

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

RESTRUCTURING SCHEMES

A COMPARISON BETWEEN THE NEW UK, DUTCH AND GERMAN TOOLS
DECEMBER 2020

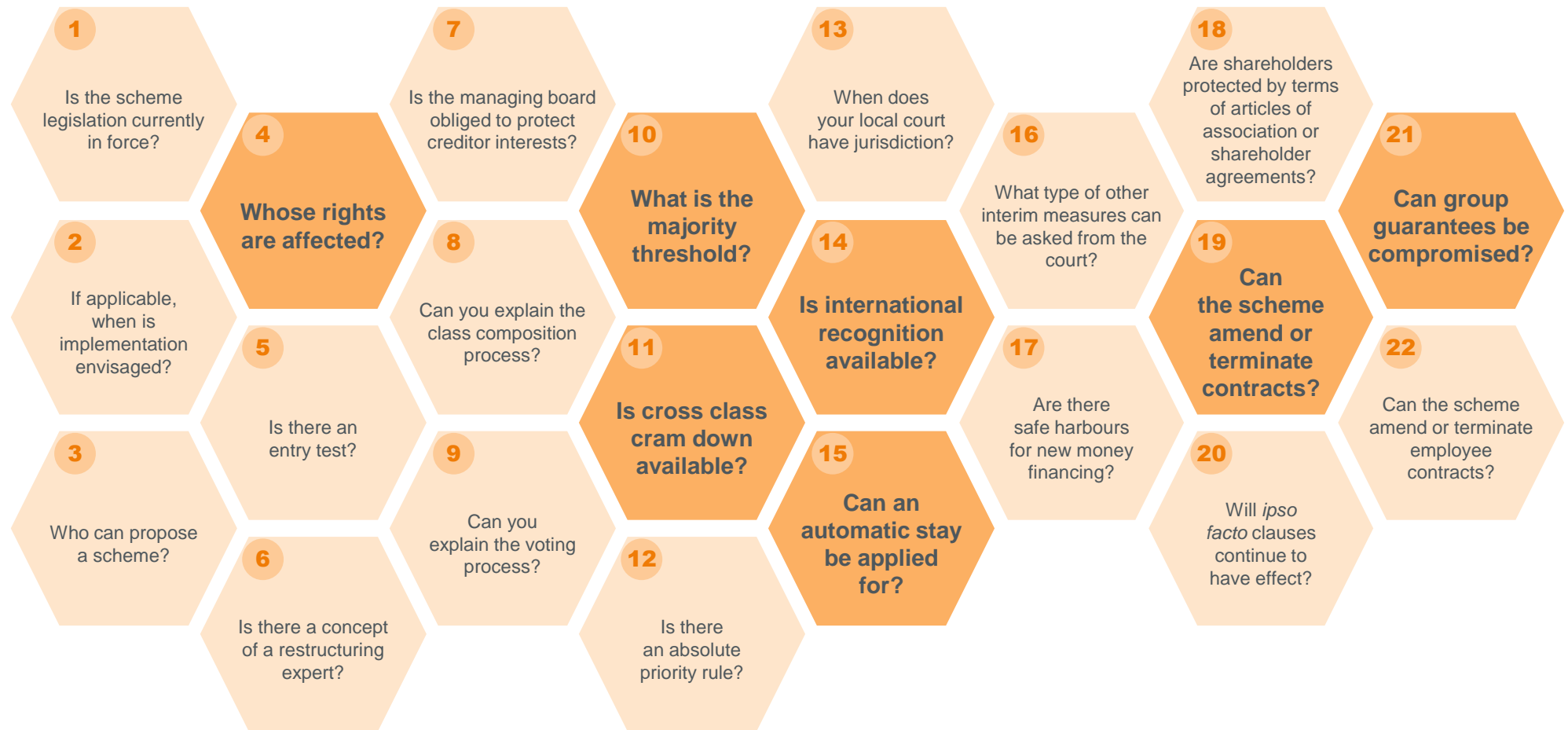
International law reform in the context of restructuring and insolvency has been gathering pace for a number of years.

The focus is very much on the development of pre-insolvency and restructuring regimes rather than formal insolvency proceedings.

They are designed to encourage investment with clear, efficient and cost-effective rules on restructuring. Recent reforms have taken place in various jurisdictions and most recently in the UK, the Netherlands and Germany. In the UK a new restructuring plan was introduced, in addition to the already existing Scheme of Arrangement, which includes cross class cram down. The Netherlands will be able to use a long-awaited restructuring plan to cram down dissenting creditors starting 1 January 2021. And Germany is expected to follow soon, by implementing a similar regime at the beginning of 2021.

This briefing provides a comparison of key features of the new regimes in these three jurisdictions. Click on any of the FAQ links on the following page to skip to the relevant section of the document, then click on the 'home' icon to return to this list from any other page.

FREQUENTLY ASKED QUESTIONS



CLICK on any question to see a comparison between the countries or on the navigation panel at the top of each page to move from slide to slide or return to this homepage

FREQUENTLY ASKED QUESTIONS

(CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
1	Is the scheme legislation currently in force?	<p>Yes</p> <p>The UK has had the Scheme for many years, but recently an extra tool (the Restructuring Plan) was introduced.</p>	No	No
2	If applicable, when is implementation envisaged?	N/A	Implementation date 1 January 2021 (confirmed)	Expected Q1 2021
3	Who can propose a scheme?	<p>The company/debtor</p> <p>Creditors can also propose (albeit unusual).</p>	The company/debtor or a restructuring expert (on behalf the creditors).	The company/debtor.

FREQUENTLY ASKED QUESTIONS

(CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
4	Whose rights can be affected by the scheme?	Creditors (or any class of them) (including guarantors) and shareholders (or any class of them).	Creditors (or any class of them) (including guarantors subject to limitation) and shareholders (or any class of them).	Creditors (excluding employees) and shareholders.
5	Is there an entry test?	Not for schemes. For the new restructuring plan the company must either have encountered or be likely to encounter financial difficulties that affect or will affect its ability to carry on business as a going concern.	Yes. It is required that "it can reasonably be expected that the debtor will be unable to continue to pay its debts". This can also be the maturity of a facilities agreement within 6-12 months which the debtor knows cannot be repaid or refinanced.	Yes. It is required that the debtor is in a state of impending illiquidity – i.e. unable to satisfy its payment obligations within the next 24 months.
6	Is there a concept of a restructuring expert?	No, but the court is likely to need expert evidence on the value of the business and the likely alternatives to the scheme or the restructuring plan.	Yes. A restructuring expert, who can propose a scheme, can be appointed at the request of the debtor, its creditors or the debtors' works council.	Yes. A mandatory restructuring representative will be appointed by the restructuring court whilst an optional restructuring representative will be appointed by the court at the request of the debtor / creditors holding 25% of the voting rights in each voting group.

FREQUENTLY ASKED QUESTIONS (CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
7	Is the managing board obliged to protect creditor interests?	All directors have a duty to have regard to the interests of creditors when a company is in financial difficulty.	All directors have a duty to have regard to the interests of the joint creditors when a company is in financial difficulty.	<p>In the context of impending illiquidity, the managing board has an obligation to preserve the general interests of creditors. Should a conflict arise between shareholder interests and creditor interests, the interests of the creditors take priority. Resolutions and instructions of the shareholders have no binding effect on the managing board insofar as they do not comply with the interests of creditors.</p> <p>The managing directors are liable to the company for damages in case of violation of these obligations. If the restructuring case is pending, this claim can also be asserted by creditors.</p>
8	Can you explain the class composition process?	The debtor determines the constitution of classes which is then reviewed by the court at the first hearing. Creditors are classed according to their rights and their treatment within the scheme or restructuring plan.	There are separate classes of creditors and shareholders if their rights are distinct in a manner that would not constitute a similar position. A class can also consist of one creditor or one shareholder. Secured creditors are in a separate class for that part of their claim which is in the money. For their residual claim they are placed in the unsecured creditors class.	<p>In general, the scheme allows for distinct groups representing different rights and interests. There would typically be different creditor groups for secured and unsecured creditors, shareholders, minor creditors and authorities.</p> <p>These rules are modelled on the existing insolvency plan rules.</p>

FREQUENTLY ASKED QUESTIONS (CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
9	Can you explain the voting process?	The voting takes place at creditor or shareholder meetings at the date and time approved by the court. These can be virtual and/or creditors can vote by proxy.	The scheme proposal must be sent to all creditors and shareholders whose rights are affected by the scheme. This must be done ultimately 8 days prior to the voting. After the voting a report will need to be drawn up within 7 days. Virtual or electronic voting procedures are possible.	All creditors and shareholders whose rights are affected by the plan must be informed – individually or by way of an assembly – of its content. Each group votes separately. Virtual voting procedures are possible.
10	What is the majority threshold?	For schemes it is 75% or more in value and more than 50% in number of creditors in each class. The court also has to be satisfied that the scheme is fair and reasonable. For restructuring plans at least one class voting in favour by 75% or more in value. For cross class cram down to operate, the court also has to be satisfied that none of the dissenting creditors would be any worse off than the relevant alternative and that the class voting in favour would receive a payment or have a genuine economic interest in the event of the relevant alternative.	2/3 of the value of claims of those creditors who have cast their vote.	3/4 of the value of the creditor claims of their respective creditor groups (by value, not headcount).

FREQUENTLY ASKED QUESTIONS (CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
11	Is a cross class cram down available?	Yes, in a restructuring plan only.	Yes.	Yes, if the majority of groups accepts the plan and the best-interest test is satisfied.
12	Is there an absolute priority rule?	No, but there are certain protections for dissenting creditors – see under 10 above.	A similar concept applies, which is more a relative priority rule. A Dutch court will have to refuse the confirmation of a restructuring plan if the (re)allocation of value deviates from either statutory law (i.e. <i>paritas creditorum</i>) or any contractual arrangements (e.g. an Intercreditor Agreement), unless the deviation does not (materially) affect the interests of the creditors/shareholders.	In principle, the APR applies, but there is an exception for (a) creditors if their different treatment (i) is appropriate, or (ii) interferes with creditor rights to a minor extent, and (b) shareholders if (i) they are essential to the continuation of the company, and (ii) they are obliged to cooperate and to transfer economic values in the event that their participation ceases prior to a lapse of five years for reasons for which they are responsible.
13	When does your local court have jurisdiction?	There must be a sufficient connection to the jurisdiction. This is a low threshold and can be met for example if there are English law governed documents that are the subject of the compromise. It may also be based on other factors including the location of COMI, assets, or creditors in England, which may also suffice.	There are two options. For a public scheme it is required that the COMI of the debtor is in NL. For a non-public scheme a "sufficient connection" rule is applied similar to the UK.	The court has international jurisdiction over public schemes if the COMI of the debtor is in Germany. The international jurisdiction over non-public schemes is uncertain as International jurisdiction could well be established according to several different rules of international private law.

FREQUENTLY ASKED QUESTIONS (CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
14	Is there a possibility of international recognition?	The recognition of schemes and restructuring plans shall depend on international private law rules of the other jurisdiction involved.	The public scheme will be added to the list of the EUIR and thus benefits from automatic recognition within member states. The recognition of non-public schemes shall depend on international private law rules of the other jurisdiction involved.	The public scheme will be added to the list of the EUIR and thus benefit from automatic recognition within member states. The recognition of non-public schemes depends on the international private law rules of the relevant jurisdiction.
15	Can an automatic stay be applied?	A separate moratorium may be applied for by certain eligible companies under Part A1 of the Insolvency Act 1986. Schemes may also be used in conjunction with administration which includes an automatic stay. These stays extend to security enforcement and other proceedings (including other insolvency processes).	Yes, for a maximum period of 8 months.	Yes, for a period of 3 to 8 months.
16	What type of other interim measures can be asked from the court?	The processes often rely upon a consensual approach to negotiations to provide creditors with the time to consider the proposals. The court may in certain circumstances grant relief from processes that would otherwise upset the restructuring, for example, grant a specific injunction against a specific action or proceeding.	The court can appoint an observer to safeguard the interests of the creditors/shareholders, take measures to protect the interests of creditors (i.e. setting a time limit to complete the scheme proposal), and rule in relation valuation and class composition disputes.	The court may rule in relation to valuation and class composition uncertainties.

FREQUENTLY ASKED QUESTIONS

(CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
	<p>Are there safe harbours for new money financing?</p>	<p>No, but usually new money would not be susceptible to challenge and would be paid in priority to other claims with the agreement of the creditors affected.</p>	<p>Yes. New money and related security can be pre-approved by the court and therefore not be challenged at a later stage.</p>	<p>Based on the current draft, only to a limited extent. The concepts of lender liability and insolvency claw-back for new money continue to apply but such actions cannot be solely evidenced by the existence of the pending restructuring scheme process. Repayments on new financing provided for the restructuring plan are not subject to insolvency claw-back until the restructuring is implemented. A restructuring opinion (mostly on the basis of IDW S6) would still be required by creditors to protect new money.</p>
	<p>Are shareholders protected by terms of articles of association or shareholder agreements?</p>	<p>No, for example protections such as authorization for share allotment, and pre-emptions rights are expressly disapplied. Listed companies raise separate issues under the Listing Rules and Takeover Code.</p>	<p>No, all such (approval) rights do not apply.</p>	<p>No, all such (approval) rights do not apply and are superseded by the rules applicable under the new restructuring process.</p>

FREQUENTLY ASKED QUESTIONS (CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
19	Can the scheme amend or terminate so-called ongoing contracts (e.g. leases)?	Ongoing contracts may be compromised, but schemes and restructuring plans may not affect rights of a proprietary nature without the consent.	Yes. A proposal can be made to amend an ongoing contract. If the counterparty does not agree, then the debtor can terminate the contract with a maximum of 3 months' notice. Claims for damages as a result thereof can be limited through the scheme. The termination will require court consent (along with the sanctioning of the scheme) if the counterparty does not agree.	Yes, if applied for in connection with a request to the restructuring court for scheme approval. The court may terminate the contract with a maximum of 3 months' notice. Claims for damages as a result thereof can be included and therefore limited through the scheme.
20	Will <i>ipso facto</i> clauses continue to have effect?	Yes in relation to schemes (unless it is combined with administration or a company voluntary arrangement). No in relation to restructuring plans. This is prohibited by section 233B of the Insolvency Act 1986. Defaults occurring after the commencement of the insolvency process may however rely on the termination triggers.	No. Also the preparations of offering the scheme or the appointment of a restructuring expert will not constitute a default under existing contracts.	No. The pending scheme or the utilisation of measures stated above cannot be the sole basis of a termination.

FREQUENTLY ASKED QUESTIONS (CONTINUED)



	FAQs	United Kingdom	Netherlands	Germany
21	Can guarantees from group companies be included in the scheme?	Yes, these are known as ricochet claims. and schemes and restructuring plans can be implemented by guarantor companies which benefit underlying debtors.	Yes, but only if those group companies also meet the entry test (i.e. financial difficulties) and provided that the Dutch court would have jurisdiction if such company would have offered the scheme itself.	Yes, upstream guarantees provided by subsidiaries can also be included in the scheme.
22	Can the scheme amend or terminate employee contracts?	Yes, although certain consultation rights may apply. Also in relation to an employee's entitlements under certain occupational pensions schemes additional notifications to the Pensions Regulator and Board of the Pension Protection Fund are required.	No, they are specifically carved out.	No, they are specifically carved out.

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