KEY POINTS

- The Restructuring Plan, the Dutch Scheme and the German Scheme each introduce a mechanism to allow compromises to be imposed on dissenting classes of creditors or shareholders. This has been absent from the restructuring toolbox in these jurisdictions until now.
- Each process is just beginning its journey. The UK courts are already busy with Restructuring Plans and things are now getting going in The Netherlands and Germany. With further test cases, the restructuring community will get more comfortable applying the legislation and understanding the limitations of each process.
- Some of the mechanisms through which UK schemes of arrangement (schemes) and Restructuring Plans were capable of being recognised in the EU pre-Brexit are no longer available and practice is still developing for post-Brexit recognition of Restructuring Plans in the EU.

Feature

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2020 vision: expanding the toolbox for European restructurings

Whilst 2020 will be remembered for less positive reasons, restructuring professionals may remember it for the creation of: (i) the "Restructuring Plan" under the UK's Corporate Insolvency and Governance Act 2020 (CIGA 2020); (ii) the Dutch scheme under Wet homologatie onderhands akkoord (Dutch Scheme); and (iii) the German scheme under the StaRUG (German Scheme). Each bears similarities with the tried and tested English scheme of arrangement but has adopted certain features from the US Chapter 11 process. This article covers some of the important differences between each process that practitioners should be aware of.

The introduction of the Restructuring Plan, the Dutch Scheme and the German Scheme has caused some excitement in the restructuring community. Adopting several of the features found in English schemes and US Chapter 11 proceedings, these new processes offer additional optionality including the ability to impose compromises on dissenting classes of creditors and shareholders – the so called "cross-class cram down".

We have analysed the key differences in the cross-class cram down mechanisms and in Table 1 overleaf focussed on several fundamental questions relating to each process.

CROSS-CLASS CRAM DOWN

With the introduction of the cross-class cram down, arrangements can be imposed on affected creditors and shareholders even if they are part of a class which has voted against such arrangement. The Restructuring Plan, the Dutch Scheme and the German Scheme each incorporate this powerful tool, but with subtle differences, of note:

- Where a class has voted against the arrangement, before applying the cram-down mechanism:
  - Under the Restructuring Plan the court will need to be satisfied that:
    - dissenting creditors are no worse off than under the "relevant alternative"; and
    - at least one class who would receive a payment, or have a genuine economic interest, in the event of the relevant alternative has voted in favour of the arrangement.

    Once these conditions are satisfied, the court still has discretion whether or not to sanction the plan (and approve the cram down) and the court may refuse to sanction a plan on the basis that it is not just and equitable (ie fair).
  - Under the German Scheme, cram down is only possible if:
    - dissenting creditors are no worse off than they would be in a liquidation. This includes compliance with a modified absolute priority rule; and
    - the arrangement has been approved by a majority of the classes.
  - Under the Dutch Scheme, the court will approve the arrangement provided at least one "in the money" class has voted in favour. Creditors who voted against the arrangement can ask the court to refuse to confirm it on the grounds that it does not meet the "best interests of creditors test" (that creditors or shareholders should receive no less under the plan than they would on the liquidation of the debtor). In addition, where a creditor has voted against the plan and is part of a class which has voted against the plan, the creditor can ask the court to refuse confirmation of the plan in certain circumstances, including where:
    - the value distribution under the restructuring plan deviates from statutory or contractual arrangements and, as such, impairs the opposing creditors (with reasonableness exception);
    - the relevant creditor is an SME creditor and has not been offered an amount representing a value of at least 20% of its outstanding claims (subject to certain exceptions); or
    - the creditor is a secured creditor and has only been offered shares in the restructuring plan.
- The consent threshold within each class is different – a class is taken to have approved the arrangement where the following thresholds of creditors vote in favour:
  - Restructuring Plan: creditors holding 75% of the claims in that class who are present and vote at the meeting;
  - German Scheme: creditors holding 75% of all the claims in that class (not just those held by creditors who vote); and
  - Dutch Scheme: creditors holding $66^{2/3}$% of the claims in that class who vote at the meeting.

Application in the UK

We have seen a number of successful Restructuring Plans already (eg *Virgin Atlantic*, *PizzaExpress*) but the first use of the cram-down in *Re: DeepOcean 1 UK ltd & Ors*, [2021] EWHC 138 (Ch) (DeepOcean) provides us with a useful judgment setting out how the court will approach a cross-class cram down. It tells us that understanding the relative treatment of shareholders and creditors under a Restructuring Plan is vital to the fairness assessment which is the key factor in determining whether the court will exercise its discretion to sanction. The court in DeepOcean applied a similar analysis to the "horizontal comparison" analysis, looking at differential treatment between classes, that the court will often carry out when considering a challenge to a CVA. Whilst there is no prohibition on differential treatment between classes, it must be clearly justified. The key question is: does the plan represent a fair distribution of the benefits of the restructuring between consenting and dissenting classes?

Application in Germany and the Netherlands

Judgments are awaited under the German Scheme with the first Dutch Scheme, of *Jurlights and Jurlights Holding (ECLI:NL:RBNHO:2021:1398)* not required to consider the point.

CROSS-BORDER ENFORCEMENT AND RECOGNITION ABROAD

One of the hot Brexit related topics in restructuring circles is the impact on recognition and enforcement in EU member states of insolvency and reorganisation proceedings (including schemes and Restructuring Plans) commenced in the UK.

Recognition of the Restructuring Plan

The UK court will not sanction a Restructuring Plan unless it is comfortable that it will be recognised in those jurisdictions where it needs to be effective. The Restructuring Plan was not listed in Annex A of Regulation (EU) 2015/848 (Annex A) of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (Recast Insolvency Regulation) and so recognition of Restructuring Plans is not affected by the UK no longer benefiting from automatic recognition and assistance in EU member states pursuant to the Recast Insolvency Regulation. However, the UK also no longer benefits from automatic recognition in EU members states of judgments from UK courts pursuant to Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation). This was considered one of the routes to recognition in the EU of schemes and potentially Restructuring Plans pre-Brexit.

So what options are available for Restructuring Plans where recognition in an EU member state is necessary to ensure the efficacy of the process?

- The Rome regulation on the law applicable to contractual obligations ((EC) No. 593/2008) (Rome I) continues to apply in the UK and provides that the contracting parties' choice of governing law should govern their contractual relations. Consequently, where the parties have chosen English law to govern their contractual relationships, the use of a Restructuring Plan to vary or extinguish those relationships should be recognised by the courts in EU member states.
- The UNCITRAL Model Law (Model Law) has been implemented in the UK under

TABLE 1 : GUIDE FOR PRACTITIONERS

	RESTRUCTURING PLAN	GERMAN SCHEME	DUTCH SCHEME
PRIMARY LEGISLATION	Pt 26A Companies Act 2006	*Unternehmensstabilisierungs- und -restrukturierungsgesetz StaRUG–* (trans. Corporate Stabilization and Restructuring Act)	*Wet homologatie onderhands akkoord*
WHO CAN PROPOSE THE PROCESS?	• Company • Creditors • Shareholders • Where the company is in an insolvency process, the administrator or liquidator.	Company	• Company • Restructuring expert (court appointed) at the request of a creditor, a shareholder or the employees through their representative.
WHO CAN BE AFFECTED BY THE PROCESS?	Creditors (secured and unsecured) or shareholders, or any class thereof.	Creditors or shareholders (or any class of them), excluding employees.	Creditors (secured and unsecured) or shareholders, or any class thereof, excluding employees.
IS IT OPEN TO ALL COMPANIES?	Company must be liable to be wound up under Pt V of the Insolvency Act 1986. Will include overseas companies which have a "sufficient connection" to England and Wales. Certain exclusions apply.	Company must have its COMI in Germany.	**Non-public procedure**: can be entered into by any company with sufficient connection to the Netherlands. **Public procedure**: can be entered into by any company whose COMI is in the Netherlands.

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ARE THERE ANY THRESHOLD CONDITIONS TO ENTRY?	There must be a compromise or arrangement between the company and its creditors or members: an element of give and take. In addition: (a) the company must have or be likely to encounter financial difficulties that affect or will or may affect its ability to carry on business as a going concern; and (b) the purpose of the plan must be to eliminate, reduce, prevent or mitigate the financial difficulties.	Company must be in a state of imminent illiquidity – ie it is more likely than not that the company will be unable to honour its payment obligations within 24 months.	Company must believe it is likely to be unable to pay its debts in the future.
IS IT A DEBTOR-IN-POSSESSION PROCESS?	Yes	Yes	Yes
IS ANYONE APPOINTED TO SUPERVISE THE PROCESS	No	The appointment of a restructuring officer is mandatory if a stabilization order directed against substantially all creditors is issued, or the plan will most likely require a cross-class cram down (unless only financial sector creditors are affected by the plan).	Under certain circumstances an observer or restructuring expert may be appointed.
DO THOSE AFFECTED BY THE PROCESS HAVE TO BE PUT INTO CLASSES?	Yes. Classes must contain those stakeholders whose rights against the company (both going into and coming out of the process) are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Class composition is considered by the court at the convening hearing although it is not uncommon for the court to allow challenges to classes at the sanction hearing if the timetable is truncated.	Yes. Creditors will be considered members of the same class if they are in similar positions, ie they have the same rights against the Company in an insolvency. Class composition is reviewed by a judicial preliminary review or as part of judicial plan confirmation.	Yes. Creditors or shareholders may not be in the same class if their rights at liquidation or after adoption of the plan are so different that there is no comparable position. Secured creditors may find themselves in two separate classes, one for the secured part of their debt and the other for the unsecured part (based on the "liquidation value" of the collateral).
VOTING THRESHOLDS	75% in value present and voting.	75% in value of the total voting rights (including those creditors who do not participate).	2/3 in value of creditors who participate in the vote (or 2/3 of subscribed capital in respect of shareholders).
IS THERE A CRAM-DOWN MECHANISM?	Yes – see para 2.	Yes – see para 2.	Yes – see para 2.

Feature

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WHAT IS THE COURT'S INVOLVEMENT?	**Convening hearing**: The court considers issues such as eligibility, jurisdiction, and class composition. **Sanction hearing**: The court may exercise its discretion to sanction the Restructuring Plan.	**Optional judicial pre- examination hearing**: Only on request by the Company, the court will inform parties of its assessment of the proposed plan. **Optional judicial voting hearing**: The Company and affected stakeholders discuss and vote on the proposed plan. Upon application by the debtor, the court confirms the restructuring plan following the vote by all creditors affected by the plan.	**Confirmation hearing**: Confirmation by the court following the vote by all relevant stakeholders. **Additional hearing**: The company and the restructuring expert may apply to the court for guidance on any matter, eg eligibility and class composition.
IS A MORATORIUM AVAILABLE	Not under the Restructuring Plan process itself but yes pursuant to the separate statutory moratorium process under Pt A1 of the Insolvency Act 1986 (IA86) if conditions are met. Available for an initial 20 Business Days but can be extended up to a year (with Creditor consent) or indefinitely by the court.	Yes – up to eight months.	Yes – up to eight months provided either: (a) the company files a restructuring statement with the court and intends to offer a restructuring plan within 2 months; or (b) a restructuring expert is appointed.
HOW LONG WILL IT TAKE?	Typically 6-8 weeks from launch but can be longer depending on complexity and availability of court dates.	Depends on level of court involvement required. Typically 3-6 months (up to 9 for large restructurings).	Depends on level of court involvement required. Typically 6-8+ weeks.

the Cross Border Insolvency Regulations 2006. However, few EU member states have implemented the Model Law and so it remains of limited use when seeking recognition of a Restructuring Plan in the EU. Recognition of Restructuring Plans by adoptees of the Model Law will also depend on how they have implemented the Model Law and whether a Restructuring Plan is a type of proceeding that can be recognised.

- EU member states will have their own laws that enable recognition of a Restructuring Plan, but this would be a matter for each member state and so will need to be analysed on a case by case basis.

Many practitioners had hoped that the Hague Convention on Choice of Court Agreements 2005 would fill the gap created by the "loss" in the UK of the Recast Brussels Regulation. However, it does not apply to "insolvency, composition and analogous matters" or to contracts with asymmetric jurisdiction clauses (common in "LMA style" finance documents) and so it is looking less likely to be the recognition solution people had hoped for.

RECOGNITION OF THE GERMAN SCHEME AND THE DUTCH SCHEME

Both the Dutch Scheme and the German Scheme (from July 2022) are available as either public or private processes.

It is likely that public processes will be included as a restructuring or insolvency proceeding under Annex A and so will benefit from automatic recognition in all other EU member states other than Denmark. Practitioners should be mindful however of an exception under the Recast Insolvency Regulation which provides that the opening or closing of an approved plan (under Annex A) that involves: (i) a reduction in secured debt; and (ii) is coupled with a stay on enforcement, shall not affect the rights of the secured creditors who have rights in rem in respect of assets in another member state to enforce their security.

Private processes, however, will not be listed in Annex A and so, like the Restructuring Plan, will have to rely on other routes to recognition. In addition to Rome I, the Model Law and (domestic) private international law, the German Scheme and the Dutch Scheme may qualify for recognition under the Recast Brussels Regulation.

CONCLUSION

The Restructuring Plan is off to a flying start with several successful restructurings already delivered and many more in the pipeline. More test cases for EU recognition of Restructuring Plans are needed for practice to be established but we (tentatively) anticipate Rome I and domestic law to provide the recognition tools needed. In the Netherlands, *Jurlights* has set the bar for the Dutch Scheme to be used for small restructurings – if it is true that they can be achieved within 4-6 weeks – as well as large ones, and in Germany, we must wait and see. Time will tell whether the global market will embrace the German and Dutch options as well. ■