majority of finance creditors</p>
Judicial Rehabilitation	<p>Debtor is insolvent, but business appears viable</p>	<p>66²/₃% majority (same committees as above)</p>

FRANCE – BUSINESS RESCUE IN AN ACCELERATED FORM



Adrian: 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).

Reinhard: Yes, of course, consensual proceedings (*mandat ad hoc* and *conciliation*) were traditionally mainly opened by large companies, as small size enterprises seemed to ignore the existence and benefit of such proceedings and the role of courts (preferring staying away from courts). However, as shown by the figures mentioned above, even smaller companies tend to use them nowadays.

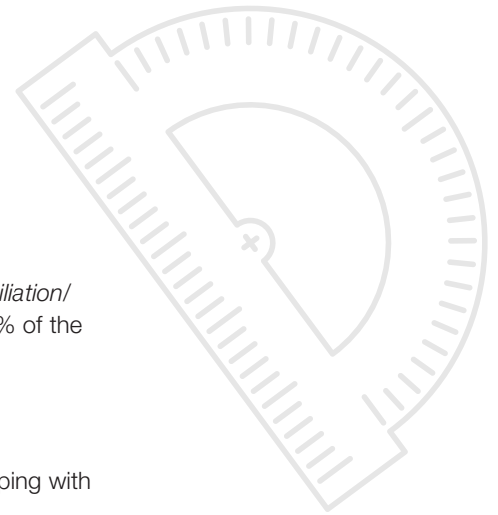
Safeguard proceedings are mainly used by small and middle firms with less than 10 employees (94% of those commenced in 2017 – Deloitte-Altarex). It has however to be noted that safeguard proceedings have also been used by major group companies in France (very recently CGG, and before that Eurotunnel, Thomson, Coeur Defense, etc.), thus (i) concerning a high amount of debts to be restructured and (ii) impacting a large number of employees.

ASF and AS are designed for larger companies.

Such 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, SAUR, and CGG recently, to quote public ones.

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. CGG was also very interesting in that the use of French safeguard proceedings was combined with Chapter 11 proceedings in the US.



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).

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

The attractiveness of such proceedings is designed to increase again (which is in keeping with the EU proposal for a directive on preventive restructurings).

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

Safeguard proceedings have been widely used by French court for important cases, including for debt restructuring of foreign groups of companies (CGG again, and before that Eurotunnel, Coeur Defense, Belvedere, Emtec etc.). We note that, 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 and under the Recast Regulation we don't think this will change.

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 of foreign companies. In particular, the benefit of *conciliation* applies for French companies (new money privilege, the limitation of the risks related to hardening period in case of subsequent opening of insolvency proceedings etc.).

**COLLABORATION IS THE KEY TO RESTRUCTURINGS
OF THE FUTURE**

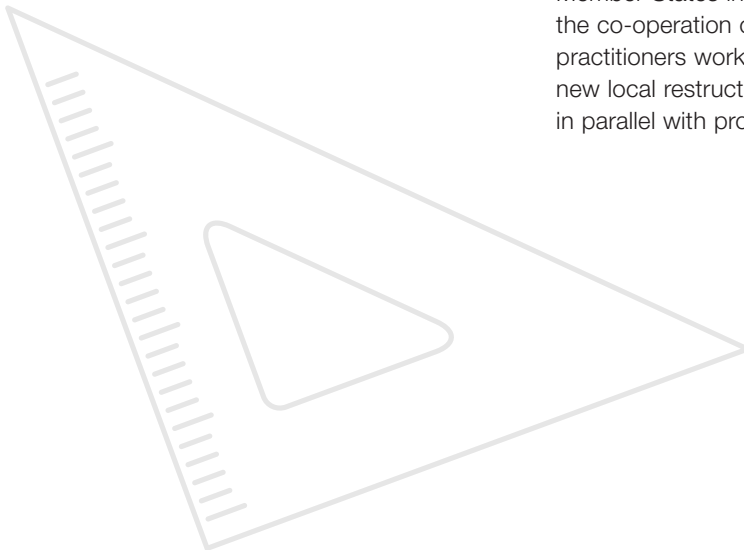




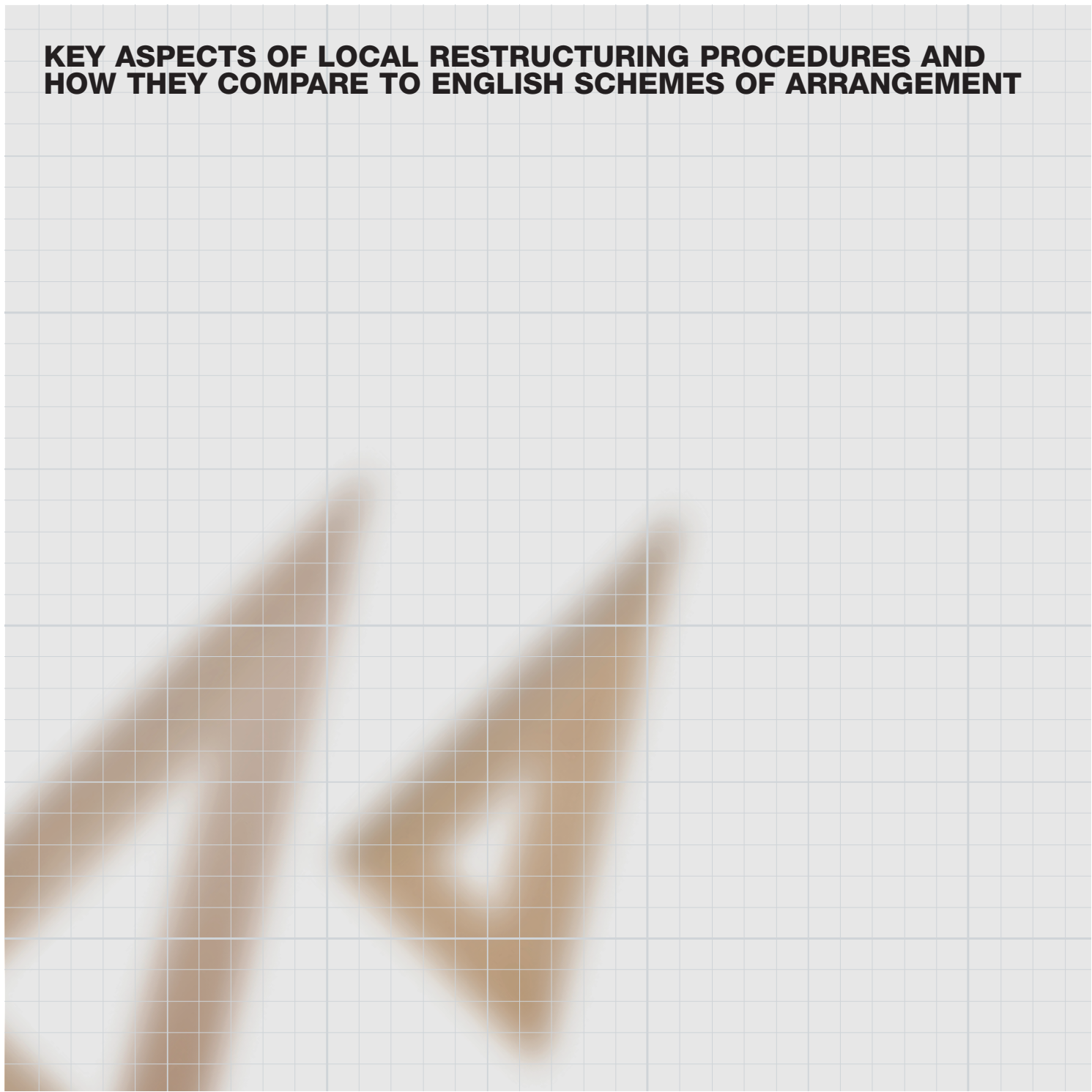
Gabrielle Ruiz
Director, London

Gabrielle Ruiz, Editor of this publication and Director of Knowledge in the Restructuring and Insolvency team in London notes: “As part of the Capital Markets Union Action Plan the European Commission is fast tracking its EU Directive for a more harmonised approach to restructuring procedures and second chance provisions.

Even though European Member States will have three years to implement the Directive once it is finalised, a number of jurisdictions are already well advanced in the development of their restructuring mechanisms in anticipation of the Directive. One thing for certain is, even in a post-Brexit World, practitioners will continue to explore innovative techniques. Whilst solutions may not always be in the jurisdiction where we may expect to find them, restructurings will continue to be achieved and will be a key focus for some years to come. What we may see is more collaboration, not just between the Member States in their approach to harmonisation, but also more generally in the co-operation of cross border insolvency cases, where courts and practitioners work in tandem to achieve restructuring solutions, either by using new local restructuring techniques to deal with group situations or operating in parallel with procedures elsewhere”.



KEY ASPECTS OF LOCAL RESTRUCTURING PROCEDURES AND HOW THEY COMPARE TO ENGLISH SCHEMES OF ARRANGEMENT



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Are local composition arrangements available?	✓	✓	✓	✓	✓	Dutch Scheme legislation hoped to be effective in 2016
What are they?	<ul style="list-style-type: none"> • Schemes of arrangement • Company Voluntary Arrangements (CVAs) • New proposal for restructuring plan 	Insolvency Plan	<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) 	<ul style="list-style-type: none"> • Refinancing agreements out of court and court sanctioned • <i>Convenio</i> 	<ul style="list-style-type: none"> • (draft) Dutch scheme • Post insolvency composition
Are they available pre and post insolvency?	✓	x (post insolvency only)	✓	✓	✓	✓

KEY ASPECTS OF LOCAL RESTRUCTURING PROCEDURES AND HOW THEY COMPARE TO ENGLISH SCHEMES OF ARRANGEMENT

	UK	Germany	France	Italy	Spain	The Netherlands
What majority of creditors needs to vote/ agree in favour?	<ul style="list-style-type: none"> • Schemes: 75% in value, over 50% in number in each class • CVA: 75%; cannot bind secured creditors without consent • New proposal restructuring plan: 75% in value and 50% unconnected, at least one class must vote in favour 	50% in value of each class of creditors	66 $\frac{2}{3}$ % in value in each of the classes	<ul style="list-style-type: none"> • <i>Concordato preventivo</i>: 51% in value and a majority of classes • Out of court (Art 67): not prescribed • Restructuring arrangements (Art 182 bis): 60% of credits • Debt restructuring with 50% debt due to finance creditors (Act 182 septies): 75% financial credits • Post-bankruptcy composition: majority • Large companies post administration: 51% majority only where the company is admitted to concordato proceedings 	<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

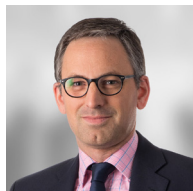
KEY ASPECTS OF LOCAL RESTRUCTURING PROCEDURES AND HOW THEY COMPARE TO ENGLISH SCHEMES OF ARRANGEMENT

	UK	Germany	France	Italy	Spain	The Netherlands
Can the Court impose a restructuring (i.e. cram down)?	Currently, no New proposal – cross class cram down to be available where at least one creditor approves class	Yes, if non-concurring class, no worse off than in liquidation	Yes, but only for rescheduling of debt for up to 10 years	Yes, if non-concurring class is no worse off than in liquidation	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)
Have local compositions ever been used in parallel with English schemes?	N/A	Not yet tested	Not tested	Yes, in the case of SEAT Pagine	Not yet tested	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	✓ (e.g. Eurotunnel/ Coeur Defense) – subject to meeting French COMI/ establishment requirements)	Not yet tested. Local procedures only available if Italian COMI/ establishment	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.

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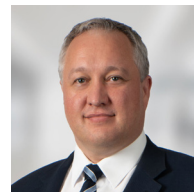
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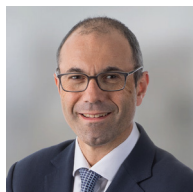
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