

Cross-border Schemes and Plans: How they work in different jurisdictions

Kathy Stones summarises the findings from the panel at the Dublin Congress, comparing and contrasting the restructuring regimes in Ireland, UK, Netherlands and Germany



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Many European countries have been prompted to revamp their restructuring laws following the introduction of the EU Directive on Restructuring and Insolvency (Directive 2019/1023). At INSOL Europe's 40th annual conference in Dublin on 4 March 2022, a panel compared and contrasted the restructuring regimes in the following countries: Ireland, UK, Netherlands and Germany.

Three long-established procedures (examinership and schemes in Ireland and schemes in the UK) were compared with three newer procedures, Restructuring Plans in the UK, WHOA in the Netherlands and StaRUG in Germany. The focus was the schemes' or plans' efficacy in cross-border restructuring.

A summary of the findings appears below and in the table.

Ireland

For Ireland, **Michael Murphy** (McCann FitzGerald LLP) stated that examinership is a well-established restructuring process in Ireland that has gained significant international attention. It was introduced 30 years ago and was largely modelled on the US Chapter 11 process. It is user-friendly and its concepts are very familiar to advisors in an international context. Similarly, the Irish statutory scheme of arrangement provisions have been on the statute books for over 60 years, largely mirroring UK provisions.

Some final words:

- Ireland remains a firm member of the EU. Examinership is listed in Annex A of the Recast European Insolvency Regulation (Regulation 2015/848), facilitating recognition of the process throughout the EU. Schemes of arrangement can be also recognised in the EU using the Recast Judgments Regulation. Both processes have also been recognised in the US using the Chapter 15 procedure; and
- Ireland has a proven track record in international restructuring, with a responsive and experienced judiciary and a fast track appeal court. Irish decisions have also been relied upon in an international context.

UK

In the UK, **Kathy Stones** (LexisPSL R&I) noted that schemes of arrangement have been used for many years and are available without proving insolvency, as they arise under the Companies Act 2006, rather than the Insolvency Act 1986. Indeed, statistically, around 50% of all scheme cases currently going through the courts are solvent schemes. Part 26A restructuring plans are a new tool available since June 2020 sharing many of the same features as schemes, with the addition of cross-class cram-down where certain conditions are met. Insolvency does not need to be proved, rather that the company 'has encountered or is likely to encounter financial

difficulties', the case of Hurricane Energy showing the need for a "burning platform".

Some final words:

- the UK has some fantastic, pragmatic, specialist judges to hear plan/scheme cases and a great track record;
- the low sufficient connection test is appealing for foreign companies; and
- if the finance documents contain English law governing clauses, then UK schemes/plans may be the only option, unless the *Gibbs* rule can be circumvented.

The Netherlands

As from 1 January 2021, **Marcel Groenewegen** (CMS) outlined the availability of the Dutch 'scheme', already widely known as 'WHOA', as a new restructuring tool. Combining certain elements of the US Chapter 11 and the English Scheme with typical Dutch law innovations, the WHOA has had a successful start and continues to grow in popularity. Currently, approximately 150 WHOA proceedings, mainly for small and medium size enterprises in financial distress, have been launched and approximately 90 court decisions have been published.

Some final words:

- with the WHOA, the Netherlands has become a very attractive jurisdiction for cross border restructurings, especially given the low entry test for companies with no COMI in the Netherlands;
- the WHOA is very much a "debtor in possession"



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process and court involvement can be very limited;

- cross-class cram-down and the option to obtain a general moratorium for a maximum period of eight months allow for a flexible restructuring tool, which can be used in private (non-public) proceedings as well; and
- the relatively low costs and the availability of well trained and specialised courts (which rule in the highest instance with no option for lengthy and costly appeal proceedings) provide for a speedy and cost efficient restructuring instrument with a high level of deal certainty.

Germany

As presented by **Riaz Janjuah** (White & Case LLP), on 1 January 2021, the StaRUG introduced the new Preventive Restructuring Framework that fills a gap in German restructuring law. In particular, the new Preventive Restructuring Framework allows for an implementation of a restructuring plan by way of outvoting dissenting creditors and including the possibility of a cross-class cram-down.

Some final words:

- with the Preventive Restructuring Framework, the StaRUG has added a swift and flexible instrument to the toolbox that allows, in particular, for an implementation of a restructuring plan by way of outvoting dissenting creditors and including the possibility of a cross-class cram-down;
- there have been twenty-two cases reported so far with four confirmed restructuring plans. In one case, the process has been implemented in just seventy-five days from initiation to confirmation; and
- the Preventive Restructuring Framework has proven as a

flexible tool that can deal, for example, with disputes among shareholders, the restructuring of bonds, dissenting lenders in syndicated loans or assist with the restructuring of an individual group entity during the reorganisation of the group in an in-court process.

Concluding remarks

For the Chair, **Chris Laughton** (Mercer & Hole), there is a striking similarity between many of these regimes and, where time and circumstances permit, the particular facts of the cross-border case in question may well dictate which restructuring regime is chosen. Each regime claims flexibility and skilled practitioners and none stands out with all-round advantages for cross-border restructuring. Often these plans and schemes will support each other and run in parallel. As ever in cross-border restructuring the key to success is communication and cooperation between professionals, as exemplified by the panel members.

Further research

LexisPSL R&I is excited to be partnering with INSOL Europe to produce a research paper in 2022 analysing how various Member States have implemented Directive 2019/1023.

INSOL Europe’s national reporters will be asked to analyse their country’s regimes through a series of questions mapped to the requirements of the Directive text. The findings will be published on the organisations’ websites. We will add reports as countries continue to implement new restructuring plan/scheme procedures before the long-stop date of 17 July 2022 (for Member States which have requested an extension) for implementation of the EU Directive. ■

A full report from the panel is published on our ‘**Past Events**’ section of our website under the Dublin section at: www.insol-europe.org/events/past_events



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Summary of the findings:

	Ireland		UK		Netherlands		Germany
	Examinership	Scheme	Restructuring Plan	Scheme	WHOA		StaRUG
					Private	Public	Plan
Insolvent (or likely)	Y	N	Y	N	Y	Y	Y (imminent)
Moratorium/stay	Y	N	N	N	N(Y)	N(Y)	Y
Voting (Number, Value)	50% N&V	50%N 75%V	75%V	50%N 75%V	66%V	66%V	75%V
Cross-class cram down	Y	N	Y	N	Y	Y	Y
IP appointed	Y	N	N	N	N(Y)	N(Y)	Y/N
Jurisdiction test	COMI (EU), SC	SC	SC	SC	SC	COMI	COMI
EU recognition	Y	Y	Local Law	Local Law	Local Law	Y	Private: Local Law Public: Y (22.7.22)
Challenge/solution	100/150 days	Limited moratorium	Moratorium	Moratorium			Directors’ duties shift Contracts termination
Final word	Ready recognition; proven 30+ years track record		Sufficient connection; judges			Groups	Swift & flexible