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Liability Management Exercises In Europe: What Do They Mean for Lenders? – Part One

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Synopsis

Liability management exercises ('LMEs'), originally a phenomenon of the bond world, have spilled over to the senior secured leveraged finance market in the US for a number of years as a result of the prevalence of cov-lite, among other factors. Drop downs, uptiers, double dip and *pari* plus transactions – all forms of LMEs – are now starting to be seen in Europe.

In the US, creditors' response to the recent round of LMEs has been described as a 'whack a mole' approach – each type of LME generates a specific documentary response, which is often only included in the post-LME documentation. Creditors' search for an omni-blocker is continuing.

This Part One covers what LMEs are, documentary provisions and responses and their use in the US. Part Two, which will be published in the next edition, covers the use of LMEs in Europe and potential legal issues to be considered.

1. What are LMEs and types of LMEs

LMEs, also now being referred to somewhat misleadingly as creditor-on-creditor violence, have been around for years in the bond world. What is relatively new is that these techniques are now appearing in the senior secured leveraged finance market, where investors seem to have expected to be uniformly *pari passu* or senior to other creditors and discover that this is not always the case.

Most of the LMEs in the news over the past few years have been executed by groups seeking liquidity when their ability to borrow is tapped out for whatever reason – be it covenants or the credit.

Others are driven by the need to achieve a mini-restructuring without the greater expense of a formal restructuring via US Chapter 11 – reducing leverage and interest expense and getting in liquidity to keep the business operating.

Finally, a few seem to have been driven in part by a desire of shareholders to retain exposure to a valuable asset that otherwise might be dragged into a deterioration of the overall business.

Broadly speaking, the LMEs that have been getting all the attention fall into several distinct categories, and sometimes a combination of them:

1. Drop downs and/or structurally senior financings, often achieved within the covenant permissions of the pre-existing debt – some of these are referred to as a *J. Crew* (drop down of intellectual property into an unrestricted subsidiary that borrows new debt), *Envision* (designation of a subsidiary with intellectual property as an unrestricted subsidiary that borrows new debt) or *Nieman Marcus* (drop down into an unrestricted subsidiary and dividending the unrestricted subsidiary out of the group).
2. New financings coupled with super seniority for the new financing and potentially for pre-existing debt held by the lenders participating in the new financing – with those participating lenders voting through the necessary amendments to pre-existing debt documentation. These are usually referred to as 'Serta' style 'uptiering' or 'priming' after *Serta Simmons Bedding* implemented this kind of uptiering – first withstanding litigation scrutiny and more recently with some setbacks. Most uptier transactions involve the exchange of old debt for new, more senior debt (usually at a discount) coupled with an amendment of the terms of the old debt to the disadvantage of the creditors not participating in the uptier transaction.
3. New financings where the financing is effectively *pari passu* with the pre-existing senior secured debt, but which also has additional credit support that does not need to be shared with the other *pari passu* creditors. These new financings typically require a special purpose vehicle ('SPV') to act as borrower from the third-party financiers, with the borrower on-lending into the group on a *pari passu* senior secured basis. The extra credit support varies according to what is possible at the time – sometimes significant assets are dropped into the SPV, sometimes the group guarantees the third-party debt using basket capacity and so on. Similar to drop

downs, these are often achieved within the covenant permissions of the pre-existing debt.

4. Releases of guarantees and security over key assets by creating minority holdings in relevant subsidiaries, taking advantage of contractual provisions allowing the releases when the subsidiary is not wholly owned.

2. Documentary provisions/enhanced flexibility

The recent relative popularity of LMEs in the senior secured debt market is driven in part by a convergence over the past 15 years or so in many loan leveraged finance and private credit documents on the flexibility of bond covenants, particularly in the large cap space but also to a degree in the mid-market.

Before that convergence took place, typical LMA market standard facility agreements contained maintenance covenants whose starting point was that actions could only be taken by the borrower and its subsidiaries if expressly permitted by a series of negotiated baskets, ideally (from the creditors' viewpoint) but not always set on the basis of fixed amounts rather than ratios. The convergence was driven by a number of factors, including the low interest rates and available liquidity seeking return driven by post 'global financial crisis' and post COVID-19 quantitative easing as well as technical factors such as were recently a relative dearth of M&A-driven financings after events such as the Russian invasion of Ukraine.

Standard baskets include:

– ***Financial indebtedness***: new indebtedness is not permitted to be incurred except debt that does not meet the technical definition of indebtedness and any debt that is permitted to be incurred under the relevant baskets. The specific size and characteristics of the baskets (e.g. is it a fixed amount, based on a multiple of EBITDA or based on senior secured or total leverage or fixed charge cover) vary by deal, industry and what kind of debt it is, but fixed amount baskets have got rare. However, a set of baskets has become relatively standard, including: credit facilities or freebie basket (not limited by leverage), incremental facilities limited by leverage and/or fixed charge cover (as the case may be), capitalised lease obligations, ratio debt, general debt and contribution debt, as well as industry-specific baskets.

– ***Permitted collateral liens and permitted liens***: most, but not necessarily all, of the financial indebtedness baskets may be permitted to be secured by the existing senior secured collateral (permitted collateral liens) or other collateral (permitted liens), either in full or in part, with the most restrictions on what can be secured applying to the existing senior secured collateral. Senior secured ratio debt, general debt, and the debt in the credit facilities baskets can typically be secured by existing collateral. Capitalised lease obligations and, occasionally, the general debt basket can be partly and/or fully secured by new security. In the European market contribution debt can now commonly be secured by existing collateral or new security.

– ***Restricted investments***: other than pursuant to a predetermined basket as negotiated, investments are generally not permitted save, typically, investments in other members of the restricted group, investments in cash and investments in assets or entities that become assets or members of the restricted group as well as transactions that technically fall within the definition of investments but that need to be permitted to allow the smooth running of daily operations. In addition, other investments are often permitted in the amounts that otherwise could be dividended out of the group.

– ***Restricted payments***: restricting dividends and other forms of distributions to shareholders/sponsors and restricted payments on subordinated debt (noting that second lien is not invariably treated as subordinated debt in some formulations because of the seniority of the second lien unsecured claim), so that payments are subject to limits during the life of the debt and (sometimes) conditional on there being no default outstanding and (where applicable) additional capacity under the ratio debt basket. The restricted payments basket typically has the capacity to grow depending on distributions from, and other transactions with, unrestricted subsidiaries.

Not only have maintenance covenants given way to incurrence covenants, but the incurrence covenants have also become increasingly borrower-friendly, starting with a generous basket size that grows with adjusted EBITDA (adjusted for synergies and certain other reorganisation/cost savings and other steps – as negotiated – on a *pro forma* basis). This results in significant basket capacities that, if earlier unused and/or annual, gives a debtor significant leeway to combine more than one basket for use in one LME.

3. Documentary responses

As the recent round of US LMEs kicked off, there were market reactions with each LME-type generating its specific documentary ask, rather than creditors adopting a holistic approach.

– ***The J Crew/Envision blocker***: has become fairly standard, blocking the transfer of material intellectual property outside the restricted group (by transfer or, as was the case in *Envision*, by designating a subsidiary as unrestricted that already had the asset in question) as well as at times limiting the amounts that can be invested in unrestricted subsidiaries. This is sometimes extended to capture other material assets that can be used for a structurally senior financing.

– ***The Chewy blocker***: limits the ability of a restricted subsidiary to trigger contractual provisions entitling it to the release of guarantees and security over its assets by issuing or transferring some of its shares outside the restricted group.

– ***The Serta blocker:*** limits any change to the 100% or super-majority amendment provisions in the senior facilities or intercreditor agreements in relation to any subordination and – importantly as some miss it – any change in the proceeds waterfall. Note that the requirement for super-majority or all-lender consent can be overridden by a court-supervised process that requires lower consent levels, such as an English scheme of arrangement (75% of value and a majority in number in each class of those voting in person or by proxy), an English restructuring plan (75% of value of each class of those voting in person or by proxy) or the Dutch WHOA (66⅔% per class).

  There has been some focus by lenders on limiting the use of exclusionary exchange offers to achieve uptierings, and a focus by some borrowers on ensuring this flexibility remains. Where this will settle in the market is unclear at the moment.

– ***Pluralsight blocker***: in *Pluralsight*, intellectual property was moved to a non-guarantor restricted subsidiary that issued preference shares to a shareholder affiliate, rather than the intellectual property being moved to an unrestricted subsidiary as was the case in *J. Crew*. The *Pluralsight* blocker is usually a restriction on the issuance of minority stakes outside the restricted group by a restricted non-guarantor subsidiary that owns an important asset.

– ***Vote rigging blockers***: to be able to implement LMEs, some debtors have made use of the incremental debt provisions to issue additional debt to supportive creditors just before a vote on a proposed LME. The debt issuance is designed to be sufficient so that the supportive creditors constitute the necessary majorities to implement the planned LME against the objections of a sizeable minority. Vote rigging blockers therefore seek to block the votes of debt issued at substantially the same time as the LME transaction in question.

– ***Double dip blockers:*** these are relatively rare and seek to block credit support for debt of unrestricted subsidiaries or, at times, for non-guarantor restricted subsidiaries, to the extent done to enable multiple claims into the group. This can include limiting restricted group credit support for debt of unrestricted subsidiaries, the so-called 'At Home' blocker.

– ***General LME blocker***: the market became excited about the *RR Donelly* (and its limited number of progeny to-date) use of a general LME blocker. However, the ones seen so far have included a '*bona fide business purpose*' or similar exception that may make it ineffective against the categories of LME whose purpose includes raising new funds for the restricted group. The search by creditors for an effective omni-blocker continues.

This lack of a holistic approach means that troubled borrowers and their financiers will inevitably continue to pore over their documentation to find ways of raising finance and find ways of delivering it.

New LME structures are also still being thought about, such as a hypothetical new LME structure termed 'inside out' by some by which a third-party lender or minority lender 'dethrones' a majority lender group and acquires requisite lender status by funding a refinancing loan to help the company prepay existing loans on a pro rata basis.

The majority of LMEs to date, and any associated litigation, have been in the US. There has been much speculation about whether we will see similar LMEs here in Europe. There has already been a number of LMEs used by European debtors, at times driven by US principles. These include the negotiations that took place in relation to *Altice France*, the Ardagh *pari plus* and the recent *Hunkemöller* uptier, followed by a super senior security enforcement, now in litigation in the US. All those cases involved New York law debt documentation. While there are clear differences between New York law and, for instance, English law, and the duties and potential liabilities of directors are generally broader under European laws than US laws, there is clearly scope for these transactions to be proposed in the UK and Europe depending on the circumstances.

4. Cooperation agreements

One way that creditors have taken back some control in light of aggressive LMEs is the use of cooperation agreements. Even though cooperation agreements cannot stop borrowers from taking actions permitted under the debt documents, e.g. a drop down of material assets or a double dip transaction, they have been used successfully, not only in the US but recently also in Europe, to restrict a debtor's actions in relation to a proposed LME.

Nevertheless, cooperation agreements can only assist in certain circumstances and come with notable drawbacks so that creditors and their advisors will want to carefully weigh their limitations against their potential advantages.

As already mentioned, one significant drawback is that a cooperation agreement cannot prevent a transaction which is already permitted under the debt documents, even though it can exclude the cooperation agreement members from participating in that transaction. Similarly, it cannot prevent the debtor diluting voting power of existing holders by issuing permitted incremental debt to non-cooperation group members. In addition, a cooperation agreement involves significant coordination costs and adds an extra layer in addition to the costs of negotiating a restructuring agreement. As two practical points, cooperation agreements also disproportionately favour weaker creditors and therefore there will need to be sufficient incentives for stronger creditors to join the cooperation agreement, and as cooperation agreements require the creditor parties and their successors to be bound, i.e. transferors require their successors to become bound, this may affect pricing in the secondary market.

In the latest development, sponsors/debtors have been trying to contractually exclude creditors' ability to enter cooperation agreements by inserting anti-cooperation clauses. At the time of writing, we are not aware of any anti-cooperation language expressly excluding cooperation agreements which has been accepted by creditors in Europe or the US. Given the flurry of LMEs in the recent years and the change in market conditions, it is unclear whether creditors will be willing to give up one of their most effective defences against the effects of loose documents.

Finally, there are potential competition issues that must be considered if the effect of the cooperation agreement is to make certain types of financing unavailable (or change the available terms).

Part Two of this article will analyse the differences between LMEs in Europe and the US and will look at recent trends of European debtor LMEs.

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Liability Management Exercises In Europe: What Do They Mean for Lenders? – Part Two

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Synopsis

Part One, published in the previous edition, covered what LMEs are, documentary provisions and responses and their use in the US. This Part Two covers the use of LMEs in Europe and potential legal issues to be considered.

The UK and European markets are characterised by a number of differences which have, so far, led to fewer LMEs:

– ***Size*** – the European leveraged debt market is significantly smaller than the US market
– ***Typical documentation*** – cov-lite incurrence-based loan agreements arrived later in Europe and English-law intercreditor agreements may disincentivise certain types of LMEs
– ***Structure of the creditor market and local culture*** – markets are smaller so that sponsors and creditors interact relatively more frequently and therefore may prefer less aggressive approaches
– ***Minority protections*** – English law does not have a general implied duty of good faith but a majority exercising a contractual power must not be oppressive or unfair to the minority and fairness is part of the judicial considerations in a scheme of arrangement or restructuring plan
– ***Directors' duties*** – unlike the business judgment rule in the US, directors' duties in the UK and most major European jurisdictions are stricter and less willing to defer to the directors' judgment, e.g. wrongful trading liability in the UK. In addition, there are a number of clawback risks where LMEs are implemented within a certain period before the debtor's insolvency and, as has previously not infrequently been the case in the US, the LME is not able to stave off insolvency proceedings
– ***Restructuring tools*** – English-law schemes of arrangement have long been used as tools to implement restructurings that are supported by at least 75% of the relevant creditors by value and a majority in number. In recent years, the UK introduced the restructuring plan (requiring only 75% by value), which allows for cross-class cram down of dissenting stakeholders, and most major European jurisdictions have introduced similar tools, all inspired by the US Chapter 11 process. These permit the implementation of a restructuring with the protection of a court-supervised process

The debtors in recent LMEs in Europe tend to be family rather than sponsor-owned, with at least a sizeable part of their debt being New York-law governed bonds and the LME appears to have often been used as a stick or a prelude to a holistic restructuring, a cooperation agreement among creditors has often been a response when a LME is mooted.

1. LMEs in Europe

As noted in Part One of this article, a number of differences between the European and US markets have led to fewer LMEs in Europe to-date. Additionally, where LMEs have been used to-date in Europe, they have often involved a European issuer's New York-law governed debt.

Size: The European leveraged debt market is approximately a quarter of the US, so statistically there should (and have been) fewer deals to get into trouble. In large cap situations, e.g. *Altice France* and *Ardagh*, LMEs are relatively more common as the typically cov-lite documents allow for greater flexibility and the reward that can potentially be obtained by taking the risk of an LME is greater. By contrast, mid-market capital stacks allow for less scope to play lenders off one another, and mid-market deal documentation also tends to be less borrower friendly, i.e. less flexible.

Typical documentation: Under pre-cov-lite leveraged loan facility documents, there was limited scope for the more aggressive LMEs. Convergence on bond-style terms and particularly the arrival of cov-lite incurrence-based loan agreements has enabled a wider potential use of drop downs, uptiers and the other forms of LMEs.

In addition, in any structure in which there is, or is potentially, more than one series or ranking of debt, in Europe it is customary to agree an English-law intercreditor agreement to regulate, amongst other things, the ranking among the different series and/or types of debt. An equivalent agreement has not always been necessary in the US due to Chapter 11 which regulates both the enforcement and the priority of secured and unsecured debt and imposes standstills while things are sorted out. Also, subordination is commonly achieved by third party beneficiary language.

Since the intercreditor agreement governs the ranking among the different creditors of a group, its presence is an additional complication in achieving an uptier transaction in that the uptiered debt may need to slot into the intercreditor agreement, requiring an amendment of the intercreditor agreement that may be, but is not necessarily, set at a relatively high consent threshold. If the relevant debt documents require the relevant new debt to accede to the intercreditor agreement, this can also disincentivise drop down-based financings within the restricted group.

Structure of the creditor market and culture: The structure of the creditor market in Europe and individual European countries in conjunction with the culture of the relevant countries is also generally perceived to be another factor leading to fewer LMEs in Europe compared to the US.

European markets are marked by relatively few institutional players when compared to the US market. Since the markets are smaller, sponsors and creditors interact on relatively more situations and therefore may prefer less aggressive solutions as they will likely have to face each other again in the future. There is also a perception that consensus and procedural fairness tends to be favoured in most major European jurisdictions.

a. Legal restrictions/considerations

Order of analysis – the 'art of the possible': A number of legal restrictions/considerations in the major European jurisdictions also affect what is possible. These permeate the analysis at each stage and the debtors and creditors need to consider:

(i) What the documents allow without requiring creditor consent, i.e. baskets and other permissions as noted above, and any legal restrictions/considerations, including minority protections, directors' duties and clawback risks (see below).

(ii) What the amendment provisions require for a modification of the relevant restrictions (including consent solicitations/exchanges combined with a covenant strip), consent thresholds and any legal restrictions/considerations, including minority protections, directors' duties and clawback risks (see below).

Typically, amendment provisions contain two or three levels of consent depending on the amendment or waiver sought, and these vary depending on the type of debt:

European leveraged loans typically require the consent of 66⅔% in value or now more commonly, particularly in TLB structures, simple majorities in value for most amendments and waivers. Amendments to provisions pertaining directly to the nature or scope of security or to the release of guarantees and/or transaction security traditionally required the consent of 80% but now frequently 66⅔% in value. Amendments and waivers of key economic terms, e.g. maturity, interest rate, reduction in principal amount, and 'change to priority' (the so-called 'sacred rights'), require the consent of all lenders (or, increasingly, all affected lenders). Note that the actual wording makes a difference – e.g. if a security proceeds waterfall is amended but there is no subordination of any debt claim, is that a change to priority? Not in terms of the debt claim itself, so there can be interpretive questions regarding what is included in the sacred rights.

By contrast, high yield bonds typically have only two consent levels: a simple majority in value for most amendments and waivers, and 90% in value for sacred rights. In this context, the *Selecta* recapitalisation transaction uses the voting thresholds as a way to incentivise those outside the ad hoc group ('AHG') bondholders: the exchange offer to the non-AHG first lien bondholders provided the Hobson's choice of (i) either taking a 15% haircut and some equity in *Selecta* but remaining protected by stronger covenants, or (ii) accepting new notes to replace the full principal but which contain amendment provisions which allow the majority to amend sacred rights during the first 12 months. Since the AHG would hold the majority in those bonds as well as the equity in *Selecta* (and therefore controls its management), this would enable them to follow up with an LME which might disadvantage the non-AHG first lien creditors.

(iii) What restructuring processes allow (regardless of what the finance documents provide), to reduce the required voting thresholds as compared to the thresholds in the finance documents, and any legal restrictions/considerations, including minority protections, directors' duties and clawback risks (see below).

i. Minority protections

The typical structure of an uptier transaction, of which *Serta* is a prominent example, involves a part of a class of the debtor's existing creditors providing new super senior money and, as consideration for the new money, exchanging a portion of those same creditors' debt for more senior debt (usually with a haircut), thereby effectively subordinating the non-participating creditors.

When it experienced financial challenges in 2020, with the cooperation of its majority lenders, *Serta* created a new priority tranche of USD 200m new debt and USD 875m in exchanged loans in priority to the first lien. The exchanged loans were exchanged at 74% for the existing first lien and 39% for the existing second lien and the required amendments were made by way of exit consent. Non-participating lenders were effectively subordinated and the credit agreement's pro-rata sharing provisions were not applied on the basis that the exchange was an 'open market purchase', which was an exception to the pro-rata sharing provision. The Fifth Circuit appeal court ruled that the exchange in *Serta* did not fall within the 'open market purchase' exception and remitted the case for breach of the loan agreement.[1] Note, however, that in *Mitel Networks*[2] the New York State Supreme Court found that a similar uptier transaction did not violate the pro-rata sharing provisions and the exchange fell within a differently worded market exception. Each case is therefore very fact- and language-specific – a diversity that may increase litigation risk.

In addition, at first instance in *Serta,*[3] the disgruntled non-participating lenders had also argued that the exchange violated the implied covenant of good faith and fair dealing. Since the creditors were aware of the flexibility of the document, this argument was rejected by the court.

Unlike English law,[4] which does not have a general (implied) duty of good faith in contracts, contract law in New York and most of the remaining US imposes a duty of good faith and fair dealing in the performance and enforcement of a contract.[5] Good faith is defined as '*honesty in fact in the conduct or transaction concerned*'[6] and involves conduct by the parties consistent with the other party's justified expectations. What this entails in each case is highly fact dependent.

Instead of a general implied duty of fairness and good faith, English law imposes the requirement of fairness in specific cases. One example of this is the case law based on *Assénagon,*[7] which applies to LMEs which rely on majority consents and involve differential treatment between participating and non-participating creditors. In *Assénagon,* the English court applied a long-recognised principle governing the exercise of a contractual power by a majority of a class which requires that the power must be exercised in good faith in the interests of the class as a whole and not in a way that is oppressive or unfair to the minority. On this basis, the court in *Assénagon* held that the exit consent in that case which effectively expropriated the non-consenting minority was invalid. The exit consent was an extreme example in that it allowed Irish Bank to redeem the existing bonds for one cent per 1,000 euros without the ability for non-consenting bondholders to accept the more favourable exchange offer after the bondholder meeting when the deadline for acceptance was before the meeting. It is unclear if a milder covenant strip would have resulted in the court taking the same position. Different case law,[8] however, suggests that the differential treatment between the majority and the minority has to be quite extreme to be prohibited if there is no bad faith by the majority involved and the technique used for implementing the transaction itself is not coercive or oppressive.

Following the *Hunkemöller* uptier, in which EUR 186m of the group's EUR 272.5m 9% senior secured 2027 notes were exchanged for priority 'first-out' secured notes, and the subsequent distressed disposal of the group to its largest creditor, an ad hoc group of subordinated noteholders has brought a challenge against those transactions in the English High Court on various grounds. Those grounds include a breach of the *Assénagon* principle, which the ad hoc group submitted should be implied into the English law

Notes

1 *In re Serta Simmons Bedding, LLC*, 23-20181 (ECF 233-1, at 29-38) (5th Cir. Dec. 31, 2024). Following *Serta* and *Mitel Networks*, the precise wording of the 'open market purchase' provision will need to be considered carefully.

2 *Ocean Trails CLO VII v. MLPTopco LTD*. et al., No. 2004-00169 (ECF 37) (N.Y. App. Div. Dec. 31, 2024)

3 *In re Serta Simmons Bedding, LLC*, 2023 WL 3855820, at *13-14 (Bankr. S.D. Tex. June 6, 2023)

4 While good faith is not a feature of English law in the way that it is under New York law, good faith has been implied in English law in 'relational contracts', e.g. long-term contracts and joint ventures (see *Bates v Post Office Ltd (No. 3*) [2019] EWHC 606 (QB)). Also, where a commercial contract requires a party to exercise a contractual discretion, that discretion must be exercised 'rationally' – this is sometimes referred to as the Braganza Duty arising from the shipping case *Braganza v BP Shipping Ltd & anr* [2015] UKSC 17. Further, it is possible for parties to modify that implied term expressly (or even expressly refer to a duty of good faith), although the Court of Appeal when reviewing an express good faith provision warned against a formulaic approach which detracted from the court's ability to examine the context and to interpret the good faith provision, see *Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371. It is unlikely that a finance arrangement would be seen as a relational contract giving rise to an implied duty of good faith without more.

5 Section 1-304 of the Uniform Commercial Code

6 Section 1-201(19) of the Uniform Commercial Code

7 *Assénagon Asset Management SA v Irish Bank Resolution Corp* Ltd [2012] EWHC 2090 (Ch)

8 *Redwood Master Fund, Ltd and Others v TD Bank Europe Limited and Others* [2002] EWHC 2703 (Ch). In *Azevedo and another v Imcopa Importação, Exportação e Indústria de Oléos Ltda* ([2013] EWCA Civ 364) the Court of Appeal permitted additional payments by an issuer to noteholders who consented to a proposed amendment.

governed intercreditor agreement and should therefore invalidate the transactions on the basis that they were oppressive and unfair to minority senior secured noteholders. Disgruntled creditors affected by the *Selecta* recapitalisation transaction also intend to rely on the breach of this principle as a matter of English law in New York proceedings. We should therefore expect to receive guidance regarding the extent to which *Assénagon* is deemed to afford protection to minority stakeholders impacted by the implementation of LMEs that are seemingly permissible under debt documentation, but which do not benefit the affected classes of creditors as a whole. Such guidance may have a lasting impact on the appetite for European debtors to implement LMEs where there is potential jurisdictional tie to English law.

In principle, other types of LMEs, not just uptiers or *Selecta*-style recapitalisation transactions, may involve majority decisions which might fall foul of *Assénagon*. Pending the outcome of ongoing and further litigation in this area, the lines defining what is and is not permissible will remain unclear, with a chilling effect on covenant stripping exchange offers under instruments governed by English law.

ii. Directors' duties and clawback risks

A significant factor impacting a debtor's appetite for pursuing an LME and its style/ aggressiveness is the application of directors' duties.

In the US, the business judgment rule protects directors of a debtor's board if the board decides in favour of an LME. The main case in which a director would not be protected is if the director acted in gross negligence or bad faith. Therefore, if a debtor's directors decide in favour of an LME in the reasonable belief that this would be in the interests of the debtor to avoid insolvency, those directors are protected from personal liability even if the LME does not turn out to be sufficient to prevent the debtor's insolvency.

In contrast, the major European jurisdictions generally impose stricter duties on directors. In fact, a number of jurisdictions, e.g. Germany, require that directors file for insolvency in certain circumstances or face criminal responsibility.

In England, among their Companies Act 2006/ common law duties, a company's directors are required to promote the success of the company, which generally requires working for the benefit of the company's shareholders as a whole.[9] However, in *Sequana*[10] the UK Supreme Court confirmed the existence of the 'creditor duty', i.e. that the directors must consider the interests of the debtor's creditors *as a whole* in certain circumstances, which are, according to the majority of the Court, when the directors knew or ought to have known that the company was insolvent or an administration or insolvent liquidation of the company was probable with that duty shifting so that by the time an insolvency is inevitable, the duty owed to the creditors becomes paramount. Whilst *Sequana* was not the case to determine the nuances of when exactly the creditors' interests become the primary focus, the general guidance is the closer to insolvency, the more predominant the creditors' interests. If an LME therefore prefers a group of *pari passu* creditors over another group of *pari passu* creditors where the debtor's insolvency is probable, this may be argued to be a violation of the creditor duty, since the focus should be the interests of the creditors as a whole not one group of creditors compared to another.

In addition, English law also imposes liability on a director for wrongful trading[11] from the moment that the director knew or ought to have known that the company had no reasonable prospect of avoiding insolvent liquidation or administration and did not take every step with a view to minimising the potential loss to the company's creditors. Therefore, if the company ends up in administration or liquidation, the administrator or liquidator could pursue the directors for wrongful trading if an LME does not stave off an insolvency as planned but instead increased the company's debts or otherwise resulted in loss to creditors, and it could be viewed as having been attempted where there was no reasonable prospect of avoiding insolvency or it was not done to take every step to minimise loss to creditors.

Lastly, certain types of transactions can be reviewable transactions, which a court can unwind upon application by an administrator or a liquidator.

Among the reviewable transactions are transactions at an undervalue[12] if entered within two years prior to commencement of the administration or insolvent liquidation. So, a *J. Crew*-style drop down transaction by which a material asset is moved to an unrestricted subsidiary for no equivalent consideration would be potentially reviewable if it occurred within two years prior to the company dropping the asset entering

Notes

9 For completeness, there are other directors' duties in England as well as further heads of liability other than wrongful trading, e.g. fraudulent trading, which apply and may be relevant depending on the specific circumstances. However, this section focuses on the high-level duties that are likely to apply to all types of LMEs in most circumstances.

10 *BTI 2014 LLC v Sequana SA* [2022] UKSC 25

11 Sections 214 and 246ZB Insolvency Act 1986. If it appears that any business of a company has been carried on with the intent to defraud creditors, sections 213 and 246ZA Insolvency Act 1986 (Fraudulent trading) enable the liquidator/administrator to seek a court order for contributing to the company's assets against anyone who was knowingly party to the fraudulent business. What has to be shown is: (i) the director's subjective knowledge, and (ii) that the director's conduct was dishonest by the standard of ordinary decent people.

12 Section 238 Insolvency Act 1986

administration or liquidation. A drop down transaction is also potentially vulnerable to a claim as transaction defrauding creditors, which can be brought by a creditor even outside of insolvency proceedings and requires only a transaction at an undervalue where the purpose of the transaction was to put assets beyond the reach of the person making the claim.[13] Since a double dip transaction involves a drop down transaction as a first step, double dips are similarly vulnerable. Most baskets require fair value to be provided, so, in practice, the risk of a transaction being classed as done at an undervalue is relatively low and the risk is really more about losing access to a key asset such as key intellectual property.

Uptier transactions may also be reviewable as preferences[14] if the debtor enters administration or insolvent liquidation within six months of the transaction (or two years if the creditor is a connected party). An uptier transaction may be a preference to the extent that the creditor exchanges its existing debt for new debt with such preferential terms that this can be considered as something done by the debtor that puts that creditor into a better position in the event of the debtor going into insolvent liquidation or administration than if that thing had not been done. However, in order to be a preference, the person giving the preference must be influenced by a desire to put the preferred creditor in a better position than it would have been in an insolvent liquidation, and that may be difficult to show.

It is also worth noting that section 212 of the Insolvency Act 1986 provides a liquidator (but not an administrator) with a summary procedure to pursue misfeasance claims and claims for breach of their duties against directors.

Therefore, directors' duties under English law do not prevent LMEs but a proposed LME needs to be considered carefully (including the risk that it does not achieve the aim of avoiding administration or insolvent liquidation) as to whether or not it falls foul of legal restrictions or increases the risk of a challenge that one of these restrictions has been violated.

Overall, the major states of continental Europe are not uniform on the shift to a creditor duty when the debtor is in financial distress or the strictness of directors' duties. Germany, France and Luxembourg, for instance, have a strict test with no shifting of duties towards creditors. Directors in Germany (more so than in France or Luxembourg) tend to interpret their directors' duties conservatively, particularly where the debtor is in financial distress and an LME may not result in the desired stabilization of the debtor group.

In the Netherlands, a director who enters a transaction that the director knew or should have known would prejudice a creditor such as to deprive the creditor of recourse would face a liability risk towards that creditor. Similarly, the creditor duty is present in Italian law and requires a focus on creditor interests where the debtor approaches insolvency.

In fact, numerous LMEs that have been effected in the past have failed to prevent insolvency as they did not address operational issues that a deeper restructuring might have resolved.

Overall, the directors' duties and clawback regimes across the major jurisdictions of Europe differ significantly and other factors, such as market practice and creditor structure, may have played a more significant part in the slower adoption of LMEs.

iii. Restructuring tools

English-law schemes of arrangement have long been established as an effective tool to implement a variety of amendments to finance documents to inject new money into a group, extend maturities and/or re-cut the debtor's debt stack. The relatively new English-law restructuring plan and Dutch WHOA (*Wet homologatie onderhands akkoord*) have similarly been used effectively for a number of years already, including in conjunction with each other, as happened in the *McDermott* case.[15] Most other major European jurisdictions have introduced similar pre-insolvency tools (see the table at the end of this note for an overview of restructuring tools in the major European jurisdictions) not least in response to the EU Preventive Restructuring Directive (2019/1023).

Some may argue that an LME is properly defined as a process which is generally out of court and relies on the borrower's contractual options (e.g. raising new debt by way of an uptier or dropdown conducted pursuant to the pre-agreed contractual framework with its lenders or to amend those terms pursuant to the pre-agreed amendment provisions by way of consent solicitation) rather than using an in court legal restructuring process to effect changes to that pre-agreed contractual framework. However, there is no clear bright line[16] and an in court legal restructuring process (particularly one which may lower consent thresholds under

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13 Section 423 Insolvency Act 1986

14 Section 239 Insolvency Act 1986

15 Re CB&I UK Ltd [2024] EWHC 398 (Ch) ('*McDermott*')

16 The distinction makes sense in the context of an in court process like US Chapter 11, which is a full blown insolvency process and has broad ramifications for the entire body of the borrower's creditors - and for this reason, borrowers having recourse to a Chapter 11 are more likely to restructure their debt through a broader plan of reorganisation, reaching beyond the scope of an LME which would otherwise target specific lenders. An English scheme of arrangement or restructuring plan, in contrast, can be very focused on specific creditors and does not involve the borrower going into a full blown insolvency process.

the pre-agreed contractual framework) is often used as a backstop to delivering an out of court LME.[17] The mere threat of the legal restructuring process may be sufficient to ensure lenders vote in favour of the out of court process. An English scheme of arrangement or restructuring plan can also be very focused (for example, binding specific creditors only) and can therefore be used as a part of the implementation of an LME proposal to reduce contractual consent thresholds (which in some cases may also be determined in absolute terms as a percentage of debt in existence rather than those voting) to the level of the statutory consent thresholds (determined by reference to those voting).

It follows that one way of implementing LMEs would be by an English-law scheme of arrangement or a restructuring plan (the latter being introduced in 2020 and allowing for cross-class cram down subject to certain conditions).

One traditional use of the English scheme of arrangement or restructuring plan has been to effectively reduce consent levels for sacred rights to 75% in value and (for a scheme of arrangement) majority in number in each class of those voting in person or by proxy.[18] Since the voting in a scheme of arrangement or restructuring plan is by turnout, a lower quorum of creditors can approve the scheme/plan and bind the entire class. By contrast, the thresholds in amendment provisions for loans or high yield bonds (but contrast Eurobonds) are usually absolute, depending on the debt outstanding (and can be manipulated by incremental facility provisions or create issues if certain creditors (e.g. CLOs) are unable or unwilling to vote).

However, both the scheme of arrangement and the restructuring plan involve a fairness test, as, even if the relevant creditor classes have voted in favour of a scheme/plan that contains an LME, the court retains discretion not to sanction the scheme/plan where, among other criteria, it is found to be unfair.

An example of the court intervening on the grounds of fairness was the Court of Appeal in the restructuring plan of *Petrofac.*[19] As part of the restructuring, new money was provided to a post-restructured entity at a day-one return in excess of 200% even though lending to a post-restructured entity should lower any lending risk. The Court of Appeal considered that the costs of the new money provided materially exceeded what new money would have cost in the market and, therefore, the costs were better analysed as a benefit of the restructuring allocated to the senior creditors that the company needs to justify as fair. The court noted that insufficient justification for the return to new money providers and senior creditors in excess of 200% on amounts invested was given. The Court of Appeal therefore overturned the High Court's assessment that the money was provided on competitive terms, which was a '*material error that vitiated the judge's exercise of discretion*'.[20]

This is especially the case where a dissenting class of creditors is sought to be crammed down and the relevant alternative is insolvent liquidation, as the court found to be the case in *Petrofac* and where the court considered that absent a scheme of arrangement or restructuring plan, those with a claim to the insolvent estate would have had to negotiate a compromise of the claims of out-of-the-money creditors in order to receive the additional benefit of the preservation of the company itself and the value of its business as a going concern.

It follows that the treatment of out-of-the-money creditors has become a crucial factor for consideration by English courts in their analysis of the fairness of a restructuring plan, with the High Court intervening once again in the recent case of *Waldorf*.[21] Whilst the plan company in this case sought to present a 5% upfront payment to such creditors to extinguish their claims as a deviation from the existing waterfall in their favour[22], the High Court opined that a comparison with the relative alternative (in this case a value-destructive distributing administration or liquidation) 'should not be the predominant comparator in assessing fairness in the context of the Plan'[23] and instead consideration should be given to what the unsecured creditors 'might fairly and reasonably have negotiated for their support in circumstances where it has already been demonstrated that any sale process is likely to fail whilst their debts remain in place'.[24] Following the findings of the Court of Appeal in *Petrofac*, the High Court concluded that what falls to be assessed in determining the fairness of

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17 See for example the recent UK restructuring plan used for the US group Fossil (listed on the NASDAQ stock exchange), which was used as a backstop to a consent solicitation, and the many other schemes of arrangement and restructuring plans before it.

18 Creditors are required to be placed in separate classes based on an analysis of their legal rights (not merely their interests) going into the scheme of arrangement/restructuring plan and coming out of the scheme of arrangement/restructuring plan. Creditors should be placed in the same class when their '*rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*' (*Sovereign Life Assurance Company v Dodd* [1892] 2 Q.B. 573, 583). The High Court in *Re Telewest Communications plc* ([2004] EWHC 924 (Ch)) cited in numerous subsequent cases, set out the parameters of this test. In a scheme of arrangement, each class has an effective veto. The restructuring plan introduced a cross-class cram down power (see Table below).

19 *Saipem SpA & Ors v Petrofac Ltd & Anor* [2025] EWCA Civ 821 ('*Petrofac*').

20 *Petrofac* [187].

21 *Re Waldorf Production UK plc [2025] EWHC 2181* ('*Waldorf*')

22 *Waldorf* [145].

23 *Waldorf* [147].

24 *Waldorf* [169].

a restructuring plan at the discretion stage is 'whether what the Plan would achieve is a fair and reasonable allocation of the benefits of the Restructuring having regard to the amounts contributed by each creditor class'.[25] This is a burden that must be discharged by the plan company, which it failed to do in this case on the basis that the restructuring had been negotiated without the involvement of the unsecured creditors and 'without any consideration or even identification of the relevance of what might be a fair allocation to the Unsecured Plan Creditors of the envisaged benefits of the Plan as distinct from what the Bondholders determine arbitrarily to be a suitable amount to pay over the de minimis that unsecured creditors would be entitled to receive in an insolvency process'.[26] The plan company had been granted a leapfrog certificate to enable a direct appeal from the High Court to the Supreme Court and the Supreme Court was due to hear the case in February 2026. However, the plan company has since withdrawn its appeal and is working on dual English and Scottish restructuring plans. It therefore presently stands that going forward debtors must give real consideration, and evidence of such consideration, to what benefits they are proposing to provide unsecured creditors to compromise their claims.

It is important to note that every case is fact dependent, and the position of the court may be different where the relevant alternative might be a pre-pack share pledge enforcement at the holding company level, for instance, with the application of an intercreditor release mechanic which has been properly triggered in accordance with junior creditor value protection provisions (for example, the requirement to obtain an independent valuation demonstrating that the junior creditors are out of the money) – in such circumstances, such junior creditors would have no residual claim and there would be no need to negotiate with them to release any interest in future going concern upside.

In the context of schemes of arrangement (and by analogy restructuring plans), the courts have also been prepared to look at such matters as the interests and even the conduct of those voting to determine, for example, that the vote in favour is fairly representative of the class (one of the tests for the court's exercise of its discretion to sanction, see e.g. *Re Telewest*[27] cited with approval in many subsequent cases) or that the vote is not manipulative, see *Re Dee Valley.*[28]

With respect to directors' duties, the proposed schemes/restructuring plans usually contain provisions which release creditors and the debtor's officers from liability for participating in the relevant plans should the debtor later enter insolvency proceedings.

The Court of Appeal has recently considered the permissible scope of director (and other affiliate) releases in the *Thames Water* restructuring plan.[29] The *Thames Water* restructuring plan gave the officers a broad release in connection with the restructuring plan (including its negotiation). The Court of Appeal required a modification to the plan so that the officers would still be able to be pursued by a special administrator of the regulated Thames Water entity or an insolvency officeholder of the Thames Water entity proposing the restructuring plan for any breach of the directors' duties. This was particularly the case as the restructuring plan was a bridging proposal, with a further restructuring plan being required to resolve the company's debt liabilities in the future and so there was no certainty that the company would avoid insolvency. The Court of Appeal considered that the releases were not necessary to give effect to the restructuring plan.[30]

A scheme/restructuring plan may, of course, reduce the prospect of insolvency and therefore prevent wrongful trading, misfeasance, fraudulent trading and clawback provisions from being triggered, but directors' duties still apply.

For this reason, notwithstanding the Court of Appeal in *Thames Water*, schemes of arrangement/

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25 *Waldorf* [172].

26 *Waldorf* [175].

27 *Re Telewest Communications plc (No 2)* [2004] EWHC 1466 (Ch)

28 In *Re Dee Valley Group plc* [2017] EWHC 184 (Ch) the court sanctioned a takeover scheme of arrangement even though but for the chairman ignoring certain votes, the headcount requirement would not have been met because an opposing shareholder engaged in a share-splitting scheme. The court accepted that the chairman of the scheme meeting was right to reject the votes resulting from the share-splitting exercise as he '*was entitled to protect the integrity of the Court Meeting against manipulative practices such as share-splitting that would frustrate its statutory purpose*' [58] even though the court did not go so far as to call vote manipulation as dishonest *per se* [56]. In this context, the actions taken by the chairman in the scheme meeting of the scheme of *VTB Capital* to exclude part or all of the votes of the largest creditors are of interest, which will be scrutinised by the court at the sanction hearing once the challenge brought by its parent VTB Bank in relation to amendments to the financial sanctions regime has been resolved. The chairman, one of the administrators of *VTB Capital*, reduced VTB Bank's debt for voting purposes by excluding the portion that is located in Russia and excluded the vote of Northern Capital Highway, a Russian affiliate of VTB Bank, on the basis that the chairman considered (relying on *Dee Valley*) that Northern Capital Highway was opposing the scheme in bad faith. As a result of the chairman's actions, the consenting creditors represented 78.7% of the claims voting as as opposed to 25.3%. Debtwire has since reported (on 12 December 2025) that PJSC VTB Bank challenged the administrators' conduct, with the claim due to be heard by the English court in April 2026.

29 *Re Thames Water Utilities Holdings Limited* [2025] EWCA Civ 475 [241, 245].

30 Generally, releases against third parties are permitted where 'necessary in order to give effect to the arrangement proposed for the disposition of debts and liabilities of the company to its own creditors', see *Re Lehman Bros (No2)* [2009] EWCA Civ 1161, [2009] Bus LR 489, per Patten LJ at [65].

restructuring plans might be a more attractive option to wrap an LME from a directors' duties perspective.

In practice, there will also be jurisdictional and cross-border considerations, which are not discussed in this article. The scheme of arrangement/restructuring plan jurisdiction is broad, requiring the debtor to have only a sufficient connection to England.[31] The rule in *Gibbs*,[32] which has also become prominent in the European context post-Brexit, requires an English process to amend or discharge English-law obligations (except where affected creditors consent to or submit to the foreign process). These factors as well as the location of the debtor's business and assets, the location of the creditors and the governing law of the debt documents to be compromised will ultimately determine (or at least narrow down) the choices of restructuring processes available to wrap an LME.

2. Cooperation agreements

One example of an effective use of cooperation agreements is *Altice France*. *Altice France* designated two subsidiaries slated for sale as unrestricted subsidiaries so as to remove the proceeds from sale from amounts to be used to repay part of *Altice France*'s debt. In light of this, in early 2024 *Altice France*'s creditors quickly moved to enter into cooperation agreements. From June 2024, several months of negotiations followed. In January and February 2025, *Altice France* repaid its outstanding senior secured notes due 2025 and in February 2025 it announced that agreement had been reached between it and a group of holders of its term loans and senior secured notes to reduce its debt stack by EUR 8.6 billion while extending its maturity runway to 2028/2033. The deal left the principal shareholder in control as they had recontributed the proceeds from the dropped-down assets, and, by March 2025, over 90% of the creditors had provided binding consents to support the transaction. In May 2025, accelerated sauvegarde proceedings were opened in Paris as a further step to implement the restructuring deal announced in February. On 9 July 2025, *Altice France* said that all classes of affected parties unanimously voted in favour of the draft accelerated sauvegarde plans. The French court confirmation hearing took place on 22 July 2025 and the company announced on 1 October 2025 that the implementation of the transaction is complete.

Even though it is difficult to say whether the restructuring agreed upon was the best, or a better, alternative than what might have been reached if the creditors had not cooperated, the example of *Altice France* shows that early organisation of the creditors by entering into a cooperation agreement can prevent fraction of the creditors and the creditors thereby retain more control.

Nevertheless, cooperation agreements can only assist in certain circumstances and come with notable drawbacks, including potential litigation risk, so that creditors and their advisors will want to carefully weigh their limitations against the potential gains in each situation. Proceedings have recently been initiated by creditors excluded from such cooperation agreements on grounds of unfairness and collusion. For example, a group of noteholders subordinated by the *Selecta* recapitalisation transaction has filed a legal complaint in the Southern District of New York alleging *inter alia* that the LME was unlawful and the cooperation agreement entered into by first and second lien noteholders, which purportedly mandated block voting against alternative restructurings, amounted to horizontal collusion among competing noteholders that was anticompetitive. This followed an earlier appeal made by a subordinated noteholder against the judgment of the Netherlands Commercial Court that sanctioned the sale of pledged shares in the group, a key component of the LME, including on grounds of risk of prejudice as the cooperation agreement provides that its signatories are not required to support any transaction that offers advantageous treatment to non-participating noteholders of equal standing. We are also seeing instances of debtor action against cooperation agreements, with *Optimum Communications* (formerly Altice USA) having recently filed an antitrust suit in the New York Federal Court against a consortium of its creditors that are party to a cooperation agreement that purportedly has prevented it from accessing the credit market, alleging they have formed an illegal cartel that has deprived it from exploring any LME or restructuring.

Whilst we expect cooperation agreements to continue to form an integral part of creditor planning to ensure future ease of coordination in implementing LMEs and restructurings, this does not mean that adverse stakeholders will refrain from mounting an attack against their terms, especially where the cooperation agreement promotes a disparity in the treatment of creditors of equal ranking or negatively impacts a debtor's access to liquidity.

3. Common characteristics of recent LMEs in Europe

A few common characteristics among the more prominent European LMEs stand out. Whether these mark

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31 Where the scheme of arrangement/restructuring plan seeks to compromise liabilities under foreign law, the court will require evidence that the scheme of arrangement/restructuring plan is likely to be recognised or applied in that foreign jurisdiction (especially where the company has assets in that jurisdiction) as the court will not make an order that has no utility.

32 *Antony Gibbs and sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399

the European style of using LMEs or whether these are simply the characteristics of early movers with European LMEs eventually developing similarly to the US will become clearer with time.

Family-owned rather than sponsor-owned: behind the recent more innovative LMEs were frequently individual owners or families: *Altice France*, *Oriflame*, *Intralot* and *Ardagh*. Despite *Hunkemöller* having been sponsor-backed even before its latest LME and *Victoria plc* (in which the largest stakes are the less than 20% minority shareholdings owned by the owner and a sponsor, respectively), the trend appears to be that, in Europe, family-owners rather than sponsors appear to use more LMEs, potentially because sponsors are facing the same creditors in a variety of their portfolio companies. An outlier to this is the comprehensive recapitalisation transaction of *Selecta* in which the creditors are taking ownership from the incumbent sponsor via Dutch enforcement process.

NY-law governed bonds involved: at least a sizeable portion of the capital stack consisted of New York-law governed bonds.

LME as a stick and/or prelude to holistic restructuring: other than the uptier in *Hunkemöller*, recent substantial LMEs frequently involved drop downs of subsidiaries which appear to have been used as bargaining chips (maybe originally intended as a stick were it not for the creditors signing cooperation agreements like in *Oriflame* and *Altice France*) to increase the leverage of the owners in the subsequent restructurings, which enabled them to retain control of their groups despite significant haircuts suffered by the creditors. It is also notable that, whilst in the US LMEs are often attempted with a view to avoiding Chapter 11, the LMEs in Europe often appear to be a prelude to a more comprehensive restructuring which obtains relatively broad support from creditors, either being implemented through an in-court process or by consensus.

As long as debt documents remain loose, there is every reason to expect LMEs to increase in Europe. However, whilst it is perhaps too early to tell whether there will be a distinctive European style of using LMEs, it appears that Europe's different structure and the different culture of European actors have influenced the purpose for which LMEs have been used: with an ultimate view to achieving a more comprehensive restructuring, possibly in conjunction with a restructuring process, rather than instead of an in-court restructuring as tends to be the case in the US.

Jurisdiction	Eligibility	Approval threshold	Cross-class cram down	Third party releases
UK – Scheme of Arrangement	– The company has sufficient connection to the UK – The company must consent to the proposed compromise – The scheme is a genuine and effective arrangement	– 75% in value – majority in number, in each class of those voting in person or by proxy	No	Guarantees of the debt can be released – such third-party releases must be integral to the restructuring and are scrutinised for fairness
UK – Restructuring Plan	– The company has sufficient connection to the UK – The company has encountered or is likely to encounter financial difficulties that are affecting or may affect the company's ability to continue as a going concern – There must be a compromise proposed between the company and its creditors and/or members with the purpose of eliminating, reducing, preventing or mitigating the effect of any of the financial difficulties – The company must consent to the proposed compromise	75% in value in each class of those voting in person or by proxy	Yes – if the following conditions are met (subject to the court's broad discretion to consider other factors, including fairness): – Condition A (No Worse-Off Test): None of the dissenting creditors would be worse off under the plan than they would be in the 'relevant alternative' (i.e. what would most likely occur if the plan does not go ahead, e.g. an insolvent liquidation or administration); and – Condition B: There is a consenting class of creditors or members who 'would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative'.	Guarantees of the debt can be released – such third-party releases must be integral to the restructuring and are scrutinised for fairness

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Jurisdiction	Eligibility	Approval threshold	Cross-class cram down	Third party releases
Germany – StaRUG	– Debtor's COMI[33] in Germany (debtor cannot be a financial institution) – Debtor must be in 'imminent illiquidity', i.e. it is more likely than not to become unable to pay its debts within the next 24 months but not already insolvent (i.e. illiquid or overindebted)	75% in value of claims per class 75% is measured against total claims in class, not just those voting	Yes – permitted if: (i) a majority of classes (by number) approve, with at least one being a senior or secured class; (ii) dissenting class members are not worse off under the plan than in the restructuring comparator (i.e., the best interest test); and (iii) the plan respects a modified absolute priority rule (i.e., no class of equal rank receives more, and junior classes receive nothing unless senior classes are paid in full)	– Explicitly allows restructuring of group guarantees (upstream, downstream, cross-stream) provided affected secured creditors receive adequate compensation – Pure third-party claims (e.g. tort claims against directors) are not covered unless express consent is obtained
Germany – Schutzschirmverfahren (protective shield proceedings) (Essentially a pre-insolvency reorganization proceeding. Under the 'protective shield' of the court, the company enjoys a temporary moratorium and operates under debtor-in-possession to formulate a rescue plan)	– Debtor must be over-indebted or face imminent inability to pay debts but must not be unable to pay its debts as they fall due – Only the debtor can apply – The debtor's application must be accompanied by a certificate from an independent expert confirming that the company is not presently illiquid and that there is a viable prospect of a successful restructuring plan	Within each class: 1. a majority in number of voting creditors, and 2. a majority in value of the claims voting in that class	Yes – permitted if: (i) a majority of classes (by number) approve; (ii) dissenting class members are not worse off under the plan than in the restructuring comparator (i.e., the best interest test); and (iii) the plan respects a modified absolute priority rule (i.e., no class of equal rank receives more, and junior classes receive nothing unless senior classes are paid in full)	– Permits impairment of intra-group guarantees or security provided by affiliates (with adequate compensation provided to affected creditors) and adjustment of shareholder rights (including issuing new equity or the cancelation of shares) – Pure third-party claims (e.g. tort claims against directors) are not covered unless express consent is obtained
Luxembourg – Judicial Reorganisation by Collective Consent *(réorganisation judiciaire par accord collectif)*	– Only the debtor can apply – Can be used only when the continuity of the business is threatened in the short or long run (including when the debtor is already insolvent)	Majority of creditors per class representing at least half of the principal amounts owed (not just those voting) Two classes contemplated: i. ordinary creditors; and ii. extraordinary creditors (includes tax and social security authorities, creditor-owners, creditors whose claims are secured by a special lien or a mortgage)	Yes – permitted if: (i) the plan is approved by at least one of the (two) classes of creditors eligible to vote; (ii) if approved by ordinary creditors only, the plan treats extraordinary creditors more favourably than ordinary creditors; and (iii) no class of creditor receives or keeps more than the total amount of its claims	No
The Netherlands – WHOA *(Wet Homologatie Onderhands Akkoord)*	– Debtor's COMI in the Netherlands or sufficient connection to the Netherlands – The debtor must be in a situation where it is reasonably likely that it will not be able to pay its debts as they fall due	≥⅔ in value of claim amounts per class of those voting	Yes – permitted if: (i) at least one in-the-money class approves (based on a liquidation valuation); (ii) dissenting class members are not worse off under the plan than in the bankruptcy of the debtor; and (iii) the plan respects a modified absolute priority rule (i.e., no class of equal rank receives more, and junior classes receive nothing unless senior classes are paid in full)	– Allows modification or release of third-party guarantees if required for the restructuring – Purely third-party claims (i.e., a creditor's direct claim against a non-debtor) are not automatically discharged unless agreed to by the relevant party

Notes

33 COMI means centre of main interests.

Jurisdiction	Eligibility	Approval threshold	Cross-class cram down	Third party releases
France –Sauvegarde	– Only the debtor can apply – The debtor must not be in a state of cessation of payments (i.e. cash-flow insolvency) – Under French law, the debtor must file prior to becoming 45 days past due on its obligations (after that point, only a reorganisation or liquidation would be available)	≥⅔ in value of claim amounts per class of those voting[34]	Yes – permitted if: (i) a majority of classes (by number) approve, with at least one being a senior or secured class, or at least one in-the-money class (based on a going concern valuation) approves; (ii) dissenting class members are not worse off under the plan than in the restructuring comparator (i.e., the best interest test); and (iii) the plan respects the absolute priority rule (i.e., which all claims held by affected creditors in a dissenting class must be fully satisfied in the same or equivalent way where a more junior class is entitled to payment or to retain any interest under the plan) Additional criteria need to be met to cram down equity	– Third-party claims require a separate plan at the level of the relevant guarantor – The plan may, however, include group support, and guarantees may be waived with the creditor's consent
France – Accelerated Sauvegarde	– Only the debtor can apply – The debtor must already be in conciliation proceedings with its creditors – The draft conciliation plan must have sufficient support from creditors such that its adoption in safeguard appears feasible – The debtor's financial statements must be audited or certified – The debtor must still be solvent or, if insolvent, must not have been insolvent for longer than 45 days before the beginning of the conciliation	≥⅔ in value of claim amounts per class of those voting		
Spain – Planes de Reestructuración *(also referred to as Homologación)*	– Debtor's COMI in Spain – Only the debtor can apply – The debtor must be in likely insolvency or actual/imminent insolvency – it is sufficient that it is objectively foreseeable that the debtor will not be able to pay its debts as they fall due within the next two years if no action is taken	Unsecured claims: ≥⅔ in value of claims Secured claims: 75% required for secured classes if their rights are altered In each case, the approval thresholds apply to the entirety of the claims in a class, not just those voting	Yes – permitted if: (i) a majority of classes (by number) approve, with at least one of those classes being 'privileged' (i.e., senior); or (ii) at least one in-the-money class approves (based on a valuation report issued by the restructuring expert valuing on a going concern basis) Additional criteria need to be met to cram down equity	– Release or modification or third-party guarantees permitted to facilitate the restructuring if the guarantee may trigger the insolvency of both the debtor and the guarantor – Non-debtor claims (e.g. directors' liability) cannot be released as all compromises must relate to the debtor's restructuring

Notes

34 Classes in ordinary sauvegarde are only constituted if certain minimum thresholds are met.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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