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Akin
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Restructuring in the UK vs France: Explanation & Comparison

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Inside this issue...

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Executive Summary

- In June 2024, ELFA together with our legal partner, Akin, and in partnership with De Pardieu Brocas Maffei, held a Disclosure & Transparency Committee Teach-In on restructuring processes in the UK and France.
- The Teach-In explored the jurisdictional landscape for restructurings across the UK and France, highlighting the similarities and differences between the British and French processes. This note summarises the content of the Teach-In.

UK

- In the UK, there are two key statutory restructuring processes: the Scheme and the Restructuring Plan. The processes are similar, with each allowing for a compromise or arrangement to be proposed between a company and its creditors/members. Both processes are available to UK companies or foreign companies that have a sufficient connection to the jurisdiction, and both entail a convening hearing (where the court convenes the meeting(s) to vote on the Scheme or Plan) and a sanction hearing (where the court will consider whether it is appropriate to sanction the Scheme or Plan).
- There are, however, important differences between the processes. Restructuring Plans allow for cross-class cramdown, whereas in a Scheme, creditors/members can only be crammed down within a class. This means that while all classes must vote in favour of a Scheme for it to proceed to sanction, one or more classes in a Restructuring Plan can vote against it and, provided certain criteria are satisfied, the Plan may still be sanctioned by the court.
- Restructuring Plans also have a financial difficulties threshold entry requirement, whereas Schemes do not.

France

- In France, there are two out-of-court restructuring processes: mandat ad hoc and conciliation. Both are flexible, voluntary and confidential proceedings that aim to reach a consensual workout agreement between a distressed company and its major creditors under the supervision of a court-appointed agent.
- Mandat ad hoc is a more flexible process, in which an agent is appointed by the president of the court, at the company's request, to carry out informal negotiations with no automatic stay or time limits and is only available to solvent companies.
- Conciliation has similar objectives to mandat ad hoc but must be completed within 5 months maximum and is available to both solvent and insolvent companies. There is no automatic stay, but the process is highly facilitated to force a stay.
- When an agreement is reached, the parties may request formal court approval of the workout agreement, recorded in a public judgment. Conciliation can also be converted into sauvegarde accélérée. This aims to implement the pre-negotiated deal with the subsequent opening of fast-track court-monitored proceedings and the vote of classes of affected parties.
- The case study below provided a practical overview to both the UK and French restructuring processes.

Introduction

ELFA's Disclosure & Transparency Committee recently held a Teach-In on restructuring processes in the UK and France in collaboration with our legal partner Akin and in partnership with De Pardieu Brocas Maffei. The Teach-In was led by Emma Simmonds, Partner at Akin and Joanna Gumpelson, Partner at De Pardieu Brocas Maffei. The Teach-In explored the similarities and differences in restructuring processes in the UK and France, using a case study to provide the perspective of each jurisdiction.

UK overview

Restructuring processes – Scheme and Restructuring Plan

In the UK there are two key restructuring processes: the Scheme and the Restructuring Plan. The Scheme is a statutory procedure under Part 26 of the Companies Act 2006, and the Restructuring Plan is a statutory procedure under Part 26A of the Companies Act 2006.

Restructuring Plans and Schemes involve similar documentation and legal processes. Both require a Practice Statement Letter to be circulated to stakeholders that will be impacted by the Scheme or Plan, followed by a convening hearing for classes of creditors to vote on the Scheme or Restructuring Plan. After the meetings to vote (and, in the case of Schemes, that all classes have voted in favour of what is proposed), there will be a second hearing of the court to consider whether to sanction the Scheme or Plan.

Schemes and Restructuring Plans are available to UK companies as well as foreign companies who have a requisite connection to the UK, for example, where the governing law of the debt is English law or the centre of main interests (or "COMI") of the relevant entity is in the UK.

Restructuring Plans also require that a company demonstrate it has encountered or is likely to encounter financial difficulties, whereas a Scheme has no such requirement.

Voting thresholds

Where a Scheme is proposed, the approval threshold for a class is 75% by value and 50% in number. Where a Restructuring Plan is proposed, the approval threshold for a class is 75% by value only (there is no numerosity requirement).

Cramdown

Restructuring Plans also allow for cross-class cramdown, whereas a Scheme allows creditors to be crammed down within a class. Where a Restructuring Plan is proposed, the court can only exercise the cross-class cram down power and sanction the plan if it is satisfied that (i) none of the members of the dissenting class would be worse off under the Plan than they would be in the relevant alternative and (ii) at least one class who would receive a payment or would have a genuine economic interest in the relevant alternative has voted in favour of the plan. The "relevant alternative" is whatever the court considers would be most likely to occur if the Plan were not sanctioned. In addition to these tests, the court will only exercise its discretion to sanction the plan if it considers it is otherwise fair.

France overview

Restructuring processes – mandat ad hoc and conciliation

There are two out-of-court restructuring proceedings specific to the French market: mandat ad hoc and conciliation proceedings. Both processes aim to promote reorganisation at a preventive stage and offer a flexible and confidential framework to negotiate under the supervision of a court-appointed agent.

Those processes rely on mediation to negotiate a solution to the company's difficulties.

Mandat ad hoc is the most flexible exercise under the French Bankruptcy Code where the president of the court appoints an agent to carry out any appropriate tasks. The deliberately lenient wording lends itself to a very broad and flexible framework, as mandat ad hoc is typically used to address financial issues before they become critical. Therefore, it is only available to solvent companies. It is a consensual process without any cramdown or automatic stay. However, in exceptional circumstances, the debtor can request the court to reschedule a specific debt for a maximum of two years.

Similarly, conciliation is a flexible, voluntary and (to a certain extent) confidential process. The company must face legal, economic or financial difficulties (whether actual or foreseeable). However, the restructuring process must be completed within a maximum of 5 months. This framework offers certain protections that the mandat ad hoc cannot.

First, conciliation is available to solvent, but also insolvent companies provided they have been insolvent for less than 45 days before the petition is filed. It is therefore an alternative for insolvent companies that want to avoid a public bankruptcy filing. Secondly, even though there is no automatic stay in conciliation, the debtor can request the president of the court (who opened the conciliation) to reschedule a specific debt for a maximum of 2 years. Claims that have not yet fallen due can also be extended for the duration of the conciliation. Any third party acting as guarantor or joint debtor shall benefit from such court-imposed moratorium. The process is thus highly facilitated to force a stay and prevent any enforcement actions whilst discussions are pending. However, conciliation does not provide for any cramdown mechanism, and the workout agreement must be approved by each impaired stakeholder.

Sauvegarde and sauvegarde accélérée

Conciliation can be converted into sauvegarde accélérée, which aims at enabling debtors, for which conciliation proved unsuccessful, to obtain the consent of all participating creditors to implement a pre-negotiated deal through the opening of fast-track sauvegarde proceedings (i.e. a maximum of 4 months) and the vote of classes of affected parties. Alternatively, regular sauvegarde proceedings aim to encourage debtors in

financial distress who are not yet insolvent to restructure at a preventive stage through a court-approved restructuring plan (so-called "sauvegarde plan").

Unlike the more confidential process of conciliation, sauvegarde is a formal, court-monitored proceeding. Therefore, once sauvegarde is opened, the process becomes public. Furthermore, sauvegarde triggers an automatic stay which protects the company from legal action by its creditors on pre-filing claims and prevents those pre-filing creditors from seizing assets or enforcing debts (subject to a few exceptions). This automatic stay benefits individuals, but not companies who are acting as joint debtors and guarantors. Therefore, it is usually recommended that all group companies acting as guarantors simultaneously file for court protection to benefit from a stay on enforcement.

Both sauvegarde and sauvegarde accélérée are voluntary processes. This means that only the debtor may file, and no competing plan can be submitted by other stakeholders. The plan must be approved by impaired creditors as their rights are directly affected by the plan. The affected parties can also include equity holders, but only when the plan provides for modification of their rights, which can be commonly seen when the draft plan provides for a debt-equity-swap solution.

Voting thresholds

Sauvegarde accélérée requires that impaired stakeholders vote through classes of affected parties. Each class must gather stakeholders who share a sufficient community of economic interests determined on the basis of verifiable objective criteria. A class of impaired stakeholders will be considered to have approved the plan if a two-thirds majority in amount votes in favor without any quorum requirement. The court also has the ability, under certain strict conditions, to approve the plan even if such plan has been rejected by one or more classes (the so-called cross-class cramdown). Therefore, the plan does not need unanimous support. Once the plan is sanctioned by the court, it becomes binding on all creditors and shareholders, including those who voted against. Court approval is mandatory to ensure that the plan is fair and equitable and complies with all the necessary legal requirements.

Annex 1 summarises the differences between the restructuring processes in the UK and France in a table.

Case Study overview

A PE fund-owned company that makes small cogs for use in car transmissions has launched an online platform to sell its products. Sales have recently declined and investment is required to scale the online platform. Cost-saving measures have proved insufficient, and the group has indicated that it will run out of money to meet its obligations within the next few months.

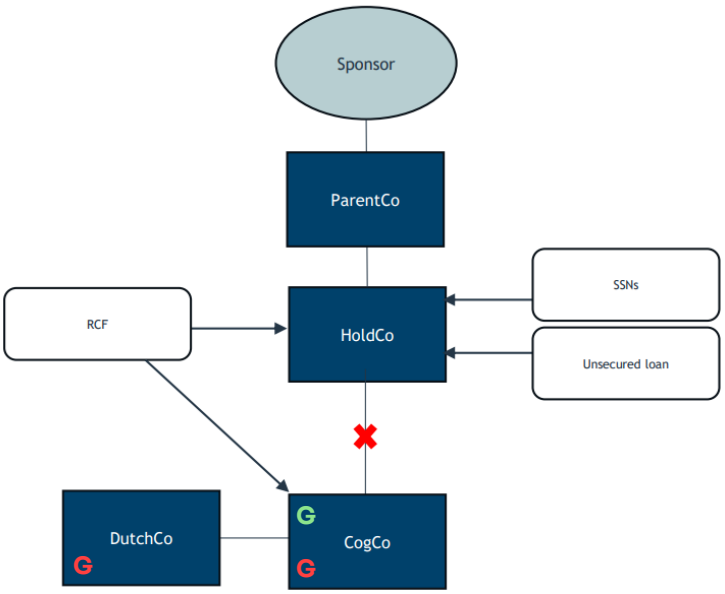
The group's debt includes (i) senior secured notes ("SSNs") governed by NY law, (ii) an RCF governed by English law and (iii) an unsecured loan governed by English or French law (depending on jurisdiction). The SSNs and RCF rank "pari passu".

An ad hoc group of SSN holders has appointed advisers and begins to engage with the group.

The participants in this case study are as follows:

- **HoldCo: borrower and issuer. Incorporated in France or England, depending on context.**
- **CogCo: guarantor of the SSNs, the RCF and the unsecured loan. Incorporated in France or England, depending on context.**
- **DutchCo: guarantor of the SSN and the RCF, incorporated in the Netherlands.**

A diagrammatical representation of the group pre-restructuring is as follows:



Key

G – Guarantee (SSNs & RCF)

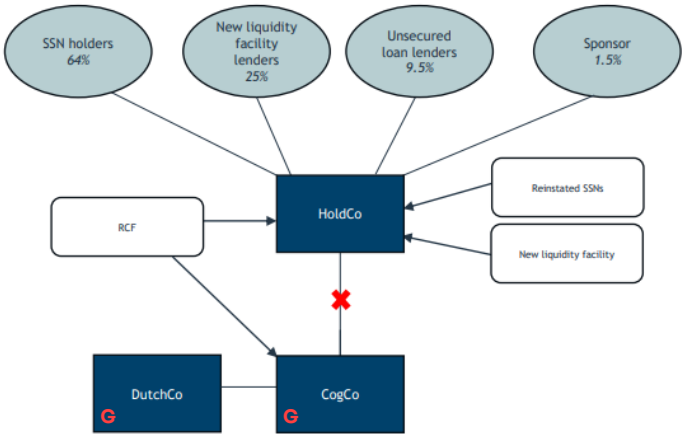
G – Guarantee (unsecured Loan)

X – Share Pledge (SSNs & RCF)

Case Study Restructuring Proposal

The group needs to address its unsustainable capital structure and liquidity issues. It is proposed that:

- the SSNs be partially equitised and partially reinstated. They will take a stake of 64% in HoldCo post-restructuring
- the unsecured loans will be fully equitised with 9.5% of the post-restructuring equity being allocated to the unsecured lenders
- the RCF will be retained on modified terms, with maturity extended
- a new liquidity facility will be provided, with equal participation in that facility open to all SSN holders. In return, participants will receive 25% of the post-restructuring equity and the sponsor will retain 1.5% of the equity post-restructuring.



Key

G – Guarantee (SSNs & RCF & new liquidity facility)

X – Share Pledge (SSNs & RCF & new liquidity facility)

The UK perspective

Restructuring process

As primary obligor in relation to the SSNs, the RCF and the unsecured loan, it is likely that HoldCo will be the entity proposed for the statutory restructuring process. Given that there is likely to be more on than one stakeholder class voting on the process, a Restructuring Plan is probably the most likely tool due to the availability of cross-class cram down. HoldCo will need to demonstrate that it has (or will) encounter financial difficulties in order to be able to propose a Restructuring Plan. The UK processes allow for third party releases, meaning that only HoldCo needs to propose the Plan.

In the UK, there is no requirement to demonstrate to the court that there is support for the Restructuring Plan or its implementation within a set time period.

Classes of creditors

In the UK, stakeholders may be classified into up to four classes. Class composition is determined by reference to the rights of stakeholders, both rights prior to and post the restructuring. While the SSN holders and the RCF rank "pari passu" (and so their "rights in" are equivalent), their "rights out" are likely to be sufficiently different to warrant the SSNs and the RCF forming separate classes (as the SSN holders are equitising and partially reinstating their claim, whereas the RCF lenders are extending their maturity and modifying their terms).

Alternatively, the RCF lenders may not be included within the Plan but implement their part of the restructuring on a consensual basis (but inter-conditional with the Plan).

The unsecured lenders have sufficiently different rights to the other financial stakeholders and so will likely form a third separate class. If the shareholders are joined to vote on the Restructuring Plan, they would also form a separate class.

The Restructuring Plan legislation permits a company to apply to exclude stakeholders that are "out of the money" from voting on the Plan (a 901C(4) application). This has not been widely used, but can be a powerful tool when utilised. It could be used in retaliation to the creditors of the unsecured loan if they are out of the money.

Court involvement in the UK

The court has absolute discretion to sanction a Restructuring Plan, including in a cross-class cramdown scenario (for example, of the creators of the unsecured loan). There are two conditions of cross-class cramdown in the UK. Firstly, none of the members of a dissenting class would be any worse off under the Restructuring Plan than they would be in the "relevant alternative". Secondly, at least one class who has an economic interest in the company must have voted for the plan in the event of the "relevant alternative".

In contrast to France, there is no absolute priority rule. This increased flexibility with payment of creditors allows justifiable deviations from the "pari passu" principle. The plan must, however, be fair in the eyes of the court. A parallel plan is likely to be required in the Neatherlands.

The French perspective

Restructuring process

As primary obligor in relation to the SSNs, the RCF and the unsecured loan, it is likely that HoldCo will be the main filing entity. The initial step should be a conciliation filing to negotiate a deal with the majority of creditors and the signing of a lock-up agreement. Even though a standstill can be forced in conciliation, the effect of such stay is limited to France; therefore, the opening of conciliation may require prior waiver from SSNs (governed by NY law) to avoid automatic acceleration, especially since HoldCo owns assets outside of France (shares of DutchCo).

Given the number of stakeholders involved, unanimous consent will hardly be achieved, and it seems likely that conciliation be converted in sauvegarde accélérée to implement the restructuring through the vote of classes of affected parties. In that context, filing will be required at the level of each borrower, issuer and guarantor in order to compromise primary debt but also guarantee claims.

Conciliation followed by sauvegarde accélérée should thus be opened at the level of HoldCo and CogCo. DutchCo will also need to file so that guarantee claims be compromised as well. It may file for conciliation and sauvegarde accélérée if its center of main interests is in France or alternatively file for local proceedings in the Netherlands or file for Chapter 11 in the US if conditions are met.

Classes of creditors

The opening of sauvegarde accélérée (entity by entity) will notably require that:

- Conciliation process be pending.
- There is a draft plan likely to ensure the continuation of business activities.
- Such draft plan is likely to receive sufficiently broad support to be approved within 4 months (in practice, demonstration based on lock-up agreement).

At the level of HoldCo, stakeholders should be classified into four classes (keeping in mind that only impaired stakeholders shall vote on the plan). Even though they rank pari passu, SSN holders and RCF lenders should be viewed as different categories and form separate classes. This is all the more true as they will be offered different options. The other two classes should gather the unsecured lenders and the shareholders, which shall always vote in a separate class if impaired.

At the level of CogCo, there will be two classes of creditors. This consists of the RCF claims, (assuming CogCo is a direct borrower under the RCF) and the guaranteed claims held by the SSN holders and the unsecured lenders. HoldCo should not vote as equity holder in the sauvegarde accélérée of CogCo if its shareholder's rights are not impaired (i.e., assuming that the debt-equity-swap is implemented at the level of HoldCo only).

Court involvement in France

Following the vote of the classes of affected parties, the plan will ultimately be submitted to court approval.

To approve the plan, the court must verify that certain statutory conditions are complied with, including notably that the plan is fair and equitable, that the best interest test is complied with and that new financings provided for under the plan are necessary and do not excessively prejudice the interests of affected parties.

In a cross-class cramdown scenario, the plan will be imposed by the court on dissenting classes provided certain additional conditions are met, notably compliance with the absolute priority rule. Cross-class cramdown may apply to dissenting equity holders as well but the French Bankruptcy Code provides for additional protection to such category of impaired stakeholders. It is therefore reasonable to assume, upon valuation of the debtor as a going concern, that they would not be entitled to any payment or interest in a liquidation scenario.

Once approved by the court, the plan is enforceable against all affected parties, including minority dissenting creditors within a class and all members of dissenting classes.

Restructuring processes for publicly listed companies

If HoldCo were a public limited company (PLC) in the UK, certain provisions of the Companies Act 2006 would be disapplied where an equitisation is proposed, to make the implementation of that equitisation easier. Shareholders would still vote on the plan, unless a 901C(4) application is made.

For French listed companies, confidentiality must be maintained during the conciliation phase. The main exception to this rule is when there is a leakage in the press, in which case the Autorité des marchés financiers (AMF) will request the company to disclose the conciliation to ensure market transparency and integrity. Publicity is also likely when all or part of the debt instruments are listed.

Conclusion

The Teach-In highlighted the key similarities and differences between restructuring processes in the UK and France. The UK's established Scheme and newer Restructuring Plan offer procedural certainty and familiarity. In contrast, France's mandat ad hoc and conciliation processes provide a more confidential and informal approach, with sauvegarde accélérée offering an expedited path to dealing with financial distress.

For companies with the choice between UK and French frameworks, considerations come down to the extent of the company's financial distress, creditor composition, and the desire for certainty and confidentiality. Both jurisdictions emphasise creditor involvement and court approval, but their slight differences in proceedings require companies to carefully consider their strategy to account for legal requirements and private aims.

Annex 1 – Summary of differences in restructuring in the UK vs France

	UK	France
Main Restructuring Processes	Scheme: ▪ Long-established process existing for over 100 years. Restructuring Plan: ▪ Introduced 4 years ago. ▪ Similar documentation and legal processes to the Scheme.	Mandat ad hoc: ▪ Flexible and relaxed process for early stages of financial distress. Conciliation: ▪ Highly facilitated to force a stay. ▪ When financial distress becomes more urgent.
Entry Criteria	Restructuring Plan only: ▪ Financial difficulties threshold.	Mandat ad hoc: ▪ Available only to solvent companies. Conciliation: ▪ Aimed at solvent or insolvent companies.
Characteristics	Scheme: ▪ Creditors can only be crammed down within a class ▪ No automatic stay. Restructuring Plan: ▪ Allows cross-class cramdown ▪ No automatic stay.	Mandat ad hoc: ▪ No automatic stay or time limits. ▪ Appointed agent negotiates with creditors. Conciliation: ▪ No automatic stay but is highly facilitated to force a stay. ▪ 5-month limit. ▪ Can be converted into Sauvegarde Accélérée for implementation of a pre-negotiated restructuring. Sauvegarde Accélérée: ▪ Public process. ▪ Allows cramdown within classes of affected parties and cross-class cramdown.
Court Involvement	Court oversight and sanction required for both Scheme and Restructuring Plan.	Court sanction required for safeguard plans.
Additional Information	Over 30 Restructuring Plans have been initiated since its introduction, signalling a need for careful oversight.	The combination of conciliation and sauvegarde accélérée has been used in major restructuring cases over the last few years especially to implement debt-equity-swap solutions.

About ELFA:
ELFA is a professional trade association comprised of European leveraged finance investors from over 60 institutional fixed income managers, including investment advisors, insurance companies, and pension funds. ELFA seeks to support the growth and resilience of the leveraged finance market while acting as the voice of its investor community by promoting transparency and facilitating engagement among European leveraged finance market participants. For more information please visit ELFA's website: www.elfainvestors.com.

About Akin:
Akin is a leading global law firm providing innovative legal services and business solutions to individuals and institutions. Founded in 1945 by Richard Gump and Robert Strauss with the guiding vision that commitment, excellence and integrity would drive its success, the firm focuses on building lasting and mutually beneficial relationships with its clients. Our firm's clients range from individuals to corporations and nations. We offer clients a broad-spectrum approach, with over 85 practices that range from traditional strengths such as appellate, corporate and public policy to 21st century concentrations such as climate change, intellectual property litigation and national security. akingump.com

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