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SHAREHOLDER RIGHTS IN RESTRUCTURINGS

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FOREWORD

INSOL International and INSOL Europe are pleased to present this new joint special report, *Shareholder Rights in Restructurings.*

The report explores the role that shareholders play in a distressed restructuring scenario, and how they may seek to exercise various rights and powers to control the outcome of a proposed restructuring plan. This is an important topic – indeed, while shareholders are often thought of as only residual claimants when a company is in financial distress (with creditors becoming the priority stakeholders), some jurisdictions provide shareholders with an effective "veto power" which enables them to block a restructuring plan by refusing to consent to any proposed debt-for-equity conversion, even if they are clearly out of the money.

Even in jurisdictions where shareholders do not have such a veto power, the scope of a court's cram down powers may be limited – so that a restructuring plan can only be approved over the objection of dissenting classes of creditors, but not shareholders.

Alternatively, shareholders may seek to achieve de facto control over a restructuring process by replacing members of the board driving a proposed restructuring plan that shareholders do not agree to.

In the European Union, these questions are framed by article 12 of Directive (EU) 2019/1023 on restructuring and insolvency, which allows Member States to exclude equity holders from cross-class cram-down, provided they ensure by other means that equity holders cannot unreasonably prevent or create obstacles to the adoption, confirmation and implementation of a restructuring plan. Member States have transposed this provision in markedly different ways. INSOL Europe, whose members have followed the Directive from its preparation through to its transposition, brings this European dimension to the report: all of the chapters on EU Member States have been contributed by its members, as have several chapters on jurisdictions beyond Europe.

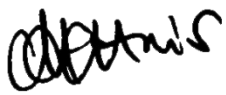
With insolvency filings on the rise globally as economic conditions remain very challenging, and with the wide disparity of approaches taken in different jurisdictions on shareholder rights in a distressed restructuring, this publication is timely.

The report provides an outline of shareholders' rights in a restructuring context in 18 jurisdictions – addressing matters such as shareholders' information entitlements, their relationship with the appointed restructuring expert, their voting rights and veto powers, and their ability to seek de facto control of the restructuring process. Recent cases, legislative changes and practical observations are profiled in each chapter.

With legislators and policy makers increasingly recognising the strong link between flexible restructuring processes and improved productivity and economic growth, this publication may assist in advocating for further reforms to circumscribe shareholders' rights in a restructuring, especially if they are out of the money. This is particularly relevant in Europe, given the review of the Directive under its article 33.

The publication will also provide valuable assistance to members of INSOL International and INSOL Europe who conduct their practices on a cross-border basis – giving them a greater understanding of the different regulatory approaches taken to shareholder rights in a restructuring, and the means to navigate complex laws and governance requirements.

INSOL International and INSOL Europe express their sincere appreciation to each of the country contributors for their time and expertise in helping bring this publication to fruition.



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ARGENTINA

Introduction

One of the debates that arouses great interest in the field of insolvency law, not only in Argentina but also globally, is the natural tension that may exist between the company's partners and its creditors regarding the company's assets in the face of financial difficulties.

The answer is not straightforward, given that Law 24,522 on Insolvency and Bankruptcy (hereinafter, LCQ) does not systematically regulate this issue. The interpreter must therefore examine – in a coordinated manner – both the LCQ and the general Companies Act, Law 19,550 (hereinafter, LGS), in an attempt to distil a response.

1. The position of the insolvency officeholder and creditors compared to shareholders

Argentine insolvency law does not create a distinct "insolvency officeholder" role that formally weighs the position of creditors against that of shareholders: the court-appointed trustee (*síndico*) supervises the debtor's assets and verifies creditors' claims, but does not itself adjudicate between creditors and shareholders. Instead, the relative position of shareholders is determined by the ordinary rules on subordination. Under article 109 of the LGS and article 228 of the LCQ, shareholders are only entitled to any surplus remaining once the company's creditors have been paid in full, whether the company is wound up under general company law or under the LCQ.

In preventive insolvency proceedings, shareholders are not treated as a distinct category whose consent is required for the restructuring. On the contrary, as a rule they are excluded from voting on the proposed arrangement, save where they are creditors of the company in their own right and are not controlling shareholders.[1] Where a shareholder is also a creditor – for example, because they have advanced a loan or other financial assistance to the company – case law has, in certain circumstances, subordinated the recovery of that claim behind the claims of the company's ordinary creditors (see the *KLP S.A.* precedent discussed in section 4 below).

2. Shareholders' rights to be consulted and to receive information

Under Argentine law, the debtor company – during the preventive composition proceedings (usually called reorganisation proceedings in the comparative law arena) – is not obliged to give special consideration to the members / shareholders when formulating the proposal for an agreement, since they are not "creditors in the strict sense" and do not, *per se*, constitute a special category that plays a leading role under the LCQ when it comes to the restructuring of the insolvent company.

However, if this is the case (e.g. because they lent money to the company, or more precisely provided financial assistance), although they are considered genuine creditors, case law has subordinated members / shareholders in the recovery of their claims,[2] placing them behind even unsecured creditors; especially when such financial assistance has been vital and ongoing for the company's survival.

To summarise, in a scenario of insolvency under Argentine law, a member / shareholder would have the following "rights":

- **Right to the residual assets –** they may only receive assets, in the form of a liquidation share in a bankruptcy scenario, if there is a surplus remaining after the liquidator has paid 100% of the debts and costs of the bankruptcy.[3]

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1 Article 45 of the LCQ, discussed further below.
2 Article 250 of the LCQ.
3 Article 109 of the LGS and article 228 of the LCQ.

- **Inadmissibility of withdrawal –** a shareholder may not exercise the right of withdrawal (to withdraw and demand the value of their shares) if the company is already in default or has been declared bankrupt. The withdrawing shareholder must repay any sums received, as such a move would be unenforceable against the creditors of the bankrupt company. Article 149 of the LCQ states:

  > *"If the right of withdrawal is exercised whilst the company is in suspension of payments, those withdrawing must return to the insolvency proceedings everything they have received on that account. Reimbursement may be required in the manner and under the conditions set out in the second paragraph of the following article."*

  In other words, the claim may be made in the same proceedings via an incidental application proceeding and the judge may immediately order the necessary interim measures for that purpose. First and foremost, it must be clarified that, once the company has been declared bankrupt, and by virtue of the automatic forfeiture of rights,[4] shareholders cannot exercise or give effect to the right of withdrawal[5] since the company would be unable to reimburse or pay them the value of their shares. However, if the right of withdrawal is exercised during the period of suspicion relating to the company's bankruptcy, the withdrawing shareholders must return to the insolvency estate whatever they may have received at the time as the redemption value of their respective shares. This will form part of the estate's assets to be distributed among the company's creditors.

  In insolvency proceedings of companies whose shareholders have unlimited liability, the shareholders likewise cannot claim what is owed to them by the bankrupt company, whatever the cause.[6] Further, once a company with shareholders bearing unlimited liability has been declared bankrupt, the shareholders are automatically declared bankrupt.[7] Separate estates are formed, one for the bankrupt legal entity and another for each shareholder each with its respective assets and liabilities. However, without prejudice to the principle of separation of estates, this rule of exception is regulated by prohibiting the inclusion of shareholders with unlimited liability in the estate of the bankrupt company, in respect of any claims they may have against it. Consequently, once bankruptcy has been declared, the company's debt to the shareholder does not form part of the company's liabilities, nor does the shareholder's claim against the company form part of the shareholder's assets.

- **Right to information –** shareholders retain the right to be informed about the proceedings, both the preventive and liquidation stages, even though corporate management is suspended during bankruptcy.

In preventive insolvency proceedings, the governing body continues to function, such that decisions of the administrative body which – according to the LGS – require the approval of the shareholders and which comply with the parameters imposed by the LCQ (e.g. acts requiring judicial authorisation under article 16) may be taken and executed without any legal objection.

In the case of bankruptcy, the matter is more complex. As the company is not only *dissolved* but also *bankrupt*,[8] the liquidation process takes on particular nuances. This means that the liquidation of a bankrupt company – unlike a solvent one – is primarily subject to insolvency law; company law

4 Articles 106 and 107 of the LCQ.
5 Article 245 of the LGS.
6 Article 150 of the LCQ.
7 Article 160 of the LCQ.
8 Article 237 of the LCQ and article 94 of the LGS.

takes a back seat. Thus, while a company remains in a state of bankruptcy, the effects of its dissolution are superseded by the effects of its bankruptcy.[9]

For example, to remove the state of dissolution of a *solvent* company, the will of the shareholders is sufficient, provided that the requirements imposed by company law are respected (i.e. provided there is economic and social viability for the continuation of the company's activities). Conversely, to revoke the dissolution of an *insolvent* company, it is necessary first to safeguard the interests of the company's creditors.[10]

On another note, the trustee appointed in the liquidation proceedings shall be the liquidator of the bankrupt company, and not the management body or the liquidator appointed by the shareholders who had been acting in that capacity. This does not imply that the corporate bodies cease to exist as such by virtue of the bankruptcy, although their functions are significantly restricted. It is said that they possess an implicit residual capacity to act. Indeed, in the financial sphere, the company's loss of legal capacity prevents its bodies from managing and disposing of the corporate assets, which falls within the remit of the insolvency trustee to the extent provided for by insolvency law and in a definitive instance by the insolvency court. However, outside that financial sphere, it is the corporate bodies that continue to act on behalf of the company.[11]

The shareholders – meeting in general assembly – may increase the share capital to restructure the company prior to a declaration of bankruptcy. However, in the event of subsequent bankruptcy – as we have seen – they have no right to recover the amount invested in the new shares. From this perspective, the situation is no different if, instead of capital contributions, shareholders "financially assisted" the company and the shareholders become a true "creditor". In the event of future bankruptcy, under Argentine law, these payments are not recognised as pre-deductible claims or maintenance and legal costs and are therefore always "subordinated". This contrasts with the

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9 TONÓN, A., La disolución de la sociedad por causa de la declaración de su quiebra, LA LEY 1987-D, p. 968.

10 For example, composition under article 94(6) of the LGS.

11 In fact, the governing bodies of the insolvent company have every right to defend it. Thus, the insolvent company may, through its governing bodies: a.- participate in the process of verifying claims and submit comments on the claims filed by creditors (section 110 of the Insolvency Act) and on the trustee's general report (sections 40 and 200 of the Insolvency Act), b.- become a party to proceedings for review and late verification (article 110 LCQ), c.- make submissions regarding the conduct of the insolvency bodies (article 110 LCQ), d.- apply for judicial protective measures in respect of seized assets until the liquidator takes charge, and to take extrajudicial measures in the event of the trustee's failure to act (article 110 LCQ), e.- to challenge the date of cessation of payments proposed by the trustee and to appeal the decision setting it (article 117 LCQ), f.- to appeal the judgment declaring automatic invalidity (article 118 LCQ), g.- to appeal the judgment declaring nullity on the grounds of knowledge of the cessation of payments (article 119 LCQ), as a necessary defendant in the revocation action (necessary joint litigation formed with the other parties to the act), h.- to appeal by way of reconsideration "with proceedings" the judgment declaring bankruptcy at the creditor's request (article 94 LCQ), i.- to appeal by way of reconsideration "without formal proceedings" against the judgment declaring bankruptcy at the creditor's request, by depositing in payment or subject to attachment the amount of the claims whose non-payment established the cessation of payments (article 96 LCQ), j.- to intervene in proceedings for the restitution of third-party assets (sections 138 and 188 of the Bankruptcy Code), k.- to cooperate with the judge or the trustee in clarifying the financial situation and determining the claims (section 102 of the Bankruptcy Code), l.- to participate in the judicial decision to transfer assets that cannot be realised and converted into cash to public-benefit entities (article 214 LCQ), m.- to propose a settlement to creditors and, where appropriate, to request the closure of the bankruptcy proceedings (article 225 LCQ), n.- to request the closure of the bankruptcy proceedings due to full payment (article 228 et seq. LCQ). In particular, where there is a surplus, the administrator intervenes in the hearing that must be held prior to its distribution in order to pay interest suspended by the declaration of bankruptcy (section 228, second paragraph, LCQ), o.- request the conversion of the bankruptcy into a preventive arrangement (section 90 LCQ), p.- to appeal against the judgment declaring bankruptcy in the event of nullity (article 61 LCQ) or breach (article 63 LCQ) of the agreement.

situation under other legal systems where they do enjoy this preference – that of *"fresh money"*[12] – which clearly constitutes an incentive to restructure the insolvent company.

3. The composition of classes involving shareholders in the context of a restructuring plan

When a company faces economic / financial difficulties, the interests of creditors and shareholders may (and often do) conflict, even when both groups of capital providers wish to recover their investments.

The LCQ establishes certain legal effects on the assets of the debtor subject to preventive insolvency proceedings and those of its creditors. As a general rule, actions relating to the debtor's assets are suspended.[13] There are also effects that directly affect the debtor: (1) the administration of their assets remains under the supervision of the liquidator; and (2) acts of disposal and those exceeding normal administration will require judicial authorisation.

However, apart from these two effects, there is no provision in our Insolvency Act that could affect, or in any way oblige, the partners to interact with the insolvency creditors.

In other words, Argentine law does not recognise shareholders as a distinct class or category for the purposes of composing or voting on the restructuring plan; classes under the LCQ are formed only among the company's creditors.

4. Shareholders' voting rights

Article 45(3) of the LCQ excludes certain persons from the calculation of the majorities required to approve a restructuring proposal, including a shareholder who is also a creditor of the debtor, unless that shareholder is not a controlling shareholder.

It is worth recalling the well-known precedent which states that:

> *"The purpose inherent in the 'prohibition on voting' affecting the controlling shareholder of the insolvent company lies in preventing those creditors linked to the debtor from voting on the resolution, in such a way that the expression of their will can only be regarded as aligned with a sort of community of interests with that of the debtor."*[14]

However, there is also another reason underpinning the exclusion of this creditor from the basis for calculating majorities. The final paragraph of article 67 of the Insolvency Act provides that claims between members of the group are not entitled to vote; and the aforementioned jurisprudential criterion appears appropriate, which gives:

> *"To the term 'corporate group' a broad meaning, encompassing any set of companies linked through a reciprocal interest that responds to unified management [and] … sets the business policy of all companies subject to its control …*

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12 In comparative law, there are legal regimes that do encourage the financing of companies in financial difficulty. In particular, the US regime contains extremely detailed regulations – which we have outlined in the first footnotes at the beginning of this paper – that grant the insolvent party flexibility to establish – subject to court authorisation – certain security interests in favour of those creditors whose purpose is to facilitate the restructuring of their debt. Thus, there is a highly developed post-insolvency financing market in the United States. Financial institutions, creditors and other third parties regularly lend capital to companies approaching or in a state of insolvency, as they are certain that, in the event of bankruptcy, they will be paid in preference to the majority of creditors.

13 Article 21 of the LCQ.

14 JNCom. No. 16, Telearte S.A. Radio and Television Company, 17/03/2006, LL 2006-C, 367 – IMP2006-9, 1247, AR/JUR/88/2006.

Regarding the right to vote on the proposed composition agreement by a company forming part of the economic group, Dr Julio César Rivera, in his former judicial capacity, explained: 'What would be the reasons that would lead these particular creditors to vote one way or the other; the common interest of all creditors or exclusively the convenience of the insolvent companies? The answer is so obvious that it does not warrant being written down. Thus, these creditors are not exercising their full freedom; on the contrary, they cannot reach a decision that contains within itself all the elements of a voluntary act. These creditors would have a 'vitiated' will in the broad sense in which I have previously used this expression; they could not vote except in favour of acceptance. And that is precisely what the law has sought to prevent.'

He then adds: 'If the law has not expressly provided for the case of affiliated companies … this does not mean that the judge can stand by impassively in the face of what constitutes a manifest violation of the spirit of the law.'[15]

With regard to this last point – that is, the legal scenario of the vote cast by a creditor forming part of the economic group comprising the insolvent company – it has been stated that "article 67 [of the Insolvency Act], insofar as it prohibits the vote of a creditor who is part of a 'group' comprising the insolvent company, applies even in cases where we are not dealing with 'insolvency proceedings in the case of a group'".[16]

It is argued that the aforementioned provision has the effect of establishing a new prohibition that has been added to the list of exclusions provided for in article 45 of the Insolvency Act. This is because the basis for the exclusion lies in the fact that the creditor has an interest in the fate of the insolvent company that differs from that of the other competing creditors, regardless of whether both – that is, the creditor as well as the debtor – are involved in joint insolvency proceedings. It concludes that the only difference between insolvency proceedings in the case of a group and individual proceedings lies in the fact that, in the former, the exclusion of voting rights operates automatically, while in the latter it will be necessary to prove whether an economic group capable of triggering the aforementioned prohibition actually exists.[17] Furthermore, it is evident in the light of article 68 of the Insolvency Act that these considerations apply to guarantors.

In another precedent, *"KLP S.A.",* the court had to resolve a different issue: how should the creditor-partner be treated when "ranking" their claim?

In that case, it was established that loan transactions had taken place between the partner and the insolvent company, and that the basis of the claim was economic and financial assistance to the insolvent company. A key feature was that this constituted a financial contribution from the shareholder that was both ongoing and necessary to maintain the company's operations, with both companies being part of the same business group. The partner was not a controlling shareholder and therefore could not vote on the arrangement.

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15 National Court of First Instance in Commercial Matters No. 3, *Del Atlántico S.A. v. Cardet S.A.*, 23 March 1979, LL 1979-B, 637, online citation: AR/JUR/51/1959. In the same opinion: Corte de la Provincia de Entre Ríos, Sagemuller S.A. s/concurso preventivo (incidente de impugnación), 26/05/2010, from the dissenting opinion of Dr Castrillon.

16 National Court of First Instance in Commercial Matters No. 3, *Del Atlántico S.A. v. Cardet S.A.*, 23 March 1979, LL 1979-B, 637, online citation: AR/JUR/51/1959. In the same opinion: Corte de la Provincia de Entre Ríos, Sagemuller S.A. s/concurso preventivo (incidente de impugnación), 26/05/2010, from the dissenting opinion of Dr Castrillon.

17 VILLANUEVA, J., El "voto" de quien integra un "grupo" o "agrupamiento" en el concurso de uno de sus miembros, *IX Congreso Argentino de Derecho Concursal – VII Congreso Iberoamericano de la Insolvencia, Crisis y Derecho*, Volume III, p. 87. There she explains that this reasoning formed the basis of the decision in the case "Clorchemical S.A. s/concurso preventivo s/inc. de impugnación del acuerdo", 28 June 2012, CNCom., Chamber C, of which the author was a member.

While the court agreed with the insolvency administrator that the claim should be admitted, it differed regarding the *ranking* it would hold in the list of creditors and the voting right that was, in principle, attached to the declaration of admissibility.

Indeed, without prejudice to the recognition of the claim and its consequent inclusion in the insolvency liabilities, its position in relation to the other claims warrants special treatment. The evidence in the case file demonstrates – and the inclusion of this significant claim in the insolvency liabilities implies recognition – that the financial assistance provided by this creditor was decisive for the maintenance of the insolvent company's operations in fulfilment of its corporate purpose. The insolvency trustee reached a similar conclusion.

Nothing prevents the company from resorting to credit, but when vital and ongoing financial assistance is provided by a partner, this inevitably leads to two conclusions:

- the credit transaction was carried out by circumventing or replacing the rule requiring that the assets, as a general security for creditors, be commensurate with the corporate purpose;[18] and

- the shareholder-creditor has sought to place themselves on an equal footing with the other creditors in relation to their position *vis-à-vis* the general security.

Although the cash contribution was made and the debt must be recognised, the shareholder, who should have situated their relationship within the intra-corporate sphere, cannot, in insolvency proceedings, be treated as having the same rights as creditors who are entirely unrelated to the debtor company. This is because, rather than a creditor-debtor relationship, we are dealing with a company-shareholder relationship.

This intra-corporate relationship can only be settled once the company's liabilities have been satisfied. Otherwise, the company's deficit would be absorbed by the creditors, with the consequent enrichment of the company's assets and, consequently, of the shareholders – particularly the controlling shareholders.[19]

In short, according to the court, this shareholder-creditor will be ranked behind unsecured creditors – who had genuine contractual relationships and were unrelated to the insolvent company – and will form part of the category of subordinated creditors.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Argentine law provides at least one procedural mechanism through which shareholders can, in effect, block or delay a restructuring: the requirement that the shareholders' meeting ratify the administrative body's decision to file for insolvency protection.

According to article 6 of the LCQ, the application for insolvency proceedings by a legal entity must be made by the legal representative, following a resolution (where applicable) by the administrative body. Furthermore, within 30 days of the date of filing, proof must be provided of the resolution to proceed with the proceedings, adopted by the general meeting, members' meeting or relevant governing body, with the majorities required to resolve ordinary matters.

Consequently, it is necessary to analyse the legal framework governing each type of legal entity (for example, the Civil and Commercial Code, hereinafter CCC, for associations and foundations; Law

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[18] Articles 12, 154 and 163(i) et seq. of the CCC; articles 94(5) and 96 of the LGS.

[19] RICHARD, E. H., Preconcursalidad societaria: existe, *IX Congreso Argentino de Derecho Concursal – VII Congreso Iberoamericano de la Insolvencia, Crisis y Derecho,* Volume I, p. 152.

19550 for companies; Law 20,337 for cooperatives, etc) to determine which bodies are responsible for representation, administration and governance.

The legal representative *files* the application for the opening of preventive insolvency proceedings with the judge (needless to say, the court file must also be accompanied by corporate documentation proving that he or she is the representative of the legal entity).

However, the decision to file for insolvency proceedings *is* not *taken* by the representative alone; rather, the decision must have been previously taken by the entity's administrative body (as evidenced by a copy of the minutes recording the decision, certified by a notary public or by the court clerk).

Within 30 working days from the filing of the insolvency petition, the application must be *ratified* by the governing body – comprising the partners or members – of the legal entity, by the majority required under the articles of association or by law for the adoption of decisions on ordinary matters.

For example, in the case of a public limited company filing for insolvency, the following are required:

(i) the application[20] drawn up and signed by the chair of the board of directors[21] (attaching a certified copy of the minutes of the ordinary general meeting appointing him or her as director and a copy of the minutes of the board of directors recording his or her acceptance of the position);

(ii) a copy of the decision of the board of directors, as the company's administrative body,[22] to apply for the opening of the preventive insolvency proceedings; and

(iii) within 30 working days of the filing of the petition, the legal representative must attach to the court file a copy of the minutes of the ordinary general meeting convened for that purpose,[23] in which the members decide[24] to proceed with the preventive composition proceedings.

If the shareholders' meeting does not ratify the continuation of the preventive insolvency proceedings, these are deemed to have been withdrawn and the legal entity may not file for preventive insolvency again during the following year, provided there are any pending bankruptcy petitions.[25]

In this way, the members, through their vote, can prevent the restructuring of the company, which will then be unable to make use of the legal remedy provided by law: the preventive insolvency proceedings.

6. Measures for the cram down of shareholders

The procedure is governed by the following rules:

(a) The judge orders the opening of a register for 5 days for creditors or interested third parties (other than creditors) to come forward regarding the acquisition of shares or equity interests representing the share capital of the insolvent company. Partners or shareholders are not included in the concept of interested third party, as although they are theoretically third

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20 In accordance with article 11 of the Insolvency Act.
21 In accordance with article 268 of the Companies Act.
22 Article 255 of the LGS.
23 Article 234 of the LGS.
24 By the majority required under article 243 of the LGS.
25 Article 31 of the Insolvency Act.

parties, they cannot act as such in relation to the insolvent company, which may participate in a second round by virtue of the amendment introduced by Law 25,589. Furthermore, their subsequent participation is incompatible when it comes to drawing up the proposal for the acquisition of the shares. Nor may members of the management body (directors, managers, etc.) and supervisory body (trustees, members of the supervisory board, etc.) of the insolvent company register. If:

(i) no one has come forward or registered, bankruptcy is declared; and

(ii) there are registered third parties, the judge appoints a valuer, who shall establish the company's fair market value (based on the net assets of the insolvent company). To this end, the valuer shall create an up-to-date and detailed statement of assets, estimating the probable realisable values of each item, including intangible assets, and shall consider:

(A) additions, disposals and substantial changes to the assets;

(B) the impact of post-insolvency liabilities; and

(C) the causes of the debtor's financial distress.

(b) On the basis of these factors (in particular the valuation provided by the valuer), the judge proceeds to determine the value of the shares representing the share capital of the insolvent company.

(c) If a third party (who may or may not be a creditor) has come forward, a period is opened to obtain the consent of the creditors of the insolvent company. Furthermore, and only if a third party has registered, the debtor regains the opportunity to seek acceptance of their previous proposal or any new proposal they may put forward, within the same time limits, competing with the other interested bidders on an equal footing. Within 20 days of the court setting the value of the shares representing the insolvent company's share capital, interested parties (and also the debtor) must obtain creditors' approval. Verified and admissible creditors may give their consent to the proposal of more than one interested party and / or to that of the debtor. The same majorities and formal requirements apply as for the preventive agreement during the exclusivity period.

The registered third party who first submits their consent is entitled to be awarded the shares or quotas, considering the value set for them by the court.

Registered third parties, provided they obtain approval of the proposed payment arrangement addressed to the debtor's creditors, become the new holders of the insolvent company's share capital, which thus ceases to belong to the former shareholders. The value of the shares determined by the court is very important. Indeed, if the value is zero or negative (because the net assets are zero or negative), nothing is payable to the former shareholders. For this reason, whoever has reached an agreement with the creditors of the insolvent company acquires the shares or equity interests of the former shareholders, upon the court's approval of the agreement. If the value is positive, it must be reduced in the same proportion as the verified and admitted liabilities are reduced to their present value.

Consider this example: the value of the shares or quotas representing the share capital has been set by the judge at $10,000 and the company has issued 200 shares, meaning the proportional equity value of each share is $50. Now then: the proposed payment to unsecured creditors is over 5 years, at an annual rate of 6%, with increasing instalments, which results[26] in the present

[26] In accordance with the financial calculation established by article 48, paragraph 7, subparagraph b of the Insolvency Act.

value of the claim being 40%, meaning that creditors make a sacrifice of 60% (for example: a creditor of $100 who, under the proposed composition agreement, was to be repaid after a 5-year waiting period, with increasing instalments and at an annual rate of 6%, discounted to present value, is as if they were receiving $40 today). In these circumstances, the $50 per share is reduced by 60%, meaning that the third party will pay $20 to each partner for each share.

Once the positive value indicated has been determined by the court, the third party may:

(i) declare that they will pay the respective amount to the partners, depositing 25% at that time as security and on account of the balance, which must be settled by means of a court deposit within 10 days of the approval of the agreement, at which time the definitive transfer of ownership of the share capital will take place; or

(ii) within the following 20 days, agree to acquire the shareholding for a value lower than that determined by the judge, for which purpose they must obtain the consent of the partners or shareholders representing 2/3 of the insolvent company's share capital. Once such consent has been obtained, the third party must notify the court and, where applicable, make a court deposit and / or subsequent payment of any outstanding balance, in the manner and within the timeframes indicated in the preceding paragraph, upon which they shall definitively acquire ownership of the entire share capital.

That being the case, the full deposit of the price is an essential condition for the transfer of the shares. The confirmation order must provide for the transfer of the shares to the third party. If the third party fails to pay the price, this prevents the definitive acquisition of ownership of the shares, resulting in a declaration of bankruptcy.[27] This, in turn, means that the arrangement with the creditors is rendered void. Payment to the shareholders – who are withdrawing from the company – is made after the price has been paid in full by the third party and the shares have been definitively transferred.

Conversely, if the first party to submit their consent is the debtor, the rules governing the approval and ratification of the composition agreement reached during the exclusivity period apply.

Finally, if no preventive agreement is reached, either by a third party or by the debtor, the judge shall declare bankruptcy without further proceedings.

7. Debt-for-equity-swap and consent of shareholders

The proposal for a preventive arrangement is the offer of payment made by the debtor to its creditors to settle its debts. Its content may consist of debt forgiveness, deferral, delivery of assets, formation of a company with the creditors, reorganisation of the company, administration of assets by the creditors, the issue of negotiable instruments, the creation of security over third-party assets, or any other agreement.

As a legal act, the proposal for an arrangement must comply with certain requirements[28] – if it does not, the arrangement may not be approved by the judge on the grounds of being abusive or fraudulent.[29]

For example, a judge might consider abusive a proposed settlement involving a 10% payment with a 90% reduction and a 10-year deferral period from the date of judicial approval, payable in 10

[27] Article 53 of the LCQ.
[28] Article 43 of the LCQ.
[29] Article 52 of the LCQ.

equal, annual and consecutive instalments without interest. A proposal of this nature effectively liquidates the liabilities to the detriment of the creditors.[30]

The proposal for an arrangement must also contain identical terms for creditors within each category, although proposals may differ between categories.

The proposal must not consist of a payment that depends on the debtor's discretion. For example, the debtor could not propose to pay 100% only if the debtor wished.

Within this regulatory framework, the debtor is open to offer creditors the capitalisation of their claims.

Debt capitalisation is a restructuring tool provided for under Argentine insolvency law,[31] which allows an insolvent debtor to offer its unsecured creditors the conversion of their claims into shares or bonds convertible into shares of the debtor company.

This proposal entails a fundamental change in the ownership structure, as the creditors become shareholders in the company.

This manoeuvre has an impact on the company's original shareholders, as it is likely to alter their political and economic position within the company.

Some of the most significant consequences of this operation are outlined below:

- **Capital dilution** – the issue of new shares to capitalise debts generally entails an increase in share capital that reduces the original shareholders' percentage stake (dilution), potentially leading to a loss of control over the company.

- **Loss of right of withdrawal** – partners who object to the capitalisation of debts approved within the framework of a preventive insolvency proceeding have no right of withdrawal. The justification lies in the exceptional nature of the insolvency proceedings and the objective of preserving the company. Since it entails the company paying the capital contribution back to the withdrawing partner,[32] even though this former partner becomes a creditor of a claim arising after the filing for insolvency proceedings[33]and, for that reason, there is no objection to such payment, we consider that – as it goes beyond an act of administration falling within the ordinary course of the company's business – judicial authorisation would be required which, given the context, would not be at all favourable to the company's creditors, given the disbursement the company would have to make.

- **Need for an extraordinary general meeting** – the corporate resolution approving the capital increase through the capitalisation of receivables should be adopted at an extraordinary general meeting.[34]

- **Creditor involvement** – creditors who capitalise their claims acquire political and economic rights within the company, displacing or sharing power with the founding shareholders.

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30 See the judgment of 4 September 2001 of Chamber C of the National Chamber of Commerce in the case of Línea Vanguard SA s/ Concurso preventivo, ED 197-206.

31 Article 43 of the Insolvency Code.

32 Argument according to article 245 of the LGS.

33 Argument according to article 16 of the LCQ.

34 Argument according to articles 234 and 235 of the LGS.

In summary, debt capitalisation is a valid and common proposal in severe crises, which prioritises the continuity of the company[35] over the inviolability of the original shareholders' interests, who assume the risk of dilution and loss of control within the company.

[35] Paragraphs 1 and 3 of article 43 of the LCQ.

AUSTRALIA

Introduction

In contrast to many other jurisdictions, the insolvency and restructuring regime in Australia has not been the subject of recent substantial overhaul. Despite this, the possibility of significant change remains ever present.

In July 2023, the Australian Government's Parliamentary Joint Committee on Corporations and Financial Services released its report on Corporate Insolvency in Australia (Report). The Report was the culmination of the first major review of Australia's corporate insolvency regime in almost 30 years.

Candidly, the Parliamentary Joint Committee concluded in the Report that:

> *"Australia's corporate insolvency system is overly complex, difficult to access, and creates unnecessary cost and confusion for both debtors and creditors. Tellingly, few parties seem satisfied with the system as it stands. Unsecured creditors are understandably frustrated by stubbornly low returns in insolvency processes. Debtors, particularly smaller businesses, regard opportunities for restructure as lacking, and system costs as excessive. Insolvency practitioners and other observers consider the system is not appropriately resourced to achieve its purposes."*

The Parliamentary Joint Committee made 28 recommendations, which included the following:

> *"The Committee recommends that as soon as practicable the Government commission a comprehensive and independent review of Australia's insolvency law, encompassing both corporate and personal insolvency."*

At the time of writing, this "comprehensive and independent review" has not been initiated.

However, progressive steps are being taken to implement some of the recommendations identified by the Parliamentary Joint Committee as the "low hanging fruit" of corporate insolvency law reform.

What does any of this mean for shareholders of Australian companies in the context of restructurings? The answer is, very little. Despite the opinion expressed by the Parliamentary Joint Committee as to Australia's existing insolvency system, there are no recommendations in the Report intended to materially alter the position of shareholders in the context of a restructuring or to offer anything new. Accordingly, for now, shareholders' rights fall to be determined within the confines of the existing longstanding legal system.

Under that system, the balance between creditor and shareholder rights in a restructuring context remains firmly tilted in favour of creditors. Despite this, there are circumstances, although limited, where shareholders' rights arise.

Under Australian law, only two processes offer a genuine opportunity to facilitate a restructuring and / or recapitalise a company: voluntary administration and a creditors' scheme of arrangement. A brief overview of each process is set out below.

For completeness, it should also be noted that small Australian companies that encounter financial difficulty can avail themselves of a small business-specific, debtor-in-possession debt restructuring process. Eligibility requirements for the initiation of a small business restructuring process include a company having total liabilities of not more than AU $1,000,000. For obvious reasons, the interests of shareholders in small business restructurings are not a relevant consideration, and it is often the case that the directors of the company are also the company's shareholders in any event.

Voluntary administration

The Corporations Act 2001 (Cth) (Corporations Act) sets out the statutory purpose of the voluntary administration process as follows:[1]

> *"The object of this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:*
>
> *(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or*
>
> *(b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company."*

Voluntary administration can be initiated by:

- a resolution by a majority of directors that the company either is insolvent, or likely to become insolvent at some future time;
- a person entitled to enforce a security interest over the whole, or substantially the whole, of a company's property; or
- a liquidator of the company.

Each initiation method identified above requires the appointment of a voluntary administrator by instrument in writing. The voluntary administrator, so appointed, then takes control of the company to complete the voluntary administration process.

That process involves two key milestone dates:

1. The first meeting of creditors, which must take place within 8 business days after the administration begins.
2. The second meeting of creditors, which must be convened within the "convening period" (typically 20 business days from the date the administration begins), with the meeting to be held within 5 business days before or after the end of the convening period.

Ultimately, at the second meeting, creditors must make a decision on the future of the company. That decision involves a choice between one of three alternate options:

- to end the administration and return control of the company to the directors;
- that the company executes a deed of company arrangement (assuming one or more alternatives is proposed); or
- that the company be wound up.

To assist creditors with the decision they need to make at the second meeting, between the first meeting of creditors and the convening of the second meeting of creditors, the voluntary administrator investigates the affairs of the company and issues a report detailing various matters for the consideration of creditors. If a deed of company arrangement (DOCA) is proposed, the report will

[1] Corporations Act, section 435A.

also set out the key terms and features of the DOCA – including, importantly, a comparative analysis of the likely return to creditors in liquidation versus the likely return to creditors under the proposed DOCA.

A DOCA is, essentially, an arrangement that facilitates the compromise of unsecured creditor claims against the company and, ultimately, allows the company to continue to trade. On this basis, it provides a means by which a company may be restructured and recapitalised. A DOCA may facilitate a sale of the company's business and assets, or an acquisition of the restructured company via a transfer of shares.

Creditors' scheme of arrangement

A creditors' scheme of arrangement is a statutory mechanism also contained within the Corporations Act that enables a company to compromise the claims of creditors or certain classes of creditors. Australian schemes are modelled on, and similar to, English law schemes that have been at the forefront of global debt restructuring for many years.

A company need not be insolvent or about to become insolvent before it can propose a creditors' scheme of arrangement. Further, a company may propose a scheme of arrangement to a limited class or classes of creditors. In those circumstances, a creditors' scheme of arrangement is not a collective proceeding, and indeed is not an insolvency proceeding per se.

Ultimately, a creditors' scheme of arrangement requires the approval of the court before it can be implemented. On that basis, two key events in the timeline of a creditors' scheme of arrangement include:

1. The first court hearing at which the court approves the convening of the meeting of creditors or classes of creditors and the issue of the scheme documentation including an explanatory memorandum.

2. The second court hearing at which the court approves the compromise effected by the scheme.

The other significant event that occurs between the first and second court hearings is the meeting of creditors, or classes of creditors, to consider and vote on the proposed scheme.

The threshold for approval of a creditors' scheme of arrangement requires a majority of creditors in number, present and voting at the meeting, who hold at least 75% in value of the debt, to vote in favour of the proposed scheme.

In the case of separate classes of creditors, each class must approve the scheme. There is no mechanism for a cross-class cram down under Australian law.

Upon the approval of the scheme at the second court hearing, the court may also make an order appointing a person to administer and implement the scheme. Otherwise, the directors remain in control of the company while the scheme is being proposed.

Except for some policy considerations, there are no real limitations as to what can be proposed via a creditors' scheme of arrangement to effect a compromise of creditor claims. On that basis, they are an effective tool for the financial restructuring of company.

1. The position of the insolvency officeholder and creditors compared to shareholders

1.1 Voluntary administration

As indicated above, the object of the voluntary administration process is to maximise the chance of the company and its business continuing in existence, or if that cannot be achieved, to secure a better return to creditors *and members* than would result from an immediate liquidation of the company.

These statutory objects form the basis upon which the voluntary administrator (officeholder) undertakes the process. Importantly, it is to be noted that the objects contain an express reference to securing a better return to the members of the company, as well as creditors.

However, despite the express reference to members in the statutory objects, in practice shareholders are largely excluded from the voluntary administration process save for in circumstances where a transfer of their shares is proposed (see further in section 7 below). However, even though shareholders do not feature as part of the voluntary administration process, self-evidently if the outcome that is achieved does result in the company and its business continuing, then that has an obvious benefit to the company's shareholders also.

Having regard to the above matters, and notwithstanding the statutory objects, the voluntary administration process is ultimately one that takes place as between the voluntary administrator and the company's creditors.

1.2 Schemes of arrangement

A creditors' scheme of arrangement is not an insolvency proceeding and does not involve an insolvency officeholder. Rather, the scheme is propounded by the company itself.

When approval of the scheme is sought at the second court hearing, the court may appoint a person (usually a qualified insolvency practitioner) to administer the scheme. Whether and to what extent that task requires engagement with shareholders will depend on the terms of the particular scheme.

For the most part, creditors' scheme of arrangement will be conducted as between the company, its creditors whose debts are sought to be compromised by the proposed scheme and, ultimately, the court. On that basis, shareholders do not enjoy a position of significance as part of the process, other than as identified in what follows.

2. Shareholders' rights to be consulted and to receive information

2.1 Voluntary administration

There is no general requirement arising under statute, or under the common law, that requires a voluntary administrator to consult with shareholders in relation to the voluntary administration process.

In addition to the above, and in contrast to the rights of creditors, there is no obligation arising under statute or under the common law that requires a voluntary administrator to provide information about the voluntary administration process to shareholders.

Generally speaking, shareholders will also not receive notice of the meetings that take place in the course of the voluntary administration process.

Despite there being no general right to be consulted and receive information, that does not mean shareholders have no access to relevant information. Many of the documents issued to creditors by the voluntary administrator in the course of the voluntary administration process, including reports to creditors, notices of meeting, minutes of meetings and, ultimately, deeds of company arrangement are required to be lodged with the Australian Securities and Investments Commission (ASIC). As a result, these documents are publicly available and accessible to shareholders on payment of the prescribed fees.

In addition, it is worth noting that, in certain circumstances, stakeholder management can be a key ingredient to the success of a proposed restructuring. With that in mind, and despite the absence of any statutory or regulatory requirements per se, it is often the case in practice that voluntary administrators will communicate with shareholders and keep them informed of relevant developments.

In contrast to the general position outlined above, in circumstances where a shareholder is also a creditor of the company, a different disclosure regime applies. Section 563A of the Corporations Act identifies certain claims that are, by reason of that section, deemed to be "subordinated claims" as follows:

- a claim for a debt owed by the company to a person in the person's capacity as a member of the company (whether by way of dividends, profits or otherwise); or

- any other claim that arises from buying, holding, selling or otherwise dealing in shares in the company.

To the extent that a shareholder is a creditor of the company by reason of a subordinated claim within the meaning of section 563A of the Corporations Act, then notwithstanding the subordinated nature of those claims, section 600H of the Corporations Act entitles those shareholder creditors "to receive a copy of any notice, report or statement to creditors only if the person asks the administrator, the restructuring practitioner or liquidator of the company, in writing, for a copy of the notice, report or statement".

A shareholder who is a creditor of the company in voluntary administration by reason of a claim that is not a "subordinated claim" would be entitled to receive information in the capacity as a creditor in the same way any other creditor of the company would.

2.2 Schemes of arrangement

There are few, if any, rights that a shareholder has to be consulted, or to receive information in relation to, a creditors' scheme of arrangement.

Despite the above, it is worth noting that stakeholder management can be key to determining whether a restructuring by way of a scheme succeeds or not. On that basis, in practice, it will often be the case that the company proposing a scheme will communicate regularly with a number of its key stakeholders, including shareholders or other key creditors not impacted by the scheme. Therefore, shareholders can in some cases have a reasonable expectation of being provided with information. Whether this is required will depend upon the facts of each case.

Otherwise, as is the case with voluntary administration, many of the documents relating to a scheme of arrangement are lodged with ASIC and may be publicly available in exchange for payment of the applicable search fees.

A shareholder who is a creditor of the company proposing a scheme, and whose debt is to be compromised by the scheme, would be entitled to receive information in the capacity as a creditor in the same way any other creditor impacted by the scheme would.

3. The composition of classes involving shareholders in the context of a restructuring plan

3.1 Voluntary administration

Shareholders have no voting rights in a voluntary administration. The right to vote on the future of the company is reserved for creditors only.

For the purpose of voting, there is no mechanism for dividing creditors into classes. Creditors vote as one general body and their votes are weighted based on the dollar value of the debt they are owed via lodgement of proofs of debt.

The voting threshold of the general body of creditors is determined based on a majority in number *and* a majority in value. That is, a resolution is passed if both:

- more than half the number of creditors who are voting (in person or by proxy at the meeting) vote in favour of the resolution; and
- those creditors owed more than half of the total debt owed to creditors at the meeting vote in favour of the resolution.

If a majority in both number and value is not reached under a poll (deadlock), the chairperson has a casting vote.

3.2 Schemes of arrangement

Creditors' schemes of arrangement do not confer voting rights on shareholders.

The voting threshold for a creditors' scheme of arrangement is determined based on a majority of creditors who attend and vote at the meeting, and who represent at least 75% in value of the creditors voting on the proposed scheme.

If creditors are comprised of separate classes, then the same voting thresholds apply for each class of creditors and must be approved by each class. There is no mechanism for a cross-class cram down in Australian law.

As to the composition of classes of creditors generally, Australia has followed the test set out in *Sovereign Life Assurance Company v Dodd*.[2] The principle established in *Dodd* was cited with approval by Justice Gleeson in *Tiger Resources Limited*,[3] where Her Honour noted:

> *"The test for the constitution of classes in the context of a scheme of arrangement involves grouping together for the purposes of voting those persons "whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".*

[2] [1892] 2 QB 573 at 583.
[3] [2019] FCA 2186.

4. Shareholders' voting rights

4.1 Voluntary administration

Shareholders have no voting rights in a voluntary administration.

It is important to note that, if a resolution is passed at a creditors' meeting convened in connection with the voluntary administration of a company (such as a vote to approve a DOCA), and that resolution is passed with the support of a vote of a shareholder who is also a creditor (a related creditor), the court may, on the application of another creditor, make orders setting aside the resolution if:

1. The resolution would not have, in fact, passed had the vote of the "related creditor" not been counted; and

2. The court is satisfied that the resolution is either:

    a. contrary to the interests of the creditors as a group or of that class of creditors as a group; or

    b. has prejudiced, or is reasonably likely to prejudice, the interests of creditors who voted against the resolution.[4]

In contrast to the general position outlined above, in circumstances where a shareholder is also a creditor of the company, different voting rights arise. Section 563A of the Corporations Act identifies certain claims that are, by reason of that section, deemed to be "subordinated claims" as follows:

- a claim for a debt owed by the company to a person in the person's capacity as a member of the company (whether by way of dividends, profits or otherwise); or

- any other claim that arises from buying, holding, selling or otherwise dealing in shares in the company.

To the extent that a shareholder is a creditor of the company by reason of a subordinated claim within the meaning of section 563A of the Corporations Act, then notwithstanding the subordinated nature of those claims, section 600H entitles those shareholder creditors "to vote in their capacity as a creditor of the company, at a meeting during the external administration of the company, only if the court so orders."

The question of whether a court should grant a shareholder with a "subordinated claim" leave to vote at the second meeting of a voluntary administration was recently the subject of consideration in *EVP Opportunities Master Pty Ltd as trustee for the EVP Opportunities Master Fund v Strong Room Technology Pty Ltd (Administrators Appointed)*.[5] In making an order permitting the shareholder to vote at the relevant meeting, Justice Moore of the Federal Court of Australia adopted the approach previously taken by Justice Brereton in *SurfStitch Group Limited*,[6] noting as follows as to the relevant considerations for the court:

> *"Brereton J observed…. that the object of s 600H include reducing the costs and improving the efficacy of external administration, and that the rationale for excluding subordinate claimants from decision-making, unless the court otherwise orders, was*

4 Idem, Schedule 2, Insolvency Practice Schedule (Corporations) at paragraph 75-41.
5 [2025] FCA 594.
6 (2018) 124 ACSR 234.

that if they have no real financial interest, they should have no say in decision-making. His Honour observed … that it followed that a relevant consideration for the purpose of deciding whether an order should be made under s 600H entitling a subordinate claimant to vote, is whether the claimant might reasonably be considered to have a real financial interest in the external administration of the company. In that case, the view of the administrators was that it was likely that there would be a surplus in the liquidation. Brereton J held … that as there was likely to be a surplus, the subordinate claimants have a real financial interest in the administration, and accordingly there should be an order that subordinate claimants be entitled to vote."

In the circumstances, it can be inferred that if a shareholder can demonstrate a possibility of surplus funds being available to meet subordinated claims, thus indicating a sufficient interest in the matters to be decided at the creditors' meeting, a court may be prepared to make an order under section 600H of the Corporations Act permitting the shareholder to vote.

A shareholder who is a creditor of the company in voluntary administration by reason of a claim that is not a "subordinated claim" would be entitled to vote at a meeting convened in the course of the voluntary administration in the same way any other creditor of the company would be entitled to vote.

4.2 Schemes of arrangement

Creditors' schemes of arrangement do not confer voting rights on shareholders.

Again, as is the case with voluntary administration, it is important to note that if the requisite voting majority of creditors (within a class or otherwise) includes a shareholder who is also a creditor (a related creditor), the court may, on the application of another creditor, make certain orders setting aside any resolution that was passed if:

1. The resolution would not have, in fact, passed had the vote of the related creditor not been counted; and

2. The court is satisfied that the resolution is either:

    a. contrary to the interests of the creditors as a whole or of that class of creditors as a whole; or

    b. has prejudiced, or is reasonably likely to prejudice, the interests of creditors who voted against the resolution.[7]

In contrast to the general position outlined above, in circumstances where a shareholder is also a creditor of the company, and the debt owed to them is to be compromised by the proposed scheme, different voting rights arise.

As noted above, if a shareholder is a creditor of the company by reason of a subordinated claim within the meaning of section 563A of the Corporations Act, and that claim is to be compromised by the proposed scheme, section 600H of the Corporations Act entitles those shareholder creditors to vote in their capacity as a creditor of the company at a scheme meeting only if the court orders.

The circumstances in which a court may make an order permitting a shareholder with a subordinated claim to vote in relation to a proposed creditors' scheme of arrangement are considered above.

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[7] Corporations Act, section 415A.

A shareholder who is a creditor of the company by reason of a claim that is not a "subordinated claim" and that is sought to be compromised by the proposed scheme would be entitled to vote at a meeting convened in connection with the proposed scheme in the same way any other creditor.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

5.1 Voluntary administration

As noted above, the voluntary administration process does not confer any voting power on shareholders acting in that capacity. Accordingly, there is no power of veto reserved for shareholders in the voluntary administration process.

Even if a shareholder can participate in the voting process in the capacity as a creditor, as noted in section 4 above, the Corporations Act ensures that any outcome engineered or influenced by a "related creditor" remains open to challenge by an aggrieved creditor or creditors.

If the restructuring proposed via the voluntary administration process involves a transfer of shares, then, as set out below (see section 7 below), a shareholder can oppose or frustrate that process, but not in an unlimited way.

Specifically, a shareholder may refuse to provide consent to the transfer of their shares (if their consent is sought) or, if an application is made by the voluntary administrator for leave to transfer the shares, the shareholder may be heard in opposition to that application. If the shareholder can satisfy the court that the shares have a residual value, they may succeed in opposing leave to transfer the shares, thus preventing the transfer of their shares and frustrating the process.

5.2 Schemes of arrangement

Shareholders do not have voting rights in a creditors' scheme of arrangement. Accordingly, there is no power of veto reserved for shareholders in a creditors' scheme of arrangement.

Ultimately, a scheme requires the approval or sanction of the court before it can be implemented. On that basis, a shareholder who believes they would suffer prejudice if the scheme were to be approved and implemented may approach the court at the Second Hearing stage and seek to be heard in opposition to the approval being sought. It may also be open to a shareholder to seek to injunct the implementation of the scheme temporarily, and until such time as its opposition to the scheme can be heard and determined by the court.

The strength of a shareholder's opposition to the approval or implementation of a creditors' scheme of arrangement will depend on the factual circumstances of each case. Suffice to say, a shareholder seeking to oppose a scheme before the courts would likely face a significant evidentiary burden, the risk of an adverse costs order and, if injunctive relief is sought, an obligation to provide the court with an undertaking as to damages, which are all matters that may dissuade an aggrieved shareholder from pursuing such a course of action.

Shareholders who are also creditors of the company, and whose rights in the capacity of a creditor the scheme seeks to compromise, may be able to influence the outcome of the vote in the particular class to which they belong if the size of their debt (or debts) is large enough.

It is not uncommon for parties with large shareholdings to also hold substantial debt. With that in mind, and noting that the voting threshold (for each class) requires a majority of creditors in attendance and voting with at least 75% of the total debt to approve the scheme, shareholders

may be able to exert influence over the outcome, particularly in circumstances where there is no mechanism for a cross-class cram down under Australian law.

6. Measures for the cram down of shareholders

6.1 Voluntary administration

There are no measures contained in the Corporations Act for the cram down of shareholders in the context of a voluntary administration of an Australian company.

The only aspect of the voluntary administration process that is analogous to cram down arises in the context of an application to the court by the voluntary administrator for leave to transfer the shares in the company under administration in accordance with section 444G of the Corporations Act (see section 7 below).

6.2 Schemes of arrangement

A creditors' scheme of arrangement under Australian law cannot be used to cram down shareholders' rights. A creditors' scheme can only be used to compromise the claims of creditors.

To the extent a shareholder is also a creditor, they can have their claim as a creditor compromised via the scheme in the same way that any other creditors, or classes of creditors, can have their claims compromised.

There is otherwise no mechanism for cross-class cram down under Australian law.

7. Debt-for-equity swap and consent of shareholders

7.1 Voluntary administration

In a voluntary administration, a DOCA may be proposed to facilitate the sale of the company by way of a transfer of its shares, or to facilitate a debt-for-equity swap.

Specifically in this regard, section 444GA of the Corporations Act permits the administrator of a DOCA to transfer shares with the consent of the relevant shareholders, or in the absence of that consent with the leave of the court.

In the case of private companies where the shareholding is typically more narrowly held, it may be possible for the voluntary administrator to secure the consent of the relevant shareholders to the transfer of their shares to facilitate the proposed transfer of shares if those shareholders can be convinced their shares have no residual value in circumstances where the alternative to consenting would be the insolvent liquidation of the company.

On the other hand, in circumstances where the shareholding of a company is more widely held, or in the case of publicly listed Australian companies, it is practically impossible to secure the written consent of all shareholders to the transfer of their shares. In those circumstances, a voluntary administrator is more likely to seek leave from the court to the transfer the shares.

If leave of the court is sought, section 444GA(3) of the Corporations Act provides that a court may only grant leave if it is satisfied that the transfer "would not unfairly prejudice the interests of members of the company". In applying this test, Australian courts have taken a consistent

approach, succinctly summarised by Justice Jagot in *Cussen, Re Big Un Ltd*,[8] where Her Honour observed:

> *"The test involves unfair prejudice to the interests of the shareholders. Further, in order to determine this, the court must consider whether there is any residual value in the company as the issue involves comparing the circumstances in the event of a transfer of shares with the circumstances which would prevail in a liquidation."*

Similarly, in *Re Openpay Group Ltd*,[9] Justice Black summarised the relevant considerations as follows:

> *"Conversely, it is difficult to see how shareholders could be prejudiced by the transfer of their shares in the absence of any residual value or equity in the company … The case law also seems to me to establish that there would not ordinarily be any prejudice, or no prejudice that has the requisite quality of 'unfairness', if the shares to be transferred have no value and there would be no distribution in the event of a liquidation which is the only realistic alternative to the proposed transfer."*

In the event of an application to the court for leave to transfer shares pursuant to section 444GA of the Corporations Act, shareholders have a right to appear and make submissions on the question of whether the proposed transfer would unfairly prejudice their interests. In light of the approach taken by the courts, those submissions will need to be directed to the question of whether there is any residual value in the shares.

In addition to the above, there are further statutory and regulatory requirements that are directed to the rights and interests of shareholders in the context of a proposed transfer of their shares as part of a DOCA. These requirements are engaged in circumstances where the application for leave to transfer concerns shares held in a publicly listed company, or an unlisted company with more than 50 shareholders.

Relevantly, section 606 of the Corporations Act prohibits a person from acquiring or increasing their voting interest in a company above 20% of the total voting rights in the company (Takeover Provisions).

Although the Corporations Act contains certain exceptions to this prohibition,[10] the transfer of shares via a DOCA is not one of them. It is however possible to seek an exemption from compliance with the Takeover Provisions from ASIC. Accordingly, in addition to seeking the court's leave to transfer the shares, it will be necessary for the proposed acquirer of the shares to seek an exemption from ASIC to the proposed transfer of the shares where the 20% threshold would be exceeded.

The process of seeking the required exemption from ASIC operates in conjunction with the application to the court for leave to transfer the shares. Importantly for shareholders, "ASIC Regulatory Guide 6 – Takeovers: Exceptions to the General Prohibition" requires the application for exemption from compliance with the Takeover Provisions to demonstrate that shareholders have been provided with both of the following at least 14 days before the hearing at which the court will consider whether to grant leave to transfer the shares pursuant to section 444GA of the Corporations Act:

1. A report by an independent expert that concludes the shareholders have no residual equity in the company; and

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8 [2019] FCA 1162 at [5].
9 [2024] NSWSC 789 at [21].
10 Corporations Act, section 611.

2. An explanatory memorandum that:

    a. explains the nature of the application for leave of the court pursuant to section 444GA;

    b. explains shareholders' rights to object;

    c. explains the requirement for ASIC relief from the operation of the takeover provisions of the Corporations Act – that is, section 606;

    d. includes a copy or link to the independent expert report; and

    e. includes a copy of the originating process and other documents filed with the court initiating the application under section 444GA for leave to transfer the shares.

Subject to the above, and the court granting the leave, the ASIC exemption from compliance with the Takeover Provisions will be provided, thereby facilitating the transfer of shares.

7.2 Schemes of arrangement

A debt-for-equity swap is a common feature of creditors' schemes of arrangement under the Corporations Act. Typically, this is achieved through the issue of shares in consideration for the release of the debt, diluting existing shareholders' interests.

Despite the above, a debt for-equity swap via a creditors' scheme of arrangement does not require shareholder consent. Importantly, even though a proposed debt-for-equity swap undertaken via a creditors' scheme may breach the Takeover Provisions (as defined above), the acquisition of the relevant interest in shares that would have otherwise breached the general prohibition threshold is given specific exemption under item 17 of the table in section 611 of the Corporations Act.

In the circumstances, and unlike the case of a transfer of shares undertaken in voluntary administration, no application for an exemption is required to be made to ASIC.

Ultimately, a scheme that is intended to implement a debt-for-equity swap needs to be approved by the court before it can be implemented. On that basis, a shareholder who believes they would suffer prejudice if the scheme were to be approved by the court and implemented may have to approach the court and seek to be heard, or otherwise seek to injunct the implementation of the scheme.

BRAZIL

Introduction

The restructuring of financially troubled companies is a highly relevant topic in the Brazilian legal and economic landscape.

In 2025, Brazil marked a historic record for companies undergoing judicial reorganisation: according to Serasa Experian, there were 977 proceedings involving 2,466 companies, representing a 5.5% increase in the number of proceedings and a 13% rise in the total number of companies compared to 2024, reaching the highest level since 2016. The main sectors affected were agribusiness and services, followed by commerce and industry. The agribusiness sector specifically had 743 filings, accounting for 30.1% of the total number of companies.

Federal Law No. 11,101/2005, commonly referred to as the Brazilian Reorganisation and Bankruptcy Law, sets forth a structured framework for addressing insolvency via three primary proceedings: judicial reorganisation, extrajudicial reorganisation and forced liquidation / bankruptcy, apart from preliminary precautionary measures also provided by law.

The overarching goal of both judicial and extrajudicial reorganisations is to facilitate the restructuring of viable companies while effectively managing their debts, thereby preserving business operations and safeguarding jobs.

There are, however, some major differences between both proceedings. While extrajudicial reorganisation is essentially a judicial ratification of a plan previously negotiated with creditors, judicial reorganisation is a more complex, costly and time-consuming process that involves a judicially supervised negotiation of a reorganisation plan, with supervision of activities by a judicial administrator and the court, and that may result in liquidation.

In contrast, liquidation procedures are applied when a company is deemed non-viable, leading to the removal of the debtor from management and the appointment of a judicial administrator to gather, appraise and sell the company's assets, ensuring that creditors are paid in accordance with established legal priorities.

1. The position of the insolvency officeholder and creditors compared to shareholders

The Brazilian Reorganisation and Bankruptcy Law contains only a few provisions regulating the role of shareholders. The request for judicial reorganisation by a company must be approved or ratified by shareholders. Only in urgent cases can the filing be authorised by the controlling shareholder, subject to subsequent approval by the general meeting.

In the Brazilian judicial reorganisation regime, which is currently the main restructuring proceeding in Brazil, the debtor-in-possession model generally applies: the management elected by the shareholders remains in office (apart from exceptional legal cases of removal) and shareholders retain all their corporate rights, with some exceptions, such as the right to receive dividends. The judicial administrator performs a supervisory and auxiliary role to the court; they do not replace corporate management nor deliberate on behalf of the shareholders.

Creditors deliberate on the restructuring plan at the general creditors' meeting, but they are not owners of the company or its assets. They cannot, by themselves, override essential rights of shareholders or interfere with the exclusive competencies of corporate bodies. Any powers of influence (such as vetoes on certain actions or participation in the choice of managers) depend on compatibility with the Brazilian Civil Code / Corporations Law, through statutory amendments approved by the shareholders themselves. The reorganisation plan may provide for some measures that may impact on shareholders, but the plan, as a general rule, is proposed by the company after internal approval by shareholders.

Despite this, case law, in concrete situations, has at times favoured the effectiveness of the plan and the principle of business preservation, mitigating the effectiveness of assembly acts or control practices that hinder the execution of the plan. However, the prevailing doctrine denies any "absolute sovereignty" of creditors over corporate bodies and reinforces the non-existence of hierarchy between the Brazilian Reorganisation and Bankruptcy Law and the Brazilian Civil Code / Corporations Law: concurrent measures must comply with corporate legislation.

The judicial administrator plays a fundamental role in a judicial reorganisation and in bankruptcy proceedings. Appointed by the judge, the judicial administrator is responsible for overseeing the process and managing the interests of creditors and the company itself. Their duties include analysing company documentation, assessing the feasibility of the reorganisation plan and coordinating the creditors' meeting.

The judicial administrator must act impartially and ensure transparency, guaranteeing that all stakeholders have access to relevant information. Their role becomes even more critical in bankruptcy situations, where the liquidation of the company's assets needs to be conducted efficiently to maximise returns for creditors.

As mentioned, during judicial reorganisation, the management of the company remains with the managers who held their position before the start of the process. This continuity is essential for the preservation of the company and the promotion of its restructuring, allowing administrators to make strategic decisions that may improve the financial health of the company. The administrator may be a shareholder, but their main role is to act in the best interests of the company and its creditors.

The judicial administrator, in turn, does not have management power over the company except in situations specified by law. The judicial administrator acts as a supervisor of the reorganisation process, overseeing the execution of the reorganisation plan and verifying whether the company is fulfilling its obligations.

Except in specific situations of removal, the judicial administrator cannot interfere in the daily management of the company. The removal of managers by the courts can occur, for example, in cases of conviction for bankruptcy crime, mismanagement or acts that compromise the reorganisation of the company, or fraud against the interests of creditors. In such cases, the judge may determine that the administrators be removed, and the judicial administrator may take over the management or appoint a manager to run the company during the reorganisation process until new management is elected by creditors.

In a bankruptcy scenario, the situation is different. Bankruptcy entails a complete removal of the company's administrators, who are stripped of management power. The judicial administrator takes over the management of the bankrupt estate and decides on the necessary procedures for the liquidation of the company's assets.

In this context, continued bankruptcy is a possibility that may occur, where instead of immediately liquidating all assets, the judicial administrator may choose to maintain the operation of the company, selling assets one by one, or even restructuring if this is viable and advantageous for creditors.

Creditors have a central role in the judicial reorganisation process, as they are the primary stakeholders interested in debt restructuring and the preservation of the company. During the proceeding, they have the right to approve or reject the reorganisation plan presented by the company. Their participation in assemblies is vital, as their decisions can determine the survival or failure of the business. If the reorganisation plan is rejected by creditors, and the requirements for cram down are not verified, the forced liquidation shall be decreed.

In the event of bankruptcy, creditors find themselves in a more vulnerable position, as the priority of repayment is determined by the classification of debts. Those with secured claims take precedence, followed by unsecured creditors and, finally, shareholders, who often receive no compensation in the liquidation of the bankrupt estate.

2. Shareholders' rights to be consulted and to receive information

As mentioned, the management of the company, in a judicial reorganisation scenario, is maintained and shareholders retain their corporate rights. However, shareholders are not parties in the judicial reorganisation and also do not vote on the reorganisation plan in the creditors' assembly, even if they are creditors, as stipulated by article 43 of the Brazilian Reorganisation and Bankruptcy Law. According to that article, shareholders, as well as related parties with close links to the debtor, may participate in the general meeting of creditors without the right to vote and will not be considered for the purpose of verifying the quorum for installation and deliberation.

However, shareholders fully retain their corporate rights, such as the right to participate and vote in shareholders' meetings and to receive information in accordance with the Corporations Law and, in publicly traded companies, according to the information regime of the Securities and Exchange Commission.

Furthermore, shareholders' meetings must be convened and shareholders must deliberate whenever the implementation of the plan depends on matters that fall under the jurisdiction of the assembly or the board, such as corporate reorganisations, the issuance of debentures, statutory amendments, capital increases and the election of administrators.

However, the Brazilian Reorganisation and Bankruptcy Law does not create a specific "right of consultation" for shareholders in the bankruptcy process. Rather, their intervention occurs through corporate channels when the plan addresses subjects governed by the Brazilian Civil Code / Corporations Law. Also, the judicial reorganisation request itself requires corporate approval according to the debtor company's by-laws, even if presented by management as an urgent measure.

Shareholders have the right to be informed about the company's status and the reorganisation proceedings – see Federal Law No. 11,101/2005.

After filing of the judicial reorganisation request, article 53 of the Brazilian Restructuring and Bankruptcy Law establishes that the debtor must present a reorganisation plan that includes clear and detailed information about the company's situation and the means for recovery. Although consulting shareholders is not mandatory, transparency is essential for maintaining trust and the value of shares in the market.

Therefore, especially in cases where debt-for-equity swaps are being considered, shareholder approval is an aspect that can become a significant point of discussion. To date, the prevailing interpretation is that it is the responsibility of the reorganisation court to decide on these matters, taking into account, among other aspects:

(i) the specific conflict presented;

(ii) the motivations of the shareholders in their actions; and

(iii) the profile of the control structure of the company undergoing reorganisation.

In this context, section II of article 50 explicitly states that the means for reorganisation must comply with "the relevant legislation in each case" and "the rights of shareholders, as per current legislation."

Beyond the explicit legal provisions, the protection of shareholder interests transcends private interests and is inherently a matter of public interest, given that safeguarding the stock market, an alternative source of financing, is crucial for Brazil's economic development.

Therefore, the importance of investigating potential conflicts between bankruptcy proceedings and corporate legislation is undeniable. Furthermore, several reorganisation methods outlined in article 50 correspond to measures that impact shareholder interests and, according to corporate law, require their approval.

Additionally, many corporate measures considered to be judicial reorganisation methods may be influenced by what is agreed upon in shareholder agreements, which are enforceable against third parties and can be the subject of specific execution under corporate law.

3. The composition of classes involving shareholders in the context of a restructuring plan

One of the challenges in restructuring is the definition of classes of creditors and shareholders. The Brazilian Reorganisation and Bankruptcy Law and case law allow – for restructuring and payment of credits purposes – the formation of creditor classes based on similarity of interests, but including shareholders in these classes can lead to controversies.

In Brazil, the formation of classes is specifically meant for creditors, not shareholders. A shareholder, if also a creditor, may be included in one of the classes, but without voting rights, as mentioned. Consequently, shareholders do not vote as a class; their influence instead arises through necessary corporate resolutions when the plan requires acts within the competence of the assembly or board.

In judicial reorganisations, creditors are categorised into four distinct classes for voting purposes:

(i) Class I – labour creditors;

(ii) Class II – secured creditors;

(iii) Class III – unsecured creditors; and

(iv) Class IV – micro and small business creditors.

These classes facilitate the calculation of majorities by headcount and by value, enabling cram downs both intra-class and inter-class.

Any differentiation of classes for payment purposes must have an objective and rational basis (e.g. supporting creditors who provide new resources, offer longer grace periods or accept additional risks), thus avoiding unjustified discrimination. The creation of subclasses is only applicable for the provisions of payment under the reorganisation plan, not for voting at the creditors' meeting. Case law has accepted tailored solutions as long as the principle of *par condition creditorum* is preserved: creditors in equivalent situations cannot receive arbitrarily unequal treatment.

Shareholders that are also creditors usually are considered subordinated creditors in the plan, since including shareholders may lead to rejection of the plan by creditors. However, it is important to mention that there is no "absolute priority rule" in judicial reorganisation in Brazil – i.e. there is no specific legal provision determining that only after all other creditors' claims have been settled can shareholders receive their credits.

Generally, the approval of the plan requires majority support from the creditors present, with voting rules differing among classes. Labour and micro / small business creditors are counted by headcount,

while secured and unsecured creditors vote based on both headcount and claim amounts. Shareholders, affiliated companies and certain designated entities are excluded from voting on the creditors' plan.

In bankruptcy proceedings, creditors are classified into the following categories:

(i) Labour-related credits, capped at 150 minimum wages per creditor, and credits deriving from occupational accidents.

(ii) Credits with secured interest, up to the value of the collateral.

(iii) Tax credits, regardless of their nature and the time of constitution.

(iv) Unsecured credits:

  (a) credits not provided for in other categories;

  (b) balances of credits not settled with the proceeds from disposal of the assets offered as collateral thereof; and

  (c) balances of labour-related credits that exceed the limit established in item (i) above.

(v) Contractual penalties and fines for breach of criminal or administrative laws, including tax-related fines.

(vi) Subordinated credits:

  (a) those so provided for by law or contract; and

  (b) credits of shareholders and administrators without an employment relationship, and with terms and provisions outside of market practices.

(vii) Interest accrued after the bankruptcy decree.

Regarding the subordination of shareholder credits in bankruptcy, the rule is that credits from the shareholders as a financier / insider (for example, loans / advances made by the shareholder to the company) tend to be classified as subordinated, if not under market conditions. The rationale is to prevent shareholders who participate in residual risk through equity from "repackaging" that risk as parity debt with external creditors.

There are exceptions based on the nature of the credit: labour credit from a shareholder with an effective employment relationship (and not simulated) retains its priority labour nature, not subordination. Credits from the shareholder that arise from an autonomous and typical relationship, legally distinct from the corporate condition (for example, a real lease agreement with guarantees and market compensation, or supply agreements with documentation backing and market price), can be classified according to their intrinsic nature, provided they do not serve as instruments to circumvent subordination. In controversies, it is common to scrutinise "insider re-characterisation" to prevent fraud against the payment order.

A valid real guarantee established before the legal term, without fraud, theoretically preserves real preference concerning the encumbered property. Nevertheless, transactions with related parties undergo rigorous examination of validity, price and timing, with a risk of requalification or ineffectiveness if they are found to circumvent parity.

It is possible for securities (for example, debentures) to be voluntarily subordinated by a clause of the issuance itself. This conventional subordination should not be confused with the legal subordination of "shareholder credit" but both coexist: a debenture holder can be subordinated by contract, while shareholder credit, typical of an insider loan, is subordinated by law.

Some argue that legal subordination affects credits from the shareholder "in the capacity of a shareholder", which opens the door to recognising, on a case-by-case basis, shareholder credits with a different nature (such as genuine labour credits) outside of the subordination scheme. There are also proposals for additional controls (e.g. a specific "suspicious" period for shareholder debt) to curb opportunistic behaviour of reclassifying equity as debt on the eve of a crisis.

In summary, it is not correct to say that "any and all" credit from the shareholder in bankruptcy is automatically subordinated. The rule primarily applies to typical insider financing credits and those specified by law. However, credits from the shareholder with a distinct and legitimate legal nature may retain their own regime, as long as they do not involve simulation, fraud or instruments to circumvent the hierarchy.

4. Shareholders' voting rights

As already mentioned, shareholders do not vote on the plan at the creditors' meeting, even if they are also creditors. Rather, they vote in shareholder assemblies on matters within their exclusive competence, including: corporate reorganisations (spin-offs, mergers, consolidations, transformations); statutory amendments (structure of governing bodies, separate elections, creation of positions, shared management); the issuance of debentures (and, if convertible, with respect to the right of first refusal); capital increases in the case of conversion of debt into equity (by the assembly or by the board, if there is authorised capital), with attention to the right of first refusal and the prohibition of unjustified dilution; and the election and removal of directors according to the Corporations Law. They maintain essential rights (such as preferential subscription rights) and, in legal cases, the right to withdraw.

In recently decided cases, Brazilian courts have addressed such disputes and tended to protect the decisions made by the company undergoing reorganisation and / or the group of creditors in accordance with the prevailing interest in the judicial reorganisation process.

An example of this scenario is the judicial reorganisation of Grupo Renuka, particularly the appeal filed as an interlocutory appeal. This appeal addressed the decision made by the reorganisation court, which waived the requirement for a favourable vote from the minority shareholder for the capital increase outlined in the company's reorganisation plan.

In this instance, the Court of Justice of the State of São Paulo (TJSP) upheld the first-instance decision, arguing that there was an abuse of the minority shareholder's position, as well as a conflict between their actions and the overall interests of the company. According to the TJSP, it was legitimate to dispense with the minority shareholder's approval for the capital increase, as well as the accompanying arbitration clause, given that the capital increase through the major shareholder's contribution was compatible with the company's financial condition, and thus would not result in unjustified dilution.

The TJSP prioritised the rules of the reorganisation plan and their application to corporate matters, stating that the decision to increase capital was "the solution found by the company to overcome the crisis," supported by well-founded economic and social justifications from Grupo Renuka, while the minority shareholders were perceived as merely defending their own interests.

Another relevant case is the judicial reorganisation of Grupo Daslu, where minority shareholders sought to challenge, via an interlocutory appeal, the decision that granted judicial reorganisation.

The Superior Court of Justice (STJ) affirmed the TJSP's decision, which ruled that the shareholders did not have the right to contest the approval of the judicial reorganisation plan that stemmed from the agreement reached in a creditors' general assembly. The TJSP noted that the minority shareholders' interests "did not outweigh the principle of company preservation and its social function," nor the collective interests of the creditors.

The minority shareholders contended that the effectiveness of the reorganisation plan was contingent upon the approval of the shareholders, in accordance with a memorandum of understanding they had established. Furthermore, they asserted that a shareholders' agreement existed, granting them rights to participate in new business ventures undertaken by the company. From this perspective, they argued that they had grounds to veto the reorganisation plan, as: (i) their approval would be a condition for the effectiveness of the plan; and (ii) the plan included the formation of a new entity that would receive assets from Grupo Daslu, including the aforementioned brand, without clarifying how the rights of minority shareholders would be respected.

Both the first-instance court, as well as the TJSP and the STJ, understood that these arguments would not hinder the approval of the plan. The TJSP also asserted that, being corporate matters, they should be resolved in a separate and autonomous process, rather than within the framework of judicial reorganisation.

Lastly, one of the most significant cases on this issue was the positive conflict of jurisdiction arising from the judicial reorganisation of Grupo OI, which involved the 7th Business Court of the Capital District of the State of Rio de Janeiro and the Arbitral Tribunal of the São Paulo Stock Exchange Arbitration Chamber.

In summary, minority shareholders attempted to contest the approved reorganisation plan, asserting that it included a capital increase through the conversion of Grupo OI's debts into shares, the approval of which should have been submitted to the board of directors of OI S.A.

Additionally, they convened an extraordinary general meeting, resulting in the removal of part of the board of directors of Grupo OI S/A and the approval of a liability action against two directors, including the president. In light of these actions, OI S.A. filed a request with the reorganisation court to suspend the effects of the extraordinary general meeting resolution, which was swiftly granted.

However, minority shareholder Bratel BV, grounded in the by-laws of OI S.A., initiated arbitration proceedings to dispute the measures outlined in the reorganisation plan, a request that was initially accepted by the arbitral tribunal. Consequently, OI S.A. raised a positive conflict of jurisdiction in the Superior Court of Justice, seeking to suspend the arbitral tribunal's decision and affirm the jurisdiction of the 7th Court of Rio de Janeiro.

The reporting minister decided to provisionally suspend the arbitral tribunal's decision, recognising the jurisdiction of the 7th Court of Rio de Janeiro to address matters related to judicial reorganisation and other urgent measures, in order to protect the interests and assets of the company undergoing reorganisation.

With the examination of the aforementioned cases, it is evident that during judicial reorganisation processes, both at the time of filing the request and during discussions regarding reorganisation measures, conflicts may arise between corporate legislation and the Brazilian Judicial Reorganisation and Bankruptcy Law.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Shareholders may attempt to thwart a restructuring effort by exercising their veto power, particularly when their shares are at risk of devaluation or when restructuring proposals do not align with their personal interests. This resistance can manifest in various ways, including voting against crucial measures such as capital increases, corporate reorganisations, statutory amendments or necessary issuances aimed at implementing the restructuring plan.

Additionally, shareholders may leverage shareholder agreements that contain veto clauses or establish reinforced quorums, making it more difficult to achieve the necessary approvals. They might also replace directors or initiate litigation measures aimed at obstructing the plan's execution. Furthermore, shareholders can amplify their influence by mobilising corporate controversies, including pursuing arbitration when a statutory clause permits such action and undertaking legal actions designed to complicate or hinder the implementation of the restructuring acts.

The potential for shareholder resistance poses a critical challenge, as it can result in deadlocks during negotiations and impede the progress of restructuring efforts. Understanding and addressing these dynamics is essential for ensuring a smooth and effective restructuring process.

6. Measures for the cram down of shareholders

In the context of judicial reorganisation, the imposition of conditions on shareholders must be carefully structured to balance the effectiveness of the plan with the preservation of the exclusive competencies of corporate bodies and the essential rights provided for in corporate law.

A solid approach involves utilising contractual and corporate instruments that, without replacing decisions made by the shareholder assembly or legal responsibilities of the board of directors and management, create sufficient incentives and penalties to align behaviours with the goals of the plan.

A primary focus is the inclusion in the plan itself of covenants and binding conditions, the breach of which would lead to early maturity of obligations, liquidity restrictions, operational limitations or other legitimate contractual effects.

These covenants may pertain to aspects of plan execution, transparency, indebtedness, significant divestments or transactions with related parties – always with the caveat that creditors do not make corporate decisions or exercise powers reserved to the internal bodies under the Corporations Law. Here, the consequence is patrimonial and contractual, rather than a direct imposition of the creditors' will upon the corporate body.

A second focus involves governance adjustments negotiated and implemented through corporate mechanisms. Measures such as establishing a specific restructuring position with defined responsibilities, providing for separate elections of directors, granting veto powers over certain management matters or implementing shared management models can be designed and codified through statutory amendments approved by shareholders while respecting the quorums and the hierarchy of competencies established by the Corporations Law.

In this way, creditors can influence the formation of a governance structure capable of executing the plan swiftly and coherently. However, legitimacy arises from the corporate decision-making which internalises the new power structure in the company's articles of association and governing bodies. The most successful cases in the country have involved agreements supporting the plan that tie commitments to convene assemblies, the composition of the board, the election of directors and the delineation of prerogatives – all reflected in valid corporate acts.

In extreme situations, judicial oversight of abuses or acts that demonstrably hinder the plan's execution is accepted. This oversight is exceptional, justified and does not confer unlimited powers to the bankruptcy court to override assembly decisions or redesign the power structure as laid out in the Corporations Law.

Targeted intervention may mandate the performance of acts necessary for the implementation of the plan, restrain contradictory resolutions concerning approved measures or prevent actions that improperly frustrate the process. However, it does not authorise the wholesale transfer of competencies from corporate bodies to creditors or to the court. The paradigm remains debtor-in-possession, emphasising management's accountability and the respect for internal decision-making processes.

Regarding shareholder agreements, their enforceability is maintained within the limits of the Corporations Law. There is no general rule that "disengages" voting conventions, acquisition preferences or governance clauses simply due to the existence of a judicial reorganisation process, provided they are filed and registered. The compatibility is assessed on a case-by-case basis, considering the social interest, good faith and legal limitations of the instrument itself. Furthermore, the prevailing doctrine rejects the generalised substitution of assembly will by the bankruptcy court.

The Brazilian Reorganisation and Bankruptcy Law does not remove the exclusive competencies of the shareholder assembly, the board of directors or management, nor does it grant creditors management powers without the corresponding assumption of corporate duties and responsibilities. When there are no corporate approvals for essential measures – such as corporate reorganisations, capital increases or debt-for-equity conversions – the typical solutions are: deliberative re-engagement, adjustments to design and incentives; modulation of plan clauses to ensure compatibility with company law; or, as a last resort, conversion to bankruptcy when the deadlock reveals impracticality and where a liquidation solution better preserves the stakeholders' and creditors' interests.

It is not presumed that every opposing vote from a shareholder is abusive. The assessment must be concrete, considering social interest and economic-financial viability.

From a comparative perspective, European Directive 2019/1023 allows Member States to create mechanisms to prevent abusive shareholder blocking. Among the instruments included are the temporary derogation, in justified situations, from the obligation to convene a meeting and from the right of first refusal in capital increases related to debt conversion into shares, aiming to avoid the opportunistic use of corporate prerogatives that undermine viable plans. The logic is to equip the system with a mechanism to overcome hold-outs, whether by excluding shareholders from voting on the plan under specific conditions or by including them in their own classes with cram down rules based on assessment criteria and priority.

Italy has gone beyond the confines of the Directive by broadly shifting powers to management during crisis processes and allowing for the formation of classes of shareholders to vote on the plan, along with judicial confirmation mechanisms that reduce the centrality of the traditional general assembly. This is an intrusive design not replicated by Brazil, which still requires adherence to applicable legislation governing each reorganisation method while preserving quorums, essential rights (such as preferences and withdrawal rights, where applicable) and statutory competencies. In this context, imposing conditions on shareholders in Brazil must operate through valid contractual and corporate instruments, punctuated by control over abuses and compatible governance designs, and avoiding shortcuts that might undermine legal certainty, investment protection and the balance between equity and debt.

It should be noted that this differs from the "cram down" applied to creditors, in which the plan can be approved if it meets specific criteria: support from at least two of the four classes of

creditors, approval by a majority of creditors present based on the number of credits, and support from one third of dissenting creditors. If the plan is accepted, the court assesses its legality and grants approval, resulting in the novation of all credits subject to judicial reorganisation.

7. Debt-for-equity-swap and consent of shareholders

In Brazil, the conversion of debt into equity is a means of restructuring provided for in the Brazilian Reorganisation and Bankruptcy Law, but its implementation must adhere to the Corporations Law and require previous and proper corporate approvals.

Some of the most usual scenarios in which existing shareholders may be diluted or even receive shares of another company due to a corporate reorganisation are:

- **Dilution of equity interest:** it is possible – and very usual – for the judicial reorganisation plan to provide for credits' capitalisation in the debtor company, which may result in the dilution of the existing shareholders. It is important to highlight that, as mentioned above, existing shareholders will have pre-emptive (or priority) rights. The Brazilian Bankruptcy and Reorganisation Law also provides that, if a plan presented by creditors contemplates the capitalisation of credits, shareholders of the debtor company are entitled to withdrawal rights (see article 56, paragraph 7).

- **Replacement (total or partial) of equity interest:** shareholders' interests may be replaced by shares / quotas of another company in the event of a corporate reorganisation (spin-off, merger or merger of shares) involving the debtor company as the merged company or subject to a spin-off.

In these scenarios, a shareholder could

(i) agree with the transaction and its shares would be substituted by the other company's shares;

(ii) disagree with the transaction and exercise withdrawal rights, leaving the company and receiving the redemption value; or

(iii) disagree with the transaction, but decide not to withdraw the company.

The redemption value per share shall correspond to not less than the book value per share (see article 45, paragraph 1 of the Brazilian Corporation Law).

Notwithstanding the dilution scenarios above, there is no legal mechanism under Brazilian law to squeeze out current shareholders as a consequence of a judicial reorganisation. The only scenario in which a compulsory redemption of equity interests is permitted under the Brazilian Corporation Law is the squeeze-out procedure set forth in article 4, paragraph 5. Such redemption is authorised in case of a successful delisting tender offer, after which less than 5% of the total shares issued by the company remain outstanding.

Furthermore, article 50, XVIII, of the Brazilian Bankruptcy and Reorganisation Law provides for the sale of the entire debtor as a means of judicial reorganisation. Legal scholars are divided on the interpretation of the term "sale of the entire debtor": for some, it refers to the sale of 100% of the shares or quotas issued by the debtor; for others, it refers to the sale of all of the debtor's assets as an isolated production unit (UPI).

In all the scenarios above, the applicable rules on approval authority must be complied with. The prevailing legal doctrine and market practice confirm the understanding that the judicial reorganisation regime does not imply non-compliance with corporate governance rules.

In the Oi S.A. judicial reorganisation case, despite discussions on the matter by the judicial reorganisation court, the Brazilian Superior Court of Justice (STJ) ruled that "the deliberations of the creditors' meeting – despite its sovereignty – are subject to the validity requirements of legal acts in general" and that article 50, II, of the Brazilian Bankruptcy and Reorganisation Law is "emphatic in providing that, in corporate transactions, the rights of shareholders must be respected, in accordance with applicable law".

In summary, the increase in capital and issuance of shares require corporate deliberation (by a general meeting or board, depending on the by-laws and authorised capital). The pre-emptive rights of shareholders must be respected, alongside the prohibition of unjustified dilution and the justified determination of the issuance price. In publicly held companies, the rules and oversight of the CVM (Securities and Exchange Commission) apply, and there may also be competitive or sectoral regulatory conditions. The right of withdrawal must also be respected, when applicable.

Not only it is a reorganisation possibility provided for by section 50 of the Brazilian Bankruptcy and Reorganisation Law, but also court rulings have accepted conversion for creditors, provided it does not entail forced association. The general requirement is to offer an alternative of cash payment or the immediate ability to dispose of the received shares.

Regarding shareholder consent, the prevailing position is that, even in a creditors' alternative plan – a possibility provided after the alterations implemented by Law 14.112/2020 – conversion that implies an increase in capital requires corporate approvals and respect for essential rights (pre-emption, withdrawal, price, etc), without providing for a specific proceeding for appraisal in the case of withdrawal, for example.

There is a divergent position in the doctrine advocating that, in an alternative plan, certain approvals could be waived, substituted by bankruptcy safeguards (e.g. withdrawal rights and a no-worse-off rule concerning bankruptcy). However, as noted, the Brazilian Reorganisation and Bankruptcy Law does not supersede the Corporations Law and corporate compliance remains necessary.

Additionally, when the conversion results in a change of control as outlined in an alternative plan, the Bankruptcy and Judicial Reorganisation Law grants the withdrawal right as a safety valve for the shareholder harmed by the change of control, but it does not waive (nor could it waive, according to the prevailing position) the deliberative formalities imposed by corporate legislation for the operation to be carried out. This is a safeguard that prevents creditors or the bankruptcy court from supplanting the exclusive competence of the corporate bodies, preserving the debtor-in-possession model and the balance between the insolvency regime and corporate law.

8. Conclusions and proposals for legislative reform

The Brazilian experience has shown a structural tension between the bankruptcy regime and corporate law when the reorganisation plan, whether proposed by the debtor or an alternative plan by creditors, includes measures that directly affect shareholders' rights.

The literal wording of the Brazilian Reorganisation and Bankruptcy Law, especially article 50, caput and item II, requires adherence to applicable corporate legislation and respect for the rights of shareholders, without establishing a rule that gives preference to bankruptcy rules over the Corporations Law.

This legislative choice preserves the exclusive powers of corporate bodies, essential rights such as pre-emption, withdrawal and the prohibition of unjustified dilution, as well as the property rights of shareholders. However, case law has, in various instances, relaxed such rights in light of the principle of business preservation, particularly when faced with obstacles in implementing the plan approved by creditors.

There are no clear normative parameters in the current legal framework to curb the abusive exercise of corporate rights by shareholders in a recovery context, whereas the Brazilian Reorganisation and Bankruptcy Law has expressly regulated the abuse of creditor voting (article 39, § 6). This asymmetry creates regulatory uncertainty and encourages litigation regarding the necessity and extent of corporate approvals, with potentially negative impacts on the cost of capital, investment protection and the effectiveness of rehabilitation processes.

Regarding creditors' alternative plan, article 56, § 6 imposes relevant limits: the proposal cannot create new obligations for the shareholders, must observe a detailed description of the means and applicable legislation and must ensure that the situation of shareholders is not worse than in bankruptcy. Still, grey areas remain regarding the conversion of debt into equity, changes in control, changes in management and corporate reorganisations when disconnected from the decisions required by the Corporations Law. Also, if it provides for debt-for-equity conversion, the withdrawal right is expressly maintained.

Comparative analysis indicates that EU Directive 2019/1023 offers two paths to address shareholder hold-outs: exclude shareholders from voting, conditioning this on safeguards against abuse, or include them in classes subject to cram down rules based on independent assessments of enterprise value and priority and fairness tests. The Italian reform (CCII) has taken a disruptive approach – shifting decision-making powers from shareholders' meetings to managers and reallocating the decision-making locus of shareholders to the creditors' meeting when affected, allowing for classes of shareholders and cram down – but has faced criticism for breaking the balance of checks and balances in corporate governance and for granting excessive powers to management at the expense of internal controls.

In light of the Brazilian framework and these experiences, it is concluded that:

- there is no normative basis to generally suppress corporate approvals;
- business preservation does not authorise, by itself, the derogation of the exclusive powers of corporate bodies;
- contrary corporate voting against the plan may be abusive, but legal criteria for evaluation are lacking; and
- the result of non-approval of corporate decisions should not automatically be bankruptcy, prioritising mechanisms for deliberative re-engagement under judicial control of legality.

Given the identified gaps and inspired by best international practices, reforms should be proposed that procedurally integrates affected shareholders into the decision-making dynamics of recovery by, for example, creating classes of shareholders when the plan affects rights of participation, governance, pre-emption, issuance price, conversion of debt into equity, corporate reorganisations or change of control.

Another suggestion is for voting to occur proportionally to capital participation, with restrictions for conflicts of interest when applicable. On these classes, rules for cross-class cram down could apply, conditioned on an independent assessment of enterprise value at the plan's reference date, adherence to priority (whether absolute or relative, as defined by law), treatment not inferior to classes *pari passu*, and not worse than subordinate classes, plus a fairness test preventing out-of-the-money shareholders from capturing value before meeting the minimum thresholds of senior classes, with only compatible residual concessions allowed given the uncertainty of evaluation. Minimum assessment standards should also be established: accepted methodologies, assumptions, disclosure rules, technical counterarguments, judicial expertise when necessary and price windows for issuances and conversions.

To ensure symmetry with the applicable regime for creditors, shareholder abuse of rights should be defined in the recovery context, establishing objective criteria to characterise such abuse as occurring when the vote contradicts, without suitable technical justification, alternatives that maximise value for the entire set of stakeholders, or when it aims to extract disproportionate private benefits at the expense of restructuring value, create irrational business blockages or frustrate, without feasible alternative, essential means for the viability of the plan. If abuse is ruled out, judicial supplementation of the veto should be limited to the specific implementation of the plan, restricted to what is necessary and without eliminating essential rights beyond what is strictly cram down.

In converting credits into equity, cash payment or immediate functional liquidity alternatives for regulated creditors unable to hold shares should be required, along with a detailed justification of the issuance price according to article 170, § 1 of the Corporations Law, and information treatment equivalent to public offerings, mitigating the risk of unjustified dilution.

To overcome corporate impasses, it is suggested to insert a staggered and expedited procedure within the Judicial Reorganisation and Bankruptcy Law when the plan approved by creditors depends on corporate approvals. Subsequently, judicial control would assess the legality of the deliberations and the grounds for the veto in light of the new criteria for abusive corporate voting. If the impasse persists, and the requirements for assessment and priority are met, cram down could apply to the affected class(es) of shareholders.

Concerning creditors' alternative plan, it is recommended to enhance §§ 6 to 9 of article 56 to reiterate the prohibition on creating new obligations for shareholders, except when subject to cram down while observing the guarantees of valuation, priority and fairness.

An independent assessment could be required whenever there is a conversion, change of control or corporate reorganisation. In these cases, there could be minimum mandatory obligations for the treatment of minorities compatible with the Corporations Law, with specific and justified derogations of pre-emptive rights only when essential for economic rebalancing, for strictly necessary time intervals and extent, and with reinforced disclosure.

It is also important to establish clear consequences and alternatives when corporate approval is lacking. Non-approval should not automatically imply conversion to bankruptcy. The court should reopen the deliberation of creditors for adjustments to the plan, conversion to a class regime with cram down of shareholders, or trigger the period for presenting an alternative plan, with safeguards for actions already taken. Bankruptcy may be considered if it is demonstrably more efficient than continuity, based on an independent assessment and underlying public interest, ensuring that shareholders have the opportunity to show that liquidation provides a superior outcome compared to the proposed restructuring.

Coordination between regulatory and competitive bodies should also be more efficient, with preferential and integrated processing before CADE and sectoral agencies, the possibility of applying the failing firm theory, and the adoption of provisional measures aimed at preserving company value, as well as rules that prevent the effectiveness of resolution clauses due to changes in control arising from confirmed plans when and to the extent necessary for viability, with proportional compensations where applicable.

Finally, transparency should be reinforced by requiring a robust informational report for any measures affecting shareholders, exposing the financial grounds, the alternatives considered and the impacts on capital structure and governance – accompanied by an independent valuation opinion. The right to information and technical counterarguments in challenges should be expanded, with deadlines compatible with the urgency of reorganisation.

Unfortunately, the current proposal in the Congress for alterations in the Brazilian Reorganisation and Bankruptcy Law (Bill 03/2024) do not provide for those necessary adjustments in order to combine the protection of both creditors' and shareholders' interests.

CANADA

Introduction

Canada's corporate insolvency and restructuring framework is principally governed by two federal statutes: the Bankruptcy and Insolvency Act (BIA)[1] and the Companies' Creditors Arrangement Act (CCAA).[2] Within those statutes, a distinction can be drawn between "creditor-driven" bankruptcies and receiverships, which focus on liquidation, and on BIA proposal and CCCA proceedings, which focus on "debtor-in-possession" restructurings under the supervision of an independent licensed insolvency trustee – a "proposal trustee" in BIA proposals and a "monitor" in CCAA proceedings.

Canadian law strongly prioritises creditors over shareholders in insolvency, under the premise that where a debtor is insolvent, by definition the equity has no residual value. In characterising a claim as a creditor or shareholder, Canadian law looks behind the identity of the claimant and to the nature of the claim. Even where shares retain residual value, shareholders typically have limited procedural rights. They do not ordinarily vote on restructuring plans, are not entitled to be consulted or entitled to non-public information during the proceedings and have few (if any) remedies to frustrate a restructuring, including the cancellation or dilution of equity through a plan of compromise or arrangement, or proposal, without a shareholder vote.

1. The position of the insolvency officeholder and creditors compared to shareholders

The role of the insolvency officeholder varies depending on the appointment. In a bankruptcy (liquidation) under the BIA, all assets of the debtor company vest in the trustee, subject to the interests of secured creditors. The shareholders no longer have any control (via the board of directors) over the assets.

Similarly, the appointment of a receiver places the assets or business subject to the receivership in the care and control of the receiver, and outside the control of the board of directors.

In a debtor-in-possession proceeding such as a proposal proceeding under the BIA or a restructuring under the CCAA, the insolvency officeholder (being a proposal trustee or a monitor, respectively) provides a more supervisory role as the court's "eyes and ears", although this role can be increased to be more like a receiver if necessary. Even where the insolvency officeholder is not in control (such as a proposal trustee or monitor), their recommendation is given substantial weight by the court.

Relative to creditors, shareholders' interests and priority are subordinate. Both the BIA and the CCAA provide for a modified absolute priority rule in any proposal or plan of compromise or arrangement. This means that equity claims cannot be paid until all creditors have been paid in full.[3] The rule is not an absolute priority rule because both the BIA and the CCAA are flexible and do not mandate any specific priority order among creditor classes.

The requirement for creditors receiving full payment is evaluated bearing in mind the CCAA's flexible structure. In one case, the court sanctioned a plan that provided for the payment of preferred shareholders despite the fact the plan would only provide creditors with a combination of shares, and cash worth less than the total debt.

The court accepted that the shares paid to the creditors arguably retained value based on the forecasted future income streams and that this satisfied the meaning of "paid in full" under section 6(8) of the CCAA, allowing payment to the preferred shareholders.[4]

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1 Bankruptcy and Insolvency Act, RSC 1985, c. B-3.
2 Companies' Creditors Arrangement Act, RSC 1985, c C-36.
3 CCAA, section 6(8).
4 *Re Bul River Mineral Corp*, 2015 BCSC 113, at para 52.

2. Shareholders' rights to be consulted and to receive information

In general, shareholders are only entitled to publicly available information during insolvency proceedings. There is no requirement to notify or consult shareholders when instituting insolvency proceedings or applying for a court order under the CCAA. The insolvency officeholder also has no obligation to consult with shareholders.[5]

When considering a plan of compromise or arrangement, or a sale transaction, consultation within each creditor class is an important consideration for the court, in particular as Canada does not have cross-class cram down provisions (discussed in further detail below).

3. The composition of classes involving shareholders in the context of a restructuring plan

A court may sanction a plan of compromise or arrangement pursuant to the CCAA or a proposal under the BIA where it achieves the requisite double majority of votes from each creditor class. This requires approval from a majority of all creditors voting in person or by proxy, representing more than two-thirds of the value of claim in that class.[6]

Shareholders do not form any voting class for these proceedings. Voting occurs only among each creditor class "other than, unless the court orders otherwise, a class of creditors having equity claims".[7] Because the purpose of both the BIA and the CCAA is to facilitate recovery for creditors and avoid the economic and social harms of insolvency,[8] courts are reluctant to provide shareholders a vote insofar as it may jeopardise the end-goal of facilitating reorganisation.

Further, as noted above, equity holders cannot be paid unless all creditors are paid in full and as such, there is rarely a need for them to vote on a plan.

In organising creditors into classes to vote on a plan under the CCAA or a proposal under the BIA, creditors are classed according to the commonality of their interests. This means that a creditor who has an equity claim is classed *qua* creditor in relation to the debtor company prior to and under the plan as well as on liquidation. Thus, to the extent that creditors with equity claims are allowed to vote within a creditor class, the voting class is distinct from their equity claim.

Courts have demonstrated extreme caution in permitting creditors with equity claims to vote on plans, out of concern that they may block or jeopardise a successful vote for tactical advantage or leverage. They have traditionally scrutinised creditor claims that could alternatively be characterised as equity claims.

This position was summarised in *Canadian Airlines Corp (Re)*, where the court noted:

> *"The rationale for allowing such a reorganisation appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances … there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganisation."*[9]

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5 *Harbour Grace Ocean Enterprises Ltd., Re CCAA*, 2024 NLSC 47, at para 94.
6 CCAA, section 6(1).
7 Idem, section 6(1); BIA, section 54(2)(d).
8 *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60, at para 59.
9 *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, at para 76.

Indemnitors,[10] redeeming preferred shareholders,[11] auditors and underwriters[12] have all been characterised as equity claims and excluded from voting under section 6.

For example, in *Re Nelson Financial Group*, the court found that while it was possible that an equity claim could be a debt claim – for instance, if the shareholder obtained judgment in a suit – the claims advanced for unpaid dividends, unperformed redemptions and payments due upon rescission of the preferred shares all amount to "equity claims" that fall within the ambit of section 2 of the CCAA.[13]

Likewise, in *Re All Canadian Investment Corporation*, the court once again emphasised the nature of the claim rather than its characterisation as debt or equity or the parties' intentions.[14] The court explained that, where the claimant possesses rights normally exercised by shareholders, such as dividends or upside risk, the claim is ordinarily one of equity. Drawing an analogy with previous cases, the court found that the presence of redemption rights alone does not establish a debt relationship.[15]

Canadian courts have taken the same approach with respect to auditors and underwriters. In *Sino Forest Corporation (Re)*, a proposed shareholder class action was brought against Sino-Forest and various underwriters. The underwriters filed proofs of claim against Sino-Forest in the concurrent CCAA proceedings for contribution and indemnity for any liability in the proposed class action. The trial judge found that the underwriters' filed proofs of claim were not those of unsecured creditors, but rather "equity claims" within the meaning of section 2(1) of the CCAA. On appeal, the court dismissed the appeal and upheld the trial judge's conclusion, agreeing:

> *"It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or underwriters, through a claim for indemnification, to be treated as creditors … when the underlying actions of shareholders cannot achieve the same status."*[16]

Thus, in looking behind the identity of the claimants as underwriters and auditors – traditionally creditors – and looking to the nature of the claim, the court determined the claims were derivative of the monetary losses resulting to the shareholders.[17]

4. Shareholders' voting rights

Shareholders do not have any independent voting rights during an insolvency proceeding. As discussed, the BIA and the CCAA do not allow creditors with equity claims to vote on a proposed proposal or plans of compromise or arrangement, absent court approval.[18] Shareholders do not have voting rights on sale transactions, which are generally court-approved without a creditor or shareholder vote. Both the CCAA and the BIA provide that "the court may authorise the sale or disposition even if shareholder approval was not obtained".[19]

Courts have also sanctioned proposals and plans that cancel shares without shareholder approval. The business corporations legislation in each jurisdiction also empowers courts to make orders

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10 CCAA, section 2(1), "equity claim".
11 *Re All Canadian Investment Corporation*, 2019 BCSC 1488; *Re Nelson Financial Group,* 2010 ONSC 6229.
12 *Sino Forest Corporation (Re)*, 2012 ONCA 816.
13 *Re Nelson Financial Group,* 2010 ONSC 6229 at paras 32-34.
14 *Re All Canadian Investment Corporation*, 2019 BCSC 1488 at para 43.
15 Idem at para 105.
16 *Sino Forest Corporation (Re)*, 2012 ONCA 816 at para 23.
17 Idem at para 42.
18 CCAA, section 6(1).
19 CCAA, section 36(1).

constituting fundamental changes during insolvency.[20] Share restructuring without shareholder votes (or shareholder dissent rights) is thus a mainstay of insolvency proceedings.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Shareholders have only a limited ability to frustrate a restructuring. As discussed, shareholders do not have a vote with respect to proposals or plans of compromise or arrangement, or in relation to sale transactions.

When considering a proposed plan, the court does consider whether the plan is unfair to shareholders as one of several factors. However, this consideration is generally given minimal, if any, weight. The presumption is that, during insolvency, only creditors maintain a meaningful stake in the assets and business, and the interests of shareholders are pushed to the bottom of the priority ladder.

Thus, it is through the lens of insolvency that courts consider whether a sale, proposal or plan of compromise or arrangement is unfair, oppressive or unreasonable, recognising that shareholders often do not have any true interest to protect because the residual value of shares is presumably nil.[21]

As such, shareholder opposition is given minimal weight unless there is residual value in the shares after creditors are paid in full. Shareholders often apply under this part when seeking to prevent a plan, but these applications are rarely, if ever, successful. Since shareholders have last priority during insolvency, courts are generally unwilling to entertain any attempts to frustrate reorganisation, including by dismissing applications brought for tactical advantage in creditor negotiations.[22]

Although a shareholders' vote is ordinarily required to effect fundamental changes to a corporation's by-laws or alter shares, courts are empowered to order any fundamental change necessary during insolvency proceedings.[23]

In a debtor-in-possession proceeding, shareholders retain the ability to elect the directors in accordance with the relevant constitutional documents. However, the directors' obligations are to the corporation, and the stakeholder interests that directors must focus on shift more to creditors as the company approaches insolvency.[24] The court retains the ability to remove directors in an insolvency proceeding where necessary.[25]

6. Measures for the cram down of shareholders

Shareholders have no measures with which to prevent a cram down.

Unlike other jurisdictions, Canada does not have a general concept of cram down on creditors. The court cannot sanction a plan of compromise or arrangement unless it receives the requisite double-majority approval from *each* creditor class. This means that cram down is not possible against dissenting creditor classes – it is only possible against dissenting creditors *within* a class.

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20 See, for example, the *Canada Business Corporations Act*, RSC 1985, c C-44 (CBCA), sections 173 and 191.
21 *Stelco Inc., Re*, 2006 CanLII 1773 (ON SC), at para 15.
22 *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488, at para 39.
23 CBCA, sections 173 and 191.
24 *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, at paras 44-46*; BCE Inc. v. 1976 Debenture holders,* 2008 SCC 69, at paras 133-134.
25 CCAA, section 11.5(1); BIA, section 64(1).

However, shareholders are treated differently. Section 6(1) of the CCAA provides that voting occurs for each class of creditors "other than, unless the court orders otherwise, a class of creditors having equity claims". The BIA contains identical language for voting on proposals.[26]

In that sense, shareholders generally cannot vote on a proposal or plan and are frequently "crammed down".

7. Debt-for-equity swap and consent of shareholders

Debt-for-equity swaps can be effected without shareholder consent.

A proposed plan for a debt-for-equity swap under the BIA or the CCAA is treated the same as any other proposal or plan. This means that shareholders do not receive a vote and have no general basis to oppose a swap. The courts are able to order fundamental changes to the corporation without shareholder approval.

Although courts will consider whether the plan is fair and reasonable to shareholders, the fact that equity claims receive last priority and shares generally have no residual value means that, in practice, fairness to shareholders is minor or negligible factor.[27]

Many leading Canadian reorganisation cases have included debt-for-equity swaps without shareholder approval or even with shareholder opposition.[28]

In *Stelco Inc., Re*, for instance, the court authorised a plan of compromise and reorganisation opposed exclusively by shareholders. The court explained that it is well-established that:

> *"… reorganisation may result in the cancellation of existing shares of the reorganised corporation based on those shares / equity having no present value (in the sense of both value 'now' and the likelihood of same having value in the reasonably foreseeable future."*[29]

The court went on to explain that whether a plan of compromise or arrangement is "fair, reasonable and equitable" under the CCAA is assessed within the "hierarchy of interests", and it would be unfair to reallocate new equity to existing shareholders.[30]

The court in *Canadian Airlines* (cited with approval in *Stelco*) noted that:

> *"It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction."*[31]

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26 BIA, section 54(2)(d).

27 *Re Sino Forest Corp*, 2012 ONSC 7050 at para 61, citing *Nelson Financial Group Ltd., Re,* 2011 ONSC 2750 and *Canwest Global Communications Corp, Re*, 2010 ONSC 4209.

28 *Stelco Inc., Re*, 2006 CanLII 1773 (ON SC); *In the Matter of a Plan of Compromise or Arrangement of Sandvine Corporation et al.,* 2025 CanLII 15118 (ON SC).

29 *Stelco Inc., Re*, 2006 CanLII 1773 (ON SC) at para 14.

30 Idem at para 15.

31 *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, at para 78.

DENMARK

Introduction

Prior to the 2022 reform implementing Directive (EU) 2019/1023 on preventive restructuring frameworks, Danish in-court restructuring proceedings under the Danish Bankruptcy Act did not provide effective mechanisms for altering the equity structure of a company without shareholder consent.

In practice, shareholders could block essential capital measures, frequently obstructing otherwise viable restructurings and forcing creditors to pursue less efficient alternatives, such as transferring the debtor's business and assets to a newly established company, with the debtor entity subsequently entering into bankruptcy. Under the legacy framework, shareholders retained significant rights during restructuring proceedings – rights that did not necessarily align with the overarching purpose and objectives of the restructuring process from a creditor perspective.

The prior regime did provide for restructuring proceedings relating to debt (but not the share capital). As those provisions were implemented in 2011, only limited amendments to the Bankruptcy Act regarding debt restructuring were required when implementing the 2022 reform.

- **The 2022 reform and the current framework**

  Following the 2022 reform of the Bankruptcy Act, the Danish restructuring framework is characterised by the principle of creditor primacy – reflecting that, in situations of insolvency, the collective interests of creditors take precedence over those of shareholders. Once a company is considered insolvent, shareholders effectively have no blocking power with respect to the restructuring process or the measures implemented during the proceedings, including any alteration of the equity structure. This de facto effect also extends to any protective provisions contained in shareholder agreements, which are further described below. The balance between creditor and shareholder rights in a restructuring context is firmly tilted in favour of creditors.

  The current framework allows for the preservation of the corporate structure while restructuring the share capital, thereby offering an efficient means of maintaining business continuity and retaining (however reduced) tax losses carried forwards within the same legal entity, without the need for asset transfers to a new company.

- **The purpose of restructuring**

  The purpose of a restructuring under Danish law is to restore the debtor's viability through one or more of the statutory measures set out in section 10 of the Bankruptcy Act:

  i. a compulsory debt composition;

  ii. a transfer of the business; or

  iii. other measures which, either independently or in combination with one of the foregoing measures, result in the debtor no longer being insolvent.

  The Danish restructuring framework does not pursue the rescue of the debtor at any cost. Rather, it incorporates a set of statutory creditor-protection mechanisms designed to balance the objective of business rescue with the principle of equitable treatment of creditors.

  A central element of this framework is the best-interest test, which provides that creditors must not be placed in a worse position than they would be in bankruptcy. This ensures that no restructuring plan can be confirmed if it would leave creditors with a lower recovery than the dividend expected in a liquidation scenario.

In addition, payments of pre-commencement debts during the restructuring proceedings may only be made in accordance with the statutory ranking of claims set out in the Bankruptcy Act or where such payment is necessary to prevent further losses to the estate.

- **The restructuring process**

The *first stage* of the restructuring process must be completed within 4 weeks of the commencement of the restructuring proceedings, subject to any extension granted. At this stage, the administrator submits a restructuring plan to the creditors' meeting convened before the bankruptcy court, which must be approved by both the creditors and the court in order for the proceedings to advance to the next stage.

The restructuring plan typically remains high-level in scope, and must set out the intended restructuring proposal, an assessment of material obstacles and the debtor's opening balance sheet with any relevant adjustments. It must further identify deficiencies in the latest annual report – to be assessed by the accounting trustee, where appointed – and provide a concise description of the key actions envisaged during the restructuring period.

The restructuring plan is deemed approved unless a majority of the creditors present and entitled to vote, and representing at least 25% of the total outstanding debt, vote against its adoption.

The *second stage* of the restructuring process concerns the submission of the actual restructuring proposal, which must be filed no later than 6 months after the initial creditors' meeting, subject to a possible 4-month extension. The proposal must include the proposed restructuring terms, an overview of the debtor's assets and liabilities, a report from the administrator and any accounting trustee and, where applicable, a proposed division of creditors into voting classes.

Where the restructuring involves a transfer of the business, the proposal must further specify the purchase price and identify the assets, liabilities and contracts to be transferred. It must also describe how the restructuring is to be financed.

The restructuring proposal is assessed against the best-interest test and is subject to judicial approval, which must confirm that creditors are not placed in a worse position than they would be in bankruptcy.

Should the restructuring proposal fail to be adopted, the restructuring proceedings will be discontinued and the debtor placed into bankruptcy in accordance with the Bankruptcy Act.

1. The position of the insolvency officeholder and creditors compared to shareholders

The Danish restructuring framework is centred on the principle of creditor primacy. This principle reflects the view that, once a company becomes financially distressed, the economic risk and residual interest shift from shareholders to creditors. As a result, the restructuring process is creditor-driven and it is ultimately the creditors who exercise control over its course and outcome.

Shareholders, by contrast, hold no formal voting or decision-making rights during the proceedings. Consequently, they are not entitled to vote on the restructuring proposal or to influence its approval in any material way, except where they also hold a creditor position and are not considered closely related parties (see further below).

A restructuring proceeding under Danish law may be commenced at the initiative of the debtor or upon petition by one or more creditors, although creditor-initiated proceedings remain rare in practice. The process typically extends over approximately 7 months and must be completed no later than 1 year after initiation.

The commencement of a restructuring proceeding triggers an automatic stay on enforcement actions against the debtor. Creditors are prohibited from initiating individual enforcement measures, such as levying execution or attachment, and any enforcement action carried out within the 3 months preceding the filing date is rendered automatically void. Despite the general stay, secured creditors retain certain limited enforcement rights.

The Danish restructuring proceeding operates under judicial supervision. Upon initiation, the court appoints one or more restructuring administrators (in Danish: *Rekonstruktører*) to oversee and supervise the proceedings. The administrators are typically lawyers with specialised experience in insolvency and restructuring matters.

In contrast to other jurisdictions where restructuring involves extensive court intervention and procedural formality, the Danish model is deliberately procedurally streamlined, requiring only limited court involvement. The court's role is primarily to oversee key procedural milestones, such as the appointment of the restructuring administrator, the approval of the restructuring plan and the confirmation of the final proposal, while the substantive management of the process largely remains with the debtor and administrator.

As a general rule, the debtor remains in possession of the business during the process. However, any decision of material significance requires the consent of the administrator. Where there is a risk of conduct detrimental to creditors or a lack of cooperation by the debtor, the court is empowered to direct that the administrator temporarily takes over the management of the company.

In addition to the restructuring administrator, the court may appoint a restructuring accountant (in Danish: *Regnskabskyndig tillidsmand*) to provide financial expertise and oversight throughout the restructuring process. Until March 2021, the appointment of a restructuring accountant was mandatory, but it has since become discretionary. In larger or more complex restructurings, however, such an appointment remains common practice, as the restructuring accountant typically works closely with the company’s CFO and any external financial advisors to ensure the reliability of financial reporting and to support both the debtor and the administrator in assessing the company's viability and restructuring options.

1.1 Corporate law considerations

In the following, we provide a brief introduction to Danish corporate law, highlighting aspects particularly relevant to understanding shareholder rights, followed by a more detailed overview of shareholder rights – or the absence thereof – during restructuring. This overview does not purport to offer an exhaustive account of Danish corporate law but rather seeks to highlight the key principles and mechanisms most pertinent in the restructuring context.

The board of directors and management are subject to fiduciary duties and must, in all decisions, act in the best interests of the company and refrain from pursuing special or extraneous interests. The company’s interest serves as the decisive benchmark for assessing whether management has fulfilled its statutory and fiduciary obligations under Danish company law.

In a going concern situation, the company’s interest generally aligns with the collective interest of the shareholders as residual claimants, whose claims are satisfied only after those of other stakeholders upon dissolution. Accordingly, management is expected to pursue strategies that promote the company’s profitability and sustainable value creation for the benefit of shareholders as a whole.

When the company faces financial distress, this focus gradually shifts. As insolvency becomes imminent, creditors’ interests gain priority, reflecting their increasing exposure to financial risk. Once it is clear that the company is insolvent or unavoidably heading towards insolvency,

management's fiduciary duties are effectively redirected towards protecting the interests of creditors, including by preserving the company's assets and avoiding actions that may aggravate losses or unfairly favour certain parties.

1.2 Obligation to file for insolvency and the point of hopelessness

Under Danish law, the moment at which management becomes obliged to file for insolvency is not prescribed by legislation. Unlike in certain other European jurisdictions, where legislation establishes a statutory filing threshold, the Danish approach continues to rely on a concrete assessment carried out by management, based on the company's financial position and the information reasonably available at the relevant time.

Shareholders have no authority to block the filing or to interfere with management's duty to file for insolvency (except by replacing the existing management, in which case the new management will be subject to the same statutory obligations).

As outlined above, once a company becomes insolvent or faces imminent insolvency, shareholders effectively lose their economic stake, and the collective interests of creditors become decisive. This shift occurs, at the latest, at the so-called "point of hopelessness" (in Danish: *Håbløshedstidspunktet*). This point is generally understood as the moment at which management realises, or ought to realise, that continued operation of the business is no longer viable without causing further losses to creditors. This represents the absolute latest point at which an insolvency filing must be made.

Case law demonstrates that members of management may incur personal liability if they continue operations beyond the point of hopelessness.

Even where insolvency appears imminent, however, management remains protected by the business judgment rule, which recognises a broad scope of discretion in pursuing good-faith restructuring or turnaround efforts aimed at avoiding insolvency. Such efforts must, however, be grounded on a sufficiently informed basis, pursued in the best interests of the company and free from any improper motives.

2. Shareholders' rights to be consulted and to receive information

Immediately upon commencement of the restructuring proceedings, the administrator must notify all known creditors of the debtor's financial position and the purpose of the restructuring and the restructuring order must be published in the Danish Official Gazette.

These notification requirements apply to creditors only. Under Danish law, there is no independent obligation to notify shareholders of the commencement of restructuring proceedings, the proposed restructuring plan or the final restructuring proposal. Shareholders are only entitled to receive such information to the extent they simultaneously hold a creditor position and are notified in that capacity. Accordingly, a shareholder who does not also qualify as a creditor has no statutory right to be consulted or informed at any stage of the restructuring process. It should be noted, however, that separate disclosure obligations may arise under applicable securities regulation, in particular in relation to listed companies.

3. The composition of classes involving shareholders in the context of a restructuring plan

As a general rule, shareholders do not form part of the class-based voting structure, as voting rights are reserved for creditors. Shareholders are therefore relevant in this context only to the extent that they also hold claims against the debtor and are entitled to vote in their capacity as creditors (see further below).

The class-based voting structure applicable to restructuring proposals was introduced through the implementation of Directive (EU) 2019/1023. Voting on the restructuring proposal is ordinarily conducted without division into classes, with votes cast in proportion to each creditor's claim. Class-based voting (class formation) applies only where the debtor is not an SME or where the debtor expressly requests it.

Only the debtor may propose class-based voting and determine the composition of the classes. The proposed composition must be approved by the court, and its decision on class composition cannot be appealed.

Each class must reflect a sufficient commonality of interest among its members and must not be structured so as to manipulate voting outcomes or otherwise secure approval of the proposal. The commonality-of-interest criterion is generally considered relatively easy to satisfy, such that the debtor will typically have a reasonable indication of whether the proposal is likely to obtain the requisite approval. In the absence of Danish case law on this issue, guidance is expected to be drawn from the jurisprudence of other EU Member States.

The restructuring proposal is adopted if a majority of the classes vote in favour. This means a proposal may be confirmed even where the creditors voting in favour represent a smaller aggregate claim amount than those voting against.

The class-based voting structure also gives rise to the cross-class cram-down mechanism, which allows the court to confirm a restructuring proposal notwithstanding the opposition of one or more dissenting classes, provided that the best-interest test and the absolute priority rule are satisfied.

4. Shareholders' voting rights

As noted, the Danish restructuring framework is inherently creditor-centric, reflecting the principle that creditors, rather than shareholders, control the restructuring process once a company becomes insolvent. Shareholders, in their capacity as equity holders, do not possess any voting rights or formal powers to influence the restructuring proceedings. Their role is therefore largely residual and non-decisive, consistent with the broader principle of creditor primacy in Danish insolvency law.

However, shareholders who hold claims against the debtor – for example, arising from loans or guarantees – are, in principle, entitled to participate as creditors and to exercise voting rights in the restructuring process. This right is subject to an important qualification. Where a shareholder is deemed closely related to the debtor, the voting rights attached to such claims are excluded with respect to the restructuring plan and proposal. This restriction typically applies to intercompany claims and other forms of intra-group debt, ensuring that voting outcomes are not unduly influenced by related parties.

Under section 2 of the Bankruptcy Act, the concept of "closely related parties" encompasses close family members, entities in which such persons hold a significant ownership interest, companies under cross-ownership or common control and other parties whose relationship with the debtor demonstrates a sufficient commonality of interest.

Accordingly, even when acting in their capacity as creditors, shareholders may be subject to restrictions limiting their ability to influence the restructuring process.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

One might ask whether existing shareholders have any means of protecting themselves against such measures. Once the company is insolvent and has entered into restructuring proceedings, the short

answer is no. Shareholders no longer possess decisive control to prevent capital restructuring, reflecting a fundamental departure from the previous legal regime and bringing Danish restructuring law into alignment with modern insolvency principles of creditor primacy and value preservation.

The debtor is under a duty to pursue the optimal recovery for creditors and the administrator, as well as the restructuring accountant (if appointed), must confirm that the restructuring proposal presented to the creditors to vote on is in the best interests of the creditors. Consequently, both shareholders and creditors may, in practice, submit alternative restructuring proposals. Nevertheless, unless such proposals demonstrate a clearly superior recovery or restructuring outcome, they have no authority to compel the debtor to present or adopt one proposal over another.

In academic circles, it is being debated whether the Danish implementation went one step too far. However, the 2022 reform effectively removed a significant obstacle under the previous regime, where such measures could be blocked by the absence of a shareholder majority – a frequent scenario in distressed companies characterised by divergent ownership interests.

Under the Danish restructuring framework, shareholders cannot unreasonably prevent or obstruct restructuring proceedings and have, in general, extremely limited means to influence or avoid the process. Although shareholder agreements may attempt to regulate matters such as the initiation of restructuring proceedings or capital changes, such provisions have limited legal effect in practice. New shareholders are not bound by these agreements, and management is likewise not obligated to comply with contractual restrictions that conflict with their statutory duties under insolvency law.

Although shareholders and the general meeting formally remain in existence during the restructuring period, their decision-making authority is significantly restricted.

6. Measures for the cram down of shareholders

The 2022 reform amended section 10 of the Danish Bankruptcy Act to include item (iii), which authorises “other measures” that, either independently or in combination with the existing restructuring tools, may result in the debtor ceasing to be insolvent. Although restructurings before this date frequently involved other corporate law measures, the key innovation was the simultaneous adoption of section 10a (8).

This provision implements article 12(2) of Directive (EU) 2019/1023, which obliges Member States to ensure that shareholders cannot, by invoking company law requirements for the approval of capital changes, “unreasonably prevent or create obstacles to the implementation of a restructuring plan”. The provision authorises a complete wipe-out of existing equity holdings (i.e. all existing shareholders), followed by a cash-based capital increase through the subscription of new shares.

Accordingly, under the reformed restructuring framework, it is now possible to fundamentally alter the capital structure, including the complete wipe-out of existing shareholders.

6.1 Equity wipe-out: the Elevator Model

The Danish restructuring model facilitates investor-driven transactions, allowing external investors to inject fresh capital or acquire control through what essentially constitutes a distressed M&A process conducted at shareholder level within a court-supervised restructuring. This structure enables the continuation of the business within its existing corporate framework, promoting operational stability, continuity of value and the preservation of corporate identity.

As noted in the introduction, the restructuring proposal may encompass other measures which, either independently or in conjunction with the statutory restructuring tools, bring about a situation in which the debtor is no longer insolvent.

Section 10a (8) of the Danish Bankruptcy Act implements article 12(2) of Directive (EU) 2019/1023. Pursuant to section 10a (8), a compulsory composition may provide that the company's share capital be reduced to DKK 0 and immediately restored through a cash-based capital increase that meets the statutory minimum requirements set out in the Danish Companies Act. The subscription for new shares must be paid in cash. This mechanism is commonly referred to in Danish practice as the "Elevator Model". In effect, the Elevator Model serves to displace existing shareholders while concurrently recapitalising the company through the introduction of new investors.

The requirement of a cash contribution precludes reliance on a pure debt-for-equity conversion to satisfy the capitalisation condition. Such a conversion may, however, be carried out in parallel with or subsequent to the restructuring, but it does not fulfil the capital adequacy requirement in the absence of a fresh cash injection.

This framework also renders ineffective the protective provisions typically found in shareholder agreements. In particular, the Elevator Model effectively disapplies such contractual safeguards, including pre-emptive rights, through the possibility of a complete equity wipe-out. Moreover, new shareholders – or the company itself – are not bound by the prior shareholder arrangements.

That said, existing shareholders may still participate in a restructuring proposal, for instance by subscribing for new equity as part of a recapitalisation plan. However, they have no means to compel the inclusion or acceptance of such a proposal, as control of the restructuring process ultimately rests with the creditors and the restructuring administrator.

6.2 Derogation from pre-emptive rights

In company law, it is a fundamental principle that existing shareholders have a pre-emptive right, protected under EU law, to subscribe for new shares in the event of a cash capital increase in a public limited company. This principle derives from article 72 of Directive (EU) 2017/1132 on certain aspects of company law and is reflected in section 162 of the Danish Companies Act.

In the context of an in-court restructuring proceeding, the existing shareholders are deprived of their statutory pre-emptive rights.

In Danish legal scholarship, there has been ongoing debate as to whether the Danish implementation of article 12(2) of Directive (EU) 2019/1023 is inconsistent with other EU legislation, in particular because it arguably disregards, without sufficient legal basis, the pre-emptive rights of existing shareholders protected under Directive (EU) 2017/1132.

While article 32 of Directive (EU) 2019/1023 provides that article 72 of Directive (EU) 2017/1132 - which safeguards shareholders' pre-emptive rights – may be derogated from, such derogation is permitted only to the extent and for the period necessary for the establishment of a preventive restructuring framework.

The purpose of these provisions is clearly to ensure that shareholders cannot unreasonably obstruct or prevent the adoption and implementation of a restructuring plan. However, critics argue that the Danish implementation may go beyond this objective, as it opens the door to potential abuse and could facilitate hostile takeovers, leaving existing shareholders with no meaningful protection or recourse.

It might be argued that the legislator could have adopted a more proportionate approach by introducing a provision allowing the restructuring administrator to select the solution that best serves the objectives of the restructuring, rather than completely excluding the existing shareholders' right to participate in a proportional capital increase. This could have been achieved by granting existing shareholders a short deadline to decide whether to exercise their pre-emptive rights before the opportunity was transferred to new investors.

The issue of pre-emptive rights has been tested in a single case concerning the restructuring of the Danish football club, Esbjerg Boldklub. In this case, the Danish High Court held that section 10a (8) of the Bankruptcy Act had been enacted for the purpose of implementing article 12(2) of Directive (EU) 2019/1023, and that there was no basis for assuming that the provision conflicts with EU law.

A separate issue in this case concerned the fact that two restructuring proposals were presented - one by the debtor and another by the existing shareholders. Both proposals provided for full payment to all unsecured creditors, subject to a temporary moratorium. Prior to the vote, the creditors had expressed their position on the competing proposals and ultimately supported the debtor's plan, which, in practice, resulted in a change of ownership of the football club. For the existing shareholder, this effectively meant a loss of ownership, and for the creditors, the vote was not truly a question of creditor recovery, but rather a decision concerning control and ownership of the company. This formed the background for the court's decision on the question of pre-emptive rights, which were disregarded in this context.

The question concerning the derogation of shareholders' pre-emptive rights has not been referred to the Court of Justice of the European Union for a preliminary ruling.

7. Debt-for-equity swap and consent of shareholders

As noted above, a pure debt-for-equity conversion cannot satisfy the capitalisation requirement under section 10a (8).

In practice, however, it is possible to achieve substantially the same economic result as a debt-for-equity conversion. The claims of a specific group of creditors may be written down to DKK 0 under the compulsory composition, allowing those creditors to subscribe for newly issued share capital, which may be set at the minimum capital requirement under the Danish Companies Act. The broad wording of section 10a (8) permits considerable flexibility in structuring such transactions, provided the statutory requirement of a cash contribution is satisfied.

8. Summary and conclusion

Under the Danish restructuring framework, shareholders cannot unreasonably prevent or obstruct restructuring proceedings and have only limited means of influencing their outcome. Although shareholder agreements may attempt to regulate matters such as the initiation of restructuring proceedings or capital changes, such provisions have limited practical effect once the company has entered restructuring.

While shareholders and the general meeting formally remain in existence during the restructuring period, their decision-making authority is significantly restricted.

The Danish restructuring regime is firmly grounded in the principle of creditor primacy, under which control over the restructuring process rests with the creditors. This control is further reinforced by the restructuring administrator and the court, both of whom act as safeguards to ensure that creditor interests are duly protected and that the process remains fair and transparent.

Accordingly, shareholders have only a residual role within the restructuring framework. Following the 2022 reform, substantive control over the restructuring process rests with creditors, not shareholders.

ENGLAND AND WALES

Introduction

This chapter deals with the law relating to shareholder rights in restructuring as it currently applies in England and Wales. The relevant law is to be found primarily in the Insolvency Act 1986 (IA86) (which has been considerably amended since it came into force) and the related rules, at present the Insolvency (England and Wales) Rules 2016 (IR16) and the Companies Act 2006 (CA06). Although both Acts make provisions which apply in Scotland, that country has a distinct legal system which differs in significant respects from that which applies in England and Wales and Northern Ireland. Insolvency in Northern Ireland is governed by the Insolvency (Northern Ireland) Order 1989 (as amended), which largely mirrors the law as it applied in England and Wales. The CA06 applies there as it does throughout the United Kingdom.

The IA86 provides for a range of corporate insolvency procedures, including liquidation (compulsory and voluntary) and receivership, as well as the company moratorium, the company voluntary arrangement and administration. The CA06 legislates for schemes of arrangement and restructuring plans.

The IA86 introduced what were – at the time – two new regimes that may be described as restructuring or rescue tools: administration and the company voluntary arrangement. The scheme of arrangement (which is not strictly an insolvency process and is governed by the CA06) has a longer pedigree that can be traced to the joint stock company legislation of the nineteenth century. Recent reforms to the 1986 Act effected by the Corporate Insolvency and Governance Act 2020 (CIGA) saw the addition to the IA86 of the company moratorium, as yet another aid to company rescue; at the same time, CIGA introduced a new restructuring plan into the CA06. In spite of these, and many other, reforms to the insolvency and other rescue regimes that apply in England and Wales, little change has been made over the years as regards the interests of shareholders.

English insolvency (and related) law has traditionally treated shareholder rights as subordinate to those of creditors and continues to do so. That general point can be illustrated by two general features of English law (as well as by the answers given to the questions discussed below).

The first is that the directors of a company owe their duties primarily to the company as a whole rather than to individual shareholders. Those long-standing duties under the common law were finally codified in the CA06, section 172, which critically provides that a director "must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole."

That duty, however, shifts to being owed to creditors rather than members in the face of imminent insolvency of the company, where the company is "bordering on insolvency," or where insolvent liquidation or administration are probable or likely.[1]

The second is the order of priorities under which the proceeds of realisations in a liquidation (reflected to a greater or lesser extent in the other insolvency regimes) are applied or distributed, which, leaving to one side the rights of secured creditors, is broadly:

(a) the expenses of the winding up;

(b) preferential debts (but not interest due after the company went into liquidation);

(c) debts secured by a floating charge (but not post-liquidation interest);

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[1] See *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25 and the discussion of that decision in John Wood, Sofia Ellina, John Tribe*, Directors and Creditors: Law and Liability* (OUP 2026).

(d) ordinary debts (but not post-liquidation interest);

(e) post-liquidation interest on preferential and ordinary debts; and

(f) non-provable liabilities (postponed debts).

Only after those claims have been satisfied will any surplus become available to be distributed to the contributories (members / shareholders). The distribution of a surplus to contributories is a rare thing in a compulsory or rescue procedure; in fact, a liquidator may call upon a contributory to pay any unpaid or partly paid amounts due on their shares.

With those initial comments in mind, we turn to the rescue / restructuring procedures available under English law, namely:

(a) the moratorium;

(b) the company voluntary arrangement;

(c) administration;

(d) the scheme of arrangement; and

(e) the restructuring plan.

- **Moratorium**

  Part A1 of the First Group of Parts Insolvency Act 1986 (sections A1-A55) provides for a company to be subject to a moratorium, the object of which is to give a company in difficulty a formal breathing space by preventing its creditors from taking legal action against it during the time for which it remains in force (initially 20 business days, but subject to extension) except with the permission of the court.

  It is a free-standing regime but may be used to buy the company time in which to prepare to enter some other proceeding (such as a voluntary arrangement or administration). It leaves the company under the control of its directors but subject to oversight by a licensed insolvency practitioner – called the monitor.

  The company must be an "eligible company," which means:

  - it must be registered under the CA06, or an unregistered company that may be wound up by the court under Part V of the IA86;

  - a company is only eligible if it is not already the subject of a moratorium, and has not been the subject of a moratorium CVA or administration within the period of 12 months ending on the date of the filing of its application for a moratorium;

  - it must not be the subject of a "current insolvency procedure" (including liquidation, winding up, administration, a CVA); and

  - it must not be ineligible pursuant to the list at para 1 of Schedule ZA1 IA86.

  In addition to the above, a key qualification is that the company must be able to pay certain pre-moratorium debts (certain debts incurred before the moratorium but fall due before or during the moratorium) and moratorium debts (those debts incurred by reason of an obligation

during the moratorium) during the course of the moratorium. Failure to discharge these will result in the termination of the moratorium. Furthermore, certain financial contracts are excluded from the effect of the moratorium, so those creditors can enforce their rights (this would include commercial lending). These qualifications and exemptions are key factors in the limited uptake in the moratorium since its introduction.

There is an out-of-court procedure for obtaining a moratorium, but it is not available if a winding up petition has been presented, in which case the directors must apply to court.

Various "relevant documents" set out in section A6 of the IA86 must be produced:

(i) a notice that the directors wish to obtain a moratorium;

(ii) a statement from the directors that the company is, or is likely to become, unable to pay its debts; and

(iii) a statement from the proposed monitor that he / she is a qualified person and consents to act as the monitor, that the company is an eligible company, and that, in his / her view, it is likely that a moratorium for the company will result in the rescue of the company as a going concern.

Where there are multiple monitors, each of them must make the aforesaid statements and confirm which functions are to be exercised by them jointly and which functions are to be exercised by any or all of them. The relevant documents must be filed with the court which triggers the start of the moratorium.

Where the company is subject to an extant winding up petition then the directors would need to apply to court. The test to be applied under section A4(5) of the IA86 requires the court to be satisfied "that a moratorium for the company would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being subject to a moratorium)". The court (where it is involved) has a discretion whether or not to make an order. That discretion falls to be exercised in the light of section A4(5), which requires the court to be satisfied that a moratorium would achieve a better result for the company's creditors than would be likely in a compulsory liquidation.

A moratorium can be extended for another 20 days without court or creditor consent, and up to 12 months with creditor consent.

Although the purpose of the moratorium is defined, no particular outcome and no exit route are prescribed: the moratorium will come to an end either on the expiry of the moratorium period or sooner if terminated by the company or the monitor because the company has been rescued as a going concern, the moratorium is no longer likely to result in the rescue of the company as a going concern, the monitor is unable to carry out his / her duties due to the directors' failing to provide sufficient information, or the company is unable to pay its moratorium debts (as defined) or certain pre-moratorium debts which are not subject to the "payment holiday" in effect during the moratorium period.

- **Company voluntary arrangement**

The provisions governing a company voluntary arrangement (CVA) are contained in Part 1 of the First Group of Parts IA86 (sections 1-7B). They allow a company (which need not be, but usually is, insolvent) to propose to its creditors a composition of its debts or a scheme of arrangement of its affairs. Such a scheme need not be a scheme of arrangement within the meaning of Part 26 of the CA06 (see below).

The company (almost invariably assisted by its lawyers and / or a licensed insolvency practitioner – who will usually become the nominee proposed as supervisor of the arrangement if it is approved) drafts its proposal which, with the approval of the nominee, will be put to the company (i.e. shareholders) and creditors. The requisite decision-making processes require approval by at least 75% by value of unsecured creditors who vote to agree to the proposal, with no more than 50% of unconnected creditors voting against. The proposal may be approved with or without modifications. If the proposal is accepted, the nominee (or any replacement) becomes the supervisor, charged with implementation of the proposal. The process comes to an end when the terms of the proposal have been implemented or terminated (by the supervisor or as a result of creditor action). The proposal must also be put to a meeting of the company's members for approval or rejection. In the event of a different outcome from that of the creditors' meeting, the decision of the creditors prevails.

The effect of approval is to bind all unsecured creditors entitled to vote on the company's proposal as well as those unsecured creditors who would have been entitled to vote had they received notice (often referred to as the statutory binding). However, a drawback with a CVA is that it cannot compromise the rights of secured creditors or shareholders.

Challenging an approved Company Voluntary Arrangement (CVA) must be done pursuant to section 6 of the IA86. Parties must act immediately, as there is a strict legal time limit of 28 days from the date of the CVA's approval or the date they were notified of it to file a court claim.

Shareholders do have standing to challenge a CVA on the basis of either:

1. ***Unfair prejudice***

   The shareholders must demonstrate that the overall arrangement unfairly disadvantages them compared to other creditors in the same class, or that it leaves them worse off than you would be in an immediate company liquidation (the insolvency comparator). This is a common challenge used by commercial landlords who face disproportionate rent reductions while unsecured trade creditors remain unaffected.

2. ***Material irregularity***

   Shareholders can challenge the CVA if there was a serious procedural flaw or an error during the creditors' decision-making process or meetings. This generally points to issues such as:

   - improper notice of the creditors' or shareholders' meeting;
   - miscounted votes or manipulation of the required 75% majority by value; or
   - failure by the directors or the Insolvency Practitioner to disclose material information.

   On a successful challenge the court can:

   - revoke or completely terminate the CVA;
   - suspend the arrangement temporarily;
   - order that a new, revised meeting of creditors is called to reconsider the terms; or
   - sever or modify offending clauses while leaving the rest of the CVA intact.

- **Administration**

  The provisions governing administration are set out in Sch B1 of the IA86. Originally conceived very much as a rescue procedure, administration has also come to be regarded as an alternative to winding up / liquidation in some circumstances.

  A company enters administration when an administrator is appointed and remains in administration until that appointment ceases to have effect (12 months from appointment unless extended by the creditors for up to a further 12 months or the court thereafter). The administrator or administrators (there may be more than one) must be a licensed insolvency practitioner.

  An administrator may be appointed by order of the court, or out of court by either the holder of a qualifying floating charge or by the company or by its directors.

  Once appointed, the administrator must perform his / her functions with the objective of:

  (a) rescuing the company as a going concern;

  (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration; or

  (c) realising property in order to make a distribution to one or more secured or preferential creditors.

  The objectives operate as a hierarchy.

  The key benefit of administration is that the company is granted a statutory moratorium – i.e. "breathing space" – which protects the company from legal action and enforcement on the part of its creditors. This allows the administrator time to pursue the statutory objectives for the benefit of the creditors. Typically, most administrations result in a sale of the whole or part of the business, but in some cases the company can be restructured resulting in its rescue. One method is to exit administration via the implementation of a CVA to compromise creditor claims. Should the company not be capable of rescue then typically after the business and assets are sold the company is either placed into liquidation (to distribute to creditors and / or continue / pursue any recovery actions) A successful administration may, of course, return the company to solvency so that it can be handed back to its directors, but this is a rare occurrence.

  A pre-pack administration is one where the sale of the business is agreed prior to appointment of administrators who complete it immediately following their appointment. The key benefit being the business continues uninterrupted and continues to trade following its transfer to the buyer. The company is dissolved or goes into liquidation from whence claims may ensue against directors or others for the benefit of creditors. The buyer takes the business forward preserving the business and employees. The rationale for allowing pre-pack sales is that by preserving the business and minimising disruption caused by an insolvency procedure it preserves value for the creditors. However, pre-packs to connected parties are now under increased scrutiny and subject to a requirement to obtain a report from an independent evaluator.

- **Schemes of arrangement**

  A scheme of arrangement is not an insolvency proceeding but it is a corporate rescue and restructuring tool. The relevant legislation is contained in Part 26 of the CA06, which consists of just seven sections (sections 895-901). The bare bones nature of the legislation governing a

scheme is clear from the wording of section 895 which refers to the Part 26 provisions as applying:

> *"where any compromise or arrangement is proposed between a company and:*
>
> *(a) its creditors, or any class of them; or*
>
> *(b) its members, or any class of them."*

"Arrangement" therefore can include a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods, and "company" means any company liable to be wound up under the IA86 or the Insolvency (Northern Ireland) Order 1989. It will be apparent, then, that there are, in effect, two main categories of scheme of arrangement: creditor schemes and share schemes. Both offer a high degree of flexibility.

Whereas the IA86 remedies are concerned with the whole body of creditors, a company is generally free to decide with whom it proposes any particular compromise or arrangement. The following further advantages might be noted:

(a) insolvency is not a prerequisite for a scheme;

(b) secured creditors can be bound (which is not generally possible in an insolvency regime in the strict sense);

(c) dissenting creditors or members of any class may also be bound if the requisite approval majorities within each class are achieved, but there is no cross-class cram down (as is available in a restructuring plan);

(d) a scheme need not affect the running of the underlying business of the scheme company;

(e) it does not require the involvement of a licensed insolvency practitioner; and

(f) as a result, it carries less stigma.

On the other hand, a scheme offers no immediate protection from creditors in the form of an automatic moratorium or stay (although that lacuna may now be said to be capable of being filled by the Part A1 IA86 moratorium).

The procedure is similarly straightforward. The company proposing the scheme (which may be far from straightforward) must apply to the court for an order to convene (as may be necessary) creditor and / or members' meetings to vote on the proposed scheme. In many cases there will be only one class of creditors or members; in others, meetings will be held in classes fixed by reference to the similarity of class interests in the voting.

As to settling the classes:

> *"It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*."[2]

[2] See Chadwick LJ in *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, affirming the test set by Bowen LJ in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 537.

At least 50% in number constituting 75% in value of each relevant class of creditors must vote in favour of the scheme of arrangement for it to proceed to sanction by the court, which takes place at a subsequent hearing. It is unnecessary to hold meetings of creditors whose rights are unaffected by the proposed scheme.

The company must then apply to the court for the scheme to be sanctioned. Whilst dissenting parties may be heard at both stages at which the court is involved, challenges to the scheme are made at the sanctions hearing.

At the sanctions hearing the court must be satisfied: (a) that it has jurisdiction to sanction the proposed scheme; and (b) that it is appropriate in all the circumstances to exercise its discretion to do so.

If the scheme is sanctioned it takes effect on delivery of the order sanctioning it to the Registrar of Companies.

The process is in the hands of the company: no involvement on the part of or oversight by a licensed insolvency practitioner is required. Although in practice, financial advisors and / or insolvency practitioners are usually heavily involved in an advisory capacity.

Procedural and similar matters applicable to the court process for sanctioning a scheme of arrangement or a restructuring plan are set out in the Practice Statement Companies: Schemes of Arrangement and Restructuring Plans under Parts 26 and 26A of the CA06 of 18 September 2025.

- **Restructuring plans**

Restructuring plans are governed by Part 26A of the CA06. Introduced by CIGA during the COVID-19 emergency, they are relatively new: the first case was *Re Virgin Atlantic Airways Ltd*[3] which, as such, contains an invaluable overview of the legislative scheme; and the law in relation to them continues to develop.

Similar in many respects to the Part 26 scheme, there are also important differences between a Part 26 scheme and a Part 26A plan (see below). A restructuring plan is designed to help companies in financial or operational distress survive by modifying their debts, equity, or organisational structure. It seeks to prevent insolvency and return the ailing company to long-term viability The company must have encountered, or be likely to encounter, financial difficulties that will affect its ability to continue to carry on business as a going concern. However, the key benefit of a restructuring plan is the ability for the court to sanction a cross-class cram down, which would allow a plan to pass even where whole classes do not approve the plan. As in the case of a Part 26 scheme, there are two court hearings, a convening hearing (at which the court will consider whether to allow a meeting or meetings to be held to consider the plan) and a sanction hearing (at which the court will decide whether to sanction the scheme).

The key benefit of a restructuring plan (and difference with a scheme) is the ability for the court to sanction a cross-class cram down, which would allow a plan to pass even where whole classes do not approve the plan. Creditors and / or members vote in classes.

75% by value in each class must vote in favour to approve the plan, but the court may still sanction the plan even if the 75% threshold is not met in every class if two conditions are satisfied:

- Condition A (the no worse off test), which is that dissenting classes are no worse off than they would be in the “relevant alternative” to the plan (e.g. liquidation or administration); and

[3] [2020] EWHC 2376 (Ch).

- Condition B, which is that the plan has been approved by at least 75% of a class that would receive a payment or have a genuine economic interest if the relevant alternative were to apply.

Dissenting creditors may appear, usually at the sanction stage. The hearing may involve the court in considering complex accounting and valuation issues in relation to issues as to whether Conditions A and B have been met, which has already given rise to a substantial body of case law.

Like a scheme of arrangement, a restructuring scheme is proposed by the company; no insolvency practitioner need be involved but as with a scheme, financial restructuring advisers and / or insolvency practitioners are typically heavily involved in the preparation of the plan, negotiation with creditors and in providing certain evidence sought by the court when approving the plan Furthermore, schemes and restructuring plans may appoint insolvency practitioners as administrators or supervisors to deal with certain aspects such as adjudicating on creditor claims or distributing to creditors. However, the duties, functions and powers derive from the scheme or plan documentation rather than statute.

- **Schemes of arrangement and restructuring plans compared**

Part 26A restructuring plans, while lacking some of the flexibility of Part 26 schemes, offer obvious advantages in significant respects. The need to show that the company is currently or likely to be susceptible of financial distress is a restriction, albeit arguably not a serious one, having regard to the aim envisaged of a restructuring plan. However, the need to obtain approval from 75% in value only of each voting class (rather than the additional condition of also 50% by number in a scheme) will make approval easier to obtain in a significant number of cases. The main advantage though of a restructuring plan is, however, the ability of the court to bind in dissenting classes by what is often called "cross-class cram down," meaning the court may sanction a plan in the face of dissent if it can be shown that the conditions mentioned above have been fulfilled. In a scheme, each class of creditors or member must approve the scheme.

1. The position of the insolvency officeholder and creditors compared to shareholders

A company moratorium is in the hands of the directors of the company and the monitor. It is the directors of the company who may apply (see sections A3(2) and A4(2) of the IA86). The monitor (appointed under section A7(2)) must be a licensed insolvency practitioner. Neither the IA86 nor the 2016 Rules provide for the shareholders or creditors to play any role, save that creditor consent is required to extend the moratorium in certain circumstances (section A11).

Sections A42 and A44 allow a member (and others) to apply to court to challenge actions of the monitor[4] and directors respectively. While shareholders rights are few, their rights as shareholders are not affected by the existence of the moratorium itself; and they can, of course, exercise the general powers they may have over directors, in whose hands the conduct of the business of the company remains.

The rights of shareholders are also limited in a company voluntary arrangement. A meeting of shareholders must be held to consider the company's proposal, but the decision of the creditors' meeting will prevail over any decision of the company meeting.

Similarly, shareholders are largely ignored in administration. As we have seen, the company (i.e. shareholders) is listed among those who may appoint an administrator, but in reality, appointment by shareholders is rare; and the purposes of an administration are geared to the interests of creditors rather than shareholders. Company members (shareholders) are listed in para 74 Sch B1 of

[4] See, for example, *Minor Hotel Group MEA DMCC v Dymant* [2022] EWHC 340 (Ch), a challenge by a lender.

the IA86 in the category of persons who may apply to challenge the conduct of the administrator. They may, however, experience difficulty in persuading the court of their standing to apply if they are unable to identify harm to their interests arising out of the conduct complained of.

As we have seen, there is no involvement on the part of a licensed insolvency practitioner in an official capacity in a Part 26 scheme of arrangement or Part 26A restructuring plan, although as noted above financial advisors from the restructuring and insolvency profession are typically heavily involved. Shareholders can be compromised or affected by both schemes and restructuring plans, although where this is the case, they will be entitled to vote usually in their own class alongside the creditor classes.

2. Shareholders' rights to be consulted and to receive information

No provision is made in relation to the provision of information to shareholders in relation to a moratorium. No mention of them is made, for example, in the list of persons to be notified of the coming into force of a moratorium in section A8(2) of the IA86. This is unsurprising given that a moratorium is just that and is not designed to affect the substance of creditor or shareholder rights except in the short term.

Much the same may be said of the position of shareholders in a company voluntary arrangement, although members are entitled to a copy of the proposal and related documents for the purpose of enabling them to vote on the proposals put to them. As we have seen, however, the will of creditors will prevail over that of shareholders.

Although shareholder rights are few in administration, the administrator is obliged to provide information to shareholders in the form of their proposals for achieving the aim of the administration and progress reports; but it is the creditors who vote on the proposals.

As a matter of practicality, shareholders will usually be consulted to some extent in relation to the proposal of a scheme of arrangement or restructuring plan. They will receive the same scheme or plan documentation as any other class of shareholder (or class of creditors) for the purpose of voting at the scheme or plan meeting(s).

3. The composition of classes involving shareholders in the context of a scheme of arrangement or restructuring plan

It will usually be the company proposing the scheme or restructuring plan initially to determine the classes in which voting will take place, although the court must approve them and will ultimately decide at the convening stage how creditors and others should be grouped into classes for a scheme of arrangement. The proposing company (or insolvency practitioner) initially proposes the classification, but it must be approved by the court during the initial convening hearing. The following guiding principles were set out by Bowen LJ in *Sovereign Life Assurance v Dodd*:[5]

> *"It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worded as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."*

4. Shareholders' voting rights

Shareholder voting rights have no part to play in a moratorium and little in administration. A shareholders' (company) meeting as well as a creditors meeting is held for the purpose of approving a

[5] [1892] 2 QB 573.

company voluntary arrangement (or not), but the will of creditors will prevail over that of the company members when they are at odds with one another.

In schemes of arrangement and restructuring plans, shareholders' voting rights will be governed by:

(a) the company's articles of association;

(b) any provisions made by way of a shareholders' agreement; and

(c) the classes in which individual types of shareholders vote.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Shareholders may seek to frustrate or delay a restructuring in a number of ways, although the extent of their influence depends on the particular process in question and whether the restructuring is taking place within or outside a formal insolvency or CA06 framework.

5.1 Legal veto

As a starting point, a legal veto on the part of shareholders typically arises not from insolvency law itself, but from company law and the company's constitutional requirements.

A restructuring will often require changes to the company's share capital or corporate structure. These may include the issue of new shares (resulting in dilution), variations of class rights, reductions of capital, or the cancellation or transfer of existing shares. Such steps will ordinarily require shareholder approval by way of ordinary or special resolution and, where class rights are affected, class consent in accordance with the CA06.

In that sense, shareholders may not be able to prevent a restructuring in principle, but they can block its implementation by withholding approval in the necessary corporate steps.

Similarly, shareholder consent may be required for fundamental transactions depending on the company's articles of association or any shareholders' agreement. This may include significant disposals, group reorganisations, or amendments to the articles themselves required to give effect to the restructuring. The practical consequence is that even in a creditor-driven restructuring, shareholders may retain a degree of leverage over the mechanics by refusing to approve transaction steps.

This influence is also evident in pre-insolvency restructurings. At that stage, the board ultimately derives its authority from the shareholders where major transactions may require their approval. Shareholders can therefore simply decline to support the proposal thereby forcing the company and its creditors either to renegotiate or to move into a formal process where shareholder approval may be overridden.

In formal restructuring tools, the position varies. In a Part 26 scheme of arrangement, shareholders will only have a veto where they constitute a class whose rights are being compromised. If their rights are altered, they will participate as a class and the scheme will require the statutory majorities (a majority in number representing at least 75% in value).

In those circumstances, a dissenting shareholder class can block the scheme entirely. However, an important limitation is that if shareholders are not affected by the scheme, they will not form a class and therefore will have no vote.

By contrast, the restructuring plan under Part 26A significantly curtails any such veto. The court's ability to impose a "cross-class cram down" means that dissenting shareholder classes can be bound, provided the statutory conditions are satisfied. As noted in the *Argo Blockchain PLC* restructuring plan (Hildyard J, December 2025), the courts apply cross class cram down even where classes have diverging interests. Further, as per *The Waldorf Production* restructuring plan, even a powerful creditor like HMRC cannot exercise a veto. Its opposition is relevant but not determinative. By parity of reasoning, shareholders (particularly out of the money) do not have a veto.

5.2 *De facto* interference

Notwithstanding the erosion of formal veto rights, shareholders may still interfere with a restructuring in practical terms. One common method is through control of information and process. Shareholders, particularly where they are closely aligned with the senior leadership team, may influence or restrict the flow of financial information, delay the production of business plans, or seek to shape valuation evidence.

This is common in contested plans such as resisting the appointment of independent financial advisers and attempting to shape "relevant alternative" analysis and particularly material given the importance of valuation evidence to cross-class cram down and the allocation of restructuring benefits.

Shareholders may also seek to exert influence at board level. For example, they may threaten to remove, or actually replace, directors who support a creditor-led restructuring or otherwise destabilise the governance of the company at a critical stage. Even where they lack a direct veto over the restructuring itself, they may obstruct ancillary approvals required at shareholder level such as disposals, capital reductions or share issuances.

In some cases, shareholders may apply tactical litigation pressure. This may include the threatened or actual presentation of unfair prejudice petitions under section 994 of the CA06, or challenges to schemes or restructuring plans on procedural grounds such as disputes over class composition or alleged deficiencies in disclosure. Even if ultimately unsuccessful, such challenges can introduce delay, cost and execution risk into the process.

Shareholders may also exert pressure through capital structure leverage and control over funding. This is particularly acute where a restructuring depends on new money from existing shareholders or where they control key intra-group funding lines. In cooperative scenarios, such as in *Poundland and River Island*, shareholders have supported restructurings by providing fresh capital. However, in a hostile context, the opposite may occur: funding is withheld or withdrawn in order to force improved terms or to push the company towards an alternative transaction.

This dynamic is often reinforced where shareholders hold instruments with creditor-like characteristics, such as shareholder loans, intra-group debt, or convertible instruments. In such cases, they may act in a dual capacity by using those positions to exert influence by accelerating claims, resisting compromise, or maintaining stakes capable of affecting creditor voting outcomes.

Shareholders may further seek to undermine a restructuring by promoting alternative transactions. This may involve proposing competing refinancings, encouraging asset sales outside the restructuring, or engaging with rival bidders so as to disrupt creditor consensus. Closely linked to this is asset-level interference whereby shareholders impede implementation by refusing to approve key disposals, blocking releases of security or guarantees or interfering with subsidiaries required for the restructuring steps.

Another potential avenue of influence lies in stake building and coalition tactics. Shareholders may acquire debt positions in order to influence creditor voting outcomes or coordinate with aligned

creditors to oppose the restructuring. Shareholders may also seek to mobilise retail or minority investor bases, encouraging dissent or low turnout at meetings, or raising broader governance concerns. Low voter turnout can itself become a tactical issue, as illustrated in cases such as *Argo Blockchain*, where participation levels were a live consideration.

Reputational and regulatory pressure may also be deployed. Shareholders may seek to involve regulators or other stakeholders, for example by lobbying HMRC, the FCA or pension trustees to oppose the restructuring, or by framing it as unfair or abusive. There is a clear analogy here with creditor opposition, as demonstrated in cases such as *Waldorf Production*, where HMRC actively opposed the plan (albeit unsuccessfully). Shareholders may similarly attempt to generate external pressure through public campaigns, including media narratives focused on value extraction or unfair dilution, thereby placing pressure on directors to alter or abandon the restructuring.

A recurring theme across all of these forms of interference is delay. Shareholders may seek to force adjournments of convening or sanction hearings, prolong negotiations, or otherwise slow the process in order to worsen the company's liquidity position and thereby shift negotiating leverage. In doing so, they may attempt to influence the assessment of the "relevant alternative," particularly in restructuring plan cases where that consideration is critical to the outcome.

In practice, such interference will often arise through a combination of these mechanisms rather than in isolation. Governance disruption, litigation pressure and financial leverage frequently operate together. Importantly, even where shareholders are economically out of the money, they may nevertheless retain procedural footholds and the ability to increase execution risk. This explains the increasing emphasis in the case law, particularly following Petrofac, on ensuring that restructuring processes are conducted fairly and transparently with careful scrutiny of valuation, contributions and overall fairness given that process itself can become a central battleground.

6. Measures for the cram down of shareholders

As outlined above, statutory binding (sometimes, inelegantly referred to as cram down) is a long-established feature of insolvency regimes, even if it only operates at the level of a majority binding a minority. It was particularly noticeable in voluntary arrangement regime, which, for the first time, bound into a rescue scheme dissenting creditors who were entitled to vote, whether or not they did so. The latest stage in the extension of a statutory binding may be said to be the "cross-class cram down" provisions introduced alongside the Part 26A restructuring plan.

The availability of "cram down" for use against a dissenting class of shareholder (or creditor) in a Part 26A restructuring plan is the most powerful manifestation of statutory binding in English legislation. In brief, it means that the court has the discretion (but is not obliged) to sanction a plan as binding on a class or classes of creditors and members even in a case in which the plan has not been approved by them. The court may operate the "cram down" provision under section 901C(4) of the CA06, which enables the interests of so-called "out-of-the-money" creditors or members to be "crammed down" in favour of those of the plan company (or other applicant) (sometimes called the "disenfranchisement exception"); or, relying on section 901G, it may "cram down" if a single "in-the-money" class has approved the plan (Condition B) and members of any dissenting class(es) would be no worse off under the plan than in the "relevant alternative" (Condition A).

7. Debt-for-equity swap and consent of shareholders

In a typical bilateral lender-led restructuring, senior lenders agree to compromise a portion of their debt and to subscribe for new equity in the company. Existing shareholders are correspondingly diluted but will generally be required to approve the issue of new shares and waive statutory pre-emption rights under the CA06. These steps require shareholder authority to allot shares pursuant to section 551 and, ordinarily, a special resolution to disapply pre-emption rights under section 561.

In practice, this results in a significant shift in ownership. For example, a facility of £50 million may be reduced to £20 million, with the remaining £30 million converted into equity leaving the incumbent shareholder with a minority stake.

If shareholders refuse to pass the necessary resolutions, the transaction cannot proceed in its proposed form, and creditors may instead pursue enforcement or move to a formal insolvency or restructuring process.

A variation on this approach is the “pay-to-play” debt for equity recapitalisation in which existing shareholders are invited to contribute new capital in order to retain some or all of their equity interest. If they decline to do so, creditors convert debt into equity, resulting in dilution. The implementation of such a structure again requires shareholder approval for changes to the share capital, including the creation of new classes of shares, amendments to the articles of association and the mechanics of dilution.

In this context, the shareholder “veto” often operates as a form of leverage, with shareholders consenting in exchange for residual equity, governance rights or the preservation of some option value in the business.

Slightly more complex restructurings may involve a holding company reorganisation, including the insertion of a new parent entity. In such cases, creditors exchange their debt for equity in a newly incorporated holding company, while existing shareholders are required to transfer or exchange their interests into the new structure often on a significantly diluted basis.

For example, lenders may emerge with 80% ownership of the new holding company with existing shareholders rolled into only a 20% stake. These arrangements depend on shareholder consent to the necessary share transfers or reorganisations and, absent such consent, the mechanics of the transaction cannot be completed.

Debt-for-equity outcomes may also arise through the conversion of existing debt instruments into equity, whether voluntarily or pursuant to amended terms agreed with debtholders. Even where the relevant creditors agree to such a conversion, the company will typically still require shareholder authority to allot shares, vary existing rights or amend its capital structure. A common example is the conversion of shareholder or mezzanine debt into preference shares, often with priority over the interests of ordinary shareholders.

Similar issues arise in a distressed M&A context. A purchaser may acquire a business through a combination of new equity investment and the conversion of existing lender claims into ownership. Existing shareholders are frequently heavily diluted or eliminated, but their approval may still be required for share transfers, the issue of new shares or, depending on the company’s constitutional arrangements, the disposal of subsidiaries. In practice, these transactions are often resolved either by offering shareholders a nominal “stub” equity interest or by relying on the credible threat of enforcement if consent is withheld.

Intra-group debt capitalisations are also common. In such cases, shareholder or intercompany debt is converted into equity often in the form of preference shares in order to deleverage the balance sheet prior to external refinancing. These steps require shareholder approval for the creation of new share classes, increases in share capital and amendments to the articles.

In larger restructurings, the agreed commercial terms, including any debt-for-equity swap, are often documented in a restructuring support agreement or “lock-up” agreement entered into by creditors and shareholders. Notwithstanding such contractual commitments, the implementation of the transaction still requires the passing of formal shareholder resolutions to allot shares and

approve the necessary corporate steps. A refusal to do so may give rise to a claim for breach of contract but does not, of itself, effect the restructuring.

The unifying feature across these different scenarios is that any shareholder "veto" operates at the level of corporate implementation rather than economic outcome. The economic bargain is ordinarily dictated by creditors, but shareholders retain control over the statutory and constitutional mechanisms required to give effect to it.

In particular, the issue of shares and disapplication of pre-emption rights, the variation of class rights and amendments to the articles of association represent key control points under the CA06. These constitute hard veto points unless displaced by a court-supervised process via a scheme or restructuring plan.

In practice, shareholders are incentivised to cooperate through the offer of residual equity, governance rights or option value. Where such agreement cannot be reached, the realistic alternative is often escalation into a formal procedure, most notably a restructuring plan under Part 26A (as outlined above) under which the shareholder "veto" may be overridden by the court by exercising the cram down of any dissenting classes.

This dynamic reflects a broader shift in restructuring practice towards mechanisms capable of displacing formal shareholder vetoes, while still recognising that shareholder cooperation remains important at the implementation stage of any transaction.

FRANCE

Introduction

The Ordinance of 15 September 2021[1] transposing the EU Restructuring and Insolvency Directive of 20 June 2019[2] into French law fundamentally modified the landscape of collective proceedings by introducing the mechanism of "classes of affected parties".[3] Through this reform, shareholders ceased to be *mere spectators* of the proceedings[4] and became active participants, invested with a genuine role to restructure[5] the debtor company.

To understand the full extent of this transformation, it is first necessary to grasp its territorial scope. The formation of classes of affected parties is mandatory in safeguard or judicial reorganisation proceedings when the company exceeds either the combined thresholds of 250 employees and EUR 20 million in turnover, or the single threshold of EUR 40 million in turnover.[6] It is similarly mandatory for companies controlling other entities, provided the group as a whole meets those size thresholds.[7] Judicial reorganisation proceedings are triggered when the company is in default – i.e. unable to pay its due debts with its available assets (*cessation des paiements*)[8] – whereas safeguard proceedings may only be opened when the company faces difficulties it cannot overcome on its own, without being in default.[9] An accelerated safeguard procedure is also available,[10] reserved for large companies already involved in conciliation proceedings, to which the class mechanism applies regardless of company size. Where the statutory thresholds are not reached, the insolvency judge (*juge-commissaire*)[11] may nonetheless, at the debtor's request,[12] decide to apply the class mechanism on an optional basis.[13]

Since the formation of classes of affected parties is not always mandatory, an analysis of shareholders' rights in French insolvency proceedings requires a systematic distinction between two sets of rules in each topic: (a) those applicable in the absence of classes; and (b) those that come into play when classes are formed.

It is worth bearing in mind that the respective positions of the insolvency officeholder, creditors and shareholders differ significantly depending on which procedural framework applies.

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1 Ordinance No. 2021-1193 of 15 September 2021, amending Book VI of the French commercial code.

2 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, debt relief and insolvency, and measures to increase the efficiency of restructuring, insolvency and debt relief procedures, and amending Directive (EU) 2017/1132 (the Restructuring and Insolvency Directive).

3 The classes of affected parties are the new assemblies in which the plans of debtors covered by this mechanism will be negotiated (replacing the "creditors' committees" which only brought together credit institutions, suppliers, and bondholders).

4 Term used by F.-X. Lucas and other practitioners.

5 Term used by R. Dumont, Le devoir de restructuration des associés et actionnaires dans les classes de parties affectées (The duty of restructuring of partners and shareholders in classes of affected parties), BJE, September-October 2024, p. 58.

6 Article L. 626-29 of the French commercial code, referring to article R. 626-52 of the French commercial code, these thresholds being assessed on the date of the request to open proceedings.

7 Article L. 626-29 of the French commercial code.

8 The debtor is "unable to pay its due debts with its available assets" - article L. 631-1 of the French commercial code.

9 Article L. 620-1 of the French commercial code.

10 Proceedings open only to large companies involved in conciliation proceedings, which have already drawn up a draft plan aimed at ensuring the company's long-term viability and have received the support of the majority of their creditors (article L. 628-9 et seq. of the French commercial code).

11 Mainly responsible for ensuring that the proceedings are carried out rapidly and that the interests involved are protected.

12 In judicial reorganisation proceedings, the request may also be made by the receiver (article L. 631-1, para. 3 of the French commercial code).

13 Article L. 626-29 of the French commercial code; article R. 626-54 of the French commercial code, this decision being not subject to appeal.

1. The position of the insolvency officeholder and creditors compared to shareholders

1.1 Without classes of affected parties

- ***The classical dominance of debtor company and insolvency professionals***

  In the absence of classes of affected parties, the restructuring of a distressed company is essentially orchestrated by the judicial administrator, the CEO of the company and to some extent the creditors, with shareholders playing only a residual role. The plan is negotiated and prepared by the judicial administrator and the CEO of the company. Shareholders, for their part, are neither systematically consulted on the substance of the plan, nor granted any meaningful procedural standing in its elaboration.

  Shareholders' involvement is only triggered if the draft plan provides for corporate transactions requiring a modification of the articles of association or the share capital – such as a capital increase, a capital reduction or a *coup d'accordéon* (i.e. reduction of the share capital to zero followed by capital increase) – in which case a shareholders' meeting must be convened under general company law rules.[14] Outside these scenarios, shareholders remain on the margins of the process. It is the court, on the basis of the judicial administrator's report, that ultimately approves the plan, and the fate of the company is determined without the shareholders necessarily having a voice.

- ***The insolvency administrator's (administrateur judiciaire) limited interaction with shareholders***

  The judicial administrator's primary interlocutors are the CEO of the company and the creditors, rather than the shareholders. In the absence of the class mechanism, the administrator may nonetheless engage with shareholders in specific, circumscribed circumstances: in particular, when the plan requires a capital reconstitution and the administrator must convene a general meeting,[15] or when the administrator requests the appointment of a court-appointed representative to vote in place of dissenting shareholders in judicial reorganisation proceedings.[16]

1.2 With classes of affected parties

- ***A fundamental rebalancing of procedural roles***

  The introduction of classes of affected parties fundamentally modified the architecture of insolvency proceedings. The judicial administrator now occupies a central coordinating role that extends well beyond creditor management: it falls to the administrator, on the basis of objective, verifiable criteria, to form the classes of affected parties, including any class of equity holders, ensuring that each class reflects a sufficient community of economic interest.[17] The judicial administrator is also responsible for informing each affected party of the vote allocation methodology and for managing the voting process within each class.[18]

  Creditors retain a prominent position and continue to hold seniority over equity holders in the priority waterfall. However, their ability to impose a plan outcome is now constrained by a structured inter-class dynamic: the plan must secure majority approval within each class, and where classes vote differently, the cross-class cram down mechanism may be invoked. Equity holders, for their part, now hold formal procedural standing – including the right to vote, to request agenda items and to challenge the plan – which structurally elevates their position

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14 Article L. 626-3 of the Commercial Code (safeguard); article L. 631-19, I of the Commercial Code (reorganisation).
15 Article R. 631-34 of the French commercial code.
16 Article L. 631-9-1 of the French commercial code.
17 Article L. 626-30, III of the French commercial code.
18 Article L. 626-30, V of the French commercial code.

compared to the pre-2021 framework. They are no longer passive subjects of the plan but actors whose vote, or refusal to vote, carries legal consequences.

2. Shareholders' rights to be consulted and to receive information

2.1 Without classes of affected parties

- ***Consultation limited to capital-affecting measures***

In the classical framework without classes, shareholders do not have a general right to be consulted on the restructuring plan. Their involvement in the process is triggered only when the draft plan provides for measures affecting the share capital or the articles of association – such as a capital increase, reduction, or *coup d'accordéon* – in which case the shareholders' meeting must be convened in accordance with the rules governing extraordinary general meetings.[19] In judicial reorganisation, the judicial administrator may himself or herself convene the meeting if the directors fail to do so.[20]

Beyond this, shareholders have no statutory right to receive information on the plan's content or to participate in its negotiation. Their right to information is therefore purely incidental: they receive what is communicated in the notice of meeting and the documents accompanying it, in accordance with ordinary company law.

2.2 With classes of affected parties

- ***A structured right to information and consultation***

When classes of affected parties are formed, the landscape changes considerably. Only where there is modification of either their stake in the share capital or their other rights (including under the articles of association) by the draft restructuring plan must shareholders be invited to vote on that plan.[21]

While this invitation must in principle comply with the rules applicable to extraordinary general meetings, the relevant timelines are shorter, in accordance with article R. 626-62 of the French commercial code. The matters subject to consultation are correspondingly broad: any amendment to the articles of association, whether through balance sheet transactions (share capital increase, reduction, *coup d'accordéon*, or debt-for-equity conversion) or modifications to shareholder agreements or internal regulations that the plan may affect, must be put to a vote by the class of equity holders.[22]

It should be noted, however, that the amendment of shareholder agreements through the plan remains a source of legal uncertainty: the law does not expressly empower the court to modify agreements concluded between shareholders without their consent, and any subsequent modification to such agreements could fall within the regime governing substantial changes to the plan's means or objectives, thereby necessitating a fresh consultation of the affected classes.[23]

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19 Articles R. 626-1 to R. 626-3 of the French commercial code.
20 Article R. 631-34 of the French commercial code.
21 Article L. 626-30 I, 2° of the French commercial code; F.-X. Lucas, ibid, p.8.
22 The functioning of the class of shareholders, F.-X. Lucas, BJE, September-October 2024, p. 9, in particular II.
23 A.-S. NOURY and A. BALI, Le traitement des associés dans les plans de restructuration, Fusions & Acquisitions magazine (The treatment of shareholders in restructuring plans), Mergers & Acquisitions magazine, Restructuring dossier, September-October 2025, p. 20 et seq.

- ***The right to add items to the agenda***

  A shareholder within a class also has the right to request the inclusion of a specific item or resolution on the agenda of the class meeting, provided this request is made at least 15 days before the meeting date.[24] This right is nevertheless circumscribed: the deliberation must necessarily relate to the examination of the draft restructuring plan itself, and in safeguard proceedings it may only concern the wording of the proposals constituting the draft plan, which falls within the exclusive competence of the debtor.[25]

- ***Receipt of the plan***

  As a matter of principle, insofar as the class of shareholders is called upon to deliberate on the draft restructuring plan, all shareholders within that class are entitled to receive a copy of the plan prior to the meeting.

3. The composition of classes involving shareholders in the context of a restructuring plan

3.1 Without classes of affected parties

In the classical framework, there are no classes of equity holders to form. Shareholders interact with the restructuring process solely through the ordinary mechanisms of general company law and their intervention is confined to the specific capital-related decisions described above. The question of class composition is therefore irrelevant in this context.

3.2 With classes of affected parties

- ***Definition of equity holders***

  Article L. 626-30, I, 2° of the French commercial code defines the parties who may form a class of equity holders. Referred to as "equity holders"[26] – a concept borrowed from the EU Directive – they encompass the members of the extraordinary general meeting or the shareholders' meeting, the special meetings referred to in articles L. 225-99 (holders of a specific class of shares) and L. 228-35-6 (holders of priority dividend shares without voting rights), as well as the general meetings of bondholders referred to in article L. 228-103 of the French commercial code (*porteurs de valeurs mobilières donnant accès au capital* – VMDAC, i.e. holders of securities giving access to the share capital).[27]

  With regard to this last category, the status of VMDAC holders as equity holders has given rise to doctrinal debate. The Versailles Court of Appeal addressed the question in the *Orpea* case, ruling that holders of OCEANE bonds (bonds convertible or redeemable into shares) could not be treated as equity holders. Drawing on article 2 of EU Directive 2019/1023,[28] which expressly ties the concept of equity holder to effective ownership of a share in the capital,[29] the Court of Appeal held that article L. 626-30, I of the French commercial code could not be interpreted as encompassing all VMDAC holders, including those whose primary instrument is a bond such as the OCEANE.

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24 Article R. 626-62, III of the French commercial code.

25 FX Lucas, Ibid.

26 Article 2 of the Directive (EU) 2019/1023 of 20 June 2019, "Restructuring and Insolvency." (3) "equity holder" means a person that has an ownership interest in a debtor or a debtor's business, including a shareholder, in so far as that person is not a creditor.

27 Article L. 626-30, I, 2° of the French commercial code.

28 Directive (EU) 2019/1023 of 20 June 2019, "Restructuring and Insolvency."

29 Versailles Court of Appeal, 13th Chamber, 22 June 2023, No. 23/03276, Orpea case.

Accordingly, holders of bonds exchangeable, convertible or redeemable into shares remain creditors for as long as their securities retain their primary bond nature.

- ***The condition of modification***

  A critical limitation applies: equity holders only become "affected parties" – and therefore part of a class – if their stake in the share capital, the articles of association of the debtor or their rights are actually modified by the draft restructuring plan. This conditionality is not without controversy. It can produce outcomes that are difficult to justify from the standpoint of fairness: creditors may be required to accept significant debt write-offs while equity holders, whose situation is unaffected by the plan, are not included in a class at all – thereby insulating them from any restructuring effort and leaving creditors without the benefit of the absolute priority rule.[30] Practice has confirmed that when the draft plan provides for no debt write-off, equity holders need not be included in any class.

- ***Distribution within the classes of equity holders***

  It falls to the judicial administrator, on the basis of objective, verifiable criteria, to form the classes so that each is "representative of a sufficient community of economic interest".[31] Shareholders must be grouped in one or more classes. The judicial administrator enjoys a measure of discretion in the allocation of equity holders among classes, but must ensure that the economic interests within each class are sufficiently homogeneous to justify treating them as a unit for voting purposes.

4. Shareholders' voting rights

4.1 Without classes of affected parties

In the classical framework, shareholders exercise their voting rights through ordinary general meeting mechanisms, governed by company law. If the plan provides for capital transactions, the shareholders' meeting must vote on the corresponding resolutions. In this context, the court has the power to reduce the voting thresholds applicable to the competent meeting to a simple majority of the votes held by the shareholders present or represented, provided they hold at least half of the voting rights.[32] This mechanism enables the court to overcome the obstruction of a shareholder holding a blocking minority and to facilitate the entry of third-party investors into the share capital.

The implications of this power differ between safeguard and judicial reorganisation proceedings. In safeguard, the court cannot substitute itself for the shareholders' meeting: if the meeting does not approve the relevant capital transaction – even with a reduced majority – the safeguard plan must be terminated.[33] In judicial reorganisation, the constraints are less rigid and additional tools are available to override dissident shareholders (see section 5 below).

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30 A.-S. NOURY and A. BALI, Le traitement des associés dans les plans de restructuration, Fusions & Acquisitions magazine (The treatment of partners in restructuring plans, Fusions & Acquisitions magazine, Restructuring dossier), September-October 2025, p. 20 et seq.

31 Article L. 626-30, III, 3° of the French commercial code.

32 Article L. 626-3 of the French commercial code.

33 C. SAINT-ALARY-HOUIN, M-H MONSERIE-BON, C. HOUIN-BRESSAND, Droit des entreprises en difficulté (Law on companies in difficulty), LGDJ Lextenso, Précis Domat, 2024, no. 971.

4.2 With classes of affected parties

- ***Allocation of votes proportional to share capital***

  Once classes of affected parties have been formed, the judicial administrator is responsible for informing each affected party of the distribution arrangements within the classes, together with the method of calculating the votes corresponding to the claims or rights allocated to them, enabling them to cast a meaningful vote.[34] For equity holders, the allocation of voting rights within each class must, as for creditors, "correspond to the rights allocated," without further clarification for capital holders. In practice, this allocation is necessarily proportional to each holder's stake in the share capital.[35]

- ***Voting at meetings***

  Pursuant to article L. 626-30-2 paragraph 2 of the French commercial code, the draft restructuring plan is submitted to each class for a vote. The class or classes of equity holders deliberate in accordance with the provisions applicable to extraordinary general meetings.[36] No quorum is required, and the decision is taken within each class by a 2/3 majority of the votes cast.[37] Within a class, the vote may alternatively be replaced by a written agreement approved, after consultation with its members, by 2/3 of the votes held by them.

- ***The court's decision as a substitute for the vote***

  For the purpose of a cross-class cram down on equity holders – and contrary to general principles of company law – the French commercial code provides that the court's decision approving the plan and imposing it on dissenting equity holders "shall be deemed to constitute approval of the changes to the capital participation or the rights of equity holders or the articles of association provided for in the plan".[38] This avoids any obstruction by equity holders, who will no longer have to be consulted for approval of the changes implied by the plan.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

5.1 Without classes of affected parties

- ***The managing shareholder as a structural obstacle***

  In small and medium-sized companies, the majority shareholder is frequently also the de jure or de facto manager of the business. In this configuration, removing the managing shareholder becomes one of the first levers available to the insolvency administration. Upon opening of safeguard proceedings, the managing partner's mandate continues and cannot be revoked by the court; dismissal may only occur through ordinary corporate law mechanisms (resignation, death or dismissal). In judicial reorganisation, however, the court may make approval of the plan conditional on various measures ultimately leading to the manager's removal, "when the recovery of the company so requires",[39] as described below.

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34 Article L. 626-30, V of the French commercial code.

35 E. Richard, Le traitement des détenteurs de titres de capital en tant que classes de parties affectées (The treatment of shareholders as classes of affected parties), Revue Droit & Affaires No. 20, 1 December 2023, 29.

36 Article L. 626-30-2, paragraph 6 of the French commercial code.

37 Article L. 626-30-2, paragraph 5 of the French commercial code.

38 Article L. 626-32 of the French commercial code.

39 Article L. 631-19-1 of the French commercial code.

- ***Replacement of the manager***

  The approval of a reorganisation plan may be subject to the replacement of one or more managers of the company when the reorganisation of the company so requires, by the court and at the request of the public prosecutor.

- ***Non-transferability and forced transfer of equity interests***

  In the context of judicial reorganisation, the court may declare that the equity interests held by one or more de jure or de facto managers are non-transferable for a given period. It may also decide that the voting rights attached to those interests will be exercised, for a court-determined period, by a court-appointed representative, or order the forced transfer of the securities at a price set by an expert. Moreover, as from the date of the judgment opening the judicial reorganisation, managers are prohibited from transferring their equity interests unless with court authorisation under specific conditions.[40]

- ***Eviction of recalcitrant equity holders (i.e. blocking through the shareholders' meeting)***

  Where a non-managing shareholder refuses to vote in favour of a restructuring provided for in the plan, the court may employ statutory mechanisms to overcome this resistance. In safeguard proceedings, if the shareholders' meeting does not approve the required capital amendment – even by the reduced majority that the court has the power to impose – the plan must be abandoned.[41] Approval clauses may further complicate matters: in safeguard proceedings, existing shareholders may invoke them to oppose the entry of new investors in the event of a capital increase,[42] whereas in judicial reorganisation those clauses are deemed unwritten in the event of a capital increase or share transfer provided for in the plan.[43]

- ***Abuse of majority or minority power***

  In safeguard proceedings, the refusal of shareholders to proceed with a required reconstitution of equity capital may constitute an abuse of majority or minority power.[44] By contrast, in judicial reorganisation, the court may appoint an ad-hoc representative to attend the meeting and vote on the capital reconstitution in place of the opposing shareholders, when the draft plan provides for a capital modification in favour of one or more persons who undertake to execute the plan.[45] This mechanism highlights the central tension of the classical framework: a competing recovery plan offering to reconstitute the share capital can become a vehicle for taking control of the debtor company, ousting its management and diluting the existing shareholders.

5.2 With classes of affected parties

- ***Limited scope for obstruction in large companies***

  In large companies meeting the statutory size thresholds, the capacity of equity holders to frustrate a restructuring is significantly curtailed by the cross-class cram down mechanism. Where the relevant conditions are satisfied, a class of equity holders that votes against the plan can be overridden by the court. This significantly diminishes the value of a formal veto.

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40 Article L. 631-10 of the French commercial code.

41 Article L. 626-3 of the French commercial code.

42 Article L. 626-3 paragraph 4 of the French commercial code.

43 Article L. 631-19, II of the French commercial code.

44 In particular: R. Dumont, Le devoir de restructuration des associés et actionnaires dans les classes de parties affectées, p.0; L'éviction des détenteurs de capital (The duty of restructuring of partners and shareholders in the affected classes of shares), p.0; The eviction of shareholders, T. Duchesne and S. Martin Gousset, BJE September-October 2024, p.79.

45 Article L. 631-9-1 of the French commercial code.

- ***Residual de facto interference***

  Nevertheless, shareholders retain certain avenues of de facto interference. In safeguard proceedings, where the debtor's agreement is required for the cram down, the majority shareholder – often also the manager – may exert pressure by threatening to resign or by seeking to replace existing directors, thereby disrupting the restructuring process. The threat of managerial instability may, in practice, give equity holders leverage disproportionate to their formal legal position, especially in companies where the incumbent management is essential to the business's continuity.

- ***Small companies: a structural veto***

  For companies that do not meet the size thresholds required for cross-class cram down, dissenting shareholders effectively retain a de facto veto. Therefore, in most companies presenting a draft plan, dissenting shareholders cannot be overcome.[46] This is consistent with the practical reality that, in smaller companies, the majority shareholder is frequently the manager and primary income-earner from the business.[47] In this context, a plan requiring significant shareholder effort, such as a capital reduction and increase, cannot be imposed if the shareholders' meeting declines to approve it.

6. Measures for the cram down of shareholders

6.1 Without classes of affected parties

- ***Coercive mechanisms in judicial reorganisation***

  Even outside the class framework, French law has long provided the court with instruments to overcome shareholder resistance in judicial reorganisation. The most significant of these is article L. 631-9-1 of the French commercial code, which allows the judicial administrator to request the appointment of a court-appointed representative to convene the general meeting and vote on the share capital reconstitution in place of opposing shareholders, when the draft plan provides for a capital modification in favour of one or more parties who undertake to carry out the plan.

- ***An exceptional and rarely applied provision (possibly never used to date)***

  Since the French law of 6 August 6 2015, an even more radical mechanism exists: article L. 631-19-2 of the French commercial code, which enables the court, in judicial reorganisation, to impose a capital increase under certain stringent conditions – either by appointing a representative to vote in place of dissident shareholders, or by ordering the forced transfer of their shares.[48] In practice, this provision has remained a dead letter[49] owing to the multiplicity of conditions attached to it, and notably because it is restricted to companies with more than 150 employees whose cessation of activity would be likely to cause serious disruption to the national or regional economy and employment pool.

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46 J.-B. Barbièri and M.-H. Monsièrié-Bon, La restructuration de la personne morale (The restructuring of legal entities), BJE, 28 March 2025, No. 2, p. 50.

47 O. Debeine and E. Rosier, La règle de la priorité absolue (The rule of absolute priority), RPC No. 6, November–December 2021, p. 10.

48 Article L. 631-19-2 of the French commercial code.

49 In particular: J.-B. Barbièri and M.-H. Monsièrié-Bon, La restructuration de la personne morale (The restructuring of legal entities), BJE, 28 March 2025, No. 2, p. 47.

6.2 With classes of affected parties

- ***Cross-class cram down: a mechanism to compel equity holders***

  The introduction of classes of affected parties brought with it a far more systematic mechanism for overriding dissenting equity holders: the cross-class cram down.[50] In safeguard proceedings, this mechanism can be triggered with the debtor's consent;[51] in judicial reorganisation, no such consent is required.[52] When activated, the court can approve the restructuring plan and impose it on the class or classes of equity holders that voted against it.

  The economic stakes of this mechanism can be considerable. It has notably been deployed in large-scale French restructurings such as *Orpea*, where existing shareholders were diluted to 0.04% of the share capital,[53] and more recently *Altice*, where 45% of the share capital was surrendered to creditors.[54]

- ***Conditions for the cram down of shareholders***

  The cross-class cram down in respect of equity holders is subject to specific cumulative conditions set out in article L. 626-32 of the French commercial code, which provides for: (i) the general conditions of article L. 626-31, paragraphs 2 to 7, of the French commercial code relating to any verification that must be carried out by the court even when all classes vote in favour of the plan; and (ii) additional specific conditions relating solely to equity holders[55] set out below.

  First, the debtor must meet the statutory size thresholds for the mandatory formation of classes of affected parties – that is, at least 150 employees combined with either more than EUR 20 million in turnover (at group level), or more than EUR 40 million in turnover.[56] Second, equity holders must be "out of the money": they would not be entitled to any payment in a liquidation ranking scenario or as part of a disposal plan, based on the going-concern valuation of the company. Third, their preferential subscription rights must not be removed in the event of a cash-funded share capital increase provided for in the plan. Fourth, the plan must not provide for the forced sale of their shares.

- ***Absolute priority rule and the equity holders' contribution[57]***

  The law does not make equity holder contribution a prerequisite for restructuring.

  However, the absolute priority rule operates as a structural constraint: creditors must be paid in full when lower-ranking parties are entitled to payment or retain an interest under the plan. Since equity holders rank last, this rule generally results in them being required to make a contribution. Conversely, when equity holders are not included in a class at all because the plan does not affect their rights, creditors may nonetheless be required to accept a significant

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50 E. Richard, The treatment of equity holders as classes of affected parties, Revue Droit & Affaires No. 20, 1 December 2023, 29.

51 Article L. 626-32, I of the French commercial code: "Where the plan is not approved in accordance with the provisions of Article L. 626-30-2, it may be adopted by the court at the request of the debtor or the insolvency administrator with the debtor's consent and imposed on the classes that voted against the draft plan (...)."

52 Article L. 631-19, I, paragraph 5 of the French commercial code.

53 Orpea press release, 24 July 2023.

54 Altice press release, 26 February 2025, referring to the judgment of the Paris Economic Activities Court, ch.2 2, 4 August 2025, no. 2025049040.

55 In particular: R. Dumont, The duty of restructuring of partners and shareholders in the classes of affected parties, p.0; The eviction of shareholders, T. Duchesne and S. Martin Gousset, BJE September-October 2024, p.79.

56 Article L. 626-32, 5° and R. 626-63 of the French commercial code.

57 R. Dumont, Le devoir de restructuration des associés et actionnaires dans les classes de parties affectées, p.0; L'éviction des détenteurs de capital (The constitution of classes of shareholders), BJE September–October 2024, p. 64.

haircut without any corresponding contribution from shareholders[58] by way of derogation from the absolute priority rule provided for in article L626-32 II of the French commercial code.[59]

7. Debt-for-equity swap and consent of shareholders

7.1 Without classes of affected parties

In the classical framework without classes, a debt-for-equity conversion may be contemplated as part of the restructuring plan. Such a conversion constitutes a modification of the share capital and therefore requires a vote of the shareholders' general meeting. In safeguard proceedings, the shareholders' meeting retains the final say: if the meeting does not approve the capital increase, the plan cannot proceed. In practice, the majority shareholder, who as noted above is often also the manager, may therefore oppose a debt-for-equity swap, even if this is in the long-term interests of the company.[60]

In judicial reorganisation, the court has additional tools: approval clauses are deemed unwritten, the judicial administrator may convene the meeting and the court may appoint a representative to vote in place of opposing shareholders. These mechanisms mitigate, but do not fully eliminate, the risk of shareholder obstruction.

7.2 With classes of affected parties

- ***Debt-for-equity conversion imposed on shareholders***

  In safeguard proceedings with classes of affected parties, the debtor's agreement to the plan is required before a cross-class cram down can be triggered. The debtor may therefore favour a debt-for-equity conversion against the shareholders' wishes, in the interests of the company, although the manager risks dismissal in anticipated retaliation.[61] In judicial reorganisation, no debtor consent is required for the cram down, which allows the conversion to be imposed more directly.

  When the conditions for cross-class cram down are met (see section 6 above), shareholders may be subject to a debt-for-equity swap even in the absence of their consent. In particular, where equity is negative on a going-concern valuation, shareholders cannot resist relinquishing control to creditors. At most, they may, within the framework of a *coup d'accordéon*, subscribe in cash to a share capital increase to preserve a residual interest.[62] However, even where preferential subscription rights are preserved, shareholders may find themselves economically squeezed out.

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58 Bordeaux Commercial Court, judgment of December 17, 2025, known as "Fib": in this case, creditors had to agree to write off 98% of their claims under the plan, without any contribution being required on the part of the shareholder.

59 "At the request of the debtor or the insolvency administrator with the debtor's consent, the court may decide to derogate from paragraph 3 of section I, where such derogations are necessary to achieve the objectives of the plan and if the plan does not unduly prejudice the rights or interests of the affected parties. Claims by suppliers of goods or services to the debtor, shareholders, and claims arising from the debtor's tortious liability, in particular, may be given special treatment."

60 R. Dammann, T. Bos, ibid.

61 R. Dammann, T. Bos, Le debt-for-equity swap change la donne des restructurations financières (Debt-for-equity swaps change the game in financial restructuring), BJS, Oct. 2021, No. 10, p. 1.

62 R. Dammann and T. Bos, Le nouveau droit de la restructuration financière: les classes de parties affectées (The new law on financial restructuring: the classes of affected parties), Recueil Dalloz 2021, p. 1931; R. Dammann and T. Bos, Le Debt-for-equity swap change la donne des restructurations financières (Debt-for-equity swaps are changing the landscape of financial restructuring), BJS Oct. 2021, Editorial.

- ***The Orpea illustration***

  This economic squeeze-out was graphically illustrated in the Orpea restructuring. Shares issued as part of the plan were offered on a priority basis to existing shareholders (grouped in a single class of equity holders) who had voted against the proposed plan. Their priority derived from the preservation of preferential subscription rights during the first and third share capital increases provided for in the accelerated safeguard proceedings, and from the introduction of a priority period reserved for historical shareholders during the second share capital increase. Notwithstanding these protections, the existing shareholders ultimately held only 0.04% of the share capital following completion of the various capital transactions, with a group of equity investors having crossed the 50% threshold of share capital and voting rights.[63]

- ***Dilution without cross-class cram down***

  Even where the conditions for cross-class cram down are not met, shareholders may still face significant dilution. The restructuring plan may include corporate transactions that are particularly damaging to the economic value of existing securities – such as reserved share capital increases implemented on the basis of heavily discounted valuations – thereby significantly diluting the existing shareholder base.[64] In that scenario, however, adoption of the plan requires the affirmative vote of each class of equity holders by a 2/3 majority of votes cast.

  The restructuring of the Casino Group provides an instructive illustration of this scenario: the class of equity holders voted in favour of a plan that provided for a share capital increase through the conversion into shares of nearly EUR 5 billion in secured and unsecured debt, resulting in a massive dilution of existing shareholders to less than 0.3% of the share capital.[65]

63 Orpea press release, 24 July 2023.
64 T. Duchesne and S. Martin Gousset, L'éviction des détenteurs de capital (The Eviction of Shareholders), I, A.
65 Casino press release, 26 February 2024.

GERMANY

Introduction

The German preventive restructuring framework, embodied in the Act on the Stabilisation and Restructuring Framework for Enterprises (*Unternehmensstabilisierungs-und-restrukturierungsgesetz*, or StaRUG), entered into force on 1 January 2021 and transposed EU Directive 2019/1023 into German law.[1]

The StaRUG allows a debtor-in-possession to address imminent illiquidity (*drohende Zahlungsunfähigkeit*, 24 months prior to illiquidity) through a restructuring plan that can bind dissenting creditors and – notably – shareholders, including through capital measures such as debt-for-equity swaps and exclusion of subscription rights. Since its inception, the balance between the expediency of restructuring and the protection of shareholder rights has been one of the most hotly debated issues in German restructuring practice.[2] Case law has developed rapidly, culminating in the landmark VARTA AG restructuring and two constitutional complaints currently pending before the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), which may ultimately determine the constitutional boundaries of the StaRUG regime.

This chapter provides a practical guide on the position, rights and limitations of shareholders in restructuring proceedings under the StaRUG in Germany.

By way of further background, unlike formal insolvency proceedings under the German Insolvency Code (*Insolvenzordnung*, InsO), the StaRUG provides a pre-insolvency, debtor-in-possession restructuring tool that is available exclusively where the debtor faces imminent illiquidity but is not yet illiquid (i.e. cashflow insolvent), or over-indebted (i.e. balance sheet insolvent), within the meaning of sections 17 and 19 of the InsO.[3] The proceedings are initiated by the debtor filing a notice of the restructuring project (*Anzeige des Restrukturierungsvorhabens*) with the restructuring court pursuant to section 31 of the StaRUG; upon filing, the restructuring matter becomes pending (*rechtshängig*).[4]

At the core of the StaRUG is the restructuring plan (*Restrukturierungsplan*), which may include measures affecting creditor claims, security rights and the rights of shareholders.[5] Section 2(3) of the StaRUG permits the plan to shape the organisational foundations of the debtor and the membership and participation rights of its shareholders, including through capital reductions, exclusion of subscription rights and transfer of shares.[6]

The StaRUG framework was designed to prevent shareholders from unreasonably blocking viable restructurings, in line with article 12 of the Restructuring Directive.[7] At the same time, the legislature provided certain protective mechanisms to safeguard shareholder interests, including the prohibition against worse treatment (*Schlechterstellungsverbot*, no worse off test) and the right to file an immediate appeal (*sofortige Beschwerde*).[8]

The tension between these competing objectives – effective restructuring versus shareholder protection – has generated extensive litigation and scholarly debate, particularly regarding whether

1 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, OJ EU 2019, L 172, p. 18.
2 Korch, Gesellschafter in der Restrukturierung, ZHR 2025, 647; Brackmann / Holze, Gesellschafter- und Aktionärsbeteiligung in der Restrukturierung, ZRI 2024, 143.
3 Rauhut, Die Gesellschafter unter dem StaRUG, NZI-Beilage 2021, 52.
4 Ziegenhagen, Gesellschaftsrecht versus Restrukturierungsrecht gem. StaRUG, ZInsO 2025, 281.
5 Mulert / Steiner, Gesellschaftsrechtlich zulässige Regelungen im Restrukturierungsplan, NZG 2021, 673.
6 Sections 2(3), 7(4) StaRUG; BT-Drucks. 19/24181, p. 113.
7 Art. 12 Directive (EU) 2019/1023; OLG Stuttgart, Beschl. v. 21.8.2024 – 20 U 30/24, ZIP 2024, 2218, 2225.
8 Sections 64, 66 StaRUG; Gehrlein, Rechte der Gesellschafter im Restrukturierungsverfahren, BB 2022, 1096.

a shareholder resolution is required before management may file the restructuring notice.[9] This question, the EMAG group and the VARTA case, and respective pending constitutional proceedings illustrate that German law remains in flux on several key issues, as discussed in detail below.

1. The position of the insolvency officeholder and creditors compared to shareholders

Under the StaRUG, the debtor remains in possession; there is no insolvency administrator (*Insolvenzverwalter*) comparable to formal insolvency proceedings.[10] The debtor's management continues to run the business but becomes subject to additional obligations once the restructuring matter is pending: pursuant to section 43(1) sentence 1 of the StaRUG, management must exercise the care of a diligent restructuring manager and must safeguard the interests of the creditors as a whole.[11] This represents a partial shift of fiduciary duties, though no absolute priority of creditors' interests exists prior to the filing of the restructuring notice; the question of when and how management's general duty of care evolves into a creditor-oriented restructuring responsibility (*Sanierungsverantwortung*) in the pre-filing phase remains one of the most contested doctrinal issues after a provision which had set forth that the fiduciary duties of the management shifts towards creditors upon imminent illiquidity had been deleted from the draft StaRUG shortly before its enactment.[12]

The restructuring court may appoint a restructuring commissioner (*Restrukturierungsbeauftragter*) pursuant to sections 73 et seq. of the StaRUG, whose role is primarily supervisory and advisory.[13] The commissioner does not act as an officeholder in the insolvency law sense; he or she does not replace management, does not take control of the debtor's assets and has no power to dispose of company property. The commissioner's tasks may include monitoring the debtor's conduct, providing an opinion on the restructuring plan and facilitating negotiations.

Creditors hold a structurally stronger position than shareholders in the StaRUG framework. The legislative concept is based on the premise that, in a situation of imminent illiquidity, the economic value attributable to shareholders has typically diminished significantly, and that creditor interests must be given priority to achieve a viable restructuring.[14] Shareholders, among others, appear in the statute as "plan-affected parties" (*Planbetroffene*), ranking behind secured creditors, ordinary restructuring creditors and subordinated creditors in the statutory hierarchy.[15] Nevertheless, shareholders are not without rights: they participate in the plan vote, benefit from the prohibition against worse treatment and retain access to judicial remedies.[16]

The balancing between creditor and shareholder interests under the StaRUG is addressed through a set of mechanisms that operate at all stages of the restructuring. Prior to the filing of the restructuring notice, the management's duty of care under section 1(1) sentences 1–2 of the StaRUG requires the identification of crisis developments and the adoption of suitable countermeasures, but this duty does not yet entail an absolute priority of creditor interests.

It has been observed in the literature that even in the phase of imminent illiquidity, the management remains obligated to consider shareholder interests alongside those of creditors,

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9 Flöther / Wilke, Neue Zugangshürde zum StaRUG – Der Gesellschafter als Sanierungsbremse, ZRI 2023, 1029; Seibt / Harf, Gesellschaftsrecht und StaRUG: Beschluss- und Treuepflichten, ZIP 2024, 2309.

10 Korch, ZHR 2025, 647, 650; Rauhut, NZI-Beilage 2021, 52, 53.

11 Section 43(1) sentence 1 StaRUG; Korch, ZHR 2025, 647, 660 ff.; Ziegenhagen, ZInsO 2025, 281, 283.

12 Korch, ZHR 2025, 647, 660; Ziegenhagen, ZInsO 2025, 281, 284; Kowalewski / Klockenbrink / Meier, Sanierungsverantwortung und Kompetenzgefüge bei der Einleitung von StaRUG-Verfahren, ZRI 2024, 1089, 1092 ff.

13 Sections 73 ff. StaRUG; Gehrlein, BB 2022, 1096, 1098.

14 BT-Drucks. 19/24181, pp. 113 f.; Gehrlein, BB 2022, 1096, 1097.

15 Section 9(1) sentence 2 no. 4 StaRUG; Brackmann / Holze, ZRI 2024, 143, 145.

16 Sections 24, 25, 64, 66 StaRUG; Gehrlein, BB 2022, 1096, 1100.

consistent with article 19(a) of the Restructuring Directive.[17] Once the restructuring matter becomes pending, however, section 43(1) sentence 1 of the StaRUG effects what has been described as a "small shift of fiduciary duties" (*kleiner shift of fiduciary duties*): management must safeguard the interests of the creditors as a whole, and shareholder instructions that conflict with this obligation become non-binding.[18]

The literature has characterised this transition as a progressive shift – from a shareholder-oriented duty of care towards a creditor-oriented restructuring responsibility (*Sanierungsverantwortung*) – that intensifies with the depth of the crisis and reaches its full expression at the latest upon balance-sheet insolvency, when the enterprise's purpose ceases to serve shareholder wealth maximisation and instead serves the satisfaction of creditor claims.[19]

Within the plan itself, the balance is maintained through the interplay of several safeguards: the mandatory separate group formation for shareholders (section 9(1) sentence 2 no. 4 of the StaRUG) ensures that their interests are represented distinctly; the voting threshold of 75% in each class gives shareholders a meaningful voice unless their class can be crammed down by way of a cross-class cram down; in case of a cross-class cram down, the prohibition against worse treatment than without a plan (section 26(1) no. 1, section 64(1) of the StaRUG) protects their economic position against outcomes inferior to the next best alternative, if there is none against the insolvency alternative; and the absolute priority rule (section 27(1) StaRUG, with a specific rule for shareholders section 27(2) StaRUG) ensures the distribution of value according to the waterfall.[20]

It has been noted, however, that the absolute priority rule is not a protective mechanism from the shareholders' perspective but rather an additional risk factor, because it requires their complete and compensationless exclusion whenever a senior creditor group is not fully satisfied – with the result that shareholders must either accept elimination or compensate for any value they retain by contributing to the debtor's assets.[21]

The overall architecture thus reflects the legislative premise that, in a situation of imminent illiquidity, the preservation of enterprise value for the benefit of creditors takes precedence over the preservation of shareholder positions, while residual shareholder protection is channelled exclusively through procedural participation rights and the comparison with the next best alternative, if there is none, the insolvency alternative.[22]

2. Shareholders' rights to be consulted and to receive information

2.1 Pre-filing information obligations

Section 1(1) sentences 2 and 3 of the StaRUG obliges management to ensure that the supervising and otherwise competent corporate organs are consulted without delay where the measures to be taken fall within their competence.[23] This provision confirms and constitutes the general corporate law requirement that shareholders must be informed about crisis developments and their countermeasures, but it does not create a right for shareholders to receive a copy of the restructuring plan before the notice is filed.[24] Management is, however, expected to inform

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17 Rauhut, NZI-Beilage 2021, 52, 54; Korch, ZHR 2025, 647, 658 f. (discussing article 19 RRL and noting that shareholder interests were added to the provision during the trilogue negotiations).

18 Flöther / Wilke, ZRI 2023, 1029, 1032; Gehrlein, BB 2022, 1096, 1097 f.; Korch, ZHR 2025, 647, 669 ff.

19 Kowalewski / Klockenbrink / Meier, ZRI 2024, 1089, 1092 ff.; similarly Korch, ZHR 2025, 647, 660; Flöther / Wilke, ZRI 2023, 1029, 1033.

20 Gehrlein, BB 2022, 1096, 1099 ff.; Brackmann / Holze, ZRI 2024, 143, 149 f.; Mulert / Steiner, NZG 2021, 673, 677 f.

21 Korch, ZHR 2025, 647, 681; Kowalewski / Klockenbrink / Meier, ZRI 2024, 1089, 1095.

22 Rauhut, NZI-Beilage 2021, 52, 53 f.; Gehrlein, BB 2022, 1096, 1100 f.; Brackmann / Holze, ZRI 2024, 143, 150.

23 Section 1(1) sentence 3 StaRUG; Ziegenhagen, ZInsO 2025, 281, 282.

24 Gehrlein, BB 2022, 1096, 1097; Flöther / Wilke, ZRI 2023, 1029, 1035.

shareholders about the financial situation, the need for restructuring and the absence of alternatives, particularly where their consent to the filing is sought.[25]

2.2 Information during the proceedings

Once the restructuring matter is pending, the StaRUG provides specific information mechanisms to plan-affected parties, including shareholders. Pursuant to section 61 of the StaRUG, plan-affected parties must be heard before the court confirms the plan.[26] In the judicial plan voting procedure, shareholders receive a summons to the discussion and voting hearing with at least 14 days' notice, and access to the restructuring plan. However, critics have argued that the short timeframes and the information asymmetry between the debtor and affected shareholders make meaningful participation difficult in practice.

The general corporate law information rights (such as section 51a of the GmbHG for GmbH shareholders or the general right to ask questions at a general meeting under section 131 of the AktG) are not expressly displaced by the StaRUG.[27] In the literature, it is argued that the information obligations under the StaRUG replace the need for separate corporate-law consultation.[28]

3. The composition of classes involving shareholders in the context of a restructuring plan

Under section 9(1) sentence 2 no. 4 of the StaRUG, holders of membership and participation rights (*Anteils-oder Mitgliedschaftsrechte*) always form a mandatory separate group for the purposes of the plan vote.[29] This ensures that shareholders are never lumped together with creditors; their distinct interests are recognised through separate group formation.

Beyond the mandatory classes, the StaRUG permits the plan proponent to divide plan-affected parties into further subdivided into groups in accordance with economic interests; they must be appropriately distinguished from one another and the criteria for such distinction must be specified in the plan (section 9(2) of the StaRUG). Discrimination within groups is prohibited (section 10 of the StaRUG).[30] In the VARTA case, the restructuring court accepted the formation of two separate shareholder groups – one for the majority shareholder who was contributing substantial restructuring resources, and another for the minority shareholders – on the basis that their economic interests diverged significantly.[31] This differentiation has been criticised in the literature as potentially undermining the equal treatment of shareholders.[32]

Questions of group formation have proven to be of strategic importance. It has been observed in the literature that the composition of groups can determine whether a cross-class cram down is achievable, and the courts have acknowledged the plan proponent's broad discretion in this regard, subject only to a prohibition of arbitrary formation.[33]

4. Shareholders' voting rights

4.1 Voting in the plan procedure

Shareholders vote on the restructuring plan in their capacity as plan-affected parties within their own group. Adoption of the plan within the shareholder group requires a majority of 75% of the

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25 Seibt / Harf, ZIP 2024, 2309, 2315; Ziegenhagen, ZInsO 2025, 281, 286.
26 Section 61 StaRUG; Gehrlein, BB 2022, 1096, 1099.
27 Gehrlein, BB 2022, 1096, 1098; Brackmann / Holze, ZRI 2024, 143, 148.
28 Flöther / Wilke, ZRI 2023, 1029, 1040.
29 Section 9(1) sentence 2 no. 4 StaRUG; Mulert / Steiner, NZG 2021, 673, 677; Korch, ZHR 2025, 647, 680.
30 Thole, Ausgewählte Fragen aus drei Jahren StaRUG, ZRI 2024, 1006, 1009.
31 AG Stuttgart, Beschl. v. 11.12.2024 – 6 RES 1243/24, ZRI 2025, 149.
32 BRAK, Stellungnahme Nr. 18/2026, pp. 16 ff.
33 Thole, ZRI 2024, 1006, 1009 f.

voting rights, measured by the proportional participation in the company, i.e. the proportion of the subscribed capital or assets (section 24(1) no. 3, 25(1) of the StaRUG).[34] Notably, any restrictions as well as any special or multiple voting rights agreed among shareholders in the articles of association or shareholders' agreements are disregarded for the purpose of the plan vote (section 24(1) no. 3 of the StaRUG).[35]

If the shareholder group does not approve the plan, the plan may nonetheless be confirmed through a cross-class cram down under sections 26–28 of the StaRUG.[36] This mechanism is discussed in detail in section 6 below.

4.2 Practical significance

In practice, the restructuring plan in many prominent cases (such as Leoni AG and VARTA AG) has provided for a capital reduction to zero followed by a capital increase with exclusion of subscription rights, effectively eliminating the existing shareholders' positions.[37] Because these measures are directed at the shareholders, their approval through the 75% intra-group majority is almost never achievable and the cross-class cram down becomes the standard path to plan confirmation.[38]

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

5.1 The debate on the requirement for a shareholder resolution for the restructuring notice

The most virulently debated issue in German restructuring practice is whether management must obtain a prior shareholder resolution before filing the restructuring notice under section 31 of the StaRUG.[39] The question arises because the filing triggers the pendency of the restructuring matter, which in turn activates the duty to consider creditor interests (section 43(1) sentence 1 of the StaRUG), limits the shareholders' instruction rights and opens the path to measures that may eliminate shareholder positions entirely.[40]

The prevailing view in the literature differentiates between the AG (stock corporation) and the GmbH (limited liability company). For the AG, the majority of courts and commentators hold that no shareholders' meeting resolution is required because the management board (*Vorstand*) acts autonomously in business matters and the filing does not constitute a so-called *Holzmüller-Gelatine* measure or a change of corporate purpose.[41] For the GmbH, the prevailing opinion, at least of company law scholars, holds that a shareholder resolution is required in principle because the filing constitutes an extraordinary measure (*außergewöhnliches Geschäft*) or a fundamental corporate decision (*Grundlagengeschäft*), given the potential for severe interference with shareholder rights.[42] The required majority is debated – some authors demand a ¾ majority analogous to amendments of the articles of association, while others consider a simple majority sufficient.[43]

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34 Sections 24(1) no. 3, 25(1) StaRUG; Korch, ZHR 2025, 647, 680.
35 Seibt / Harf, ZIP 2024, 2309, 2311.
36 Sections 26–28 StaRUG; Korch, ZHR 2025, 647, 681.
37 AG Nürnberg, Beschl. v. 21.6.2023 – RES 397/23, ZIP 2023, 2317 (Leoni); AG Stuttgart, Beschl. v. 11.12.2024 – 6 RES 1243/24, ZRI 2025, 149 (Varta).
38 Korch, ZHR 2025, 647, 681; Brackmann / Holze, ZRI 2024, 143, 150.
39 Korch, ZHR 2025, 647, 651 ff.; Flöther / Wilke, ZRI 2023, 1029; Ziegenhagen, ZInsO 2025, 281.
40 Korch, ZHR 2025, 647, 655 ff.; Rauhut, NZI-Beilage 2021, 52, 54.
41 AG Nürnberg, Beschl. v. 21.6.2023 – RES 397/23, ZIP 2023, 2317, 2319; Baumert, Restrukturierungsrecht trifft auf Prozess- und Gesellschaftsrecht, NZI 2023, 952, 954; Brackmann / Holze, ZRI 2024, 143, 147.
42 Flöther / Wilke, ZRI 2023, 1029, 1033 ff.; Gehrlein, BB 2022, 1096, 1097; Rauhut, NZI-Beilage 2021, 52, 54.
43 Korch, ZHR 2025, 647, 668 ff. (simple majority); a.A. Gehrlein, BB 2022, 1096, 1097 (three-quarters majority); Ziegenhagen, ZInsO 2025, 281, 284.

In the context of the forthcoming StaRUG evaluation, it has been observed that the courts have now "largely" settled this question in favour of dispensing with a shareholder resolution – at least for external effect and in particular for the AG – and that the remaining uncertainty is primarily a matter for which legislative clarification would be desirable, in particular to protect management against liability risks *vis-à-vis* shareholders, but not urgent.[44]

5.2 The OLG Stuttgart decision of 21 August 2024

The Higher Regional Court of Stuttgart (OLG Stuttgart) addressed this question in its decision of 21 August 2024 (case no. 20 U 30/24), the first appellate-level ruling on the matter.[45] The case concerned a partnership with only a limited liability company as a general partner, i.e. a GmbH & Co. KG of the EMAG group. At a shareholders' meeting on 28 June 2024, the shareholders voted in favour of initiating a StaRUG proceeding; however, the claimant's votes were excluded on the basis of alleged contractual breaches. The claimant obtained a preliminary injunction from the Regional Court of Ulm (LG Ulm) prohibiting the execution of the resolution.[46]

On appeal, the OLG Stuttgart reversed the lower court and dismissed the application for an injunction. In an obiter dictum that has attracted enormous scholarly attention, the court held that "a shareholder resolution is not required for the initiation of StaRUG proceedings at least where, as in the present case, the restructuring proceeding is the only sufficiently promising alternative to insolvency proceedings."[47] The court reasoned that requiring shareholder consent in all cases would substantially reduce the scope of the StaRUG and would allow shareholders to block restructurings even where the alternative is insolvency, thus undermining the legislative purpose.[48] The court further relied on a directive-conforming interpretation of article 12 of the Restructuring Directive, which requires Member States to ensure that shareholders cannot unreasonably prevent or frustrate the adoption of a restructuring plan.[49]

5.3 Commentary on the OLG Stuttgart decision

In the literature, the result of the OLG Stuttgart decision is broadly supported, though the absence of a clear dogmatic foundation has attracted criticism.[50] One prominent approach locates the proper doctrinal basis for dispensing with the shareholder resolution in the fiduciary duty (*Treuepflicht*) of shareholders: where a shareholder is obligated by its duty of loyalty to consent to the restructuring (because the restructuring does not leave the shareholder worse off than insolvency), a refusal to consent is void, and in urgent cases consent may be deemed given (*Zustimmungsfiktion*).[51]

A similar view derives the exception for cases of imminent insolvency from a directive-conforming interpretation of the StaRUG in light of article 12 of the Restructuring Directive, emphasising that shareholders may not invoke their formal legal position to block restructuring measures where this would result in insolvency, and where the comparison calculation shows that they would receive no better outcome in insolvency.[52]

A more expansive position in the literature argues that restructuring law as *lex specialis* overrides corporate law requirements across all legal forms, however, even if one is of the opinion that a shareholder resolution is generally required, it becomes dispensable once the crisis has deepened

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44 Thole, StaRUG-Evaluation: Ausgewählte Reformperspektiven, ZRI 2025, 941, 942.
45 OLG Stuttgart, Beschl. v. 21.8.2024 – 20 U 30/24, ZIP 2024, 2218, ZRI 2024, 802.
46 LG Ulm, Beschl. v. 1.8.2024 – 10 O 43/24 KfH (unpublished).
47 OLG Stuttgart, ZIP 2024, 2218, 2225.
48 OLG Stuttgart, ZIP 2024, 2218, 2220–2225.
49 Art. 12 Directive (EU) 2019/1023; OLG Stuttgart, ZIP 2024, 2218, 2225.
50 Seibt / Harf, ZIP 2024, 2309.
51 Seibt / Harf, ZIP 2024, 2309, 2314 ff.
52 Ziegenhagen, ZInsO 2025, 281, 285 ff.

to the point where the StaRUG proceeding is the only viable option.[53] Under this graduated approach, in the early phase of threatened illiquidity, shareholder involvement is required; in the critical restructuring window (where insolvency threatens within twelve months), the shareholders' blocking position must yield to creditor interests.[54]

A further doctrinal approach, commenting on the full OLG Stuttgart judgment of 28 October 2024, provides the most detailed defence of the court's reasoning by locating the foundation not in the shareholders' fiduciary duty but in management's restructuring responsibility (*Sanierungsverantwortung*): section 1(1) of the StaRUG codified a pre-existing duty of care that, in crisis situations, extends to an obligation to take "suitable countermeasures" and carries a competence-extending function (*kompetenzerweiternde Funktion*).[55] With progressive crisis deepening – and at the latest upon balance-sheet insolvency – the duty of care shifts from being shareholder-oriented to creditor-oriented, because the enterprise's purpose then serves the satisfaction of creditor claims rather than shareholder wealth maximisation.[56]

In a "critical restructuring window" of 12 months (where the company's going-concern prognosis depends entirely on creditor-supported restructuring measures), the competence to initiate the StaRUG proceeding shifts to management.[57] This view also critically examines the alternative fiduciary-duty solution, acknowledging its complementary role but identifying three structural limitations: the uncertain extension of the fiduciary duty to creditor protection; the procedural inability to resolve blockade positions in time; and the risk that shareholders may contractually exclude the fiduciary duty, thereby circumventing the StaRUG framework by private ordering.[58]

In summary, and supported by the most comprehensive scholarly analysis of the issue, for the AG, no general meeting resolution is required because neither a written nor unwritten general meeting competence exists.[59] For the GmbH, a shareholder resolution with simple majority is required in principle. However, management may exceptionally file without shareholder consent where the company would otherwise be over-indebted and management would be obligated to file for insolvency. This exception is derived from a directive-conforming interpretation of section 1(1) of the StaRUG or from a directive-conforming development of GmbH law.[60]

5.4 *De facto* interference: replacing directors and other tactics

Even where the shareholder resolution requirement is overcome, shareholders retain the power to frustrate restructurings through de facto means. In the GmbH, shareholders may dismiss the managing directors at any time and replace them with individuals willing to withdraw the restructuring notice.[61] The StaRUG does not contain a provision equivalent to section 276a of the InsO (which restricts shareholder influence in formal insolvency).[62] Newly appointed directors must, however, weigh their own obligations under section 43(1) of the StaRUG and risk personal liability if they withdraw the notice in a manner that harms creditors.[63]

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53 Flöther / Wilke, ZRI 2023, 1029, 1038 ff.
54 Flöther / Wilke, ZRI 2023, 1029, 1041 f.
55 Kowalewski / Klockenbrink / Meier, ZRI 2024, 1089 (commenting on OLG Stuttgart, Urt. v. 28.10.2024 – 20 U 30/24, ZRI 2024, 1076).
56 Kowalewski / Klockenbrink / Meier, ZRI 2024, 1089, 1092 f.
57 Kowalewski / Klockenbrink / Meier, ZRI 2024, 1089, 1093.
58 Kowalewski / Klockenbrink / Meier, ZRI 2024, 1089, 1094 f.; similarly Herding / Krafczyk, ZRI 2023, 750; Flöther / Wilke, ZRI 2023, 1029, 1041 f. See also Kowalewski / Klockenbrink / Meier, ZRI 2024, 1089, 1097 f.; contra Seibt / Harf, ZIP 2024, 2309, 2314 ff.
59 Korch, ZHR 2025, 647, 659.
60 Korch, ZHR 2025, 647, 689.
61 Korch, ZHR 2025, 647, 673; Ziegenhagen, ZInsO 2025, 281, 283.
62 Thole, ZRI 2024, 1006, 1008.
63 Korch, ZHR 2025, 647, 674.

In the AG, the literature has discussed the case of a minority shareholder seeking a court order for the convening of an extraordinary general meeting under section 122 of the AktG during a pending restructuring matter.[64] Such requests, including demands for a special auditor (*Sonderprüfer*), may serve to delay or disrupt the restructuring process. The practical result in the AG Landshut case was that the shareholder's actions ultimately precipitated an insolvency filing.[65]

6. Measures for the cram down of shareholders

6.1 Cross-class cram down under sections 26–28 of the StaRUG

The StaRUG provides for a cross-class cram down (*gruppenübergreifende Mehrheitsentscheidung*) where one or more groups, including the shareholder group, do not achieve the required 75% majority for plan adoption.[66] The conditions for overriding a dissenting group are set out in section 26(1) of the StaRUG and require, cumulatively: first, that the overruled group is not worse off than without the plan (the *Schlechterstellungsverbot*, not worse off test); second, that the overruled group participates appropriately in the economic value (*angemessene Beteiligung am wirtschaftlichen Wert*); and third, that a majority of the groups has approved the plan, with the approving groups not consisting exclusively of shareholder groups.[67]

6.2 The absolute priority rule

The requirement of appropriate participation in the economic value is further specified in section 27 of the StaRUG, and for shareholders specifically in section 27(2) of the StaRUG, which embodies the absolute priority rule (APR). Under the APR, no subordinate group may receive any value unless all senior groups have been fully satisfied.[68]

Because shareholders rank last in the statutory waterfall, the APR means in practice that shareholders must be entirely excluded, without compensation, whenever a creditor group is being crammed down, unless the narrow exception of section 28 of the StaRUG, and for shareholders in particular section 28(2) of the StaRUG, applies.[69] If shareholders are to remain in the company post-restructuring, they must compensate for the economic value they retain by making a contribution to the debtor's assets, pursuant to section 27(1) no. 3 of the StaRUG.[70]

6.3 The prohibition against worse treatment (not worse off test)

The prohibition against worse treatment (not worse off test) protects shareholders against outcomes that would leave them worse off than in the next-best alternative scenario, which in practice in almost all cases is formal insolvency.[71]

Because shareholders typically receive nothing or only very little distributions in an insolvency liquidation of a heavily indebted company, this threshold is easily met. The comparison calculation (*Vergleichsrechnung*) is thus the key protective mechanism, but its practical effectiveness has been questioned because of the information asymmetry between the debtor and minority shareholders.[72] In the context of the forthcoming StaRUG evaluation, it has been proposed in the literature that validation of the comparison calculation should become a standard task of the restructuring commissioner (by amendment of section 76(2) no. 3 of the StaRUG), and that section 6(2) of the

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64 Thole, ZRI 2024, 1006, 1008 f.
65 Thole, ZRI 2024, 1006, 1009.
66 Sections 26–28 StaRUG; Korch, ZHR 2025, 647, 681 f.
67 Section 26(1) nos. 1–3 StaRUG; Mulert / Steiner, NZG 2021, 673, 678.
68 Section 27(1) StaRUG; Korch, ZHR 2025, 647, 682.
69 Korch, ZHR 2025, 647, 683 f.
70 BT-Drucks. 19/24181, p. 161.
71 Sections 26(1) no. 1, 64(1) StaRUG; Korch, ZHR 2025, 647, 684; Gehrlein, BB 2022, 1096, 1100.
72 BRAK, Stellungnahme Nr. 18/2026, p. 12 with reference to the constitutional complaint dated 19.2.2025 (1 BvR 606/25).

StaRUG should be supplemented with enhanced disclosure requirements regarding the concrete assumptions underlying the valuation, particularly where liquidation rather than going-concern is assumed as the alternative scenario.[73]

6.4 Minority protection and immediate appeal

Shareholders who have voted against the plan and raised an objection may file an immediate appeal against the plan confirmation pursuant to section 66 of the StaRUG.[74] They must demonstrate that they are materially worse off under the plan than without it and that this disadvantage cannot be compensated from the funds set aside under section 64(3) of the StaRUG. Additionally, a minority protection application (*Minderheitenschutzantrag*) under section 64 of the StaRUG of the allows affected parties to request that the court refuse plan confirmation.[75]

6.5 Practical limitations

In practice, the effectiveness of these safeguards has been questioned from multiple perspectives. The short procedural timeframes, in particular the 14-day notice period for the discussion and voting hearing under section 45(1) sentence 2 of the StaRUG, have been criticised as insufficient for shareholders to engage meaningfully with complex restructuring plans.[76]

A significant information asymmetry has been identified between the debtor (which prepares the plan and controls the underlying data) and affected shareholders (who must evaluate the plan's assumptions, the comparison calculation and the proposed capital measures within compressed timeframes).[77]

Further, the immediate appeal under section 66 of the StaRUG, while formally available, is subject to a restrictive admissibility threshold. Specifically, section 66(2) no. 3 of the StaRUG requires the appellant to demonstrate worse treatment and to present substantiating evidence (*Glaubhaftmachung*), which, given the information deficit, has been described in the literature as placing a burden on minority shareholders that is "hardly manageable for small investors."[78]

The practical result is that appeals have been uniformly unsuccessful, which has been attributed to the deliberately high hurdles of substantiation designed to minimise the "hold-up potential" of legal remedies and to preserve the stability of plan confirmations.[79]

Whether this design is constitutionally adequate – or whether, as the BRAK has argued, the structural tendency of courts to adopt the restructuring commissioner's assessments without independent review creates an impermissible procedural deficit – is among the central questions pending before the BVerfG.[80]

In the context of the forthcoming StaRUG evaluation, it has been proposed that the statutory framework should be supplemented with enhanced disclosure requirements for the comparison calculation and that validation of the comparison calculation should become a standard task of the restructuring commissioner, in order to mitigate the information asymmetry without fundamentally altering the procedural architecture.[81]

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73 Thole, ZRI 2025, 941, 943 f.
74 Section 66 StaRUG; Baumert, NZI 2023, 952; Gehrlein, BB 2022, 1096, 1101.
75 Section 64 StaRUG; BVerfG, Beschl. v. 28.2.2025 – 1 BvR 418/25, ZIP 2025, 651, para. 14.
76 BRAK, Stellungnahme Nr. 18/2026, pp. 12 ff. with reference to the constitutional complaint dated 19.2.2025 (1 BvR 606/25).
77 Korch, ZHR 2025, 647, 680.
78 Takjas, NZI 2025, 371, 375; BVerfG, Beschl. v. 28.2.2025 – 1 BvR 418/25, ZIP 2025, 651, para. 12 ff.
79 Thole, ZRI 2025, 941, 949.
80 BRAK, Stellungnahme Nr. 18/2026, pp. 10 ff. with reference to the constitutional complaint dated 19.2.2025 (1 BvR 606/25).
81 Thole, ZRI 2025, 941, 943 f.

7. Debt-for-equity swap and consent of shareholders

7.1 Legal framework

Section 7(4) of the StaRUG, modelled on section 225a of the InsO, permits the restructuring plan to provide for capital reductions, exclusion of subscription rights and transfer of membership rights.[82] These measures may be imposed against the will of shareholders through the cross-class cram down mechanism.[83] However, section 7(4) sentence 2 of the StaRUG expressly prohibits the conversion of creditor claims into equity (debt-for-equity swap) against the will of the affected creditors; for creditors who object to such a conversion, a cash compensation must be provided.[84]

There is no equivalent prohibition protecting shareholders against being crammed down into accepting a debt-for-equity swap that dilutes or eliminates their position.

7.2 Practical application

In practice, the most common restructuring technique under the StaRUG involves a "capital cut" (*Kapitalschnitt*): a reduction of share capital to zero, followed by a capital increase with exclusion of subscription rights for existing shareholders, allowing new investors or converting creditors to subscribe to the new shares.[85] This was the approach taken in the LEONI AG and VARTA AG restructurings, as well as in many others.[86] Such measures, according to the prevailing view, are "permissible corporate-law measures" within the meaning of section 7(4) sentence 5 of the StaRUG ("any measure that is permissible under corporate law may be provided for").[87]

The question whether the general corporate law requirements for exclusion of subscription rights (in particular, the requirement of substantive justification under section 186(3) of the AktG as developed by the BGH) continue to apply within the StaRUG plan has been raised.[88] The prevailing view, supported by the restructuring courts, holds that section 7(4) sentence 3 of the StaRUG as *lex specialis* displaces the general corporate law requirements, and that shareholder protection is achieved exclusively through the StaRUG's own mechanisms (the *Schlechterstellungsverbot* and the cross-class cram down requirements).[89] The opposing view, advanced inter alia in the VARTA constitutional complaint, argues that article 14(1) of the GG (the constitutional property guarantee) requires the continued application of corporate law safeguards, particularly for listed companies.

In the context of the forthcoming StaRUG evaluation, the permissibility of the exclusion of subscription rights has been defended in the literature against reform proposals. The question has been raised whether the sticking point in the public debate is not the exclusion of the subscription rights itself – which is expressly provided for by section 7(4) of the StaRUG – but rather the circumstance that entities controlled by a former majority shareholder acted as plan investors and captured the upside of the debt reduction, albeit not for free, but compensated per section 27(1) no. 3 of the StaRUG by way of subscription, payments in cash and contributions in kind for the new shares and bearing the risk of the restructuring's failure.[90] Proposals to grant existing shareholders even a limited subscription right (for instance, up to the blocking minority threshold) are rejected in the literature, on the grounds that investors may only be willing to invest if all existing shareholders are excluded, and that establishing a subscription right would require compliance with prospectus

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82 Section 7(4) StaRUG; Mulert / Steiner, NZG 2021, 673, 675 ff.
83 Mulert / Steiner, NZG 2021, 673, 676; Korch, ZHR 2025, 647, 680 f.
84 Section 7(4) sentence 2 StaRUG; Mulert / Steiner, NZG 2021, 673, 677.
85 Korch, ZHR 2025, 647, 649; Brackmann / Holze, ZRI 2024, 143, 150.
86 AG Nürnberg, Beschl. v. 21.6.2023 – RES 397/23, ZIP 2023, 2317 (Leoni); AG Stuttgart, Beschl. v. 11.12.2024 – 6 RES 1243/24, ZRI 2025, 149 (Varta).
87 Mulert / Steiner, NZG 2021, 673, 676 f.; Ziegenhagen, ZInsO 2025, 281, 287.
88 Ziegenhagen, ZInsO 2025, 281, 287 f.
89 Ziegenhagen, ZInsO 2025, 281, 288; Flöther / Wilke, ZRI 2023, 1029, 1041.
90 Thole, ZRI 2025, 941, 944.

obligations that are virtually impossible to fulfil within the compressed timeframes of a restructuring.[91]

These concerns were mainly raised by investor protection associations and it is being discussed whether substantive reform is actually needed. To address these concerns, it has been suggested that a formal disclosure requirement could be added at section 31(2) no. 2 of the StaRUG, obliging the debtor to explain what financing options, including participation by existing shareholders, were explored and why they were not pursued.[92]

8. Recent case law and constitutional proceedings

8.1 The BVerfG decision of 28 February 2025 (1 BvR 418/25)

On 28 February 2025, the German Federal Constitutional Court (BVerfG) declined to accept for decision a constitutional complaint filed by minority shareholders of VARTA AG against the confirmation of the restructuring plan.[93] The restructuring plan provided for a capital reduction to zero and the exclusion of subscription rights for minority shareholders, with the result that the complainants would exit the company without compensation.

The BVerfG held the complaint inadmissible on procedural grounds: the complainants had failed to satisfy the substantiation requirements of sections 23(1) sentence 2 and 92 of the BVerfGG.[94] In particular, they had not engaged sufficiently with the reasoning of the Regional Court's decision rejecting their appeal, had not addressed the statutory minority protection regime (sections 64 and 66 of the StaRUG), and had not demonstrated that they were materially worse off under the plan by reference to alternative scenarios.[95] The court noted that a further constitutional complaint arising from the same restructuring matter remained pending and had not yet been decided.[96]

In commentary on this decision, the VARTA constitutional proceedings have been placed in the broader context of prior BVerfG jurisprudence on shareholder rights, including the Squeeze-Out, Delisting and Suhrkamp decisions.[97] A structural "power asymmetry" (*Machtasymmetrie*) inherent in the StaRUG has been identified: the strict substantiation requirements for the immediate appeal (section 66(2) no. 3 of the StaRUG) demand that minority shareholders demonstrate their worse treatment and present evidence, which – given the short timeframes and information deficit – is "hardly manageable for small investors" (*für Kleinanleger kaum zu bewältigen*).[98]

8.2 Pending constitutional complaints (1 BvR 502/25 and 1 BvR 606/25)

Two constitutional complaints are currently pending before the BVerfG, both arising from Stuttgart-based restructuring proceedings.

The first complaint (1 BvR 502/25) was filed against the confirmation of a restructuring plan by the AG Stuttgart (decisions of 22 October and 6 December 2024) and the LG Stuttgart's dismissal of the appeal (14 January 2025).[99] The complainant challenges the initiation of the restructuring without a proper shareholder resolution (relying on corporate law arguments) and the transfer of partnership

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91 Thole, ZRI 2025, 941, 944 f.; similarly on the prospectus problem Thole, ZRI 2024, 1006, 1010; Ziegenhagen, ZInsO 2025, 281, 289.

92 Thole, ZRI 2025, 941, 945.

93 BVerfG (3. Kammer des Ersten Senats), Beschl. v. 28.2.2025 – 1 BvR 418/25, ZIP 2025, 651 = NZI 2025, 371.

94 BVerfG, ZIP 2025, 651, para. 8.

95 BVerfG, ZIP 2025, 651, para. 12 ff.

96 BVerfG, ZIP 2025, 651, para. 19.

97 Takjas, Anm. zu BVerfG, Beschl. v. 28.2.2025 – 1 BvR 418/25, NZI 2025, 371, 374; referring to BVerfG NJW 2007, 3268 (Squeeze-Out); BVerfG NJW 2012, 3081 (Delisting); BVerfG NJW 2015, 465 (Suhrkamp).

98 Takjas, NZI 2025, 371, 375.

99 BRAK, Stellungnahme Nr. 18/2026, pp. 2 ff.

interests at inadequate prices. The complaint raises questions about the necessity of a shareholder resolution, the adequacy of compensation for transferred interests and the conformity of the StaRUG with article 14(1) of the GG (property guarantee) and article 3(1) of the GG (equality).[100]

The second complaint (1 BvR 606/25) was filed on 19 February 2025 by minority shareholders of VARTA AG against the plan confirmation by the AG Stuttgart (11 December 2024) and the LG Stuttgart's dismissal of the appeal (21 January 2025), and also directly challenges section 7(4) of the StaRUG. The complainants allege violations of article 14(1) of the GG (property), article 3(1) of the GG (equality), and articles 2(1), 20(3), 19(4) and 103(1) of the GG (effective legal protection and the right to be heard).

Their core arguments include: the StaRUG constitutes an ultra vires implementation of the EU Directive; the subscription right forms part of the constitutionally protected core of the property guarantee; the proceedings violate the Holzmüller doctrine; the cross-class cram down mechanism enables expropriation without compensation; the procedural safeguards are inadequate; and the comparison calculation was a party expert opinion adopted without critical examination.[101]

8.3 Statements submitted to the BVerfG

Pursuant to section 27a of the BVerfGG, the BVerfG invited stakeholders and professional associations to submit statements on both pending constitutional complaints by 31 March 2026. The positions of the publicly known statements reveal a sharp divide between the Constitutional Law Committee of the German federal bar (*Bundesrechtsanwaltskammer*, BRAK) and BRAK's Insolvency Law Committee, as well as associations of the restructuring practitioners.

The BRAK's Constitutional Law Committee submitted a joint statement covering both cases (Stellungnahme Nr. 18/2026, March 2026) and concluded that, if admissible, both complaints are well-founded on the merits.[102] It identifies three key constitutional deficiencies: first, the StaRUG lacks a constitutionally compliant compensation provision when share interests are transferred under section 7(4) sentence 4 of the StaRUG, contrary to article 14(1) sentence 2 of the GG; second, the allocation of new shares to restructuring shareholders against symbolic contributions of EUR 1 constitutes unconstitutional unequal treatment under article 3(1) of the GG; and third, structural procedural deficits arise because courts tend to adopt the restructuring commissioner's assessments without independent review, compounded by the highly restrictive admissibility of appeals under section 66(2) of the StaRUG.[103] Regarding the initiation without a shareholder resolution (raised in 1 BvR 502/25), the BRAK finds this challenge unpersuasive, as the filing itself does not decide on the restructuring plan.[104]

By contrast, three insolvency and restructuring practitioners' organisations – the VID (Verband Insolvenzverwalter und Sachwalter Deutschlands), TMA Deutschland e.V. (Gesellschaft für Restrukturierung) and the Gravenbrucher Kreis e.V., including BRAK's Insolvency Law Committee, uniformly defend the constitutionality of the StaRUG.[105] Their common position is that section 7(4) of the StaRUG constitutes a permissible content and limitation provision (*Inhalts-und-Schrankenbestimmung*) under article 14(1) of the GG; that the no-worse-off principle and the cross-class cram down requirements provide adequate shareholder protection; and that the framework substantially corresponds to the proven section 225a of the InsO mechanism, which the BVerfG did

100 BRAK, Stellungnahme Nr. 18/2026, pp. 8 ff.
101 BRAK, Stellungnahme Nr. 18/2026, pp. 4 ff.
102 BRAK, Stellungnahme Nr. 18/2026, pp. 6 ff.
103 BRAK, Stellungnahme Nr. 18/2026, pp. 10 ff.
104 BRAK, Stellungnahme Nr. 18/2026, p. 14.
105 VID, Stellungnahmen zu 1 BvR 502/25 und 1 BvR 606/25, March 2026; TMA Deutschland e.V., Stellungnahme v. 31.3.2026; Gravenbrucher Kreis e.V., Stellungnahmen v. 12.3.2026.

not object to in the Suhrkamp decision.[106] The TMA explicitly opposes the statement of BRAK's Constitutional Law Committee and sees the proceedings as an opportunity for the BVerfG to confirm the constitutionality of the StaRUG and create legal certainty for future restructuring proceedings.[107]

9. Prospective law reform

The German Federal Ministry of Justice (*Bundesministerium der Justiz*) has announced that it will present a formal evaluation of the StaRUG in 2026, prompted by article 33 of Directive 2019/1023, which requires the European Commission to evaluate the Directive's implementation by 17 July 2026.[108] No draft legislation has been published as of the date of this contribution. The scholarly debate on the appropriate scope of reform ranges from those who advocate only small adjustments and clarifications rather than fundamental change – arguing that the StaRUG "has arrived in practice" and that a far-reaching reform would create new uncertainties[109] – to those (including BRAK's Constitutional Law Committee) who consider that constitutional deficiencies may compel more substantive legislative action.

Key areas for potential reform include: the introduction of a clearer statutory rule on the necessity (or dispensability) of a shareholder resolution for the restructuring notice; the introduction of a mandatory compensation mechanism for shareholders whose interests are transferred under section 7(4) sentence 4 of the StaRUG; enhanced information rights and extended procedural timeframes for plan-affected shareholders; and stricter requirements for the independence of the restructuring commissioner.[110]

Conclusion

The German StaRUG has fundamentally reconfigured the position of shareholders in pre-insolvency restructurings. Prior to 2021, no restructuring could be imposed on shareholders outside formal insolvency proceedings without their consent.[111] The StaRUG now permits the cross-class cram down of shareholders, including through capital measures that may eliminate their participation entirely. Shareholders' protection rests primarily on the prohibition against worse treatment / not worse off test, which compares their position to the next-best alternative (typically insolvency liquidation), and on procedural safeguards including the plan vote, the hearing and the immediate appeal.

The interface between corporate law and restructuring law at the point of entry into the StaRUG proceedings remains unresolved. The OLG Stuttgart has carved out an exception from the shareholder resolution requirement where the StaRUG proceeding is the only sufficiently promising alternative to insolvency, but this exception still lacks a settled dogmatic foundation and has been criticised by some scholars.[112] The pending constitutional complaints will provide the BVerfG with an opportunity to clarify the constitutional limits of the StaRUG regime, particularly regarding the necessity of a shareholder resolution, the adequacy of compensation for excluded shareholders, the compatibility of the cross-class cram down with article 14(1) of the GG and the sufficiency of procedural safeguards.[113]

For practitioners, the current legal landscape requires careful navigation. In GmbH restructurings, obtaining a shareholder resolution before filing remains advisable where practicable, even in cases

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106 TMA Deutschland e.V., Stellungnahme v. 31.3.2026, pp. 4 ff.; referring to BVerfG, Beschl. v. 18.12.2014 – 2 BvR 1978/13 (Suhrkamp), NJW 2015, 465.

107 TMA Deutschland e.V., Stellungnahme v. 31.3.2026, p. 8.

108 Thole, ZRI 2025, 941; Art. 33 Directive (EU) 2019/1023.

109 Thole, ZRI 2025, 941, 950.

110 Seibt / Harf, ZIP 2024, 2309, 2310; BRAK, Stellungnahme Nr. 18/2026, pp. 6 ff.

111 Korch, ZHR 2025, 647, 649.

112 Seibt / Harf, ZIP 2024, 2309, 2312 ff.; Korch, ZHR 2025, 647, 672.

113 BRAK, Stellungnahme Nr. 18/2026, pp. 6 ff. with reference to the constitutional complaint dated 19.2.2025 (1 BvR 606/25).

of imminent insolvency, to minimise litigation risk as well as liability risks for management. Where consent cannot be obtained, management must carefully document the absence of alternatives and a shift of fiduciary duties towards creditors.[114] For management in crisis situations the following is recommended: early stakeholder engagement, the development of solutions primarily with financial creditors once creditor interests become paramount and continuous documentation of the decision-making process to demonstrate, if necessary, the dispensability of the shareholder resolution.[115]

In AG restructurings, management enjoys greater latitude, but the VARTA experience demonstrates that use of capital measures against minority shareholders, particularly in listed companies, may currently trigger litigation until the BVerfG resolves the pending complaints.

[114] Seibt / Harf, ZIP 2024, 2309, 2315 f.; Ziegenhagen, ZInsO 2025, 281, 286.
[115] Kowalewski / Klockenbrink / Meier, ZRI 2024, 1089, 1098 f.

HONG KONG

Introduction

In Hong Kong, shareholders have very limited rights generally in the context of a restructuring. There are, however, a wide range of factors, including statutory protections, contractual rights and commercial and regulatory considerations which may influence the treatment of shareholders. Such treatment will differ on a case-by-case basis and is highly dependent on the factual scenario.

As recent examples, in the sanctioned debt restructuring of:

- Sunac China,[1] the chairman retained approximately 23% of his shareholding in the company. According to Sunac China's public announcements, the justification for the level of equity retained was, among other things, to secure the continued contribution of the chairman to the Sunac China group in order to maintain investor confidence; and

- Sino-Ocean,[2] two majority shareholders being primarily PRC state-owned entities which had held approximately 60% of the shares in Sino-Ocean were permitted to retain shareholdings of approximately 15% each. According to an English court judgment,[3] Sino-Ocean justified this approach on the grounds that this would cause Sino-Ocean to continue to be regarded as a state-owned entity. This was perceived to have several benefits for the company, including with respect to receiving a more helpful reception by state organisations in Mainland China and securing more favourable financing terms in debt markets.

To provide greater context, Hong Kong does not presently have a formal corporate rescue regime akin to the UK administration regime or the US Chapter 11 debtor-in-possession regime. When a company seeks to restructure its financial indebtedness outside formal insolvency, the two principal avenues are:

- an informal, out-of-court workout; and

- a scheme of arrangement, being a compromise or arrangement between a debtor company and its creditors or members, as applicable (or any class of creditors or members), pursuant to sections 670, 673 and 674 of the CO (as defined below).

Alongside these restructuring mechanisms sits an insolvency framework which includes provisional liquidation, liquidation and receivership.

In Hong Kong, the principal legislation covering the restructuring and corporate insolvency regimes is:

- the Companies Ordinance (Cap. 622) (CO);

- the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (CWUMPO); and

- the Companies (Winding Up) Rules (Cap. 32H).

The responses that follow primarily address the shareholder position and rights within this framework in the context of debt restructurings. Additional considerations may be relevant in the context of a

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1 Sunac China Holdings Limited and various group entities restructured approximately US $9.6 billion of offshore debt via a scheme of arrangement. The Hong Kong court sanctioned the scheme on 5 November 2025. See *Sunac China Holdings Limited* [2026] HKCFI 68.

2 Sino-Ocean Group Holding Limited and various group entities restructured approximately US $6.3 billion of offshore debt via a UK restructuring plan and an inter-conditional scheme of arrangement in Hong Kong. The English court sanctioned the plan on 3 February 2025, and the Hong Kong court sanctioned the scheme on 19 February 2025. See *Sino-Ocean Land (Hong Kong) Limited* [2025] HKCFI 1270; see also *Re Sino-Ocean Group Holding Ltd* [2025] EWHC 205 (Ch).

3 *Re Sino-Ocean Group Holding Ltd* [2025] EWHC 205 (Ch).

corporate reorganisation or a restructuring of shareholder rights through a members' scheme of arrangement.

1. The position of the insolvency officeholder and creditors compared to shareholders

1.1 Insolvency proceedings

The appointment of a liquidator or provisional liquidator to a Hong Kong company (or a receiver and manager over all or substantially all of its business and assets) has a substantial impact on the rights of the company's shareholders. The appointed insolvency officeholders will take over the control of the company and its business and assets from the company's directors and officers. Accordingly, shareholders cease to be able to effectively control the company through the board.

Furthermore, pursuant to section 182 of the CWUMPO, in a winding up by the court, any transfer of shares, or alteration in the status of the members of the company after the commencement of the winding up, is void unless otherwise ordered by the court. Upon the appointment of a provisional liquidator or liquidator, no action or proceeding may be continued or commenced by creditors against a debtor company or its property except with leave of the court. Secured creditors can generally still enforce their rights under a security interest.

Creditors may submit a proof of debt in the liquidation in respect of provable debts. Pursuant to the statutory order of priority for payments in a liquidation, shareholders rank behind the liquidators' claims for fees and expenses of the winding up and creditor claims.

Unlike creditors, in an insolvent liquidation shareholders ordinarily have no economic interest unless there are sufficient assets or recoveries to pay creditors in full. Shareholders' rights are therefore typically limited to receiving any surplus after all prior ranking claims have been fully satisfied. Accordingly, shareholders have very limited ability to direct outcomes once an insolvency officeholder has been appointed, except to the extent that the insolvency officeholder intends to propose a restructuring in a manner that will require shareholder consent (see further below).

1.2 Informal workouts and schemes of arrangement

If an informal workout or scheme of arrangement is being pursued by a company outside of a formal insolvency process and there is no insolvency officeholder appointed, the directors and officers will generally continue to have control over the day-to-day management of the company and the restructuring process. Shareholders will retain their rights in the company during this period, including any rights to appoint or remove directors and other voting rights.

While a scheme or informal workout is being proposed in Hong Kong, there is presently no automatic moratorium from creditor actions or proceedings. However, it is possible for a debtor company or any creditor to ask the court for a stay or adjournment against winding up proceedings filed in respect of the company if a viable restructuring is proposed.[4]

In the context of an informal workout, the threshold of creditor approval required to effect the restructuring will depend on the terms of the debt instruments that are being restructured. Approval of a scheme will require the affirmative vote of a majority of scheme creditors by number (of those present and voting) whose claims represent at least 75% by value of the claims of those scheme creditors present and voting, and sanction by the court.

[4] In *Re China Huiyuan Juice Group Limited* [2021] 1 HKLRD 255, the winding up petition was adjourned to allow the restructuring plan to progress.

Whether or not the consent of the shareholders will be required to implement an informal workout or a scheme of arrangement will depend on various factors including the terms of the restructuring and how they will impact the rights of the shareholders (see further below).

2. Shareholders' rights to be consulted and to receive information

In Hong Kong, shareholders do not have an automatic right to inspect company books and records. However, under section 740 of the CO, qualifying shareholders (being either at least 5 members, or members holding at least 2.5% of the voting shares) may apply to the court for an order authorising inspection of any record or document of the company. The court will grant such an order only if it is satisfied that the application is made in good faith and that the inspection is for a proper purpose.

In the context of a debt restructuring, shareholders' consultation and information rights are significantly narrower than those of creditors. However, where the implementation of a debt restructuring scheme includes steps that will require the cooperation of shareholders (see further below), it is necessary in practice for the scheme company to consult with shareholders and seek their support for the restructuring.

3. The composition of classes involving shareholders in the context of a restructuring plan

The creditors' scheme of arrangement procedure under the CO does not provide for shareholders to vote as a scheme class in the creditors' scheme or to vote on the creditors' scheme at all. To the extent that consent or approval from shareholders is required to implement the creditors' scheme (e.g. for the issuance of new shares or the reduction of capital), shareholder consent or approval must be obtained in accordance with the applicable contractual, statutory or regulatory provisions (see further below) and, in practice, the scheme will ordinarily include obtaining such consents or approvals as a condition precedent to the restructuring effective date under the scheme.

A members' scheme of arrangement would typically only be pursued if a compromise or arrangement is proposed that will alter the rights of the members. If a members' scheme is utilised, whether or not all members will vote together as a single class or in separate classes will depend upon whether their rights are so dissimilar as to make it impossible for them to consult together and vote in one class.

4. Shareholders' voting rights

The voting rights of shareholders in Hong Kong are governed by the CO, as well as any applicable provisions in the company's articles and any shareholders' agreement. If the company is listed in Hong Kong, shareholders also have certain voting rights under the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (Listing Rules). In certain circumstances, voting rights under the Codes on Takeovers and Mergers and Share Buy-Backs (Takeovers Code) will also apply.

The requisite voting threshold (e.g. ordinary or special resolutions) for shareholder approval or consent will depend on the terms of the debt restructuring and what steps are required to be taken to implement it (e.g. new share issuances, substantial dilution, material transactions, etc) which will determine the nature of the approval or consent required. Requisite shareholder approvals are typically a condition to the effective date of the restructuring under the creditors' scheme of arrangement that will implement the restructuring.

For listed companies in Hong Kong, the Listing Rules provide additional considerations such as the restriction of interested shareholders from voting on certain resolutions which can provide leverage to disinterested shareholders.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via veto power or by *de facto* interference)

Shareholders can impede or delay a debt restructuring through several avenues, including but not limited to the following:

- if a members' scheme of arrangement is proposed in parallel with a debt restructuring or the proposed debt restructuring scheme terms will prejudice shareholders or otherwise affect their interests – seeking to challenge the scheme at either a convening hearing or the sanction hearing (e.g. challenging class composition, adequacy of disclosure or fairness). In the context of a members' scheme, the court will have regard to whether a reasonable shareholder might approve the scheme with proper information and whether the statutory majorities are met; and

- by voting against a shareholder resolution (e.g. for approval of a share issuance, capital reduction or waiver of pre-emption rights) required to implement a debt restructuring. For example:

    - if the restructuring requires independent shareholders' approval under the Listing Rules (e.g. specific mandates for share issuance and connected transaction approvals), independent shareholders may vote against the resolutions, thereby blocking key steps in the restructuring; and

    - where a restructuring involves the issuance or transfer of shares that would trigger a mandatory general offer under the Takeovers Code, and such restructuring is conditional on a whitewash waiver, independent shareholders may vote against the whitewash waiver.

6. Measures for the cram down of shareholders

Hong Kong does not currently have a cross-class cram down regime equivalent to the UK Part 26A restructuring plan. Accordingly, there is no mechanism by which the court can impose a restructuring on a dissenting class. Any cram down under a Hong Kong scheme of arrangement is strictly intra-class. Once approval from the statutory majorities within a given class is obtained and the court sanctions the scheme, dissenting minorities within that class are bound, but no class can be overridden entirely by one or more other classes.

Where shareholders' rights are to be altered, a members' scheme of arrangement can be used to cram down dissenting members within that class provided that the requisite statutory majorities (i.e. a majority of members in number representing at least 75% by value of those present and voting) vote in favour of the members' scheme and it is sanctioned by the court (which must be satisfied that the scheme is fair and reasonable).

7. Debt-to-equity swap and consent of shareholders

Under Hong Kong law, the general position is that issuance of shares or securities that are convertible into shares by an unlisted company in Hong Kong must comply with the CO, as well as any applicable provisions in the company's articles of association and any shareholders' agreement. For a company listed in Hong Kong, it must also comply with the Listing Rules.

Pursuant to sections 140 and 141 of the CO, subject to certain exceptions, directors must not allot shares, or grant rights to subscribe for, or convert securities into, shares without the prior approval of the company by ordinary resolution.

Under rule 13.36 of the Listing Rules (Main Board), the directors of the issuer must obtain the consent of shareholders in a general meeting prior to allotting, issuing or granting any shares, securities convertible into shares or options, warrants or similar rights to subscribe for any shares or

such convertible securities (subject to certain exceptions such as where there is available headroom in any general mandate granted by the shareholders to directors (subject to applicable limits)). The Listing Rules also contain shareholder consent requirements in respect of transactions that result in material equity dilution.

INDIA

Introduction

The primary legislation governing corporate restructuring and insolvency in India is the Insolvency and Bankruptcy Code 2016 (Code). The Code was designed to ensure departure from the debtor-in-control rescue model to the creditor-in-control rescue model. This was one of the foundational principles in the report submitted by the Bankruptcy Law Reforms Committee (which formed the basis of the Code), wherein it was noted that:

> *"Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default."*[1]

Against this backdrop, the framework of the Code significantly limits the scope and ambit of shareholder participation and challenge during the resolution or restructuring process. This chapter provides an overview of the role of shareholders during the resolution process and their associated rights and entitlements under the Code.

Prior to undertaking that analysis, a number of background concepts and principles under Indian law are outlined below.

- **Initiation of insolvency proceedings and subsequent participation in the process**

  As per the scheme of the Code, an attempt is first made to rescue a "corporate debtor" – i.e. a company incorporated under the (Indian) Companies Act 1956/2013 or a limited liability partnership incorporated under the Limited Liability Partnership Act 2008 or any other person with limited liability (other than a financial services provider), through a corporate insolvency resolution process (CIRP). It is only if the CIRP fails to find a resolution or such resolution fails that liquidation proceedings would be initiated against the corporate debtor as a last resort.

  The application for commencement of CIRP can be filed either by the corporate debtor itself or a financial creditor[2] or operational creditor[3] in case of payment default of INR 10 million or more.[4]

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1 The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (November 2015).

2 Section 5(7) of the Code defines "financial creditor" as "a person to whom a financial debt is owed and includes a person to whom such a debt has been assigned or transferred to". Further, section 5(8) of the Code defines "financial debt" as follows: *"Financial debt" means a debt along with interest, if any disbursed against the consideration for the time value of money and includes - (a) money borrowed against the payment of interest;(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed; (e)receivables sold or discounted other than any receivables sold on non-recourse basis; (f) any amount raised under any other transaction, including any forward sale of purchase agreement, having the commercial effect of borrowing.*
Explanation: for the purposes of this sub-clause: (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having commercial effect of a borrowing; and (ii) the expressions. "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016); (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account; (h) any counter indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution; (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause".

3 Section 5(20) of the Code defines the term "operational creditor" to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Further section 5(21) of the Code defines "operational debt" to mean a *claim in respect of the provision of goods or* services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

4 Section 4 of the Code read with the Notification dated March 24, 2020, issued by the Ministry of Corporate Affairs.

The application is required to be filed before the National Company Law Tribunal (NCLT) having territorial jurisdiction over the place where the registered office of the corporate debtor is situated. In case the corporate debtor itself files an insolvency petition, the filing is mandatorily required to be approved by shareholders by way of a special resolution (75%).[5] Interestingly, while a role for shareholders is envisaged at the filing stage (where the filing is made by the corporate applicant itself), shareholders do not have any right of representation or participation in the process once a CIRP is initiated.

- **Locus standi of shareholders to challenge insolvency petition by creditors**

If the insolvency petition is filed by creditors, any intervention by shareholders is not envisaged. The test for admission of an insolvency petition is primarily based on the establishment of the existence of a debt and payment default by the corporate debtor.[6]

The courts have held that a derivative action is not maintainable when the company for whose benefit the derivative action is initiated is insolvent.[7]

The National Company Law Appellate Tribunal (NCLAT) has also on different occasions considered the objections by shareholders and examined the issue whether shareholders can appeal the order initiating a CIRP.[8]

In *Nirej Vadakkedathu Paul v Sunstar Hotels and Estates Pvt. Ltd*,[9] a two-member bench of the NCLAT was of the view that shareholders may not be considered as aggrieved merely by admission of the corporate debtor into insolvency – otherwise, a shareholder could seek to maintain a derivative action and sabotage a valid CIRP. The court held that the shareholders did not have locus standi to challenge the initiation of CIRP.

In *Park Energy Private Limited v State Bank of India & Anr*,[10] a two-member bench of the NCLAT held that held that there is no embargo in the Code on the promoters or shareholders challenging the CIRP admission order on the basis that they are not aggrieved persons. However, having regard to the observations of the coordinate bench in Nirej Vadakkedathu, the issue was placed before the Chairperson, and the matter was referred to a three-judge bench of the NCLAT.

Recently, in *Park Energy v State Bank of India*,[11] a three-judge bench of the NCLAT reaffirmed the decision in Nirej Vadakkedathu and held:

> *"As far as the interest of the shareholders is concerned, it is protected by the agent or the authority appointed by the NCLT i.e., Resolution Professional, or the liquidator, where the liquidation has been ordered and the shareholders are taken care of by the aforesaid two agents who are appointed by the court under law. Therefore, proceedings at the behest of the shareholders in their individual capacity will not be maintainable as in case the shareholders are permitted to maintain the proceedings under the Code, it would run contrary the very object of the Code of timely resolution of insolvency, and would rather be an abuse the*

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5 Section 10 of the Code.

6 *Innoventive Industries Ltd.* v. *ICICI Bank and Anr*. (2018) 1 SCC 407; *M. Suresh Kumar Reddy v. Canara Bank & Ors.* (2023) 8 SCC 387.

7 *ICP Investments* v. *Uppal Housing* 2019 SCC OnLine Del 12371.

8 As per section 61 of the Code, any person aggrieved by the order of the NCLT may prefer an appeal to the National Company Law Appellate Tribunal within 30 days (condonable by 15 days) on specified grounds.

9 2023 SCC OnLine NCLAT 102. An appeal has been preferred against this order before the Supreme Court and the same is pending adjudication.

10 Company Appeal (AT) (Insolvency) No. 62 of 2023 (NCLAT order dated 17 November 2023).

11 Company Appeal (AT) (Insolvency) No. 62 of 2023 (NCLAT order dated 22 July 2025).

process, in a proceeding where time plays an important role to conclude the proceedings in a time bound basis."

Accordingly, any potential challenge to the CIRP admission order by shareholders is not be maintainable.

- **Impact of initiation of CIRP**

Once the NCLT admits the insolvency petition, it also passes an order imposing a moratorium, which comes into effect from the insolvency commencement date and subsists until the conclusion of the CIRP.

The moratorium prohibits initiation or continuation of suits or proceedings, the transfer, alienation or disposal of assets (or any legal rights or beneficial interest therein) by the corporate debtor and the enforcement of security interests in connection with the property of the corporate debtor.[12]

In addition to imposition of a moratorium, the NCLT will appoint an insolvency professional, referred to as an interim resolution professional (IRP) at the time of admission of the CIRP application.[13]

The IRP is subsequently replaced by / confirmed as the resolution professional (RP) by the committee of creditors (comprising unrelated financial creditors) constituted in relation to the corporate debtor (Creditors' Committee).

For the purpose of this chapter, the IRP and the RP are collectively referred to as the Insolvency Professional for ease of reference.

In terms of the Code, the Insolvency Professional is entrusted with running the resolution process under the overall supervision of the Creditors' Committee.

- **Classification of shareholder dues**

As noted, the Creditors' Committee comprises of the financial creditors (who are not a related party of the corporate debtor). For a creditor to be considered as financial creditor, the Supreme Court has held that requirement of existence of a debt, which is disbursed against the consideration for the time value of money remains an essential part for classification as financial debt, even in respect of any of the transactions or dealings stated in sections 5(8)(a) to 5(8)(i) of the Code.[14]

As far as shareholders are concerned, while shareholders are not *per se* creditors of the corporate debtor, courts have examined the nature of share application money and preference shares. In *Pramod Sharma v Karanaya HeartCare Private Limited,*[15] the NCLAT held that share application money (when no shares have been allotted to the subscriber) cannot be considered as financial debt. Recently, in the matter of EPC Constructions India Limited through its liquidator, Abhijit Guhathakurta v Matix Fertilizers and Chemicals Limited,[16] the Supreme Court of India examined the issue of whether convertible redeemable preference shares (CRPS) can be

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12 Section 13 read with section 14 of the Code.

13 Section 13 of the Code.

14 *Pioneer Urban Land and Infrastructure Limited v Union of India* (AIR 2019 SC 4055) and *Anuj Jain Interim Resolution Professional of Jaypee Infratech Limited v Axis Bank Limited* (2019 SCC OnLine SC 1775).

15 Company Appeal (AT)(Insolvency) No. 426 of 2022 (NCLAT order dated April 21, 2022); see also *Murlidhar Vincom Pvt. Limited v Skoda (India) Pvt. Ltd.* Company Appeal (AT)(Insolvency) No. 1334 of 2024 (NCLAT order dated 26 November 2024).

16 2025 SCC OnLine SC 2293; see also *Lalchand Surana* v. *Hyderabad Vanaspathy Ltd.,* (1990) 68 Com Cases 415 at 419 (AP).

considered to be a financial debt post the redemption period and therefore entitle a CRPS holder to file a petition for commencement of insolvency proceedings against the corporate debtor. The Supreme Court held that by being preference shareholders they do not enjoy the status of creditors of the company. Hence, they do not fulfil the definition of a financial creditor for the purpose of the Code.

Accordingly, since shareholders are not financial creditors of the company, they do not enjoy the right of representation on, or participation in, the Creditors' Committee. In case the shareholders are owed debt by the corporate debtor, it is likely the shareholders will not have a right to participate in the Creditors' Committee, being related parties.

1. The position of the insolvency officeholder and creditors compared to shareholders

The Insolvency Professional is entrusted with undertaking the resolution process of a corporate debtor. The Code stipulates that, during the resolution process: (a) the management of the affairs of the corporate debtor vest in the Insolvency Professional; and (b) the powers of the board of directors of the corporate debtor are suspended and are exercised instead by the Insolvency Professional.[17] Accordingly, in terms of the Code, the Insolvency Professional is expected to discharge the functions of the board of directors of the corporate debtor. All the officers and managers of the corporate debtor are required to report to the Insolvency Professional, provide access to the records and documents of the corporate debtor and provide all such other assistance as may be required by the Insolvency Professional for conducting the insolvency resolution process relating to the corporate debtor.

Although the Insolvency Professional has been given significant powers, he or she is required to act under the overall supervision of the Creditors' Committee. The Supreme Court has also examined the role of the Insolvency Professional vis-à-vis the Creditors' Committee and has held that the Insolvency Professional is really a facilitator of the resolution process, whose administrative functions are overseen by the Creditors' Committee and by the NCLT.[18]

The Creditors' Committee is entrusted with the key decision-making powers during the resolution process. The Code also lays down various action items which require prior approval of the Creditors' Committee, which may be primarily categorised as:

(i) approval of the resolution plan and certain other critical decisions specified in section 28 of the Code – requiring 66% of the voting share;

(ii) approval for withdrawal of a CIRP proceeding (once admitted by the NCLT) under section 12A of the Code – requiring 90% of the voting share; and

(iii) approval of other matters – requiring 51% of the voting share.

Section 28 of the Code lists the following action items which will entail a change in shareholding / ownership and therefore require approval of the Creditors' Committee by a 66% voting share:

(a) changing the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redeeming issued securities;

(b) any change in the ownership interest of the corporate debtor; and

(c) disposing of or permitting the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties.[19]

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17 Section 17 read with section 22 of the Code.

18 *Swiss Ribbons Private Limited and Another v Union of India and Ors.* (2019) 4 SCC 17.

19 Section 28 of the Code.

As may be ascertained from the above, while the Insolvency Professional and Creditors' Committee run the resolution process, the initiation of insolvency proceedings results in the disenfranchisement of shareholders. There is no requirement for any approval from shareholders during the insolvency resolution process or even for the purpose of acquisition of the corporate debtor (as part of the completion of the resolution process). This is the case irrespective of whether shareholder approvals were otherwise stipulated under other legislation or contractual arrangements (such as shareholders' agreements or charter documents of the corporate debtor). Additionally, even a transfer of shareholdings of a corporate debtor – after the admission of insolvency proceedings – can only be done with the prior approval of the Creditors' Committee.[20]

2. Shareholders' rights to be consulted and to receive information

The Code does not vest any right in shareholders to be consulted or to receive information during the resolution period. While the suspended board of directors can participate in the Creditors' Committee meeting and receive documents associated with the resolution process (such as a resolution plan, minutes of the meeting and agenda),[21] no similar rights are available to shareholders. In fact, as stated above, the Creditors' Committee is entrusted with the decision-making powers, and the Insolvency Professional is expected to consult and seek approval (where required) from the Creditors' Committee for any key decision during the resolution process.

3. The composition of classes involving shareholders in the context of a restructuring plan

3.1 Entitlement of shareholders during the resolution process

As per the Code, resolution of a corporate debtor is done in a CIRP, in terms of which the Insolvency Professional invites resolution plans from eligible resolution applicants.

After following a detailed evaluation and negotiation process, the resolution plan is required to be approved by the Creditors' Committee by a majority vote of 66% by voting share. This approval needs to be followed by the approval of the NCLT, and no approval of the shareholders is required.

Once approved by the NCLT, the resolution plan is binding on all stakeholders (including the corporate debtor, members, creditors and guarantors). The courts have on multiple occasions reiterated that so long as the provisions of the Code and the regulations are complied with, the commercial wisdom of the requisite majority of the Creditors' Committee as to whether to accept or reject a resolution plan must prevail.[22] Certain mandatory contents of the resolution plan include priority payment of the insolvency resolution process cost and payment of minimum entitlements prescribed for the operational creditors and dissenting financial creditors.

While certain mandatory payments have been specified for identified classes of creditors, no mandatory payment is specified for shareholders. Further, the Code does not envisage shareholder participation as part of the resolution plan process. In the matter of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v NBCC (India) Ltd. & Ors*[23] (Jaypee Kensington), the Supreme Court observed:

> *"In the scheme of IBC, only the [Creditors' Committee] is entrusted with the task of dealing with and approving the plan of insolvency resolution; and the shareholders of a corporate debtor, who is already reeling under debts, have not been provided any participation in the insolvency resolution process."*

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20 Section 28(1)(d) of the Code.

21 *Vijay Kumar Jain v Standard Chartered Bank* (2019) 20 SCC 455.

22 *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta& Ors*. 2019 SCC OnLine SC 1478.

23 (2021) SCC OnLine SC 253.

It is also pertinent to note that similar to the analysis in relation to ability of shareholders to intervene at the admission stage, the courts have also held that shareholders do not have locus standi to challenge the approval of a resolution plan. In *Ravi Shankar Vedam v Tiffins Barytes Asbestos and Paints Limited* and Anr,[24] the court held:

> *"Keeping in view the scope and intent of the Legislature, and that the [Code] is a distinct shift from a 'Debtor in Possession' to 'Creditor in Control' Insolvency System, where the Shareholders have a limited role and are only confined to co-operate with the Resolution Professional as specified under section 19 of the Code, are entitled to receive the Liquidation value of its equity, if any, in accordance with section 53 of the Code, we are of the considered opinion that a 'Shareholder' has no locus standi to challenge the Resolution Plan."*

An appeal filed against this order was dismissed by the Supreme Court. This position has been reiterated in subsequent decisions, thereby limiting the scope of intervention by shareholders once the resolution plan has been approved by the Creditors' Committee in compliance with the Code.

3.2 Disqualification criteria

Another unique feature of the Indian insolvency regime is that it lays down certain disqualification criteria for potential resolution applicants interested in the acquisition of the stressed corporate debtor. The rationale for introducing such criteria was that persons who contribute to the defaults of companies or are otherwise undesirable should not be permitted to participate in the resolution process in order to regain control of the corporate debtor.[25]

In this regard, section 29A of the Code stipulates that a resolution applicant will be ineligible to submit a resolution plan in respect of a company undergoing corporate insolvency resolution process if:

(a) such resolution applicant;

(b) any person acting jointly or in concert with such resolution applicant; or

(c) any connected person of a person in items (a) or (b),

suffers from any of the conditions set out in paragraphs (a) through (j) of section 29A (Disqualification Criteria).

The term "connected person" has been defined to mean:

(i) any person who is the promoter or in management or control of the resolution applicant;

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in items (i) and (ii).

The Disqualification Criteria include disqualification on account of classification as a non-performing loan in the specified period, being an undischarged insolvent and classification as a willful defaulter. Accordingly, in the event that any shareholder is a resolution applicant or is acting in concert with

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[24] 2023 SCC Online NCLAT 274.

[25] Statement of Objects and Reasons and Reasons appended to the Insolvency and Bankruptcy Code (Amendment) Bill, 2017 (as introduced in Lok Sabha); see also *Chitra Sharma v Union of India* (2018) 18 SCC 575.

the resolution applicant or is a connected person of the resolution applicant, they may be disqualified from submission of the resolution plan.

3.3 Entitlement of shareholders during the liquidation process

During the liquidation process, if the liquidator proceeds with the sale of assets after forming the liquidation estate, the proceeds will be distributed as per the liquidation waterfall, summarised below:[26]

(a) *first*, the insolvency resolution process costs and the liquidation costs paid in full;

(b) *second*, debts owed to a secured creditor (in the event such secured creditor has relinquished its security interest to the liquidation estate), ranked equally with workmen's dues for the 24-month period preceding the liquidation commencement date;

(c) *third*, wages and unpaid dues owed to employees other than workmen for the 12-month period preceding the liquidation commencement date;

(d) *fourth*, financial debts owed to unsecured creditors;

(e) *fifth*, the following debts ranked equally:

(i) any amount due to the Central Government and the State Government in respect of the whole or any part of the 2-year period preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of their security interests outside the formal liquidation process;

(f) *sixth*, any remaining debts and dues;

(g) *seventh*, preference shareholders, if any; and

(h) *lastly*, equity shareholders.

Therefore, under the Code, shareholders are considered as a separate class of stakeholders of a corporate debtor, which rank lower than all other debts and dues of the company.

It is relevant to note that, similar to a CIRP, a liquidator is not permitted to sell the immovable and movable property or actionable claims of the corporate debtor to any person who is not eligible to be a resolution applicant.[27] Accordingly, the Disqualification Criteria are applicable to prospective bidders interested in acquiring assets in liquidation of a corporate debtor, thereby limiting participation by shareholders subject to the relevant Disqualification Criteria.

4. Shareholders' voting rights

As stated above, shareholders do not have a right of representation on, or participation in, the Creditors' Committee. Further, the courts in India have questioned the locus standi of shareholders to challenge the resolution plan, thereby limiting any interference in a creditor-run process.

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[26] Section 53 of the Code.

[27] Proviso to section 35(f) of the Code; see also paragraph 1(5A) of Schedule I (Mode of Sale) of the Insolvency and Bankruptcy (Liquidation Process) Regulations 2016.

It is also pertinent to note that the Code was amended in 2018 to provide for an umbrella exemption from the requirement of obtaining shareholder approval for implementation of the resolution plan.[28] The exemption extends to shareholder approval requirements under the Companies Act or any other law for the time being in force and such approval shall be deemed to have been granted by virtue of NCLT approval of the resolution plan.[29]

The regulations were also amended to specify a "non-obstante clause" – such that shareholder consent is deemed to have been given even if it was not expressly provided under the terms of the debtor's relevant constitutional documents, shareholders' agreement, joint venture agreement or other document of a similar nature.[30]

In the majority of cases, resolution plans provide for the extinguishment of capital and capital reduction resulting in the exit of shareholders at zero value. However, for listed companies, where the company continues to be a listed company in terms of the approved resolution plan, it is required to maintain a public shareholding of at least 5% post-implementation of the resolution plan, which needs to be brought up to 10% in 12 months and 25% in 3 years.[31]

By virtue of the exemptions provided under the Code and the regulations, any specific approval from shareholders is not envisaged and the same is deemed to have been granted or is exempted – thereby limiting any scope for challenge by a shareholder at the implementation stage.

Nevertheless, if a resolution applicant proposes to delist the company, then as per the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations 2021 (Delisting Regulations) the following requirements should be complied with: (i) the resolution should categorically provide for the delisting of shares; and (ii) the resolution plan should provide an exit opportunity to the existing public shareholders at a price which shall not be less than the price at which the promoter / promoter group or any other shareholder (directly or indirectly) is provided an exit opportunity.[32]

Subject to compliance with these requirements, any scope for challenge is limited. In this regard, reference is also drawn to the judgment in Jaypee Kensington, wherein the Supreme Court dealt with the objections of public shareholders of a listed company. The resolution plan in this case provided for the delisting of shares and an exit option to public shareholders for a nominal amount of INR 1,00,00,000, where no consideration was attributed to the promoters.

The Supreme Court rejected the objections raised by shareholders and, after considering the facts of the matter, was of the view that where the promoter's shareholding is cancelled without any consideration, even a nominal exit price for minority shareholders cannot be termed as unfair or inequitable. The apex court also relied on the construct of the deemed approval of shareholders (as stated above) and was of the view that objection by the minority shareholders was not maintainable. The court also reiterated the principle that, subject to compliance with the Code and the Delisting Regulations, the decision in relation to shareholders' entitlements and options is part of the commercial wisdom of the Creditors' Committee and is not amenable to judicial review.

Specifically, in the context of listed companies, the Indian capital markets regulator in India, the Securities and Exchange Board of India (SEBI), issued a consultation paper[33] in 2022 (Consultation Paper), wherein the SEBI took cognisance of the grievances raised by the shareholders of a listed company undergoing insolvency and issued certain proposals to address those grievances. One of

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28 Explanation to section 30 of the Code.

29 Ibid. See also General Circular No. IBC/01/2017.

30 Regulation 39(6) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

31 Rule 19A(4) of the Securities Contract (Regulations) Rules 1957.

32 Regulation 3 of the Delisting Regulations.

33 Consultation Paper on "Framework for protection of interest of public equity shareholders in case of listed companies undergoing corporate insolvency resolution process" dated 10 November 2022.

the proposals mentioned in the Consultation Paper is that the non-promoter shareholder should be given an opportunity to acquire equity of the fully diluted capital structure of the new entity, on the same pricing terms as agreed upon by the resolution applicant.

However, none of the proposals have yet been formally adopted or implemented.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

As stated above, upon commencement of insolvency proceedings, there is an immediate disenfranchisement of the shareholders and the CIRP is then conducted by the Insolvency Professional under the supervision of the Creditors' Committee, leaving limited scope for shareholders to intervene in a resolution process. That being said, from a practical perspective, there are instances where shareholders intervene during the resolution process by submission of a financial proposal under section 12A of the Code seeking withdrawal of the insolvency process.

In certain cases, tribunals have allowed the Creditors' Committee to consider the option of withdrawal under section 12A of the Code even after approving the resolution plan or during the liquidation period. This has been a cause of concern, as it has enabled a premature closure of the resolution process at the behest of the management / shareholders, while negotiations were ongoing with eligible market participants.[34]

In order to address the concerns raised, the Code has been amended by the Insolvency and Bankruptcy Code (Amendment) Act 2026 (Amendment Act), which received Presidential Assent on 6 April 2026. One of the amendments introduced by the Amendment Act is in relation to section12A of the Code, wherein the NCLT is not permitted to allow an application for withdrawal of CIRP either before the constitution of a Creditors' Committee or after the first invitation is published inviting the submission of a resolution plan in relation to the corporate debtor.

6. Measures for the cram down of shareholders

As stated above, under the current framework, the shareholding of a corporate debtor may be subject to extinguishment in terms of the approved resolution plan and no cram down of the shareholder is usually required. However, in the case of delisting, compliance with the exit price conditions will have to be ensured, which practically in a majority of cases is negligible.

7. Debt-for-equity-swap and consent of shareholders

The Code does not limit or restrict the kind of resolution plan that may be submitted other than the fact the plan must be compliant with the specified mandatory requirements (see above). Further, as mentioned above, the statute exempts shareholder approval requirements for the implementation of the resolution plan and contemplates that any such consent shall be deemed to have been granted.

Considering the same, any debt-for-equity swap will not require any shareholder consent. However, any such proposal in the resolution plan will have to be approved by the Creditors' Committee and then the NCLT.

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[34] Report of the Select Committee on the Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Presented to Lok Sabha on 17 December 2025.

JAPAN

Introduction

In Japan's restructuring proceedings, although the extent of shareholders' rights varies depending on the type of proceeding, these rights are consistently treated as subordinate to creditors' rights and to the authority of trustees acting on their behalf.

Restructuring proceedings in Japan are broadly divided into in-court restructuring proceedings and out-of-court workouts. In any in-court restructuring proceeding, shareholders' interests may be extinguished or altered under a court-approved restructuring plan, even without shareholders' consent. By contrast, shareholders' rights are not affected in out-of-court workouts without shareholders' consent.[1] This chapter focuses on in-court restructuring proceedings.

1. The position of the insolvency officeholder and creditors compared to shareholders

1.1 Civil rehabilitation proceedings

Civil rehabilitation proceedings are debtor-in-possession (DIP) style proceedings, where the debtor's management, in principle, continues to operate the business and manage the assets of the business under the supervision of a court-appointed supervisor. In the proceedings, shareholders' rights are subordinated to those of creditors. Unlike creditors, shareholders have no voting rights on a proposed rehabilitation plan and do not receive any payments under the court-approved plan.

Nevertheless, even after the commencement of the civil rehabilitation proceedings, shareholders may still make decisions on significant corporate matters of the debtor company, such as the appointment or removal of directors, or mergers and acquisitions, by exercising their voting rights at the shareholders' meeting. However, in civil rehabilitation proceedings, capital increases or reductions of the debtor may be implemented through a court-approved plan without a resolution of the shareholders' meeting. In other words, the shareholders' voting rights at shareholders' meeting, which are one of the principal rights they retain, may be restricted by the court-approved plan.

1.2 Corporate reorganisation proceedings

In corporate reorganisation proceedings, a court-appointed trustee operates the debtor's business and manages its assets. Generally, in the proceedings, shareholders' rights are treated as more subordinate than in civil rehabilitation proceedings. If the debtor company is balance-sheet insolvent, shareholders have no voting rights on a proposed reorganisation plan and usually extinguished through a capital reduction under a court-approved plan without shareholders' consent.[2]

In practice, corporate reorganisation proceedings are used less frequently than civil rehabilitation proceedings, as they are procedurally more complex, burdensome and time-consuming.

2. Shareholders' rights to be consulted and to receive information

2.1 Civil rehabilitation proceedings

In civil rehabilitation proceedings, shareholders' rights to be consulted and to receive information are limited. For example, shareholders are notified only of the following court decisions:

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1 In statutory out-of-court workouts, when a debtor requests creditors to accept a haircut, shareholders are generally required to bear part of the burden, typically by extinguishing or reducing their equity interests. Any such extinguishment or reduction of shareholders' rights is carried out with the shareholders' consent.

2 Under the Corporate Reorganisation Act, shareholders have voting rights on a proposed plan if the debtor company is not insolvent. In practice, however, debtor companies subject to corporate reorganisation proceedings are typically insolvent and shareholders are therefore not granted voting rights on the proposed plan.

(i) a court order approving a business transfer in lieu of a shareholders' meeting resolution;[3]

(ii) a court order permitting the submission of a rehabilitation plan containing provisions for capital reductions or for capital increase; and

(iii) a court order approving or rejecting a proposed rehabilitation plan that includes provisions directly affecting shareholders rights, such as capital reductions.

Since these court decisions may be disadvantageous to shareholders, a right is given to shareholders to file an appeal against those decisions. If the court rejects the appeal, shareholders may further appeal to a higher court. In practice, however, it is rare for such shareholder appeals to be upheld.

Shareholders also have the right to request access to (and obtain copies of) relevant case records relating to a company. Such case records may include, for example, a petition for commencement of rehabilitation proceedings and reports submitted to the court, including reports concerning the company's financial position as of the date of the commencement order. In practice, however, the scope of records the shareholders may inspect is limited,[4] and since the records are not available online, obtaining access can be time-consuming and cumbersome.

In the ordinary course, shareholders holding a certain threshold of shares (for example, at least 3% of the issued shares) may request inspect and obtain copies of the company's accounting books and related materials, provided they state the reason for the request. The company may refuse such a request in limited circumstances, such as where the request is made for purposes other than investigating or exercising shareholder rights, or where it is intended to interfere with the company's business or harm the common interests of shareholders. In principle, these rights remain available even after the commencement of civil rehabilitation proceedings against the company. That said, because shareholders' rights are generally extinguished in rehabilitation proceedings, there is a realistic possibility that the exercise of these rights may be restricted on the basis that one of the statutory grounds for refusal applies.

2.2 Corporate reorganisation proceedings

In corporate reorganisation proceedings, shareholders are generally granted broader rights to be consulted and to receive information than in civil rehabilitation proceedings, as shareholders may participate in the proceedings unless the debtor company is insolvent.

For example, under the Corporate Reorganisation Act, if the debtor company is not insolvent, shareholders have rights to receive:

(i) notice of the court order commencing the case;

(ii) summonses in relation to meetings reporting the debtor company's financial status and stakeholders' meetings for voting on a proposed plan;

(iii) notice of the content of a proposed reorganisation plan;

(iv) notice of the court order approving or rejecting the proposed plan; and

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[3] Although a business transfer would normally require a resolution of the shareholders' meeting under the Companies Act, in civil rehabilitation proceedings the court may, as an exception, authorise a business transfer without such a resolution.

[4] The court may restrict access to parts of the case record that could seriously impede the maintenance and rehabilitation of the debtor's business or cause significant harm to the debtor's assets. As a result, shareholders may not be able to inspect all records.

(v) notice of the content of a business transfer implemented with court approval outside the reorganisation plan.

In practice, however, since debtor companies subject to corporate reorganisation proceedings are typically insolvent, these shareholders' rights are rarely granted.

As in civil rehabilitation proceedings, shareholders have the right to request access to (and make copies of) the relevant court case records, including a petition for commencement of reorganisation proceedings and reports concerning the company's financial position as of the date of the commencement order. In practice, however, the scope of records the shareholders may inspect is limited, and obtaining access can be time-consuming and cumbersome.

As in civil rehabilitation proceedings, theoretically, shareholders holding a certain threshold of shares have the right to request access to (and obtain copies of) the company's accounting books and related materials. However, there is a realistic possibility that the exercise of these rights may be restricted as shareholders' rights are generally extinguished in reorganisation proceedings.

3. The composition of classes involving shareholders in the context of a restructuring plan

3.1 Civil rehabilitation proceedings

Since shareholders may not participate in civil rehabilitation proceedings, they have no voting rights on a proposed rehabilitation plan. As a result, there is no classification of shareholders in the context of a rehabilitation plan.

The rehabilitation plan does not need to differentiate between the rights of shareholders and those of creditors. In practice, however, shareholders' rights are usually extinguished through a capital reduction. Substantively, shareholders are treated as subordinated to creditors.

3.2 Corporate reorganisation proceedings

Under the Corporate Reorganisation Act, if the debtor company is not insolvent, shareholders may participate in the corporate reorganisation proceedings and separate classes are formed for secured creditors, unsecured creditors and shareholders. Shareholders vote on a proposed reorganisation plan within their class. In practice, however, debtor companies subject to the corporate reorganisation proceedings are usually insolvent, and shareholders are therefore unable to participate in the proceedings (see above).

Unlike in civil rehabilitation proceedings, for corporate reorganisation proceedings the reorganisation plan must provide different treatment for shareholders and creditors, and shareholder rights must be subordinated to those of creditors.

For a proposed reorganisation plan to be approved, the consent of *each class* of stakeholders is generally required. However, as explained below, the plan may be confirmed through cram down measures.

4. Shareholders' voting rights

4.1 Civil rehabilitation proceedings

As explained above, shareholders do not participate in civil rehabilitation proceedings and have no voting rights on a proposed rehabilitation plan. Nevertheless, even after the commencement of the proceedings, they may still decide on substantial corporate matters by exercising their voting rights at the shareholders' meeting.

However, the Civil Rehabilitation Act modifies this principle for certain matters. If the debtor is insolvent, a business transfer, which would normally require a shareholders' meeting resolution, may be authorised by the court. Similarly, capital increases or reductions may be implemented through a court-approved plan. In such cases, shareholders are not able to block these actions through a shareholders' meeting resolution.

4.2 Corporate reorganisation proceedings

In corporate reorganisation proceedings, shareholders have voting rights on a proposed reorganisation plan if the debtor company is not insolvent. In practice, however, debtor companies subject to corporate reorganisation proceedings are usually insolvent and shareholders therefore have no voting rights.

Once the proceedings are commenced, fundamental corporate transactions, such as capital increases or reductions or mergers and acquisitions, may only be implemented through a court-approved plan. In addition, if the debtor company wishes to carry out a business transfer, which would normally require a shareholders' meeting resolution, before a proposed plan is approved, the business transfer may be implemented by with court approval instead of a shareholders' meeting resolution. Accordingly, once corporate reorganisation proceedings are commenced, shareholders are substantially restricted from exercising their voting rights outside the proceedings.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

5.1 Civil rehabilitation proceedings

In civil rehabilitation proceedings, shareholders may attempt to frustrate a restructuring by appealing against the court orders, such as those:

(i) commencing the case;

(ii) approving a business transfer outside the court-approved rehabilitation plan;

(iii) permitting the submission of a rehabilitation plan containing provisions for capital reductions or for capital increase; or

(iv) approving a proposed rehabilitation plan that includes provisions directly affecting shareholders rights, such as capital reductions.

If the court rejects the appeal, shareholders may further appeal to a higher court. In practice, however, it is rare for such shareholder appeals to succeed.

For example, when shareholders appeal the court order commencing the case, they typically argue that the debtor is not insolvent and that the statutory requirements for commencing the proceedings are not satisfied. In reality, however, debtors generally file for civil rehabilitation proceedings precisely because they are insolvent and the legal requirements for commencement are satisfied.

Shareholders may file an appeal against the court order approving a business transfer to a sponsor outside the court-approved rehabilitation plan. In one actual case,[5] the company's directors filed for civil rehabilitation proceedings and sought to carry out an out-of-plan business transfer to a sponsor.

[5] The court decision in this case has not been published in any case reporter; the case is described in Hajime Shinji, "A Case Concerning Trustee-Type Civil Rehabilitation Proceedings," in Challenges and Expectations for Insolvency Proceedings: Essays in Honor of Makoto Tahira 215, 218–220 (Shojihomu, 2020).

However, a shareholder holding a majority of the company's shares, who was hostile to the directors, opposed the proceedings and filed an appeal against the court's order approving the transfer. The original closing was scheduled for the end of June, but because the sponsor was reluctant to proceed while the appeal was pending, the company negotiated with the sponsor and agreed to postpone closing by one month. The appellate court dismissed the appeal. Since the shareholder further appealed the dismissal decision, it took an additional period for the dismissal to become final; however, with the sponsor's cooperation, the business transfer was successfully closed at the end of July. Although such an appeal could delay the closing for a period of time and may create an opportunity for shareholders to seek an alternative sponsor more favourable to their interests, this example illustrates that there are very few precedents for reversals of such court orders.

In its decision of 17 June 2004, the Tokyo High Court reversed:

(i) the lower court's permission granted in lieu of a shareholders' meeting resolution authorising an out-of-plan business transfer to a sponsor under article 43(1) of the Civil Rehabilitation Act;

(ii) the lower court's approval of a rehabilitation plan providing for a 100% capital reduction under article 166(1); and

(iii) the order approving the rehabilitation plan itself. The High Court held that the proviso to article 43(1) – requiring that the transfer be "necessary for the continuation of the business" – must be construed strictly as requiring indispensability, and that the lower court's finding of balance-sheet insolvency was open to doubt.

The case suggests that, while such reversals remain rare, they may occur where: (a) the necessity of the business transfer for the survival of the enterprise has not been firmly established; and (b) the debtor's insolvency is itself contestable.

In civil rehabilitation proceedings, the directors generally continue to operate the debtor's business and manage its assets after the commencement of proceedings.

Nevertheless, shareholders retain the ability to appoint or remove directors through a shareholders' meeting resolution. Accordingly, if the existing directors are hostile to shareholders and initiate civil rehabilitation proceedings in a manner contrary to their interests, the shareholders may request that a shareholders' meeting be convened, remove those directors and appoint directors more favourable to their own interests. Such newly-appointed directors may then take actions that could hinder the civil rehabilitation process, and thus the shareholders may be able to frustrate the restructuring through this method. In practice, there have been some cases where shareholders have adopted this approach.

When shareholders make such a request for the convocation of a shareholders' meeting, the company, through the hostile directors, will generally petition the court to appoint a trustee, an independent lawyer who will manage the company's business in place of the existing directors, so that the civil rehabilitation proceedings can proceed without interference. In these exceptional cases, the court may appoint a trustee when it is necessary for the rehabilitation of the debtor's business. Once a trustee is appointed, the trustee assumes management control and the directors lose their authority. In such circumstances, replacing directors no longer serves as an effective means to frustrate the restructuring. Shareholders may appeal a court order appointing a trustee. However, where the debtor's financial condition has deteriorated, such appeals are rarely successful in practice.

5.2 Corporate reorganisation proceedings

As in civil rehabilitation proceedings, shareholders may try to frustrate a restructuring through corporate reorganisation proceedings by appealing the court orders.

For example, shareholders may file an appeal against the court order commencing corporate reorganisation proceedings. Again, however, such appeals are extremely rare and seldom successful in practice.

Additionally, shareholders may file an appeal against the court order approving a business transfer outside the court-approved reorganisation plan. In reality, however, such appeals generally have no practical effect other than delaying the closing of the business transfer.

In corporate reorganisation proceedings, since a court-appointed trustee assumes management control of the debtor company, replacing directors would not be an effective measure, unlike in civil rehabilitation proceedings.

6. Measures for the cram down of shareholders

6.1 Civil rehabilitation proceedings

In civil rehabilitation proceedings, shareholders do not participate in the proceedings and have no voting rights on a proposed rehabilitation plan. Consequently, the concept of a cram down of shareholders does not arise.

6.2 Corporate reorganisation proceedings

In corporate reorganisation proceedings, the court has the authority to impose a cram down of shareholders. Separate classes are formed for secured creditors, unsecured creditors and shareholders, and a proposed reorganisation plan generally requires the approval of each class by the requisite majorities.

However, even if one class rejects a proposed plan and the plan therefore fails to be approved, the court may amend and approve the plan, subject to certain requirements.

Specifically, if the shareholders' class votes against a proposed plan, the court may amend the plan to satisfy one of the following conditions and then approve it:

(i) shareholders are paid the amount they would be expected to receive upon liquidation from distribution of residual assets;

(ii) shareholders are paid the fair market value of their shares as determined by the court; or

(iii) shareholders are otherwise protected in a manner the court finds fair and equitable in its discretion.

7. Debt-for-equity swap and consent of shareholders

7.1 Civil rehabilitation proceedings

In civil rehabilitation proceedings, capital increases or reductions are generally implemented under a court-approved rehabilitation plan. A debt-for-equity swap is one method of capital increase and if it is provided for under the plan, it does not require a shareholders' meeting resolution. As explained above, shareholders may, in theory, file an appeal against the court order approving such a plan, but an appeal is unlikely to be successful in practice.

If a debt-for-equity swap is implemented outside the court-approved plan, it requires a shareholders' meeting resolution pursuant to the Companies Act. In that case, shareholders may exercise their voting rights to reject the proposed debt-for-equity swap.

7.2 Corporate reorganisation proceedings

In corporate reorganisation proceedings, new shares may be issued only through the court-approved reorganisation plan and a debt-for-equity swap is one method of capital increase.

If the debtor company is insolvent, which is common in practice, shareholders have no voting rights to vote on a proposed plan and therefore cannot reject a debt-for-equity swap. Conversely, if the debtor company is not insolvent, shareholders have voting rights on the proposed plan and may reject the plan that provides for a debt-for-equity swap. However, even in such cases, the court may impose a cram down on shareholders, subject to certain requirements, as explained above.

LITHUANIA

Introduction

The position of shareholders in Lithuania is rooted in corporate law. Under ordinary circumstances, shareholders may exercise considerable powers, such as appointing and removing management bodies and approving key corporate decisions. However, once a company enters financial distress, this position changes. Within insolvency-related proceedings and even before, the focus of protection shifts from shareholders to creditors. As a result, the influence of shareholders becomes significantly limited. This chapter examines the role of shareholders in restructuring proceedings in Lithuania.

The main Lithuanian law regulating insolvency proceedings for legal entities is the Law on Insolvency of Legal Entities (JANI), which governs restructuring and bankruptcy proceedings of legal persons. Depending on the debtor's situation and the type of proceeding, the position of shareholders in bankruptcy and also in restructuring proceedings may be significantly altered, and their rights may be severely restricted.[1]

JANI provides for two types of proceedings for legal entities: bankruptcy and restructuring proceedings.

Bankruptcy proceedings aim at the liquidation of the debtor (composition agreements between the debtor and the creditors in bankruptcy proceedings, though possible, are rarely used). Bankruptcy proceedings can be conducted as in-court proceedings or out-of-court (extrajudicial) proceedings.

JANI also provides for restructuring proceedings, the goal of which is the rescue of the debtor by way of a creditor-approved restructuring plan.

JANI is relatively young, having come into effect on 1 January 2020, with amendments in mid-2021 aimed at transposing the Preventive Restructuring Directive (EU) 2019/1023 (PRD).

It is noteworthy that restructuring proceedings have historically played only a marginal role in Lithuania's insolvency landscape. Official statistics show that, depending on the reference period, restructuring accounts for approximately 2-4% of all corporate insolvency proceedings, with the overwhelming majority being bankruptcy cases. In total, since the introduction of restructuring proceedings under previous laws on 1 July 2001 until 27 September 2026, only 95 restructuring proceedings had successfully concluded with implementation of a restructuring plan, while 527 proceedings were terminated, most often leading to bankruptcy.[2] The limited use of restructuring mechanisms helps explain the scarcity of consistent court practice and interpretation on procedural and substantive issues.

2025 has seen an increase in opened restructuring proceedings. However, this is largely due to one large group of companies in the agricultural sector attempting restructuring for many of its group companies.[3] It is too early to comment on the economic success of this rescue effort. However, one can already observe legal disputes being examined in several court proceedings.

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1 Law on Insolvency of Legal Entities of the Republic of Lithuania (*Lietuvos Respublikos juridinių asmenų nemokumo įstatymas*) 13 June 2019, No XIII-2221. JANI entered into effect on 1 January 2020 and replaced two separate statutes which previously regulated bankruptcy and restructuring proceedings for legal entities, the Enterprise Bankruptcy Law (EBL) and the Enterprise Restructuring Law (ERL). Enterprise Bankruptcy Law of Republic of Lithuania (*Lietuvos Respublikos įmonių bankroto įstatymas*) 20 March 2001, No. IX-216. Enterprise Restructuring Law of Republic of Lithuania (*Lietuvos Respublikos įmonių restruktūrizavimo įstatymas*) 20 March 2001, No. IX-218.

2 The Authority of Audit, Accounting, Property Valuation and Insolvency Management publishes real-time statistics and related data an information: https://nemokumas.avnt.lt/public/home/main.

3 AUGA Group restructuring: the holding went into restructuring (plan approved by shareholders and creditors, confirmed by the court in August 2025). In total, 27 petitions for opening of restructuring proceedings for were filed for group companies.

The resulting case law will certainly help shape the legal practice and use of restructurings under JANI.

The Lithuanian legislator has not made use of the possibility of introducing a specific framework for out-of-court restructuring proceedings similar to, for instance, the German *StaRUG*. Neither does JANI contain provisions for ad-hoc court involvement allowing clarifications or decisions on matters during out-of-court proceedings. Rather, JANI provides a framework for formal restructuring and related mandatory court decisions, including the formal acceptance of a petition to open proceedings, the opening decision, the formal approval of the restructuring plan, termination of restructuring proceedings and also decisions on cram downs as explained below in more detail.

It is noteworthy, though, that in practice, the court may exceptionally open restructuring proceedings concurrently with the approval of a restructuring plan. Where feasible, creditors, shareholders and the debtor may therefore agree beforehand and submit a petition with an already approved draft plan, allowing the court to open the restructuring proceedings and confirm the plan in a single ruling. This accelerates the initiation and implementation of the restructuring plan. The mechanism therefore serves as an exception aimed at facilitating pre-negotiated restructurings. Although legally available, this fast-track mechanism remains rarely used in Lithuania, and there is no judicial practice in this regard. The standard procedure, by contrast, requires the submission of a shareholder and creditor approved plan for court confirmation within 4 months of the effective date of the opening decision (extendable to 6 months).

The appointment of an insolvency administrator is mandatory in bankruptcy proceedings. In contrast, the appointment of an insolvency administrator in restructuring proceedings is normally not mandatory but is common practice. In certain situations, concurring to a large extent with the mandatory appointments under the PRD, the appointment of an insolvency administrator is mandatory also in restructuring proceedings.[4] In all cases, only licensed professionals, “insolvency administrators” in Lithuanian terminology, can be appointed.

Restructuring proceedings are debtor-in-possession proceedings. If an insolvency administrator is appointed, this professional generally fulfils a supervisory and advisory function.

JANI categorises for the first time in Lithuanian restructuring history creditors into separate classes for the purpose of voting on proposed restructuring plans. Prior to that, all creditors voted together without separation into classes. JANI recognises only two classes of creditors: unsecured creditors and creditors secured by pledge / mortgage.[5] Different from other jurisdictions, such as Germany, it is not possible to form additional classes in individual restructuring proceedings. Shareholders, though not defined as a separate class, still have an important say when it comes to plan approval, as explained in more detail below.

There are other particularities of Lithuanian law which merit attention in the context of restructuring proceedings.

First, it is noteworthy that shareholder claims, including shareholder loans, are not per se treated as subordinated claims in insolvency proceedings. Therefore, it is not unusual for shareholders to participate as creditors in the proceedings, including as secured creditors. Given that avoidance actions are rather limited under JANI, including in bankruptcy proceedings, shareholders can participate as creditors in insolvency proceedings with significant claims and voting powers.

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4 Article 35 JANI and article 5 para. 3 PRD.

5 Article 108 JANI.

Secondly, some important decisions which the insolvency court must make at the early stages of restructuring efforts have no immediate effect. They become effective only after the expiry of the appeal period or – if appealed – once an appeal has been dismissed. This applies in particular with respect to the decision by which insolvency proceedings are opened and insolvency administrators appointed. Appeals can be filed with justified reasons or as a simple tool for delaying or frustrating proceedings at an early stage. Especially in the case of restructuring proceedings, but also in bankruptcies with going concern, these appeals and ensuing delays might by themselves be sufficient to frustrate any effort to rescue the business.

Thirdly, an aggravating factor is that courts decide requests for interim protective measures in the context of insolvencies, including restructuring proceedings, largely by applying rules and principles developed for regular civil litigation cases. This does often not address the particularities of insolvency-related matters and requests.

1. The position of the insolvency officeholder and creditors compared to shareholders

Shareholders are stakeholders in insolvency proceedings, including restructuring proceedings. However, the protection of shareholders' interests is not the priority of JANI's regulation, as can be seen from the list of objectives pursued by the law. The law's main purpose is to "facilitate an effective process of insolvency of legal persons by ensuring a balance of interests of creditors and the legal persons."[6] Consequently, creditors have a significantly stronger position in insolvency proceedings than shareholders. Still, JANI ensures that shareholders' interests are protected in insolvency proceedings by granting rights to information and, in the context of restructuring, significant opportunities to influence the process.

As mentioned above, even if not mandatory, it is common practice to appoint insolvency administrators in restructuring proceedings. Their function is largely of a supervisory and advisory nature, predominantly interacting with the debtor and its management, the creditors and the court.[7] Still, also *vis-à-vis* the shareholders, the appointed insolvency administrator has obligations to provide information.[8]

During bankruptcy proceedings, shareholders may not attend or vote at creditors' meetings solely based on their status as shareholders. To the extent they participate as creditors, they can, of course, exercise the corresponding rights. In exceptional circumstances, a shareholder may participate in bankruptcy proceedings without a right to vote as a "participant in insolvency proceedings" if, upon request, the court has recognised the shareholder as a third party in the proceedings. In contrast to the rather weak position of shareholders in bankruptcy proceedings, in restructuring proceedings JANI grants shareholders an important role when it comes to voting on proposed restructuring plans, as explained below in sections 4 and 5.

2. Shareholders' rights to be consulted and to receive information

Where there is a likelihood of the debtor's insolvency, the manager (CEO) of the legal person must inform the shareholders without delay to allow them to resolve the financial difficulties at play. The same applies if the situation worsens and the debtor actually becomes insolvent.[9]

Once a petition for the opening of insolvency proceedings, including restructuring proceedings, has been filed with and formally admitted by the court, the manager (CEO) or liquidator must inform shareholders of such a petition by the next working day following receipt of the information.[10]

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6 Article 1 (1) JANI.
7 Article 103 JANI.
8 For example, information to send the opening decision to the shareholders, article 27 (3) 7) JANI.
9 Article 6 (1) and (2) JANI.
10 Article 18 JANI.

During the examination by the court of an opening petition, the court may with respect to a variety of persons, including shareholders, oblige persons to submit to the court additional documents. The court ay also summon persons and request written explanations from them.[11]

Once the court has ruled to open insolvency proceedings and such ruling is effective, an insolvency administrator must, within 3 working days, send a copy of the ruling to several persons and institutions, including the shareholders of the debtor.[12]

3. The composition of classes involving shareholders in the context of a restructuring plan

JANI defines two classes of creditors, secured and unsecured (creditors whose claims are secured by a pledge and / or mortgage).[13] JANI does not allow modifying these classes for individual restructurings, neither does it allow forming additional classes.

4. Shareholders' voting rights

Restructuring plans require approval by creditors and shareholders.

The proposed restructuring plan must be approved by creditors affected by the restructuring plan. A draft restructuring plan is considered approved if, in each creditor class, the affected creditors whose claims represent more than half of the total value of claims in that class (as confirmed by the court) have approved it.[14]

A proposed restructuring plan must also be approved by the debtor's shareholders in accordance with its founding documents and the decision-making process for the respective legal form of the debtor. For such approval, JANI requires a majority vote of the debtor's shareholders participating in the shareholders' meeting, unless a different majority is required under statutory law or the founding documents.[15] It is noteworthy that the commencement of restructuring proceedings requires shareholder support already at an earlier stage, namely the approval of the draft restructuring plan to be submitted together with the debtor's petition to open restructuring proceedings (see more information in section 5 below).

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Shareholders can influence and frustrate restructuring at several procedural stages:

- **Before filing – replacing the manager / CEO –** under JANI, the debtor, represented by the manager (CEO) may and in certain situations must file a petition to open insolvency proceedings. Creditors may also file an opening petition if certain conditions are met. In companies with a multi-tier management body set-up (e.g. CEO and management board), it is still the CEO who may or even must file the petition to open proceedings, and not individual members of a management board.

- **Shareholders can replace the CEO to prevent a restructuring petition from being filed –** this is possible by simple shareholder resolution in companies with only one management body CEO, i.e. in companies without additional management board. Replacing the CEO in a

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11 Article 20 (1) JANI.
12 Article 27 (3) 7) JANI.
13 Article 108 (1) JANI.
14 Article 107 JANI. A "creditor affected by the restructuring plan" is a creditor whose civil rights and / or obligations as a result of the assistance provided to the legal entity to overcome its financial difficulties are directly created, altered or eliminated by the restructuring plan (Art 2 para 9 JANI).
15 Article 106 JANI.

multi-tier set-up might still be possible, but is usually more complicated, since in such a set-up it is the competence of the board to appoint / replace the CEO. Hence the shareholder must influence or replace the board to then have a CEO replaced.

- **Before filing – refusing to approve the draft restructuring plan –** the debtor's petition must include a first draft of a restructuring plan and a resolution of the shareholders' meeting approving that plan.[16] Although the law does not explicitly list the failure to submit the shareholders' resolution as a ground for dismissing the petition, courts typically require its submission.[17] Absent such approval, the court should set a deadline to remedy the deficiency and would usually dismiss the petition if a consenting shareholder resolution cannot be provided.

- **Appeal against the opening decision –** the court's decision to open restructuring proceedings has no immediate and binding effect. It becomes effective only upon expiry of the appeal period or with the dismissal of the appeal. Opening restructuring proceedings without prior consent of the shareholder(s) to the draft restructuring plan (see above) will usually trigger an appeal against the opening decision with solid chances of winning the case as well as delaying and possibly frustrating the opening of restructuring proceedings. But even in other cases and without solid legal grounds, shareholders might obstruct the restructuring effort by appealing against the opening decision, thus causing substantial delays which might lead to a de facto frustration of the planned rescue simply, because the debtor's business cannot be kept afloat long enough.

- **During proceedings –** shareholders can block the plan's adoption by refusing to approve it with a sufficient majority (see further below). The court may approve the plan via cram down, provided that certain conditions are met, but not if the plan includes a debt-for-equity swap.[18]

6. Measures for the cram down of shareholders

Creditors are divided into two classes for voting purposes, secured and unsecured, as explained above. Cram down is available to overcome dissenting classes or shareholders under certain conditions.

A court may approve a plan notwithstanding shareholder dissent if the following conditions are met:

1. the regular procedural and other requirements for the plan's content and satisfaction of creditors have been met;

2. the plan is supported by at least 2/3 (by value) of claims of affected creditors in each creditor class; and

3. the measures in the plan do not alter the ownership or obligation rights of dissenting shareholders.[19]

This framework aligns with the PRD, though Lithuanian law remains restrictive regarding the modification of shareholder ownership interests.

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16 Article 17 (3) 1) JANI.

17 Cf Vilniaus District Court (*Vilniaus Apygardos Teismas*), decision of 1 March 2025, civil case no. eB2-1596-340/2021, paras 18, 24 et seq.

18 Cf. article 111-1 (1) JANI.

19 Article 111-1 (1) JANI.

7. Debt-for-equity swaps and consent of shareholders

JANI does not allow a debt-for-equity swap without shareholder consent. Article 111-1 (1) stipulates that a cram down may be used only if the plan's measures do not change the scope of ownership rights of dissenting participants. Because a debt-for-equity swap would alter ownership rights, a court cannot confirm a restructuring plan containing such a measure against shareholder opposition.

Case law is still scarce and there is no reliable court practice yet shaping details of cram downs, including cram downs of shareholders.

Concluding remarks

Lithuanian restructuring law, as shaped by JANI, grants shareholders a meaningful procedural role while maintaining a creditor-oriented framework. Shareholders must approve restructuring plans, which gives them considerable influence.

The cram down of shareholders is possible but not if the plan foresees a debt-for-equity swap. This restriction can give shareholders a significant holdout position in scenarios where a successful restructuring calls for a debt-for-equity swap.

While such a strong position of shareholders might have been seen and intended by the Lithuanian legislator when introducing JANI, it is questionable if the same can be said for the strong position of shareholders at a much earlier stage, where shareholders can delay or even fully frustrate restructuring efforts by refusing to approve the first draft restructuring plan which the management must submit to the court together with the opening petition. It is debatable if JANI in this aspect meets the requirements of article 12 of the PRD, which calls on Member States to prevent equity holders from unreasonably obstructing restructuring efforts.

PEOPLE’S REPUBLIC OF CHINA

Introduction

In China, shareholder rights in corporate restructurings are governed by a number of legislative instruments, the most important of which is the Enterprise Bankruptcy Law of 2006 (EBL 2006).

The EBL 2006 establishes three formal insolvency procedures: liquidation, compromise (settlement) and reorganisation. It adopts a "one-gate, three-procedures" framework, under which a common set of foundational rules applies across all three proceedings, while each procedure contains its own specific provisions tailored to its particular objectives and functions.

Because of the adoption of the absolute priority principle, shareholders are generally regarded as residual claimants under the EBL 2006. Their position depends largely on whether the company remains solvent. In liquidation proceedings, the absolute priority principle is reflected in the statutory distribution scheme set out in article 113 of the EBL 2006. The provision establishes a creditor-priority distribution hierarchy, under which employee claims rank ahead of social insurance and tax claims, which in turn rank ahead of ordinary unsecured claims. If the bankruptcy estate is insufficient to satisfy all claims within the same priority class, distributions are made on a pro rata basis. Significantly, shareholders are not expressly included in article 113's distribution hierarchy because they are entitled to receive distributions only after all creditor claims have been paid in full. In practice, this means that shareholders rarely receive any recovery in liquidation proceedings, as insolvent estates seldom contain sufficient value to satisfy creditors completely. The distribution structure embodied in article 113 therefore reflects the fundamental insolvency principle that losses should first be borne by shareholders before they are imposed on creditors. As a consequence, shareholders occupy a highly subordinated position in liquidation proceedings and possess only limited economic interests once insolvency has commenced.

Against this backdrop, shareholder rights in liquidation proceedings have attracted relatively little attention in Chinese bankruptcy law and practice. Because shareholders generally have no realistic prospect of receiving any distribution from the bankruptcy estate, debates concerning shareholder participation and protection arise predominantly in the context of reorganisation rather than liquidation. As a result, an extensive examination of shareholder rights in liquidation proceedings is of limited practical and theoretical significance. The more important issues concern the position of shareholders in reorganisation proceedings, where the debtor retains going-concern value and shareholders may still possess interests that are affected by the restructuring process. Accordingly, the following discussion focuses primarily on the role, rights and protection of shareholders in corporate reorganisation.

The EBL 2006 has been undergoing significant reform in recent years. In September 2025, the Standing Committee of the National People's Congress completed the first reading of the Draft Amendment to the Enterprise Bankruptcy Law (EBL Draft 2025) and subsequently released it for public consultation. Given that the reform process remains ongoing, this report primarily relies on the current provisions of the EBL 2006, while also taking into account the proposed reforms embodied in the EBL Draft 2025.

Finally, it is necessary to clarify the terminology adopted in this report. In Chinese practice, the term "restructuring" is often used to refer to out-of-court debt workouts and consensual restructuring arrangements, in contrast to the court-supervised "reorganisation" procedure under the EBL 2006. Both terms are widely used within the Chinese insolvency community, although not always consistently.

For the sake of clarity and consistency, this report uses the term "reorganisation" to refer specifically to the judicial rescue procedure governed by Chapter VIII, Reorganisation, of the EBL 2006, unless otherwise indicated. In contrast, the term "restructuring" is used in its broader sense to encompass

both in-court and out-of-court processes aimed at rehabilitating financially distressed enterprises, where the context so requires.

1. The position of the insolvency officeholder and creditors compared to shareholders

In Chinese insolvency proceedings, the relationship among the insolvency officeholder, whether an administrator or the debtor's management acting under a debtor-in-possession model, creditors and shareholders is characterised by a predominantly creditor-oriented governance structure. Once insolvency proceedings commence, shareholders occupy the most subordinate position, while decision-making authority shifts largely to the insolvency officeholder and the creditors.

Under the EBL 2006, the administrator is appointed by the People's Court upon its acceptance of the bankruptcy petition pursuant to article 13. Except where the court approves a debtor-in-possession (DIP) arrangement in a reorganisation proceeding, the administrator assumes primary responsibility for the administration of the insolvency case and becomes the central actor in the proceedings. The administrator's powers and duties are set out in article 25 of the EBL 2006 and include the following:

(1) taking over the debtor's property, seals, accounting books, documents and other materials;

(2) investigating the debtor's financial condition and preparing a report on the debtor's assets and financial affairs;

(3) deciding on the debtor's internal management affairs;

(4) deciding on the debtor's daily expenses and other necessary expenditures;

(5) deciding, prior to the first creditors' meeting, whether to continue or suspend the debtor's business operations;

(6) managing and disposing of the debtor's property;

(7) representing the debtor in litigation, arbitration or other legal proceedings;

(8) proposing the convening of creditors' meetings; and

(9) performing such other duties as the People's Court may assign.

Under the principles of company law, shareholders ordinarily exercise influence over the company through corporate governance mechanisms, particularly through the appointment of directors and the oversight of management. Although the degree of shareholder involvement varies considerably among companies, shareholders generally retain a visible role in the company's governance and strategic decision-making during its ordinary course of business. However, the commencement of bankruptcy proceedings fundamentally alters this governance structure. Upon the opening of insolvency proceedings, the debtor's management is generally required to transfer control of the company's assets and affairs to the administrator. As a result, the traditional governance link between shareholders and management is significantly weakened, if not entirely severed. In a financially distressed enterprise, the influence of shareholders consequently declines substantially.

Compared with shareholders, the administrator enjoys considerably broader powers and greater procedural authority. Once the People's Court accepts the bankruptcy petition, effective control over the company typically shifts from shareholders and management to the administrator. Unless the court authorises a debtor-in-possession arrangement during reorganisation proceedings, shareholders generally lose the ability to influence the company's operations, asset management

and restructuring decisions. This transfer of control reflects the broader shift in insolvency law from shareholder-centred corporate governance to a creditor-oriented governance framework.

Creditors are undoubtedly the principal beneficiaries of insolvency proceedings. Chinese bankruptcy law replaces the traditional shareholder-centred corporate governance structure with a creditor-oriented insolvency governance regime, under which creditors exercise collective decision-making and oversight powers through the creditors' meeting and, where established, the creditors' committee. These powers are exercised under the supervision of the People's Court and within the framework of estate administration conducted by the administrator. As a result, the governance of an insolvent enterprise shifts away from shareholders and toward creditors, reflecting the fundamental objective of insolvency law to maximise and protect creditors' interests.

The creditors' meeting is the principal collective decision-making body in Chinese insolvency law. To facilitate the efficient administration of insolvency proceedings, creditors may elect a creditors' committee, which functions as a standing representative body between creditors' meetings and exercises ongoing supervisory and consultative functions. Major matters relating to the administration of the estate, the disposition of assets and the approval of a reorganisation plan typically require creditor approval through the relevant decision-making mechanisms. Consequently, creditors enjoy substantially stronger substantive and procedural rights than shareholders throughout the insolvency process.

In reorganisation proceedings, shareholders retain a degree of influence because their equity interests may continue to have value if the business can be successfully rehabilitated as a going concern. Nevertheless, shareholder interests remain subordinate to those of creditors. Reorganisation plans may require the adjustment, dilution or even cancellation of existing equity holdings in order to facilitate the restructuring. Consistent with the creditor-oriented nature of the EBL 2006, courts may approve plans that substantially impair shareholder interests where such measures are necessary to preserve enterprise value, achieve a successful reorganisation or maximise recoveries for creditors.

2. Shareholders' rights to be consulted and to receive information

In Chinese insolvency proceedings, shareholders retain certain rights to information and consultation, although these rights are not expressly or systematically provided for in the EBL 2006 or other relevant legislation.

Compared with creditors, shareholders possess significantly weaker influence and remain largely subordinate to the authority of the People's Court, the administrator and the creditors' meeting. Unlike the detailed framework established for creditor participation, the EBL 2006 does not provide a comprehensive regime governing shareholder involvement in insolvency proceedings. Nevertheless, shareholders are not entirely excluded from the process. Through a combination of procedural participation, access to information and voting rights in specific circumstances – most notably where a reorganisation plan affects equity interests – shareholders retain a limited, albeit secondary, role in the insolvency framework.

2.1 Right to receive information and to be consulted

Following the commencement of insolvency proceedings, shareholders may obtain information concerning the case through a variety of channels. These include public sources, such as court announcements and disclosures made by the administrator, as well as internal channels where the debtor remains in possession and continues to manage its affairs under a debtor-in-possession arrangement.

Through these channels, shareholders can generally access information relating to the acceptance of the bankruptcy case, the appointment of the administrator, proposed reorganisation plans, court rulings and decisions and other major developments in the proceedings. In practice, administrators frequently communicate with controlling shareholders and actual controllers, particularly in reorganisation cases where their cooperation may be necessary for the successful implementation of the restructuring.

Shareholders' informational rights are especially significant in reorganisation proceedings. Where a proposed reorganisation plan contemplates adjustments to equity interests, shareholders are typically provided with information concerning the draft reorganisation plan, proposed equity adjustment measures, investor recruitment arrangements and major restructuring transactions. Because such measures may directly affect shareholders' interests, courts and administrators generally ensure that shareholders receive relevant information before the plan is submitted for approval. Although Chinese insolvency law does not expressly establish a comprehensive information rights regime for shareholders, the practical operation of reorganisation proceedings affords shareholders a meaningful opportunity to understand and evaluate restructuring proposals that may affect their interests.

In China, shareholders enjoy their most significant participation rights in reorganisation proceedings. Under article 85 of the EBL 2006, where a reorganisation plan involves an adjustment of shareholders' rights and interests, a shareholders' group must be established to vote on the relevant matters. The provision states:

> *"Representatives of the debtor's shareholders may attend the creditors' meeting at which the draft reorganisation plan is discussed.*
>
> *If the draft reorganisation plan proposes any adjustment of shareholders' rights and interests, a shareholders' class shall be formed to vote on those matters."*

Accordingly, shareholders are entitled to review the proposed reorganisation plan, express their views on proposed adjustments to equity interests and vote as a separate shareholders' group where their rights are affected. This participatory mechanism reflects the recognition that shareholders' proprietary interests may be materially altered by the reorganisation process, including through debt restructuring, debt-for-equity conversions, equity dilution, capital reductions or the cancellation of existing shares. By requiring shareholder involvement in such circumstances, article 85 seeks to provide a measure of procedural protection for equity holders whose interests may be directly affected by the implementation of the reorganisation plan.

The Ongoing EBL Draft 2025 further stresses the involvement of shareholders during the hearing by the court before it formally approves the reorganisation application. Article 96 of the EBL Draft 2025 states:

> *"In reviewing a reorganisation application, the People's Court may organise a hearing attended by the applicant and the respondent.*
>
> *Creditors, the debtor's shareholders, prospective investors and other interested parties may participate in the hearing upon approval by the People's Court."*

The participation of shareholders before the formal opening of reorganisation proceedings has been further highlighted in article 100 of the EBL Draft 2025. It provides:

> *"Before a reorganisation application is filed, the debtor and its shareholders may negotiate with creditors, prospective investors and other stakeholders for the purpose*

of reorganisation, and may reach a restructuring agreement or prepare a preliminary draft reorganisation plan.

The debtor shall promptly provide the parties participating in the negotiations with the information necessary for the preparation of the restructuring agreement or the preliminary draft reorganisation plan and shall ensure that such information is truthful, accurate, and complete."

After the opening of reorganisation proceedings, the administrator becomes responsible for information disclosure to shareholders. Article 104 of the EBL Draft 2025 further confirms:

"During the reorganisation period, the administrator shall bear responsibility for information disclosure. Where the debtor conducts self-administration, the debtor shall bear responsibility for information disclosure.

The person responsible for information disclosure shall provide creditors, the debtor's shareholders and other interested parties with the information necessary for their participation in the proceedings. Such disclosure shall be timely and effective, and the information disclosed shall be true, accurate, and complete.

If creditors, the debtor's shareholders or other interested parties believe that the information disclosed is insufficient, they may require the debtor or the administrator to answer questions or to make supplementary disclosures."

As mentioned above, prior to the commencement of bankruptcy proceedings, shareholders exercise their influence through the ordinary mechanisms of corporate governance provided under company law. Once insolvency proceedings are opened, however, control over the debtor's affairs is generally transferred to the administrator, unless the court authorises a debtor-in-possession arrangement. As a result, the day-to-day operation of the company, together with major business and asset-related decisions, falls under the authority of the administrator, subject to the supervision of the People's Court and the creditors. Consequently, shareholder control over corporate affairs is substantially curtailed. Shareholder consultation rights therefore should not be equated with managerial authority or decision-making power.

Shareholders may nevertheless exercise certain procedural rights in limited circumstances. For example, they may raise objections to the treatment of their equity interests under a proposed reorganisation plan, challenge procedural irregularities and participate in hearings concerning the approval of a reorganisation plan. These rights, however, are considerably narrower than those afforded to creditors and do not confer any general power to direct or control the restructuring process.

In practice, shareholder participation is most visible in the reorganisation of listed companies. Courts commonly require the establishment of a separate shareholders' voting group, the disclosure of proposed equity adjustment measures and consultation with shareholders regarding capital reductions, share transfers, debt-for-equity conversions or the cancellation of existing shares. Nevertheless, shareholders do not possess a veto over the restructuring process merely because their interests are diluted or otherwise impaired. Chinese courts have increasingly emphasised that shareholders, as residual claimants, must bear losses before creditors are required to accept substantial compromises of their claims. Accordingly, shareholder participation serves primarily as a mechanism of procedural protection rather than a means of preserving pre-insolvency control rights.

3. The composition of classes involving shareholders in the context of a restructuring plan

Under the EBL 2006, shareholders do not automatically constitute a voting class in every reorganisation proceeding. Pursuant to article 85, a shareholders' class is established only where the draft reorganisation plan proposes an adjustment of shareholders' rights and interests.

Adjustments to shareholders' rights and interests may take various forms, including the cancellation of existing shares, the dilution of existing equity holdings, capital reductions, the transfer of equity to new investors, debt-for-equity conversions that alter existing ownership structures and other restructuring measures that affect the legal or economic interests of shareholders. In essence, any provision of a reorganisation plan that materially alters shareholders' proprietary rights may trigger the formation of a separate shareholders' class.

Conversely, where the reorganisation plan does not affect shareholders' rights and interests, no shareholders' class is required. In such circumstances, shareholders have no voting rights under the reorganisation plan, reflecting the principle that shareholder participation in Chinese insolvency proceedings is limited to matters directly affecting their equity interests. This approach further underscores the creditor-oriented nature of the Chinese reorganisation framework, under which shareholder voting rights arise only as an exception rather than as a general feature of the restructuring process.

The EBL 2006 does not subdivide shareholders into multiple voting classes. As a general rule, all shareholders whose rights and interests are affected by a reorganisation plan constitute a single shareholders' class and voting is conducted collectively within that class. Unlike the classification of creditors, the EBL 2006 does not expressly distinguish among different categories of shareholders, such as controlling shareholders, minority shareholders, state-owned shareholders, institutional investors or individual shareholders. Consequently, the statutory framework adopts a relatively simple and unified approach to shareholder voting.

In practice, however, the reorganisation of listed companies has given rise to more complex arrangements. Depending on the ownership structure of the debtor, the affected stakeholders may include controlling shareholders, non-controlling shareholders, public investors, state-owned shareholders and strategic investors. These groups may have divergent economic interests and differing views regarding the proposed restructuring measures.

Nevertheless, for the purposes of voting under article 85, courts generally continue to treat all existing shareholders as a single shareholders' group. Any distinctions among different categories of shareholders are typically addressed through mechanisms outside bankruptcy law. Additional approval or voting requirements may arise under securities regulations, stock exchange rules or company law, particularly in the context of listed companies. These requirements, however, operate independently of the voting class structure established under the EBL 2006 and do not alter the principle that shareholders vote as a single class within the bankruptcy reorganisation process.

The shareholders' class is separate and distinct from the various creditor classes established under the EBL 2006. Where a proposed reorganisation plan includes adjustments to equity interests, the shareholders' class constitutes an additional voting group alongside the creditor classes. Article 85 of the EBL 2006 grants shareholders a procedural right to participate in the approval process when their rights and interests are affected. However, this procedural entitlement does not alter their fundamentally subordinated substantive position in the insolvency hierarchy.

In recent practice, particularly in large corporate and listed-company reorganisations, Chinese courts have increasingly emphasised that existing shareholders must bear losses before creditors are required to accept significant compromises of their claims. As a result, reorganisation plans frequently require shareholders to contribute value through equity adjustments, including the

transfer, dilution or cancellation of existing shares. In many cases, substantial reductions in shareholders' interests are imposed as a precondition for preserving enterprise value and facilitating creditor recoveries.

In the ongoing reform, the EBL Draft 2025 further confirms the involvement of adjustments of shareholders' rights in the reorganisation plan. Article 115 of the EBL Draft 2025 states that the draft reorganisation plan shall set forth:

(1) the debtor's business plan;

(2) the classification of claims;

(3) the proposed adjustment of claims;

(4) the proposed distribution and repayment of claims;

(5) the period for implementation of the reorganisation plan;

(6) the period for supervision of the implementation of the reorganisation plan; and

(7) other arrangements conducive to the debtor's successful reorganisation.

The proposal referred to in (4) above must include a comparison of the recoveries available under a bankruptcy liquidation and under the proposed reorganisation plan.

Where a reorganisation investor participates in the reorganisation, the draft reorganisation plan must include the proposed investment arrangements.

Where ordinary unsecured creditors are not to be paid in full, the draft reorganisation plan must include provisions adjusting the rights and interests of the debtor's shareholders.

Accordingly, shareholders' participation in the voting process should not be understood as placing shareholders on an equal footing with creditors. Rather, the establishment of a shareholders' class serves primarily as a mechanism for ensuring procedural fairness and protecting shareholders' legitimate interests where they are directly affected by the reorganisation plan. It does not confer upon shareholders the same priority status or bargaining power enjoyed by creditor classes, nor does it alter the fundamental principle that shareholders remain residual claimants whose interests are subordinate to those of creditors in insolvency proceedings.

4. Shareholders' voting rights

Under the EBL 2006, shareholders possess only limited voting rights in insolvency proceedings. They do not participate in creditors' meetings as voting members and generally have no voting rights in liquidation proceedings. Their role in the decision-making process is therefore significantly more restricted than that of creditors.

Reorganisation proceedings constitute the principal exception to this rule. Pursuant to article 85 of the EBL 2006, a shareholders' group must be established whenever a proposed reorganisation plan involves adjustments to shareholders' rights and interests. In such circumstances, shareholders are entitled to vote as a separate class on matters affecting their equity interests. This voting right serves as an important procedural safeguard, ensuring that shareholders have an opportunity to participate in decisions that may materially alter their proprietary rights. Nevertheless, the scope of this voting power remains limited to issues concerning equity adjustments and does not place shareholders on an equal footing with creditor classes within the reorganisation process.

Article 116 of the EBL Draft 2025 further highlights the right to be informed of shareholders before voting:

> *"At least 15 days prior to the creditors' meeting convened to vote on the draft reorganisation plan, the debtor or the administrator shall inform creditors, the debtor's shareholders and other interested parties of the contents of the draft reorganisation plan by means of meetings, correspondence, facsimile transmission, electronic mail or other methods.*
>
> *If the debtor has outstanding loans owed to international financial institutions or foreign sovereign governments that remain unpaid, the person preparing the draft reorganisation plan shall fully and truthfully disclose such circumstances to the reorganisation investor."*

Furthermore, article 120 of the EBL Draft 2025 confirms the rights of shareholders to vote again if the draft reorganisation plan alters the contents of the restructuring agreement and such alterations have an adverse impact on the relevant creditors or shareholders.

Under the EBL 2006, all voting groups – including secured creditors, employee creditors, tax creditors, ordinary unsecured creditors and, where applicable, shareholders – exercise voting rights within their respective classes. The voting mechanism is based on a dual-majority requirement that takes into account both the number of participants voting in favour of the plan and the value represented by those votes. In this respect, the voting rule applicable to shareholders mirrors that applicable to creditors. Article 84 of the EBL 2006 provides:

> *"A voting class shall be deemed to have approved the draft reorganisation plan where more than one-half of the creditors attending the meeting within that voting class vote in favour of the plan, and the claims represented by those consenting creditors account for more than two-thirds of the total amount of claims in that class."*

This provision establishes the standard dual-majority voting requirement under Chinese reorganisation law. First, the plan must be approved by a majority in number of the members attending the meeting within the relevant voting class. Second, the votes cast in favour of the plan must represent more than two-thirds of the total value of claims in that class. Where a shareholders' group is established pursuant to article 85, the same voting principle applies, with voting power determined by the shareholders' equity interests rather than creditor claims.

The dual-majority requirement seeks to balance the interests of both majority and minority stakeholders by ensuring that a reorganisation plan receives support not only from a numerical majority of participants but also from those holding a substantial proportion of the economic interests represented within the class. As a result, neither a small number of large stakeholders nor a large number of stakeholders holding relatively insignificant interests can unilaterally determine the outcome of the vote.

A veto by any voting class prevents the draft reorganisation plan from obtaining unanimous class approval. In such circumstances, three outcomes are possible:

(1) the reorganisation proceeding may be converted into liquidation if the plan fails to secure approval in the first round of voting;

(2) the dissenting class may conduct a second vote and subsequently approve the plan; or

(3) the dissenting class may reject the plan again.

Regardless of the voting outcome, the reorganisation plan becomes effective only upon confirmation by the court, whether through ordinary approval or judicial cram down. Failing such confirmation, the reorganisation proceeding will be converted into liquidation.

Shareholders may vote on such adjustments, but their voting rights are limited to matters affecting shareholder interests and remain subordinate to the rights of creditors, reflecting shareholders' status as residual claimants in insolvency proceedings.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Although Chinese bankruptcy law places creditors at the centre of reorganisation proceedings and significantly limits shareholder control following the commencement of bankruptcy, shareholders may nevertheless attempt to obstruct or frustrate a restructuring in various circumstances.

Such resistance is most likely to arise through a veto in the shareholders' group, where one has been established, particularly when the reorganisation plan threatens existing equity interests, control rights or private benefits enjoyed by controlling shareholders.

The most common source of shareholder resistance arises where a reorganisation plan requires the cancellation of existing shares, a reduction of registered capital, the transfer of equity to restructuring investors, debt-for-equity conversions or the substantial dilution of existing shareholdings.

Because shareholders are residual claimants, Chinese courts increasingly require existing shareholders to bear losses before creditors are asked to accept significant haircuts. Shareholders, particularly controlling shareholders, may therefore oppose reorganisation plans that substantially reduce the value of their holdings.

Controlling shareholders may also seek to frustrate a reorganisation plan where it would result in a change of control, the introduction of a strategic investor, the transfer of voting rights, the loss of board representation or a reduction in their influence over management. In many Chinese corporate restructurings, the economic value of equity may be limited, while control rights remain valuable. As a result, controlling shareholders may resist a restructuring even where the company is insolvent.

Successful reorganisations often depend on attracting new investors. Existing shareholders may attempt to impede this process by challenging investor-selection procedures, contesting valuation methodologies, initiating litigation against investment arrangements or refusing to cooperate with due diligence. Such actions may delay the implementation of the reorganisation plan and undermine investor confidence.

Before and during bankruptcy proceedings, controlling shareholders may seek to influence outcomes by withholding corporate records, concealing assets, failing to cooperate with the administrator, providing incomplete financial information or obstructing investigations into related-party transactions. Such conduct can complicate valuation, creditor negotiations and the formulation of a reorganisation plan.

Shareholders may also use legal proceedings to delay or challenge restructuring efforts. Typical actions include objecting to the acceptance of the bankruptcy case, challenging the administrator's actions, contesting claim determinations, disputing asset ownership or bringing corporate governance claims. While some challenges may be legitimate, others may be intended primarily to delay the proceedings and enhance bargaining leverage.

In closely held enterprises, controlling shareholders may influence affiliated creditors or insiders. Such influence may be exercised through coordinating voting behaviour, creating related-party

claims, using affiliated entities to oppose the plan or influencing negotiations with major creditors. Chinese courts and administrators therefore closely scrutinise related-party claims and voting arrangements, particularly in reorganisation cases.

Where a restructuring involves the sale of core assets or business units, shareholders may oppose transactions that eliminate future upside potential, reduce control over valuable assets, transfer assets to competitors or disrupt existing business networks. Such resistance may arise even where the proposed asset sale would maximise value for creditors.

Shareholder resistance is particularly visible in listed company reorganisations. Common areas of dispute include equity adjustment ratios, the retention of shell value, the allocation of restructuring gains, the introduction of new controlling shareholders and the distribution of post-reorganisation value among stakeholders. Minority shareholders may also object where they perceive that controlling shareholders or new investors receive disproportionate benefits.

Chinese bankruptcy law contains several mechanisms designed to reduce shareholder holdout problems. These include:

- the transfer of management powers to the administrator (article 25);
- a voting structure dominated by creditors rather than shareholders;
- shareholder voting rights that arise only when shareholders' interests are adjusted (article 85);
- the court's cram down power under article 87; and
- the subordination of shareholders to creditors in the distribution hierarchy (article 113).

These features substantially reduce shareholders' ability to block value-maximising restructurings when compared with ordinary corporate decision-making outside bankruptcy.

6. Measures for the cram down of shareholders

The EBL 2006 does not expressly use the term "shareholder cram down," but it contains several mechanisms that enable courts and restructuring participants to overcome shareholder opposition and implement a reorganisation plan. These mechanisms reflect the principle that, once a company becomes insolvent, shareholders are residual claimants whose interests are subordinate to those of creditors.

First, shareholders enjoy only limited voting rights in reorganisation proceedings. Under article 85 of the EBL 2006, a shareholders' group is established only where the draft reorganisation plan involves adjustments to shareholders' rights and interests. Shareholders therefore do not participate in the voting of creditor classes and are unable to control the overall approval process.

Second, Chinese courts possess broad authority to confirm a reorganisation plan despite dissent from one or more voting groups. Section 2, article 87 of the EBL 2006 provides:

> *"If a voting class that failed to approve the draft reorganisation plan refuses to vote again, or if the draft reorganisation plan is still not approved after a second vote, the debtor or the administrator may apply to the People's Court for approval of the draft reorganisation plan, provided that the plan satisfies the following conditions:*
>
> *(1) Under the draft reorganisation plan, the claims specified in article 82(1)(1) of this Law shall be paid in full from the collateral securing such claims, any losses*

resulting from deferred payment shall be fairly compensated, and the security interests of such creditors shall not be substantially impaired or the relevant voting class has approved the draft reorganisation plan;

(2) Under the draft reorganisation plan, the claims specified in article 82(1)(2) and article 82(1)(3) of this Law shall be paid in full or the relevant voting class or classes have approved the draft reorganisation plan;

(3) Under the draft reorganisation plan, the recovery rate of ordinary unsecured creditors shall not be lower than the recovery they would receive in a liquidation proceeding as of the time the draft reorganisation plan is submitted for approval or the relevant voting class has approved the draft reorganisation plan;

(4) Any adjustment of the rights and interests of shareholders under the draft reorganisation plan is fair and equitable or the shareholders' group has approved the draft reorganisation plan;

(5) The draft reorganisation plan treats members of the same voting class fairly and does not violate the priority scheme prescribed in article 113 of this Law with respect to the order of distribution; and

(6) The debtor's business reorganisation plan is feasible."

Article 87 is generally regarded as China's cram down provision. In relation to shareholders, article 87(2)(4) is particularly important because it allows a court to approve a reorganisation plan even when the shareholders' group has voted against it, provided that: "the adjustment of shareholders' rights and interests is fair and equitable." This provision effectively prevents shareholders from exercising a veto over a restructuring and constitutes the principal statutory basis for shareholder cram downs in Chinese reorganisation proceedings.

Where the statutory conditions for compulsory approval are satisfied, the court may approve the plan even if the shareholders' group rejects it, pursuant to the aforementioned provisions of the EBL 2006. This judicial confirmation mechanism effectively prevents shareholders from exercising a veto over a value-maximising restructuring.

Third, reorganisation plans frequently impose mandatory equity adjustments on existing shareholders. These measures include equity dilution, capital reduction, cancellation of shares, mandatory transfer of equity to new investors and debt-for-equity conversions. Such arrangements are common in listed company reorganisations and are designed to allocate losses to shareholders before creditors are required to accept substantial impairment.

Fourth, the transfer of management and control rights to the administrator under article 25 of the EBL 2006 further limits shareholders' ability to obstruct the restructuring process. Once bankruptcy proceedings commence, shareholders generally lose the power to manage the debtor's affairs or control the restructuring negotiations.

Taken together, these mechanisms constitute a functional shareholder cram down regime. Although the EBL 2006 formally recognises shareholders' participation where equity interests are adjusted, it prevents shareholders from obstructing restructurings that are necessary to preserve enterprise value and maximise creditor recoveries. The overall framework thus reflects a creditor-oriented approach to corporate rescue, under which shareholder rights are afforded procedural protection but remain substantively subordinate to the interests of creditors.

It follows that, even where a company is insolvent, shareholders' equity interests do not necessarily become worthless. A financially distressed company may still possess operational or going concern value, and such value may justify the preservation of a portion of shareholders' interests in an appropriate reorganisation plan.

7. Debt-for-equity swap and consent of shareholders

The EBL 2006 contains no explicit provision specifically governing debt-for-equity swaps in reorganisation plans. Nevertheless, debt-for-equity swaps are generally regarded as permissible restructuring measures within reorganisation proceedings. Their legitimacy is supported not only by statutory interpretation but also by broader policy considerations favouring corporate rescue and debt restructuring.

The practice of debt-for-equity swaps has been driven largely by financial policies issued by the State Council rather than by the Company Law or the EBL 2006. From a policy perspective, the State Council has promoted two major waves of debt-for-equity swaps. The first emerged in the late 1990s and was characterised by the establishment of four state-owned asset management companies to acquire non-performing loans from the Big Four state-owned banks. The second was initiated by a new round of policy measures introduced in 2016.

Against the backdrop of both statutory permissibility and policy support, debt-for-equity swaps have become a widely used restructuring tool in Chinese reorganisation practice. Under such arrangements, unsecured creditors may convert all or part of their claims into equity interests in the debtor company.

Today, debt-for-equity swaps are a common restructuring tool in Chinese reorganisation proceedings. They enable creditors to convert part or all of their claims into equity in the debtor company, thereby reducing debt burdens, improving the debtor's balance sheet and facilitating corporate rescue. The use of debt-for-equity swaps nevertheless raises important questions concerning the role of shareholders and the extent to which their consent is required.

This mechanism contributes to balance-sheet optimisation by reducing the debtor's liabilities while simultaneously increasing its net assets and equity capital, thereby improving solvency indicators and enhancing financial stability. In practice, debt-for-equity swaps may take different forms. Under some reorganisation plans, all unsecured claims are mandatorily or voluntarily converted into equity. In others, a hybrid approach is adopted, whereby a portion of unsecured claims is paid in cash and the remaining claims are converted into shares of the reorganised company. Such flexibility enables the mechanism to accommodate the interests and risk preferences of different creditor groups.

The implementation of debt-for-equity swaps, however, has significant implications for existing shareholders, particularly with respect to the dilution of shareholdings and control rights. A detailed analysis of these effects on pre-reorganisation equity holders will be provided in the following sections.

Under the EBL 2006, shareholders do not enjoy an absolute right to prevent a debt-for-equity conversion once a company enters reorganisation. Article 85 of the EBL 2006 provides that where a draft reorganisation plan involves an adjustment of shareholders' rights and interests, a shareholders' group must be established to vote on the relevant matters. Because a debt-for-equity swap typically results in the issuance of new shares and the dilution of existing shareholders' interests, it generally constitutes an adjustment of shareholder rights and therefore triggers shareholder voting.

In principle, shareholders are entitled to participate in discussions concerning the reorganisation plan and to vote through the shareholders' group. Their consent may therefore be sought during the approval process. Nevertheless, shareholder voting rights in bankruptcy differ significantly from

those enjoyed under ordinary company law. Bankruptcy law is primarily designed to maximise the value of the insolvent estate and protect creditors' interests. Accordingly, shareholders are treated as residual claimants whose interests rank behind those of creditors.

Consequently, shareholder opposition does not necessarily prevent the implementation of a debt-for-equity swap. Article 87 of the EBL 2006 establishes a cram down mechanism that permits the People's Court to approve a reorganisation plan even where one or more voting classes reject it. In particular, article 87(2)(4) allows judicial approval where the adjustment of shareholders' rights and interests is "fair and equitable," notwithstanding the absence of approval by the shareholders' group. This provision constitutes the principal legal basis for imposing a debt-for-equity conversion over shareholder objections.

Chinese courts have increasingly relied on this mechanism in practice, particularly in large corporate and listed-company reorganisations. Where the debtor is insolvent and the existing equity has little or no economic value, courts often conclude that substantial dilution or even elimination of existing shareholdings is justified. In such circumstances, requiring unanimous shareholder consent could enable shareholders to extract value at the expense of creditors and impede an otherwise viable restructuring.

At the same time, courts generally require that debt-for-equity swaps be implemented in a fair and non-discriminatory manner. Shareholders within the same class should be treated equally, and the allocation of post-reorganisation equity should be consistent with the valuation of the debtor and the priority structure established under bankruptcy law.

In summary, the EBL 2006 recognises shareholders' procedural right to vote on debt-for-equity swaps that affect their interests, but it does not grant them a veto. Through the combined operation of articles 85 and 87 of the EBL 2006, shareholder consent is desirable but not indispensable. Where a debt-for-equity conversion is necessary to facilitate a successful reorganisation and the resulting treatment of shareholders is fair and equitable, the court may approve the reorganisation plan notwithstanding shareholder opposition. This reflects the creditor-oriented nature of Chinese reorganisation law and the principle that shareholders must bear losses before creditors are required to compromise their claims.

With respect to shareholder participation in the reorganisation decision-making process, the EBL 2006 adopts a limited but noteworthy approach to the protection of shareholder rights. Procedurally, the law provides that representatives of the debtor's shareholders may attend creditors' meetings at which the draft reorganisation plan is discussed. Although they do not possess voting rights within the creditors' meeting, their participation promotes transparency and allows them to express their views through appropriate procedural channels.

From a substantive perspective, the EBL 2006 further provides that, where a draft reorganisation plan involves adjustments to the rights and interests of shareholders, a separate shareholders' class must be established to vote on such matters. This mechanism recognises that, although shareholders are subordinated to creditors in the priority hierarchy, they nevertheless retain residual proprietary interests and should therefore have a collective voice when their equity interests-such as ownership rights, dividend rights, or control rights-are modified or diluted.

Accordingly, the EBL 2006 expressly requires the formation of a separate shareholders' class whenever a reorganisation plan proposes adjustments to shareholders' rights and interests, thereby ensuring shareholder participation in decisions directly affecting their equity interests.

Conclusion

Based on the foregoing analysis, it is evident that the protection of shareholders' rights in Chinese reorganisation proceedings has developed significantly in response to the evolving understanding of bankruptcy law and the rapid development of company law over the past three decades.

In conclusion, although China has made substantial progress in protecting shareholders' rights in reorganisation proceedings, challenges remain. Notwithstanding the establishment of a comprehensive legal framework and the implementation of progressive reforms, further efforts are required to strengthen institutional mechanisms, improve the practical effectiveness of shareholder protections and foster a judicial and professional culture that fully appreciates the need to balance the interests of shareholders, creditors and other stakeholders in insolvency proceedings. Continued engagement among courts, legislators and insolvency practitioners will be essential to ensuring the effective implementation of shareholder protections and promoting reorganisation outcomes that are both fair and economically sustainable.

As the reform of the EBL 2006 continues through the EBL Draft 2025 and subsequent legislative developments, it may reasonably be expected that the protection of shareholders' rights in Chinese bankruptcy law will become more balanced and more fully developed.

SINGAPORE

Introduction

Singapore's restructuring regime is governed by two key statutes that operate in tandem: section 210 of the Companies Act 1967 (Companies Act), which governs schemes of arrangement for both solvent and insolvent companies, and the Insolvency, Restructuring and Dissolution Act 2018 (IRDA), which provides enhanced tools for insolvent restructurings.

- **Companies Act**

  Section 210 of the Companies Act establishes the general mechanism for schemes of arrangement, which may involve creditors or members (shareholders), or any class of them. This provision applies to all companies, regardless of solvency, and forms the procedural foundation for compromises or arrangements that are approved by the requisite majority and sanctioned by the court.

  In solvent restructurings, schemes typically involve members and may include capital reorganisations or privatisation transactions. In contrast, insolvent restructurings focus on creditors, who are grouped into classes and vote on the proposed compromise or arrangement.

- **IRDA**

  The IRDA consolidates Singapore's insolvency laws and offers enhanced tools for the restructuring of distressed companies. These tools include:

  (a) automatic and extended moratoria (sections 64-76);

  (b) rescue financing with super-priority (section 67);

  (c) pre-packaged schemes (section 71); and

  (d) a cross-class creditor cram down (section 70).

- **Insolvent restructurings**

  Read together, the statutes offer two restructuring pathways for distressed companies: judicial management (JM) and a debtor-in-possession (DIP) restructuring scheme. In practice, both JM and DIP-led restructurings often culminate in a scheme of arrangement being proposed for creditor approval and, ultimately, court sanction. Although both mechanisms aim to facilitate corporate rescue through a scheme, they differ in control, court supervision, stakeholder engagement and procedural flexibility.

- **Judicial management**

  JM is a formal insolvency process. A judicial manager may be appointed either by a court order or by a resolution of creditors, and acts as an officer of the court. Once JM is granted, an immediate statutory moratorium arises under the IRDA.

  The moratorium stays actions and proceedings against the company and prevents the enforcement of security except with leave of the court.

  The appointed JM displaces directors and assumes responsibility for managing the company's affairs, business and property (IRDA, section 99(2)).

The regime is purpose-driven. Under section 89(1) of the IRDA, the judicial manager must pursue one or more of the following objectives:

- the survival of the company, or the whole or part of its undertaking, as a going concern (section 89(1)(a));

- the approval of a compromise or arrangement under section 210 of the Companies Act or section 71 of the IRDA (pre-pack schemes) (section 89(1)(b)); or

- a more advantageous realisation of the company's assets or property than in a winding up (section 89(1)(c)).

These statutory purposes make it clear that a scheme of arrangement is not only compatible with JM, it is expressed to be one of the intended outcomes. Judicial managers regularly formulate and present a restructuring scheme to creditors. The statutory moratorium, paired with independent oversight, gives the judicial manager the breathing room needed to stabilise operations, negotiate with stakeholders and develop a viable proposal.

- **DIP restructuring**

In contrast, a DIP restructuring leaves the board in control. Directors remain responsible for managing the business. The company may apply for a moratorium under sections 64-76 of the IRDA to support the restructuring effort. This moratorium does not involve a monitor or supervisor unless the court decides one is necessary.

The scheme of arrangement is the core tool in the DIP pathway. The company develops a restructuring proposal, engages with creditors, prepares the scheme documentation and seeks court orders to convene creditor meetings. Approval requires the statutory voting thresholds. Court sanction is needed before the scheme becomes binding. The DIP structure offers flexibility and is favoured where management retains creditor confidence and the business remains viable.

Although the DIP process does not ordinarily involve the appointment of an insolvency officeholder or monitor, the court retains discretion to impose supervisory safeguards where appropriate. In *Re IM Skaugen SE*,[1] the High Court observed that, in suitable cases, the appointment of an independent chief restructuring officer (CRO) or a court-supervised monitor may be necessary to enhance transparency, safeguard creditors' interests and ensure that management operates with the discipline expected in an insolvency-adjacent environment. The judgment affirms that, in Singapore, the court will not hesitate to tailor additional oversight mechanisms where the circumstances warrant it, particularly where there are concerns about governance, information asymmetry or the need for independent evaluation of the viability of the restructuring.

- **Converging outcomes**

Despite their structural differences, JM and DIP restructurings converge on the same endpoint. In both processes:

- a scheme of arrangement is typically the vehicle through which the restructuring is implemented;

- creditors vote on the compromise; and

[1] [2018] SGHC 259.

- court sanction is required to make the scheme binding.

JM provides independent oversight and a statutory moratorium from the outset. DIP restructurings rely on management continuity and targeted court intervention. However, both processes act as pipelines that deliver the company into a scheme, reflecting the scheme's central role in Singapore's restructuring regime.

1. The position of the insolvency officeholder and creditors compared to shareholders

In an insolvent restructuring, control and economic interest shift decisively towards creditors. Shareholders, by contrast, are typically out of the money and become residual claimants with little to no influence on the outcome.

1.1 Judicial management

When a company enters JM, control transfers from the directors to the judicial manager, who acts as an officer of the court. The judicial manager's statutory mandate under section 89 of the IRDA is to advance one or more of the purposes set out in the Act, all of which are creditor-oriented. The judicial manager runs the business, evaluates restructuring options, negotiates with stakeholders and frequently formulates a scheme of arrangement as the eventual restructuring mechanism. Shareholders have no governance role in JM unless specific statutory approvals are required for certain restructuring steps.

1.2 DIP restructuring and schemes of arrangement

In a DIP scheme process, directors remain in control of the business. However, once a company is insolvent or nearing insolvency, directors' fiduciary duties shift from shareholders to creditors. This principle is well-established in Singapore law. In *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd*,[2] the Court of Appeal held that directors of an insolvent company must consider and act in the interests of the company's creditors.

This shift in duties is central to understanding the DIP regime. Although directors retain formal management powers, their decisions must prioritise creditors' interests. As the company prepares a scheme, it is therefore creditors, not shareholders, who form the relevant constituency: they are classified based on their legal and economic rights, vote on the scheme and ultimately determine whether the proposed compromise is acceptable.

In situations where the court considers additional supervision necessary, it may impose oversight mechanisms, such as appointing a CRO or monitor, to enhance transparency and maintain creditor confidence. This preserves the DIP structure while ensuring creditor protections appropriate to an insolvency-adjacent process.

1.3 Consequence for shareholders

Across both JM and DIP pathways, the consequences for shareholders are similar:

- creditors drive the restructuring;
- directors (in DIP) and judicial managers (in JM) owe their duties to creditors; and
- shareholders have no voting rights on a creditors' scheme.

[2] [2010] 4 SLR 1089 at [52].

In addition, certain restructuring steps may still require specific statutory approvals from shareholders, such as the issuance of new shares under section 161 or the disposal of the company's undertaking under section 160 of the Companies Act. These approval requirements operate independently of the scheme process and may give shareholders residual influence even when they are out of the money.

2. Shareholders' rights to be consulted and to receive information

Shareholders have no general right to be consulted or to receive information, reflecting their position as residual claimants once the company is insolvent or nearing insolvency.

2.1 Judicial management

The IRDA does not create any obligation on the judicial manager to consult shareholders or provide them with specific restructuring updates. The judicial manager reports to creditors and the court.

Shareholders' rights to information arise from general company law, such as the right to receive the company's latest financial statements or consolidated balance sheets under section 203(3) of the Companies Act. But this does not translate into a right to be kept informed about the JM or the restructuring strategy.

Where the company is listed, disclosure obligations under the SGX Listing Rules ensure that material restructuring developments are announced publicly. However, these disclosures are intended for the market as a whole, not to give shareholders an active role in the restructuring.

2.2 DIP restructuring and schemes of arrangement

The position described above in the context of JM is similar in a DIP-led scheme.

2.3 Practical considerations

Although neither JM nor DIP schemes require shareholder consultation, stakeholder management may lead judicial managers or directors to provide limited, high-level updates to significant shareholders.

This is pragmatic rather than legal: the objective is to maintain constructive engagement and avoid unnecessary friction, particularly where statutory shareholder approvals may later be required (e.g. sections 160-161 of the Companies Act, addressed further below).

3. The composition of classes involving shareholders in the context of a restructuring plan

When a company is insolvent or near insolvent, only creditors are classified for the purpose of voting on a restructuring plan. A creditors' scheme compromises the rights of creditors, not shareholders, and classification reflects the legal and economic rights of those creditors.

3.1 Shareholders generally do not form a voting class

Shareholders are not placed into any class for voting on a creditors' scheme. The reason is straightforward: in an insolvent restructuring, shareholders are typically out of the money, and have no economic interest in the outcome. As a result, they do not participate in class formation and are not entitled to vote on the compromise.

3.2 When shareholders are also creditors

A shareholder may also hold a distinct claim as a creditor, for example in relation to:

- shareholder loans;
- guarantees called against the shareholder; or
- unpaid dividends.

In such cases, the shareholder participates only in their capacity as a creditor, not as a member. These claims must be properly classified in accordance with established Singapore law. The leading authority is *The Royal Bank of Scotland NV v TT International Ltd* (*TT International*).[3]

In that case, the Court of Appeal held that where a shareholder's creditor claim is subordinated in a liquidation, it must be separately classified from ordinary unsecured creditors. Treating subordinated shareholder-creditor claims as if they were pari passu with ordinary unsecured creditors would distort the voting analysis and undermine the insolvency priority structure.

4. Shareholders' voting rights

In an insolvent restructuring, shareholders do not have voting rights over a creditors' scheme of arrangement. This is because the scheme is a compromise between the company and its creditors and shareholders are not parties to that compromise. As explained earlier, shareholders are typically out of the money and therefore have no economic interest that would justify scheme participation or voting.

4.1 No voting rights under a creditors' scheme

The Singapore position is clear:

- shareholders are not placed into any class for voting on a creditors' scheme;
- shareholders do not vote on the scheme terms; and
- shareholders cannot block the approval or sanction of a creditors' scheme through any form of scheme-based vote.

Confusion sometimes arises because shareholders may have to approve other steps required to implement the restructuring (e.g. share issuances or asset transfers). These corporate approvals sit outside of the scheme of arrangement framework. They are dealt with further below.

4.2 When shareholders hold creditor claims

As noted above, a shareholder may vote only if they are also a creditor, and only in that capacity. Examples include shareholder loans or guarantees. Even then:

- a shareholder's claim may be subordinated, requiring separate classification (*TT International*); and
- a shareholder's ability to influence the restructuring depends entirely on the size and economic value of the creditor claim, not on their equity stake.

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[3] [2012] SGCA 9.

Thus, the shareholder-creditor votes as a creditor, not as a member.

4.3 Corporate approvals that require shareholder votes

Although shareholders do not vote on the scheme itself, certain post-scheme steps may require shareholder approval. Examples include:

- the issuance of new shares (Companies Act, section 161);
- disposal of the whole or substantially the whole of the company's undertaking (Companies Act, section 160); and
- capital reductions (Companies Act, sections 78A-78G).

These are statutory corporate governance approvals, not scheme votes. They operate independently of the scheme process and may give shareholders residual leverage even when they have no economic interest. This point is developed further below.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Although shareholders have no formal role in an insolvent restructuring and do not vote on the compromise, shareholders may nevertheless have the ability to delay or obstruct restructuring efforts through procedural or litigation strategies.

These attempts arise most commonly where shareholders believe the restructuring will dilute or extinguish their equity, or where they hope to extract negotiating leverage despite having no economic interest.

5.1 Withholding statutory approvals

Shareholders may refuse to approve steps required to implement the restructuring, such as:

- the issuance of new shares under section 161 of the Companies Act; or
- the disposal of the company's undertaking under section 160 of the Companies Act.

Section 161(1) requires shareholder approval by ordinary resolution before directors may issue new shares or grant rights to subscribe for shares. The requirement is strict: directors cannot allot shares *without prior authority* from shareholders. In a restructuring, section 161 may be triggered when the plan involves a debt-for-equity conversion, new shares are issued to incoming investors, rescue-financing involves equity instruments, or a newco or white-knight transaction requires issuance of shares.

Section 160 requires shareholder approval by ordinary resolution for the "sale or disposal of the whole or substantially the whole of the company's undertaking or property." In a restructuring, section 160 is triggered when the restructuring involves a business or asset sale (including hive-down structures), value is transferred to a newco (sometimes with new investors), the restructuring plan involves selling substantially all operating assets, or the JM proposes a sale of the business as a going concern.

Shareholders may simply vote against the section 160 or section 161 resolutions. There is no statutory override in an insolvent context. These approvals sit outside the scheme framework and derive from general corporate governance rules. They may give shareholders residual leverage even when they are economically out of the money.

These shareholder approval requirements have been expressly identified in the 2025 Committee Report (discussed in section 8 below) as structural veto points that are inconsistent with the economic reality of insolvency and should be addressed. The Committee recommended expanding the statutory cross-class cram down to include shareholders and reducing approval thresholds, recognising that out of the money shareholders should not be able to block creditor-approved restructurings simply because sections 160 or 161 require their consent. As of now, the position remains as stated.

5.2 Minority oppression or derivative actions

Shareholders sometimes challenge an insolvent restructuring by commencing minority oppression proceedings under section 216 of the Companies Act. These claims typically allege that the restructuring unfairly prejudices minority shareholders or that the majority has engineered the process to their detriment. In practice, such claims are rarely successful in an insolvency scenario. Once a company is insolvent or near-insolvent, directors' duties shift towards creditors, not shareholders, as confirmed in *Progen Engineering*.[4]

A recent example is the Dasin Mall Trust restructuring where a minority shareholder brought an oppression claim and sought access to the communications of the company's restructuring advisors.[5]

The court had to consider whether such confidential materials could be disclosed in aid of the oppression claim. The case illustrates how shareholders may try to use section 216 proceedings to obtain leverage or disrupt restructuring efforts, even when equity is out of the money. The High Court rejected the request, finding that the claimant could not assert a "joint interest" in those materials merely by virtue of being a shareholder.

5.3 Applications for injunctive relief

Strictly speaking, shareholders may also seek to restrain scheme meetings, halt implementation or challenge the judicial manager's proposals, if there is some viable basis for complain. These applications are rarely attempted, and probably for good reason. It is difficult to imagine a viable legal basis in an insolvent restructuring, where shareholders have no economic interest and where directors' or the judicial manager's duties are owed to creditors, not to members.

6. Measures for the cram down of shareholders

6.1 Cross-class creditor cram down

Section 70 of the IRDA allows the court to bind dissenting creditor classes if two statutory thresholds are met:

1. ***approval by at least one class –*** requiring a majority in number *and* 75% in value of creditors present and voting in that class to support the scheme; and

2. ***court safeguards –*** the scheme must be fair and equitable, not unfairly discriminatory, and dissenting classes must receive at least what they would obtain in a liquidation.

This gives the court a powerful tool to override creditor holdouts.

6.2 No cram down of shareholders

However, section 70 applies only to creditors. It does not extend to shareholders. Members therefore

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4 [2010] 4 SLR 1089 at [52].

5 See *Re Dasin Retail Trust* [2026] SGHC 4.

cannot be bound through cram down and still hold statutory approval rights under the Companies Act, including under sections 160 and 161.

As earlier explained, these provisions can operate as *de facto* shareholder veto points with respect to a proposed issuance of new shares or a disposal of the company's undertaking, even when shareholders are out of the money.

6.3 Legislative intention

When the IRDA was introduced in 2018, Parliament deliberately chose not to extend cram down to shareholders. During the debates, the Government noted that overriding member rights would represent a "paradigm shift" and preferred to retain existing company law protections, even in insolvency.[6]

The concern then was that altering shareholder approval mechanics risked cutting across established governance principles.

6.4 Re-evaluation in the 2025 Committee Report

By 2025, experience has shown that insolvent shareholders can still use sections 160 and 161 of the Companies Act as holdout levers, particularly in restructurings such as Noble and others where equity was already valueless.

As outlined in further detail in section 8 below, the 2025 Committee Report identified this as a structural misalignment: shareholders with no economic stake can block creditor-approved restructurings purely through statutory form.

7. Debt-for-equity swaps and consent of shareholders

Debt-for-equity swaps are a common feature of restructurings but require shareholder approval for new share issuances under section 161(1) of the Companies Act.

If shareholders withhold consent, the swap cannot proceed. Any issue of shares made by a company in contravention of section 161(1) is void and consideration given for the shares is recoverable accordingly under section 161(6).

8. Recent reforms and the 2025 Committee Report

In March 2025, the Committee to Enhance Singapore's Corporate Restructuring and Insolvency Regime (Committee) released a landmark report (Committee Report) reassessing Singapore's post-IRDA framework. Comprised of practitioners from law, finance, academia, and Government, the Committee examined practical impediments to effective restructurings and ways to enhance Singapore's competitiveness as a restructuring centre.

The Committee identified two recurring issues directly relevant to this chapter:

1. shareholder veto rights under sections 160 and 161 of the Companies Act, even where shareholders are economically out of the money; and

2. the absence of any mechanism to cram down shareholders, allowing them to block restructurings despite overwhelming creditor support.

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[6] See Singapore Parliamentary Debates, Official Report, 7 March 2017, vol 94, per Indranee Rajah SC.

The Committee noted that the 2018 IRDA reforms had deliberately left member rights untouched, as introducing shareholder cram down was then considered a significant paradigm shift. Experience since then, however, has shown that sections 160 and 161 often impede timely restructurings. These provisions give shareholders an effective veto over essential restructuring steps, such as share issuances or asset disposals, which can be used tactically even where equity has no value. This undermines creditor recoveries and derails otherwise viable plans.

Market experience reflects the same dynamic. Out of the money shareholders face virtually no downside if a restructuring collapses, yet have upside potential if they can extract concessions in return for approving statutory steps.

To address this, the Committee recommended enabling shareholder cram down, subject to safeguards ensuring shareholders retain an interest only if they contribute new value. This would align Singapore with international regimes such as US Chapter 11, UK Part 26A and the Dutch WHOA, where economic reality, not formal corporate structure, determines priority.

The Committee also recommended streamlining sections 160 and 161, which currently function as de facto shareholder vetoes in insolvency. Removing the need for shareholder approval for disposals or share issuances required under a court-supervised restructuring would prevent shareholders from frustrating creditor-approved plans and bring Singapore in line with jurisdictions where shareholder consent is not required for steps integral to a sanctioned restructuring.

Following the release of the Committee Report on 11 March 2025, the Ministry of Law conducted a public consultation which closed on 8 April 2025. The Government is currently reviewing the feedback, with further legislative steps expected once the review is complete.

Conclusion

Singapore's restructuring laws provide a robust framework that prioritises creditors' interests in insolvency while maintaining defined roles and rights for shareholders.

Recent recommendations suggest a potential shift toward greater flexibility in restructuring processes, including the possible extension of cram down provisions to shareholders under certain conditions. These reforms aim to balance effective corporate rescue with the protection of stakeholder interests and to align Singapore's regime with global standards.

SOUTH AFRICA

Introduction

This chapter provides a practical analysis of the rights and standing of shareholders within South Africa's three primary corporate restructuring frameworks: business rescue proceedings, formal compromise proceedings and liquidation proceedings.

A critical preliminary distinction in South African insolvency law is between factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (an inability to pay debts as they fall due in the ordinary course of business). This distinction, established in our jurisprudence through cases such as *Ex Parte De Villiers and Another NNO: In re Carbon Developments*[1] and confirmed in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd,*[2] determines which legal regime is applicable.

Commercial insolvency is the test for the winding up of *insolvent* companies under the retained provisions of Chapter 14 the Companies Act 61 of 1973 (1973 Act), read with item 9 of Schedule 5 of the Companies Act 71 of 2008 (2008 Act). Conversely, the winding up of a *solvent* company under sections 80 and 81 of the 2008 Act requires the company to be commercially solvent.

In this Chapter, we only examine the rights of shareholders in the liquidation of insolvent companies. The business rescue framework as set out in Chapter 6 of the 2008 Act operates on a distinct, pre-emptive trigger: "financial distress." As defined in section 128(1)(f) of the 2008 Act, it was intended to be forward-looking test, met when it is reasonably unlikely the company will be able to pay all of its debts as they fall due within the *immediately ensuing 6 months*.

Business rescue was thus not intended to be a response to current commercial insolvency, but a measure designed to intervene upon the reasonable *prospect* of future commercial insolvency.

Formal compromise proceedings, as envisaged in section 155 of the 2008 Act, proceed on the basis that a board of a company or a liquidator (but not a business rescue practitioner) may propose an arrangement or a compromise of the company's financial obligations to all of its creditors or to all of the members or any class of creditors.

Understanding these foundational principles is essential before examining the specific mechanisms available for corporate restructuring.

1. The position of the insolvency officeholder and creditors compared to shareholders

1.1 Business rescue

The business rescue practitioner (BRP) assumes full management control in substitution for the board and pre-existing management, although the board remains in office and directors continue to exercise their functions subject to the BRP's authority.[3]

Creditors are a category of "affected persons" with extensive information, participation and voting rights.[4] Secured and unsecured creditors each have a voting interest equal to the value of the amount owed to that creditor by the company, but an unsecured and concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the BRP, equal to the amount, if any, that the creditor could reasonably expect to receive in liquidation. Unless a business rescue plan alters the rights of shareholders or a class of shareholders, a business rescue plan will be approved by creditors only.[5]

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1 *Ex Parte De Villiers and Another NNO: In re Carbon Developments* (720/91) [1992] ZASCA 220.
2 *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* (936/2012) [2013] ZASCA 173.
3 Section 140(1)(a), read with section 137(2) of the 2008 Act.
4 Sections 144-146 and 150–153 of the 2008 Act.
5 Section 152(3)(b), read with section 152(2) of the 2008 Act.

Shareholders are also a category of "affected persons" and their status and class rights cannot be altered during rescue except as directed by the court or as contemplated by an approved plan.[6] That is, shareholders vote on the plan only if it "would alter the rights associated with the class of securities" they hold; otherwise they have notice and participation rights but not a vote.

1.2 Compromise

Outside business rescue, the board (or the liquidator, if the company is being wound up) may propose an arrangement or compromise of the company's financial obligations to "all creditors" or any class of them. Shareholders as such do not participate in the process unless they are creditors in respect of "financial obligations" owed to them, in which case they vote within the appropriate class like any other creditor.[7]

1.3 Liquidation

In liquidation, where an insolvent company is being wound up, creditors are primary. Once a winding up order (including a provisional order) is granted, a *concursus creditorum* is established and the estate is administered for the creditors' benefit first. However, *Cronje NO and Others* v *Hillcrest Village (Pty) Ltd and Another*[8] at para 25 referred with approval to *Van Zyl NO v Commissioner for Inland Revenue*,[9] which held:

> *"It should be remembered that a company in liquidation is administered not only for the benefit of creditors, but that the liquidator is obliged to take the interests of members into account. In terms of s 342 (1) of the [1973] Companies Act, if there is a surplus after payment to creditors, this goes to members. The interest of members in the proper winding-up of the company is recognised in ss 360(1), 386(3)(a) and 387(1) of the [1973] Companies Act."*

Nevertheless, the liquidator is obliged to recover and realise all the assets of the insolvent company being wound up, and to apply the proceeds of such realisation, *first* in discharge of the costs of liquidation (which include the liquidator's fees and costs) and *thereafter* in payment of the claims of creditors in accordance with the relevant provisions of the law relating to insolvency, and *lastly* with any surplus only then going to members according to their rights and interests.[10]

2. Shareholders' rights to be consulted and to receive information

2.1 Business rescue

Shareholders are affected persons entitled to notice of each court proceeding, decision, meeting or other relevant event; to participate in court proceedings; to formally participate as the 2008 Act allows; and to vote on a plan if their rights are altered.[11]

Shareholders also enjoy a statutory right to be consulted by the BRP during the development of the business rescue plan.[12]

"Consult" has been given judicial weight[13] and requires a genuine invitation to give advice, which

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6 Section 137(1) of the 2008 Act.
7 Section 155(2) of the 2008 Act.
8 *Cronje NO and Others* v *Hillcrest Village (Pty) Ltd and Another* 2009 (6) SA 12 (SCA).
9 *Van Zyl NO v Commissioner for Inland Revenue* 1997 (1) SA 883 (C) at 891C-E.
10 Section 391, read with section 342 of the 1973 Act.
11 Sections 146(a)-146(e) of the 2008 Act.
12 Section 150(1) of the 2008 Act.
13 *Hlumisa Investment Holdings (RF) Ltd and Another v Van der Merwe N.O. and Others* (77351/2015). [2015] ZAGPPHC 1055 (14 October 2015).

must be supported by the provision of sufficient information and adequate time for the consulted party to formulate a response, and a genuine receipt of that advice.

The BRP must deliver a notice of the meeting, to be held for the purpose of approving a business rescue plan, to all affected persons,[14] and thus shareholders may attend and make submissions before the vote to approve the plan,[15] albeit they may only vote on the plan if they are also creditors (e.g. by virtue of shareholder loans) or, in the absence of such a claim, it would alter the rights associated with the shares or class of shares they hold.

2.2 Compromise

Only creditors must be served with the arrangement or compromise proposal and the meeting notice. The proposal must set out exhaustive background information, including a list of issued securities (such as shares) and the effect of the proposal on them, if any.[16]

Where an application is made to the court to sanction the proposal, all potentially affected creditors (and, practically, interested stakeholders) should receive notice of the application. A failure to join interested stakeholders (such as shareholders to the extent that their rights may be affected) risks the sanction of the proposal being refused by the court.[17]

2.3 Liquidation

As soon as a final winding up order has been made by the court or a special resolution for a creditors' (insolvent) voluntary winding up has been registered with the Companies and Intellectual Property Commission, the Master of the High Court must summon a first meeting of members to consider the directors' statement of the company's affairs.[18] Thereafter, unless a shareholder is also a creditor, shareholders will have very limited consultation and information rights in the liquidation proceedings of an insolvent company.

However, a liquidation and distribution account must be drawn by the liquidator of the insolvent company. This must be lodged with the Master of the High Court and may generally be inspected.[19] Any person having an interest in the company being liquidated, including shareholders, may object to the account.[20]

3. The composition of classes involving shareholders in the context of a restructuring plan

3.1 Business rescue

Shareholders vote separately on a business rescue plan only if the plan alters "the rights associated with the class of securities" they hold,[21] in which event an ordinary majority within that class is required to approve the plan. Implementation of altered class rights may require consequential memorandum of incorporation amendments, which the BRP can effect if shareholder approval

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14 Section 152(2) of the 2008 Act.
15 Section 152(1) of the 2008 Act.
16 Sections 155(2)-155(3)(a)(iv) and 155(5) of the 2008 Act.
17 Section 155(7) of the 2008 Act; *Commissioner of the South African Revenue Services v Cross Atlantic Properties (Pty) Ltd and Others* (43580/2015) [2017] ZAGPPHC 554 (4 August 2017); *Commissioner for the South African Revenue Service v Logikal Consulting (Pty) Ltd and Others* (96768/2016) [2018] ZAGPPHC 611 (29 March 2018).
18 Section 364 of the 1973 Act.
19 Sections 403 and 406 of the 1973 Act.
20 Section 407 of the 1973 Act.
21 Sections 152(3)(b)-152(3)(c) and section 146(d) of the 2008 Act.

under section 152(3)(c) was obtained[22] notwithstanding sections 16, 36 and 37 of the 2008 Act. Further, pre-emptive rights will not apply unless the plan provides otherwise.[23]

3.2 Compromise

Shareholders will be included in a formal arrangement or compromise proposal only insofar as they are creditors to whom the company owes "financial obligations",[24] for example where dividends have been declared but are unpaid or where shareholders are owed redemption debts. Otherwise, pure equity rights are not compromised under section 155 of the 2008 Act (those are addressed separately, where applicable, under arrangements contemplated in section 114 of the 2008 Act).

3.3 Liquidation

In liquidation proceedings, the liquidator draws up a liquidation and distribution account. It is not approved, as is the case with a business rescue plan or an arrangement or compromise proposal. The account is confirmed by Master of the High Court.[25] Once confirmed, the proceeds realised from the liquidation of the company's assets will be applied *first* in discharge of the costs of liquidation, *thereafter* in payment of the claims of creditors, and *lastly* any surplus will be paid to members according to their rights and interests.[26] As regards any surplus, unless otherwise provided by the memorandum of incorporation, all surplus proceeds are divisible pari passu between all shareholders, in proportion to their shareholdings.[27]

4. Shareholders' voting rights

4.1 Business rescue

Unless a business rescue plan alters the rights of shareholders or class of shareholders, a business rescue plan will be approved by the creditors only.[28] That is, shareholders vote separately on a business rescue plan only if the plan alters "the rights associated with the class of securities" they hold,[29] in which event an ordinary majority within that class is required to approve the plan.

4.2 Compromise

A formal arrangement or compromise proposal will be adopted if supported by a majority of creditors in number, representing at least 75% in value, of the creditors or the members of a relevant class of creditors, present and voting on the proposal.[30] Shareholders vote only if they are creditors.

4.3 Liquidation

In liquidation proceedings, the liquidator draws up a liquidation and distribution account. It is not approved, as is the case with a business rescue plan or an arrangement or compromise proposal. The account is confirmed by the Master of the High Court.[31]

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22 Section 152(6)(b) of the 2008 Act.
23 Section 152(7) of the 2008 Act.
24 Section 152(2) of the 2008 Act.
25 Section 408 of the 1973 Act.
26 Section 391, read with section 342 of the 1973 Act.
27 *South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* 1977 (3) SA 642 (AD) at 655.
28 Section 152(3)(b), read with section 152(2) of the 2008 Act.
29 Sections 152(3)(b)–152(3)(c) and section 146(d) of the 2008 Act.
30 Section 155(6) of the 2008 Act.
31 Section 408 of the 1973 Act.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

5.1 Business rescue

To the extent that shareholders may have a vote to reject or approve a business rescue plan that alters their rights, shareholders can vote down a plan.[32] However, if creditor thresholds are met but shareholder approval fails, the BRP or creditors can proceed to use section 153(1)(a)(ii) to apply to the court to have the dissenting shareholders' vote declared "inappropriate". If such a declaration is made, the plan would be validly adopted.

Shareholders may also bring proceedings, provided there are grounds to do so, seeking an order to interdict meetings to, inter alia, approve a business rescue plan or implementation of the business rescue plan.

Further, as discussed in further detail later in this chapter, where a business rescue plan contemplates an issue of shares equal to or exceeding 30% of the voting power of all the shares of that class, then such issuances must be approved by shareholders outside the business rescue proceedings by special resolution.[33] If such approval is not given, then a plan may be incapable of implementation. In practice, however, plans that need shareholder approval build in alternatives (e.g. the sale of the business to a creditor-owned "newco" entity), to avoid a shareholder veto.

5.2 Compromise

Shareholder approval of a formal arrangement or compromise proposal is not a requirement under section 155 of the 2008 Act, unless shareholders are voting as creditors on a financial claim.

Shareholders cannot therefore block a formal arrangement or compromise proposal, except insofar as they are members of a creditor class.

Where shareholders' rights may be affected, attempts to attack through process (defective notice, non-joinder, insufficient disclosure or lack of a "just and equitable" basis) may succeed and result in the court refusing to sanction the proposed compromise.[34]

5.3 Liquidation

Once a liquidation and distribution account is lodged[35] with the Master of the High Court, it may generally be inspected[36] and a person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master of the High Court an objection to the account stating the reasons for the objection.[37]

"Interest", in this context, is "a legal interest. It connotes a relation between the subject and the object of the interest, [and] interest includes a proprietary or financial interest".[38] Thus, persons having an interest in the company, in this context, would include a shareholder of the company.

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32 Section 152(3)(c) of the 2008 Act.

33 Section 41(3) of the 2008 Act.

34 Section 155(7) of the 2008 Act; *Commissioner of the South African Revenue Services v Cross Atlantic Properties (Pty) Ltd and Others* (43580/2015) [2017] ZAGPPHC 554 (4 August 2017); *Commissioner for the South African Revenue Service v Logikal Consulting (Pty) Ltd and Others* (96768/2016) [2018] ZAGPPHC 611 (29 March 2018).

35 Section 403 of the 1973 Act.

36 Section 406 of the 1973 Act.

37 Section 407 of the 1973 Act.

38 *Nieuwoudt v The Master* 1988 (4) SA 513 (A) at 528 quoted the meaning of "interest" given in *Black's Law Dictionary* 5th ed at 729.

If the Master is of the opinion that any such objection ought to be sustained, the Master shall direct the liquidator to amend the liquidation and distribution account or give such other directions as he or she may think fit. The liquidator or any person aggrieved by any direction of the Master, or by the refusal of the Master to sustain an objection lodged thereunder, may apply to the court for an order setting aside the Master's decision, and the court may on any such application confirm the account in question or make such order as it thinks fit. That order may, if the necessary grounds exist, be taken on appeal.

6. Measures for the cram down of shareholders

6.1 Business rescue

Once a business rescue plan has been approved by creditors and, to the extent necessary, shareholders, the plan binds the company, creditors, and "the holders of any of the company's securities", whether or not they were present or voted in favour of the plan.[39] However, unless the provisions of Chapter 6 expressly exclude application of the provisions in the 2008 Act granting shareholders certain rights,[40] those rights remain extant.

6.2 Compromise

The order of the court sanctioning the arrangement or compromise proposal as approved by the requisite majority of creditors is, once filed with the Companies and Intellectual Property Commission, final and binding only on all of the company's creditors, or relevant class of creditors.[41] As a company's "financial obligations" will be arranged or compromised by the sanctioned proposal, pure equity rights are not compromised. Shareholders' rights under the 2008 Act will accordingly survive an arrangement or compromise.

6.3 Liquidation

In liquidation proceedings, the liquidator draws up a liquidation and distribution account, which will ultimately be confirmed by Master of the High Court or the court, as the case may be.[42] Confirmation of the account by the Master shall have the effect of a final judgment, save as against such persons as may be permitted by the court to re-open the account after such confirmation, but before the liquidator commences with the distribution.[43]

In order to succeed in an application to reopen a confirmed account, prior to any payment thereunder, the applicant must establish a ground for *restitutio in integrum*, such as fraud or *justus error,*[44] or that there are allegations of irregularity.[45] In addition, the applicant must show that:

> *"There is merit in the reopening of the account. A court will not reopen an account if it cannot be shown that the applicant has some prospect of success of having the account varied or corrected …*
>
> *No purpose would obviously be served in merely reopening the account if it is likely to remain in the same form as originally drawn. The applicant must establish at least prima facie that the account is incorrect and would have to be amended."*[46]

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39 Section 152(4) of the 2008 Act.
40 For example, the exclusion of sections 16, 36 and 37 of the 2008 Act by section 152(6)(b) of the 2008 Act.
41 Section 155(8) of the 2008 Act.
42 Section 408 of the 1973 Act.
43 Section 408 of the 1973 Act.
44 *Cronje NO and Others v Hillcrest Village (Pty) Ltd and Another* 2009 (6) SA 12 (SCA).
45 *Van Zyl NO v The Master* 2000 (3) SA 602 (C).
46 *Wispeco* (*Pty*) *Ltd* v *Herrigel NO* 1983 (2) SA 20 (C).

In any winding up, when the affairs of a company have been completely wound-up, the Master shall transmit to the Companies and Intellectual Property Commission a certificate to that effect and send a copy thereof to the liquidator. The Companies and Intellectual Property Commission shall thereafter record the dissolution of the company and shall publish notice thereof in the prescribed manner.[47]

7. Debt-for-equity-swap and consent of shareholders

7.1 Business rescue

Shareholders will vote on a business rescue plan only if the plan alters "the rights associated with the class of securities" they hold.[48]

To the extent that implementation of the plan requires consequential amendments to the memorandum of incorporation, the BRP may effect such changes if shareholder approval under section 152(3)(c) of the 2008 Act was obtained,[49] notwithstanding sections 16, 36 and 37 of the 2008 Act. The BRP may determine the consideration for any issuance of shares as contemplated in the approved business rescue plan, despite sections 38 or 40 of the 2008 Act.[50] Further, pre-emptive rights will not apply unless the plan provides otherwise.[51]

However, where a business rescue plan contemplates an issue of shares equal to or exceeding 30% of the voting power of all the shares of that class, then such issuances must be approved by shareholders outside the business rescue proceedings by special resolution.[52]

7.2 Compromise

All of the shareholders' rights, as contained in the 2008 Act and the company's memorandum of incorporation, will survive formal arrangement or compromise proceedings. Therefore, a debt-for-equity swap may require shareholder approval in terms of the 2008 Act and the company's memorandum of incorporation, outside these formal proceedings.

7.3 Liquidation

The transfer of shares or alteration in status of shareholders is void after the commencement of the liquidation proceedings unless sanctioned by the liquidator.[53]

47 Section 419 of the 1973 Act.
48 Sections 152(3)(b)–152(3)(c) and section 146(d) of the 2008 Act.
49 Section 152(6)(b) of the 2008 Act.
50 Section 152(6)(a) of the 2008 Act.
51 Section 152(7) of the 2008 Act.
52 Section 41(3) of the 2008 Act.
53 Section 341(1) of the 9173 Act.

SPAIN

Introduction

The transposition of EU Directive 2019/1023[1] by Act 16/2022[2] has established a pre-insolvency framework in Spain aimed at facilitating early intervention and maximising the viability of companies in financial distress. Among other things, the new system aims to ensure that company law does not hinder the restructuring of viable companies and, at the same time, that the distribution of the restructuring value is predictable and equitable. Furthermore, as legal scholarship has pointed out:

> *"In particular, the aim was to ensure that shareholders cannot unjustifiably block or prevent the adoption of corporate measures necessary for this purpose within the new plans."*[3]

In this context, the position of shareholders has been reconfigured in functional terms: they are not a class of creditor,[4] but they are affected parties when the plan contains measures that directly affect their corporate or economic rights. The framework allows the cram down of shareholders in current or imminent insolvency scenarios and includes safeguards to prevent expropriation of the residual value of the capital.

After 3 years of practical application, the experience in cases such as *Celsa*[5] (debt-for-equity swap and complete takeover of capital by creditors with opposition from shareholders); *Aldesa*[6] (challenge by minority shareholders of the shareholders meeting decision to approve the plan); *Naviera Armas*[7] (first case with a situation similar to "gifting" as an exception to the priority rule); *Rator*[8] (scope of the special regime for SMEs, merger and capitalisation with complete takeover of capital by creditors, with opposition from shareholders); and *Inparsa*[9] and *Wewi Mobile*[10] (debt-for-equity swap with takeover of majority capital by creditors, with opposition from the shareholders)[11] has outlined the

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1 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, debt discharge and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and debt discharge procedures, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), the "Directive."

2 Act 16/2022, of September 5, amending the revised text of the Insolvency Act, approved by Royal Legislative Decree 1/2020, of May 5, for the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council, of 20 June 2019, on preventive restructuring frameworks, debt discharge and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and debt discharge procedures, and amending Directive (EU) 2017/1132 of the European Parliament and of the Council on certain aspects of company law (Restructuring and Insolvency Directive).

3 PULGAR EZQUERRA, J. "La posición de los socios en los nuevos planes de restructuración: dos años de aplicación práctica", *Diario LA LEY,* No. 10627, Tribuna Section, 13 December 2024.

4 Article 9.3.a) of the Directive allowed Member States to exclude shareholders from voting rights, i.e., they were not considered a class for the purposes of the plan. However, article 12 of the Directive warned Member States that, in such cases, they must ensure by other means that such holders could not unjustifiably prevent or impede the adoption, confirmation or execution of the plan or its implementation. Professor PULGAR EZQUERRA, J. op.cit., who was part of the special section of the General Codification Commission, explains that including shareholders as a class would have been the simplest legislative policy option from a technical point of view, but *"this would have meant, on the one hand, a questionable shift in the reform towards the position of those as residual claimants due to their share of the liquidation, minimising their position as owners of the company*." Furthermore, if they were a class, it would be necessary to reach 2/3 or 66.66% to obtain the agreement of the meeting, instead of the simple majority required for the adoption of the agreement at the shareholders' meeting (more than 50%). This facilitates the approval of the plan by the shareholders.

5 Judgment 26/2023, of September 4, of the Commercial Court No. 2 of Barcelona.

6 Order 164/2024, of October 15, of the Provincial Appeals Court of Madrid (section 28), regarding the preliminary ruling incident, and Judgment 328/2024, of October 18, of the Provincial Appeals Court of Madrid (section 28).

7 Judgment 133/2025, of March 11, of the Provincial Appeals Court of Las Palmas de Gran Canaria (section 4).

8 Judgment 91/2025, of May 6, of the Commercial Court No. 2 of Murcia.

9 Judgment 61/2025 of the Commercial Court No. 3 of Las Palmas de Gran Canaria of September 18 (Judge: Guillermo Fernández García).

10 Order 730/2025 of Commercial Court No. 1 of Alicante of 4 September (consolidated version of 24 September 2025).

11 Judgment 71/2026, of April 27, of the Provincial Appeals Court of Alicante (section 8). The restructuring plan was ultimately declared ineffective on appeal by the Provincial Court of Alicante in April 2026.

relationship between Book II of the Insolvency Act,[12] which regulates all pre-insolvency law following the reform by Act 16/2022, and company law.

Specifically, as explored in this chapter, Spanish courts have ruled on:

(i) *ex ante* judicial control of corporate legality when the plan contains corporate transactions;

(ii) control of fairness when there is an inter-class cram down (in non-consensual plans when an entire dissenting class is carried over) and in the best interest of creditors; and

(iii) a design for enforcement of the restructuring plan to counteract resistance, although with minimal legal regulation whose development is being forced by insolvency judges.[13]

The purpose of this chapter is to offer a practical guide to the position, rights and limits of shareholders in restructuring plans.

1. The position of the insolvency officeholder and creditors compared to shareholders

Prior to Act 16/2022, shareholders always had the final say in restructuring insolvent companies, as the law always allowed them to file for bankruptcy and required their consent for any restructuring that required a corporate agreement (i.e. a debt-for-equity swap that would allow creditors to take control).

In an attempt to mitigate the enormous power wielded by the shareholders of companies in financial distress, lawmakers introduced measures that sought to prevent this obstructionist behaviour by shareholders in the assessment of insolvency, mainly through their liability.[14] However, given that this threat could only be made effective in insolvency proceedings,[15] the shareholders managed to preserve their capital (in whole or in part), despite the company's crisis and the sacrifice of the creditors. The reality is that, in fact, no liability was ever attributed to the obstructionist shareholders in this regard.

The transposition of Directive 2019/1023, therefore, represents a radical shift in the position of shareholders in restructurings. As we have pointed out, the Spanish lawmakers have decided not to consider shareholders as a class of creditors. They do not vote by class, but they can be affected parties, so that the plan can bind them and limit or reduce their corporate rights when the company is in current or imminent insolvency.[16] This design avoids confusing their dual status as owners and residual claimants and allows for equity cram down with safeguards of legality and fairness.

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12 The revised text of the Insolvency Act, approved by Royal Legislative Decree 1/2020, of May 5 (LC).

13 PULGAR EZQUERRA, J. op.cit.

14 Specifically, article 172.2.1 of Act 22/2003 of July 9, on insolvency, allowed shareholders "*who had refused debt-for-equity swap without reasonable cause or to issue securities or convertible instruments under the terms provided in article 165.2, based on their degree of contribution to the formation of the majority necessary to reject the agreement*." The same would apply to the company directors who had unreasonably refused to swap (...) and this had obstructed a refinancing agreement, although directors were exonerated if they had recommended recapitalisation based on reasonable cause, even if it was rejected by the shareholders.

15 In addition to the deficient regulation of this liability, which referred, for example, to the need for multiple independent expert reports to match when assessing the reasonableness of the debt-for-equity swap.

16 Spanish insolvency law allows for pre-insolvency proceedings to be initiated in cases of current insolvency (inability to regularly meet enforceable obligations), imminent insolvency (when it is foreseeable that within the next three months the debtor will be unable to meet its obligations regularly and punctually), or likelihood of insolvency (when it is objectively foreseeable that, unless a restructuring plan is agreed on, the debtor will be unable to regularly meet its obligations in the next two years) under articles 2.3 and 584 LC.

The practical consequences are clear:

- **Conditional corporate intervention –** when the plan includes measures falling within the power of the general shareholders' meeting (e.g. capital increases and reductions, accordion operations, structural modifications or changes to the articles of association), the special provisions of article 631 of the Insolvency Act (*Ley Concursal*, LC) for holding the meeting apply, specifically regarding:

  (i) the call (abbreviated term);[17]

  (ii) the agenda (limited to the plan and its measures);[18]

  (iii) the right to information (focused solely on the agenda, even if it is a listed company); and

  (iv) quorum and ordinary majorities (superseding legal, statutory or shareholder agreements).

- **Different means to challenge:**

  a) If the shareholders' meeting approves the plan, the dissenting shareholders must seek protection under article 204 of the Spanish Capital Companies Act (*Ley de sociedades de capital*, LSC), which requires that the agreement constitute a legal or statutory violation or proof that it was adopted with abuse of majority power under a triple filter: lack of reasonable necessity, self-interest and unjustified harm.

  In the *Aldesa* case,[19] the Provincial Appeals Court of Madrid ruled that, although the channel and deadline for challenging the corporate resolution approving the restructuring plan are those provided for challenging or opposing the plan's approval, the dissenting shareholders (who disagree with the majority opinion) must base the challenge on the grounds provided in company law and not on those provided for challenging a plan the shareholders have not approved (article 656 LC).

  b) Indeed, if the shareholders' meeting does not approve the restructuring plan, the shareholders may oppose or challenge the order for the following reasons:

  (i) the plan does not meet the content and form requirements;

  (ii) it has not been approved by the required classes of creditors (i.e. by all classes of creditors, by a majority of classes, one of which is privileged, or, finally, by a class that is in the money);

  (iii) the debtor is not currently or imminently insolvent;

  (iv) the plan does not offer a reasonable possibility of avoiding insolvency and ensuring company viability in the short or medium term; or

  (v) a class of affected creditors will receive, as a result of complying with the plan, rights, shares or units with a value greater than the amount of their claims.

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17 10 days for unlisted companies and 21 days for companies with shares admitted to trading on a regulated market.

18 "*The agenda shall be limited exclusively to the approval or rejection of the plan in its entirety, without the possibility of including or proposing any other matters*."

19 Order 164/2024, of October 15, of the Provincial Appeals Court of Madrid (section 28).

- **Affected creditor shareholders –** when the shareholders have claims against the company, these are ranked (normally subordinated)[20] and the shareholders are included in the formation of classes solely in their capacity as creditors, with the same rights as any affected creditor in their class, without any privileges for their shareholder status. In this case, these shareholders, in their capacity as creditors, may use the creditors' grounds for instituting a challenge.

- **Additional financing by shareholders:** interim and new financing provided by shareholders may be protected against termination and with specific priorities if it meets the legal requirements.[21] Being a shareholder does not remove the financing protection, but neither does it exempt it from examination of necessity, proportionality and unjustified harm.

- **Enhanced judicial control of corporate legality:** if the plan includes corporate transactions, the judge must place on record in the approval order the control of corporate legality under article 647.4 LC, without pre-judging subsequent corporate challenges.[22]

- **Role of the restructuring expert:** under Spanish law, the restructuring expert is neither the author of the restructuring plan nor does it play a significant role in its approval, save for certifying that the required majorities have been achieved and, where applicable, determining the going-concern value in order to verify which classes are in the money. The expert's function is primarily one of mediation and persuasion, drawing on its professional experience to assist the debtor and creditors in negotiations and in preparing the restructuring plan (article 679 of the Spanish Insolvency Act).[23.]

2. Shareholders' rights to be consulted and to receive information

Under the Spanish restructuring framework, shareholders do not have a general right to be consulted about the restructuring plan. However, when the plan includes measures that fall within the power of the general shareholders' meeting, the special provisions of article 631 LC apply, which include specific information rights.

The right to information is focused solely on the matters contained in the restructuring plan and the corporate measures proposed. In listed companies, the general right to additional information on public communications to the CNMV or on the auditor's report does not apply in such cases (article 520 LSC). However, requests for information on the specific measures included in the plan must be addressed in accordance with the qualified information regime applicable to each measure.

The notice period for the shareholders' meeting is reduced (10 days for unlisted companies and 21 days for listed companies), and the agenda is limited exclusively to the approval or rejection of the plan in its entirety, without the possibility of including or proposing any other matters.

Despite these restrictions, the right to sufficient information is preserved depending on the complexity of the transactions – for example, in structural modifications, this includes access to projects, reports, balance sheets and financial statements. When shareholders are also creditors of the company and

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20 Only when the shareholder's stake is less than 10%, or 5% in the case of listed companies, does this subordination not apply.

21 To enjoy rescissory (claw-back) protection, the claims affected by the restructuring plan, excluding claims owned by specially related persons, must represent more than 60% of the liabilities of the restructured company.

22 PULGAR EZQUERRA, J. op.cit. points out, *"As commercial judges have rightly emphasised in some of their rulings, we are faced with a 'superficial' review of legality, so that only in 'manifestly gross' and 'contrary to the regulations' cases may the judge conclude in his approval order that the shareholders' agreements do not comply with the law, without prejudging in any way the decision that may be taken in a possible subsequent challenge to the corporate restructuring agreements adopted*."

23 By way of comparison, in insolvency proceedings the insolvency administrator (*administrador concursal*) does not draft the creditors' agreement, nor is its opinion on the agreement binding (articles 347–349 of the Spanish Insolvency Act), although it is granted standing to oppose judicial approval of the agreement where its fulfilment is objectively unfeasible (articles 382 and 384 of the Spanish Insolvency Act).

their claims are affected by the plan, they receive information in their capacity as creditors, including the restructuring plan itself and the reports from the restructuring expert.

3. The composition of classes involving shareholders in the context of a restructuring plan

Under Spanish law, shareholders are not configured as a class of creditors for the purposes of the restructuring plan. The Spanish lawmakers deliberately chose not to include shareholders as a voting class, despite article 9.3.a of the Directive allowing Member States this option.

As explained by Professor Pulgar Ezquerra, including shareholders as a class would have meant a questionable shift in the reform towards the position of shareholders as residual claimants due to their share of the liquidation, minimising their position as owners of the company. Moreover, not treating shareholders as a class means that the approval of the plan by shareholders at the general meeting requires only a simple majority (more than 50%), rather than the 2/3 threshold that would apply if they were treated as a class.

When shareholders also hold claims against the company, those claims are ranked (normally subordinated, unless the shareholder's stake is less than 10%, or 5% for listed companies) and the shareholders are included in the formation of classes solely in their capacity as creditors, with the same rights as any affected creditor in their class. Their shareholder status does not confer any privileges or disadvantages in the class formation process. Courts have accepted the possibility of single-member classes or classes with a creditor-member when this complies with the criteria for correct formation of classes, without privileges due to membership status.

4. Shareholders' voting rights

The starting point is the objective assumption of the pre-insolvency state – i.e. the economic situation of the debtor – as indicated above: likelihood of insolvency, imminent insolvency or current insolvency. This classification determines who must approve the plan and when it is possible to replace individual wills with judicial approval.

Notably:

- in the case of likelihood of insolvency, the debtor's approval is required and, if the plan includes measures falling within the powers of the general meeting of shareholders, the agreement of the shareholders is also required (articles 640.2 and 631 LC). Pre-insolvency special provisions facilitate the adoption of the agreement (shortened deadlines, ordinary majority, focus on relevant information), but the plan cannot be imposed on the shareholders if there is no agreement; and

- in imminent or current insolvency, approval does not require the consent of the debtor or the shareholders: it is possible to cram down shareholders through approval if the requirements of legality, viability and fairness are met. In likelihood of insolvency (remember that insolvency will occur within a long 2-year time frame), the debtor still enjoys the benefit of the term so its consent is necessary. On the contrary, when the crisis has already occurred or is imminent, the debtor, and even more so its shareholders, have no say in the solution that may be imposed by its creditors.

As also indicated above, article 631 LC establishes the special corporate provisions, all of which are aimed at facilitating the general shareholders agreement, but also at reducing their possibilities of hindering the approval of the plan. The agenda is limited to the restructuring plan and the measures to be approved. The notice period is reduced, but the right to sufficient information is preserved

depending on the complexity of the transactions[24] (e.g. in structural modifications: projects, reports, balance sheets, financial statements).

The quorum and ordinary legal majority replace statutory reinforcements to avoid blockages, and the execution of measures connected to the plan may be sequenced.[25]

Finally, as identified above, for corporations, it is important to coordinate the first and second calls with the time limit set out in article 631.2 LC: practice recommends announcing both and, if possible, that the judge wait for the second call before considering the plan rejected.[26]

A key aspect is the preventive control of corporate lawfulness in the approval process when the plan includes corporate transactions (article 647.4 LC). The judge verifies compliance with the corporate regime applicable to these transactions without transforming this control into an examination of abuse of majority, which corresponds, where appropriate, to the corporate challenge of the approval agreement.[27]

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Under the Spanish pre-insolvency framework, the scope for shareholders to frustrate a restructuring has been significantly curtailed by Act 16/2022.

Prior to the reform, shareholders effectively held veto power over any restructuring requiring corporate action, since their consent was always required and they could alternatively force the company into insolvency proceedings. The new framework limits these powers through a combination of judicial override mechanisms, special corporate provisions, and enforcement tools. Nevertheless, shareholders retain certain avenues to challenge or oppose restructuring plans, as described below.

It is important to distinguish between two scenarios:

- **If the plan has not been approved by the general meeting of shareholders and, therefore, is imposed by creditors (equity cram down):** the shareholders are entitled to oppose the sanction or to challenge the sanction order if they allege relevant formal procedural defects, lack of an objective insolvency state, absence of reasonable prospects of viability, incorrect formation of classes or lack of fairness (absolute priority, reverse rule, unjustified discrimination). Their standing does not come from being a class of creditors – they are not – but from their status as

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[24] BUIL ALDANA, I. "Planes de reestructuración, socios y operaciones societarias", *Práctica de las reestructuraciones empresariales,* 2025, Ed. Aranzadi. Limiting the right to information to the matters contained in the restructuring plan extends to listed companies, without the right to additional information on the public information communicated to the CNMV or on the auditor's report, where applicable, being applicable in such cases (article 520 LSC). In any case, requests for information on the different measures included in the plan that fall within the power of the general shareholders meeting must be dealt with, in accordance with the qualified information regime applicable to the specific measure, where applicable.

[25] If, once the plan has been approved, the measures included require an expression of the debtor's will, they must be executed in accordance with company law regulations, as pointed out by BUIL ALDANA, op. cit.

[26] This is proposed by legal scholarship, MEGÍAS LÓPEZ, J. Commentary on "Artículo 631. Decisión de los socios sobre la aprobación del plan", in Pulgar Ezquerra, J. (dir.), *Comentario a la Ley Concursal: Texto refundido a la Ley Concursal,* 2023, Wolters Kluwer. And also by BUIL ALDANA, I. op.cit.

[27] This was expressly stated in Order 528/2023, of September 18, of the Commercial Court No. 12 of Madrid, which approved the restructuring plan in the Aldesa case: *"Apparently, these meetings were validly convened by the governing body, the meeting was correctly constituted, and they were approved by the majority of the share capital, so we must understand that they are subject to corporate law. Logically, this is a merely cursory review of legality without prejudging the decision that could be taken to consider a possible challenge on this ground. Thus, only in cases that are manifestly gross and contrary to the regulations could the judge conclude that these agreements do not comply with company law*."

residual claimants potentially within the value. These grounds for challenge are expressly set out in article 656 LC.[28]

- **If the plan has been approved by the general meeting of shareholders:** in this case, corporate law provides for the protection of dissenting shareholders (specifically, article 204 of the Spanish Companies Act). Control focuses on the legality of the resolution and its possible abuse under the triple filter: absence of reasonable necessity from corporate interest, adoption in the interest of the majority and unjustified harm to the minority.[29] Practice has shown that the approved solution does not have to be the only one or the best one: it is sufficient that it be reasonably necessary to address the situation and that it respect the thresholds for the protection of the minority. If the challenge is successful, the plan may become enforceable for these purposes, opening the way for a pre-insolvency challenge.[30]

As for the effects of a successful challenge, the regime distinguishes between two scenarios. First, whether the challenge to the approval order in a plan not approved by the shareholders meeting is upheld will depend on the grounds alleged, although the rule is that the effects of the plan do not extend beyond the challenger. The plan is only completely ineffective when it does not have the necessary majorities or when formation of classes is defective. If the effects are irreversible, compensation for damages against the debtor is applicable, which will normally require an expert report (article 661 LC).

Secondly, if the challenge to the approval by the shareholders meeting is upheld, the natural consequence would be its ineffectiveness, but as we have already mentioned, the effectiveness or otherwise of the restructuring plan will depend on whether the agreement of the general meeting of shareholders was necessary. Thus, if the debtor was likely to become insolvent, when the shareholders agreement lapses, the plan will lapse, since the debtor's consent is necessary for the proposed corporate measures. Conversely, if the debtor (not a small or medium-sized enterprise) was in current or imminent insolvency, its approval would not be necessary, and the plan could be effective if it met the requirements for approval by the creditors. All of this is in accordance with the provisions of article 640.2 LC.

The system incorporates anti-blocking levers aimed at preventing delaying or obstructionist strategies by shareholders:

- **Suspension of the voluntary insolvency petition:** if a qualified majority of the liabilities potentially affected by the restructuring or the restructuring expert can demonstrate a real likelihood of finalising a plan, the judge may suspend the debtor's insolvency petition, neutralising its tactical use during negotiations (article 637 LC).[31]

- **Corporate special provisions to facilitate approval of the restructuring plan by the general meeting of shareholders:** as noted above, these provisions include shortened notice periods, a limited agenda, focused information and a quorum and ordinary majority to approve the plan and all the corporate measures included. In addition, duplicating the structural modification regime is avoided by replacing certain individual safeguards with collective safeguards in Book II, preserving legal certainty without slowing down implementation (articles 631.2 and 3 LC).[32]

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28 YAÑEZ EVANGELISTA, J. commentary on "Artículo 656. Impugnación del auto de homologación del plan no aprobado por los socios", in Pulgar Ezquerra, J. (ed.), *Comentario a la Ley Concursal: Texto refundido a la Ley Concursal,* 2023, Wolters Kluwer.

29 PULGAR EZQUERRA, J. op.cit.

30 PULGAR EZQUERRA, J. op.cit.

31 This possibility has not been used on many occasions, although it was agreed on in the case of the Rator Group, to which we will refer later.

32 Under article 631.3 LC, creditors will not have the individual protection rights provided in ordinary situations in the event that a structural modification is agreed upon.

- **Approval without a prior meeting of shareholders in the event of tacit rejection:** the closing rule in article 631.2 LC allows the judge to decide on approval once the deadlines have passed without agreement by the shareholders meeting, preventing inaction from blocking the process.

With regard to the implementation of the restructuring plan, article 650 LC allows for enforcement when the corporate bodies (shareholders' meeting or company directors) do not cooperate. The judge may appoint individuals to implement the measures contained in the plan or grant broad powers to the expert. In practice, these powers have made it possible to sign documents, prepare accounts and balance sheets for *coup d'accordion* transactions or mergers, dismiss and appoint directors, access facilities, systems and passwords, and carry out acts that can be registered in official records with the court order being sufficient. Judicial practice has applied these powers with a finalist and efficiency criterion to ensure the full effectiveness of the approved plan.

6. Measures for the cram down of shareholders

The Spanish restructuring framework provides robust mechanisms for the cram-down of shareholders in cases of current or imminent insolvency. Equity control hinges on two tests: the best interest of creditors (which involves an individual threshold, comparing what the creditor obtains under the plan with what it would obtain under insolvency liquidation) and the absolute priority rule as a collective safeguard between classes.[33]

The absolute priority rule has a vertical and a horizontal dimension. The vertical dimension is perceived both upwards, since no creditor can collect more than 100% of the value of its claims; and downwards, since no lower-ranking creditor, nor the shareholders, receives or retains value – understood broadly, since the rule refers to receiving any payment or retaining any right.

If a dissenting higher class bears any harm, they maintain or receive rights with a value lower than the amount of their claims (articles 655.2.4 and 656.1.5 LC). For its part, the horizontal dimension requires economically equivalent treatment between classes of the same rank, avoiding unjustified discrimination based on risk profiles or schedules.[34]

This architecture includes a specific safeguard for shareholders: the so-called "reverse rule," which allows shareholders to challenge a plan they have not approved when a class of creditors receives, under the plan, a value greater than that of their claim (article 656.1.5 LC). In other words, the restructuring surplus above 100% of the preferred classes must be allocated to those who are in the money. If the creditors have already been fully paid and the post-restructuring value exceeds that threshold, the surplus (upside) belongs to the shareholders.

The law also provides a limited exception to the absolute priority rule (set out in article 655.3 LC), as value may be assigned to lower classes or shareholders, even if a dissenting higher class is harmed, if this is essential for viability and does not cause unjustified harm to creditors. Legal scholarship has identified demanding standards of proof: clear economic justification of why the shareholder's retention or reinvestment is essential (e.g. continuity of key personnel, contribution of sufficient new money on market terms) and impact analysis to demonstrate the non-expropriation of value from higher classes. However, in some cases, the courts have applied the exception even though it

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33 BUIL ALDANA, I. Commentary on "Artículo 655. La regla de prioridad absoluta" in Pulgar Ezquerra, J. (ed.), *Comentario a la Ley Concursal: Texto refundido a la Ley Concursal,* 2023, Wolters Kluwer: *"The absolute priority rule (APR) is the classic rule of restructuring law relating to the distribution of the value (or surplus) of the restructuring, which is reflected in the principle that 'no one can collect more than they are owed, nor less than they deserve'."*

34 PULGAR EZQUERRA, J. op.cit.

had not been invoked.[35]

The special regime for restructuring plans for small and medium-sized enterprises (SMEs), regulated in articles 682 et seq. of the LC, has unique features that directly affect the scope of cram down available.

First, the debtor's approval is required in all cases and, in general terms, the cram down of shareholders typical of the ordinary regime is not possible, shifting bargaining power to the debtor and its shareholders. Thus, in some cases, the SME status of some of the companies affected by the restructuring plan has been disputed when determining whether the debtors' agreement is mandatory.[36]

Secondly, the protection of equity is based primarily on the relative priority rule, which makes the vertical distribution of value more flexible but requires solid justification for the allocation between classes and for the non-worsening condition of classes of the same rank.

Thirdly, there is no provision for suspension of the voluntary insolvency application during the negotiation, which limits the time frame and conditions the strategy.

And finally, membership of a group required to consolidate may exclude the application of the special regime, returning the case to the ordinary regime and, with it, the possibility of cram down. Practice has confirmed a finalistic interpretation of this exception to avoid artificial structures that shield the group's holding or auxiliary companies behind individual thresholds.[37]

Taken together, these rules reinforce classic corporate governance and reduce the scope for cram down and enforcement for SMEs, where the shareholder is understood to play a more important role (in many cases, it will be essential for the shareholder to remain at the helm of the company). In highly leveraged SMEs, viability may depend on the ability to reach consensus and on designing a simple, transparent plan supported by a credible valuation.[38]

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35 BUIL ALDANA, I. op.cit. Commentary on "Artículo 655...", considers that the exception can only occur in three cases: (i) the consensual exception, agreed by the other classes; (ii) the exception for gratuity or "gifting"; and (iii) the exception for new value, due to contributions of new money by shareholders. See also Judgment 701/2024 of July 9, of the Provincial Appeals Court of Barcelona (section 15) – J.Vilaseca case, which states: *"Retaining ownership of the shares in the hands of the current shareholders favours, on the one hand, the continuity of a company that we have considered economically viable, insofar as the creditors have not shown interest in accessing the company's capital nor have they proposed a different alternative for business management. On the other hand, we do not consider that the treatment accorded to shareholders under the Restructuring Plan causes disproportionate and unjustified harm to the creditors concerned. In fact, it is on record that BDO, as the restructuring expert appointed by the court, presented the financial creditors with different scenarios (documents seven to thirteen of the claim), without them proposing any measures other than debt-for-equity swap that would allow them to access the capital and participate in the management of the company. On the other hand, it is not disputed that the company's management is closely linked to its shareholders. Nor is it disputed that two of its shareholders are also customers of the company, one of them as important as the Spanish Mint, a public entity attached to the Ministry of Finance. In this context, company viability depends, in our opinion, on preserving ownership of the shares and the management team*. Also, Judgment 71/2023, of November 23, of the Commercial Court No. 1 of San Sebastián (Transbiaga I case). And Judgment of 12 August 2025, of the Commercial Court No. 3 of Pontevedra (Comercial Pernas II case).

36 We refer to the Rator case (judgment handed down by Murcia Commercial Court No. 2 on 6 May 2025). This is a restructuring plan that affected a group of companies, one of which was an SME, which, it argued, made its consent required in order to approve the restructuring plan. See the commentary on this ruling by LOPEZ GONZÁLEZ, R. and GÓMEZ CALAFAT, J.A. "Arrastre de socios, modificaciones estructurales y pymes: el plan de reestructuración del grupo Rator" (Cram down of shareholders, structural modifications, and SMEs: the restructuring plan of the Rator group), *Revista General de Insolvencias y Reestructuraciones,* issue 16/2025; and GUAL TOMÁS, R. and VALENCIA GARCÍA, F. "Comentario de la sentencia 91/2025 del Juzgado de lo Mercantil de Murcia de 6 de mayo de 2025 (Grupo RATOR) [Commentary on ruling 91/2025 of the Murcia Commercial Court of 6 May 2025 (Rator Group)]", in *La Ley Insolvencia,* 38/2025.

37 This is precisely the case of the Rator Group and is reflected in the comments on the above ruling.

38 LOPEZ GONZÁLEZ, R. and GÓMEZ CALAFAT, J.A. op.cit. point out that SMEs are more likely to be subject to liquidation than restructuring, as they have to bear disproportionately higher costs than larger companies, adding that these types of companies "lack the necessary resources, especially when facing financial difficulties, to meet high restructuring costs and take advantage of restructuring processes."

7. Debt-for-equity swap and consent of shareholders

Debt-for-equity swap is the typical mechanism for reducing a company's excessive financing (generally referred to as leverage). In the event of current or imminent insolvency, the post-reform regime allows the exclusion of shareholders' pre-emptive rights in *coup d'accordion* transactions (reduction to zero or below the minimum and simultaneous increase) to enable conversion and creditors' access to capital. This requires an exchange price consistent with the post-restructuring value and, naturally, a robust valuation of the restructured company.

In fact, in numerous court rulings to which we will refer, in which the debt-for-equity swap has occurred, the discussion has focused on the method and parameters for determining said value (discounting cash flows, using valuation by multiples, scenarios after the restructuring, discount rate applied) or the sensitivity of the different assumptions. In practice, valuation disputes determine the outcome of the absolute priority rule, the reverse rule and the claim of expropriation of the unsecured amount.[39]

Finally, the absolute priority rule must be distinguished from the concept of gratuity or gifting (derivative transfers): once the fairness of the original distribution under the plan has been verified, the subsequent transfer by an accepting class of part of what was received in favour of the shareholders (or junior classes) does not per se breach the absolute priority rule, provided that it does not conceal an undervaluation that artificially excludes classes in the money. Transparency and adequate disclosure of the scheme help pass scrutiny.[40]

8. Relevant court decisions on the position of shareholders

Judicial application of the rules on corporate restructuring (in Book II of the Insolvency Act) has begun to clearly outline the material and procedural contours of the position of shareholders in restructuring plans. The most relevant milestones and the lessons, which are useful for operators in other jurisdictions, are summarised below.

8.1 *Celsa* case:[41] shareholder cram down and valuation as a central issue

In the first case of compulsory restructuring in Spain following the approval of Act 16/2022, Commercial Court No. 2 of Barcelona approved a non-consensual plan promoted by creditors[42] that involved the takeover and cram down of the shareholders, despite their outright opposition and lack of cooperation. The court emphasised that, in cases of imminent or current insolvency, creditors' approval may compensate for the lack of approval by the debtor and its shareholders,[43] provided the legal requirements are met and the plan passes the viability and fairness test.

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39 THERY MARTÍ, A. and FARIÑAS PENA, J.M. "Equidad, gifting y socios (Equity, gifting, and shareholders)", *Revista General de Insolvencias & Reestructuraciones, issue 16/2025.*

40 THERY A. and FARIÑAS, J.M., op. cit., point out: *"Once it has been concluded that the original allocation of value under the plan is equitable (which in the case of Grupo Armas included delivering shares to bondholders), subsequent derivative transfers of those shares no longer need to be reviewed by the APR. What is relevant in determining whether the derivative transfer of an asset (whether debt or capital) is lawful is not the transfer itself, but whether the original acquisition was equitable or expropriatory*."

41 Judgment 26/2023, of September 4, of the Commercial Court No. 2 of Barcelona (judge: Alvaro Lobato Lavín) (Celsa Judgment).

42 The Celsa Judgment correctly points out, in relation to creditors: "*It is now the latter who enjoy the power of initiative, who can direct the proceedings and design the most efficient solutions without the need for the consent or agreement of the debtor*."

43 In fact, regarding the power of the partner, the Celsa Ruling states: *"When the proceedings have been triggered by the creditors, the debtor no longer has the possibility of resorting to the scorched earth scenario that was insolvency, and can no longer force its creditors to enter that labyrinthine tunnel in which only opportunists survived. What has ceased to apply is that rule of last resort that hung like a sword of Damocles and considerably weakened the position of the creditors of a company in crisis*."

- ***Valuation and expert evidence:*** a strongly empirical approach to economic evidence is emphasised. The judge gives priority to technically robust reports with verifiable data over speculative hypotheses. In addition, he considers the discounted cash flow method to be the most reliable for these purposes. Determination of which classes are in or out of the money and the fulcrum class determines the application of absolute priority and the protection of the shareholder as residual claimant.

- ***Legal policy message:*** it strengthens a model that discourages tactical blocking by the debtor and opens the initiative to creditors when the business is viable under a different capital structure.

8.2 *Aldesa* case:[44] consensual plans and corporate challenge

In the case of this company, the capital was divided between two shareholders. The majority shareholder was also a creditor of the company and, in fact, the approved restructuring plan only affected the claims of that single creditor. One of those claims was subject to a debt-for-equity swap, which resulted in dilution of the minority shareholders' stake in the share capital. Approval of the plan by the general meeting (by the ordinary majority provided in the Insolvency Act, without applying the reinforced majority provided in the articles of association) shifted the dispute to the corporate channel of article 204 LSC. The Provincial Appeals Court of Madrid confirmed:

- The challenge by the dissenting shareholder is governed by general grounds (legal or statutory infringement and abuse of majority), with the triple filter of:

  (i) reasonable necessity from the point of view of the company's interest;

  (ii) the majority must adopt the decision in its own interest; and

  (iii) without unjustified harm to the other shareholders.

  The approved plan is not required to be the only or best alternative, but rather to be reasonable to address the crisis.[45]

- Article 631 LC displaces reinforced majorities and shortens deadlines, but the judge approving the plan exercises limited and essentially formal control over corporate legality under article 647.4 LC, without prejudging the possible abusiveness of the agreement (which belongs, where appropriate, to corporate litigation).

- At the pre-insolvency stage, using tacit rejection by the shareholders meeting under article 631.2 LC is recognised in order to avoid blockages, as is the possibility of single-member classes or classes with a creditor-member when this complies with the criteria for the correct formation of classes, without privileges due to membership status.

8.3 *Naviera Armas* case:[46] scope, assessed causes, best interest and gifting

The Provincial Appeals Court of Las Palmas de Gran Canaria dismissed the challenge to a complex group plan in a ruling that provides us with several guidelines:[47]

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[44] The Provincial Appeals Court of Madrid (section 28) issued two rulings: Order 164/2024 of October 15, which resolves the challenge to the corporate agreement (as a preliminary ruling), and Judgment 328/2024 of October 18 (which resolves the challenge to the approval order).

[45] These rulings are discussed by PULGAR EZQUERRA, J. op.cit.

[46] Judgment 133/2025, of March 11, of the Provincial Appeals Court of Las Palmas de Gran Canaria (section 4).

[47] For a more comprehensive analysis, see THERY MARTÍ, A. and FARIÑAS PENA, J.M. op.cit.; and VALENCIA GARCÍA, F. "Comentario de la sentencia 133/2025 de la Audiencia Provincial de Las Palmas de Gran Canaria de 11 de marzo de 2025 (Naviera Armas) [Commentary on Judgment 133/2025 of the Provincial Court of Las Palmas de Gran Canaria of March 11, 2025 (Naviera Armas)]", in *Anuario de Derecho Concursal,* 66/2025.

- the grounds for challenge under articles 654–656 are limited and must be confined to the content, scope and effects of the plan. Unrelated issues (e.g. unaffected contractual or corporate disputes) fall outside the scope of the challengeable approval order;

- the test of the best interest of creditors is based on a realistic assessment of a liquidation. In sectors with illiquid assets (e.g. in the case of this company engaged in maritime transport, the fleet consisted of several ships whose sale en bloc was very complicated and whose value had depreciated significantly), the courts require expert reports with market analysis and discounts for accelerated sales;

- with regard to absolute priority and the reverse rule, the court rejected the claim that one class was receiving more than 100% of the value of its claim based on a valuation corrected by the appellants' own expert and ruled out horizontal discrimination when all classes of equal rank are out of the money; and

- finally, on gifting, the court assumes that this is a derivative assignment unrelated to the original distribution provided in the restructuring plan, not subject *per se* to the absolute priority rule, without prejudice to its possible control outside the pre-insolvency channel if it concealed an undervaluation or unjustified damage.

8.4 *Rator* case:[48] group perimeter, SME regime and enforcement

The Commercial Court No. 2 of Murcia approved a restructuring plan with shareholders' cram down. The plan was submitted by the financial creditors (banks) who had reached an agreement with an industrial investor who, as a result of the restructuring plan, acquired the debt-for-equity swap with a subsequent merger. The request for approval was made through the prior adversarial procedure, as it could not be executed until the final court decision was obtained. The case taught us several lessons:

- ***SME and group regime:*** as we have already pointed out, exclusion from the special SME regime was interpreted when one of the restructured companies has this status but belongs to a relevant group, closing the door to artificial structures designed to circumvent the corporate cram down provided in the ordinary regime;[49]

- ***corporate legality control***: the court verified ex officio compliance with corporate regulations regarding the *coup d'accordion* transaction (capital reduction and increase), the merger and the appointments, under article 647.4 LC;[50] and

- ***the application for approval included enhanced enforcement measures***: to implement the plan, the expert was granted broad powers to carry out acts that could be registered in the registers, access headquarters and systems and cancel guarantees, thereby neutralising the lack of cooperation from shareholders and directors.

8.5 *Inparsa* case:[51] discussion on the target budget

After rejecting the first request for approval, the court accepted the request submitted with prior adversarial procedure, considering that not only the grounds for opposition are subject to judicial review in this process, but also their assumptions and requirements. The ruling raised some interesting issues:

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48 Judgment of the Commercial Court No. 2 of Murcia of May 6, 2025 (Judge: Francisco Cano) (Rator Judgment).
49 LOPEZ, R. and GÓMEZ, J.A. op.cit.
50 GUAL TOMÁS, R. and VALENCIA GARCÍA, F. op.cit.
51 Judgment 61/2025 of the Commercial Court No. 3 of Las Palmas de Gran Canaria of September 18 (Judge: Guillermo Fernández García)

- it confirmed the lack of standing of the restructured companies to challenge or oppose the approval (as the Celsa and Rator rulings had previously done). However, it did accept the standing of the company that was a shareholder of Inparsa, which was affected by the restructuring, since the plan provided the debt-for-equity swap of the affected credits, which would give them 71% of the equity of the restructured company;

- the central dispute between the parties was whether the company was currently insolvent due to the early maturity of the financing as a result of a change of control that would have transformed the long-term debt into mature and enforceable debt. After analysing the successive novations of the syndicated loan secured by a mortgage on the debtor's property, the court concluded that the change of control clause remained in force. Therefore, since there had been no consent from the creditors to the change of control, and the fact that the contractually required majorities had been met to declare early maturity, the company was obliged to repay the loan early and, by failing to do so, it was in a situation of current insolvency; and

- finally, the judge rejected the argument that the creditors would receive a value greater than the amount of their claims.

8.6 *Wewi Mobile* case:[52] shareholder cram down after partial debt-for-equity swap – first instance confirmation and appellate reversal[53]

The restructuring plan of Wewi Mobile was driven by its principal creditor, without cooperation from the debtor or its shareholders, following the notice of opening of negotiations filed by the debtor. It provided for a partial debt-for-equity swap, resulting in the acquisition of control of 90% of the equity and the corresponding dilution of the former shareholders.

Of particular note:

- the plan includes conditions precedent that limit the plan's immediate general effectiveness upon confirmation, since the debt-for-equity conversion and change of control are subject to Spanish National Markets and Competition Commission and Foreign Direct Investment approvals until 31 December 2025. If such approvals are not obtained, the plan will not take effect. The judge reasoned that there is no manifest illegality and defers a merits review to any potential challenge;

- as corporate measures, the plan provides for: (i) a capital increase by set-off of claims without pre-emptive rights for existing shareholders; and (ii) removal of the sole director, a change to a board of directors governance structure, and the appointment of directors. The court authorised the expert to execute the documentation and record the changes with the Mercantile Registry; and

- the directors and shareholders of the debtor are ordered, during the interim period until satisfaction of the conditions precedent (administrative approvals), to refrain from any corporate or contractual decision that would frustrate or hinder implementation of the plan.

On appeal, the Provincial Court of Alicante upheld the shareholders' challenge and declared the restructuring plan ineffective. The shareholders, who originally held over 90% of the share capital, challenged the homologation order on three main grounds:

(i) breach of the requirements for plan approval under articles 638 and 639 TRLC, because the plan was confirmed as "consensual" without shareholder consent and without a general

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52 Order 730/2025 of Commercial Court No. 1 of Alicante of 4 September (consolidated version of 24 September 2025).
53 Judgment 71/2026, of April, 27.

meeting, and alternatively because it lacked the going-concern valuation report required for non-consensual plans;

(ii) that the creditors would receive shares with a value exceeding the amount of their claims; and

(iii) that the conditions precedent regarding administrative authorisations cast doubt on the plan's short- and medium-term viability.

We note the following key points:

- the court's reasoning on the central issue – the proper route for homologation – is particularly significant for shareholder rights. The court held that where a restructuring plan contains measures that require a shareholders' meeting resolution (such as a debt-for-equity swap), the intervention of shareholders through the corporate channel is mandatory. If the meeting is not convened, or fails to approve the plan, the plan is deemed rejected by operation of law. In such circumstances, the route of article 638 TRLC (consensual plan, requiring approval by all classes of creditors and by the debtor or its shareholders) is unavailable. The proper route must be article 639 TRLC (non-consensual plan), which requires the restructuring expert to issue a going-concern valuation report as an essential safeguard for shareholders facing potential expropriation of the residual value of their equity;

- the court emphasised that the new TRLC regime, while removing the shareholders' former veto power, preserves as a counterbalance the requirement that any plan imposed without shareholder support must be accompanied by a going-concern valuation report from the restructuring expert. This report is the "essential piece" for determining the equity value (enterprise value minus net financial debt), and thus for verifying whether shareholders are being expropriated. Since the plan was confirmed via article 638 without shareholder approval and without such a valuation report – a fact acknowledged by Vodafone itself during the clarification stage – neither the requirements of article 638 nor those of article 639 TRLC were met;

- additionally, the court made important obiter observations regarding the "reverse rule" (article 656.1.5 TRLC, transposing article 11 of the Directive): it noted that in the absence of the going-concern valuation report, it was impossible to properly assess whether the creditors were receiving shares with a value exceeding their claims. The court also expressed reservations about the capitalisation of credits whose existence or quantum was subject to ongoing litigation (including an ICC arbitration with a €150 million counterclaim by Wewi), questioning compliance with article 632 TRLC in conjunction with article 301 of the Companies Act regarding the reality and effectiveness of the contribution; and

- as to the effects of the ruling, the court held that the plan could not be "carved up": it was not possible to declare the non-extension of effects *vis-à-vis* the challenging shareholders while maintaining the plan for other parties. The restructuring plan is a unity – if it cannot be upheld in its entirety, it must be declared ineffective. The court therefore declared the plan fully ineffective and ordered the cancellation of the capital increase that had already been registered with the Mercantile Registry. The ruling is final and not subject to further appeal.

This interpretation is not without controversy, as it arguably conflicts with the express legislative decision not to configure shareholders as a class of creditors. The Provincial Court gave precedence to the reference in article 638.3 TRLC to approval "by the debtor or, where applicable, by the shareholders" over the wording of the first sentence of article 639, which provides that, as an exception to article 638.3, "a restructuring plan that has not been approved by all classes of creditors may also be sanctioned if it has been approved" through any of the alternative routes set out therein.

The court further emphasised that article 640.2 TRLC, while permitting the forced imposition of a plan on shareholders, does not automatically render the plan consensual nor allow for bypassing the framework of article 639; rather, any such imposition must follow the structure of non-consensual plans. Accordingly, in the court's view, the restructuring expert must prepare the going-concern valuation report. This report serves as the basis for determining the enterprise value and, by subtracting net financial debt, the equity value. Notably, the court did not construe the report required by article 639.2 TRLC solely as a tool to attribute decision-making power to the different formed classes of creditors – a purpose seemingly derived from the literal wording of the provision – but also as a means to determine the correct exchange ratio in a forced capitalisation and to ensure that any residual surplus remains in the hands of the shareholders.

This is undoubtedly a far-reaching position, not initially contemplated by the provision. Moreover, it overlaps inversely with the reverse rule as a specific ground for challenging the sanctioned plan (article 656.1.5 TRLC), which already provides shareholders with a mechanism to contest the valuation underlying a debt-for-equity swap, regardless of who performs it.

However, the absence of a mechanism to unify judicial doctrine will prevent a uniform position among courts on this matter, granting shareholders (at least within the Alicante Provincial Court) a position of power which, in our view, is contrary to the will of the legislator and the very purpose of restructuring plans.

8.7 Cross-cutting trends

From the court rulings we have referred to, we can point out the following:

- ***Objective assumption:*** corporate cram down requires imminent or current insolvency; in likelihood of insolvency, the plan requires shareholders agreement, although the special provisions of articles 631 LC apply.

- ***Corporate control as set out in article 647.4 LC:*** this is prior control and is essentially formal in nature. Analysis of the abusiveness of the shareholders agreement is reserved for corporate litigation.

- ***Role of the restructuring expert:*** in addition to its role during negotiation and the valuation report, its executive function after approval is consolidated in non-consensual plans.

- ***Valuation litigation:*** "valuation wars" define the success of equity grounds (the absolute priority rule, reverse rule and best interest). The courts place greater trust in consistent methodologies and sensible scenarios.

Conclusion

Book II of the LC has struck a deliberate balance: it prevents company law from blocking viable restructurings while protecting the residual value of the shareholders. The non-configuration of shareholders as a class, the corporate specialties of article 631 LC, the absolute priority rule and its limited exception, the reverse rule and the enforcement mechanisms form a coherent and pragmatic architecture to that end.

Recent case law consolidates three decisive technical vectors:

(i) valuation, to determine which classes are in or out of the money, establish the fulcrum class and distribute the restructuring value;

(ii) the scope of judicial control, which combines formal examination of corporate legality with a substantive scrutiny of viability and fairness; and

(iii) operational enforceability of the plan, with enhanced powers to overcome obstructionist behaviour by shareholders.

In SMEs, the special design reinforces the central role of the debtor and its shareholders and raises the requirement for consensus, while in groups with nominally SME entities, a finalist interpretation is established that avoids artificial shielding. In all cases, security of the transactions requires rigorous proof of the objective assumption (current or imminent insolvency or likelihood of insolvency), an operationally and financially viable plan, and support of the distribution of value in solid valuation reports. This fosters predictability and the possibility of financing solutions, reduces litigation, and preserves the ultimate objective set out in the Directive and in the Preamble to Act 16/2022: continuity of viable companies beyond continuity of their shareholders.

THE NETHERLANDS

Introduction

The position of shareholders in the Netherlands is traditionally firmly anchored in corporate law. These stakeholders wield extensive control rights, including the appointment and dismissal of directors, as well as the approval of major corporate decisions. However, when a company faces financial distress, this position undergoes a substantial change.

Once insolvency or restructuring proceedings are initiated, the interests of creditors generally prevail and the influence of shareholders is correspondingly reduced.

This chapter discusses the role of shareholders in restructuring proceedings under Dutch law, with a particular focus on bankruptcy, suspension of payments and the WHOA, addressing their rights, obligations, options and limitations within each legal framework.

1. The position of the insolvency officeholder and creditors compared to shareholders

1.1 Bankruptcy

In Dutch insolvency law, bankruptcy constitutes a judicial seizure of all assets belonging to the debtor for the benefit of the joint creditors. A declaration of bankruptcy results in the debtor losing control and management of its assets, with those powers transferred to a court-appointed trustee (*curator*). The aim of the bankruptcy procedure is the liquidation of assets and distribution of proceeds in accordance with the statutory order of priority set out in article 3:277 of the Dutch Civil Code (DCC). Shareholders are only entitled to any distribution once all creditors have been fully satisfied.

A bankruptcy may be declared upon petition by the debtor itself, by one or more creditors or by the Public Prosecutor.[1] In the case of a voluntary petition (*eigen aangifte*) by a private limited liability company (*besloten vennootschap*), the management board may only file such a petition if authorised to do so by a formal resolution of the general meeting of shareholders.[2] This resolution may be adopted in or outside a physical meeting.

As outlined above, the position of shareholders is, as a rule, subordinate to that of creditors. In practice, however, shareholders frequently provide financing to the company in the form of shareholder loans. Although shareholder claims are not automatically subordinated under Dutch law, such loans are often contractually subordinated. Likewise, shareholders may seek to improve their position in the creditor hierarchy. Shareholders may for example attempt to strengthen their position by obtaining security rights such as a pledge or mortgage over the company's assets. However, granting security to a shareholder, particularly when it disadvantages other creditors, may be challenged by the trustee under the *actio pauliana*.[3] As a consequence, shareholder security arrangements are frequently subject to scrutiny and litigation in bankruptcy proceedings.

In addition, dividend distributions made prior to bankruptcy are often reviewed by the trustee. Under article 2:216 of the DCC, dividends may only be distributed if the company's net assets exceed statutory and contractual reserves and the board has approved the distribution. If dividends were unlawfully paid, or if the board knew or should have known that the company would subsequently be unable to meet its due and payable obligations, the trustee may reclaim such distributions from shareholders, either under corporate law or insolvency law. Shareholders are also required to have fully discharged their obligation to pay up their shares.[4] Any unpaid portion of the issue price constitutes a claim of the bankruptcy estate, which the trustee is obligated to collect.

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1 Article 1 of the Dutch Bankruptcy Act.
2 Article 2:246 of the DCC.
3 Article 42 of the Dutch Bankruptcy Act.
4 Article 2:191 of the DCC.

1.2 Suspension of payment

Suspension of payments (*surseance van betaling*) is primarily designed to facilitate a restructuring through an agreement with creditors.

A creditors' agreement in suspension proceedings only binds unsecured and non-preferential creditors.[5] Shareholders are not accorded a specific role in this procedure and it is not possible to modify their rights through a creditors' agreement.

During suspension, a court-appointed administrator (*bewindvoerder*) acts jointly with the management board. Although shareholders retain their corporate powers to instruct the management board, or to dismiss and appoint directors through the general meeting, the board may only act upon such instructions with the consent of the court-appointed administrator. Consequently, the board's authority – and, by extension, that of the shareholders – is considerably restricted during the period of suspension.

A suspension of payments may only be requested by the company itself, acting through its management board.[6] While shareholders do not have a direct right to file a petition, they may influence the decision indirectly through corporate governance mechanisms. Shareholders are also not directly empowered to terminate the suspension of payments procedure. The scope of their function is confined to the (voluntary) facilitation of a creditors' agreement.

Following confirmation of the agreement by the court, the suspension is terminated and the company (through its management board) re-establishes full control over its assets. However, it is important to note that in a significant number of cases, the process of suspension is converted into bankruptcy upon the request of the administrator or the creditors.

1.3 WHOA

Since 1 January 2021, the Dutch Scheme of Arrangement (also known as the WHOA) has provided companies in financial distress with a new instrument to avoid bankruptcy.

In contrast to the suspension of payment (*surseance van betaling*), the WHOA empowers a company to propose a creditor agreement to its creditors as well as its shareholders. If a sufficient majority of creditors and shareholders vote in favour of the agreement, it may be confirmed (homologated) by the court

A fundamental feature of the WHOA is that shareholder consent is not required to initiate proceedings or to propose a plan, even if shareholder rights are affected.[7] Shareholders may themselves request the appointment of an independent restructuring expert if the board fails to act or insufficiently considers shareholder interests.[8] The specific implications of the WHOA for shareholders are addressed in greater detail below.

2. Shareholders' rights to be consulted and to receive information

2.1 Bankruptcy

Shareholders have little to no influence during the process of bankruptcy. The trustee is obliged to issue public reports on the progress and settlement of the bankruptcy proceedings. However, shareholders do not have the right to receive further information or to participate in the decision-

5 Article 252 of the Dutch Bankruptcy Act.
6 Article 214 of the Dutch Bankruptcy Act.
7 Article 370(5) of the Dutch Bankruptcy Act.
8 Article 371 of the Dutch Bankruptcy Act.

making process. The trustee's actions are exclusively aligned with the collective interests of the joint creditors, with no consideration given to the individual interests of shareholders.

2.2 Suspension of payment

During the period of suspension, the court-appointed administrator functions in conjunction with the management board to oversee the management and any disposition of the company's assets.[9] Shareholders maintain their status and associated rights, including the entitlement to information. The management and supervisory board are obliged to provide requested information, unless a compelling company interest dictates otherwise.[10]

2.3 WHOA

Shareholders are entitled to sufficient information regarding the proposed creditor agreement. It is imperative that the agreement contains all the relevant data, thus enabling the stakeholders to make an informed decision.[11] This includes information regarding the company's financial situation and the consequences of the plan for different creditors and shareholders. In the event the aforementioned information is not provided, the court is required to refuse confirmation.[12]

The right to information does not apply to the extent it would permit shareholders to demand additional disclosure during the preparation process. Nevertheless, the core principles of the WHOA – including transparent communication with stakeholders – should lead the debtor to provide reasonable interim updates to creditors and shareholders on progress, ensuring that all creditors are equally informed.

3. The composition of classes involving shareholders in the context of a restructuring plan

3.1 Bankruptcy and suspension of payment

Although Dutch bankruptcy proceedings are primarily aimed at the liquidation of a company's assets, bankruptcy may also be concluded through a creditor agreement. Such an agreement may only be proposed to unsecured and non-preferential creditors; secured and preferential creditors must be paid in full. The same applies to a composition offered during suspension of payments. As discussed above, shareholders hold the lowest rank in the order of priority as stipulated in article 3:277 of the DCC in the context of bankruptcy proceedings. Consequently, the distribution of assets from the estate to shareholders is contingent upon the settlement of all outstanding debts, also when proposing an agreement.

It should be noted that this statutory subordination only concerns payments based on shareholdings and not payments on regular, unsecured claims. Shareholders can be included in an agreement if they have provided regular, unsecured loans to the company. If that is not the case, shareholders are usually not part of a creditor agreement in bankruptcy or suspension of payment.

3.2 WHOA

Within the WHOA framework, shareholders also generally occupy the lowest position in the statutory priority hierarchy. They can however be made part of the creditor agreement under the WHOA. Shareholders can for example be forced to accept a dilution of their shares, which will be discussed in more detail below.

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9 Article 228 of the Bankruptcy Act.
10 Articles 2:107 and 2:217 of the DCC.
11 Article 375 of the Dutch Bankruptcy Act.
12 Article 384(2) of the Dutch Bankruptcy Act.

Voting on a proposed WHOA plan takes place on a class-by-class basis. Given the fundamentally different position of shareholders as compared to ordinary creditors, the WHOA requires shareholders to be placed in a separate class. In most restructuring scenarios, shareholders of a financially distressed company are "out of the money", which means that their interests in the restructuring plan differ fundamentally from those of creditors who can expect a distribution in bankruptcy.

Where shareholders also hold claims against the company in their capacity as creditors, they must additionally be allocated to one or more creditor classes reflecting the ranking of those claims. As a result, shareholders may participate in more than one voting class under the WHOA.

4. Shareholders' voting rights

4.1 Bankruptcy and suspension of payment

As mentioned above, shareholders are not permitted to vote on a creditors' agreement as the modification of shareholder rights is not possible through such an agreement. However, if a shareholder is also a creditor (e.g. by providing a loan), they may exercise the right to vote in that capacity, provided that the claim qualifies as unsecured and non-preferential debt.

4.2 WHOA

Shareholders that are part of a creditor agreement under the WHOA can vote on the proposed agreement in the event their rights are affected.[13] Situations that fall into this category include the dilution of shareholdings and forced transfers. The counting of votes is conducted within each respective class, with the approval of that class requiring a 2/3 majority in value within that class. A WHOA agreement can be confirmed by the court if at least one class of "in the money" creditors or shareholders votes in favour of the agreement.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

5.1 Bankruptcy and suspension of payment

Since shareholders hold no formal position in a creditor agreement during bankruptcy or suspension of payment, the circumstances where shareholders may frustrate a restructuring are very limited. Frustration of a restructuring is more common within the WHOA framework.

5.2 WHOA

The WHOA provides a restructuring tool through which shareholder rights can be altered if such alterations are necessary for a restructuring. As a safeguard mechanism, the WHOA is designed to significantly limit the ability of shareholders to frustrate a restructuring process.

Although shareholders can, for example, not prevent the initiation of a WHOA procedure, they may themselves request the opening of such proceedings. This may be particularly relevant where a shareholder considers a restructuring to be necessary but the management board fails to act, or where the board pursues a restructuring strategy that insufficiently takes shareholder interests into account.

[13] Article 381(3) of the Dutch Bankruptcy Act.

During the preparation of an agreement, the court may impose certain tailor-made measures at the request of the debtor company or the restructuring expert.[14] These measures may encompass the temporary restriction of shareholder powers. For instance, this mechanism may be employed to prevent shareholders from dismissing directors with a view to thwarting the WHOA process, whether in their own interests or otherwise. The objective of these measures is to safeguard the integrity of the WHOA procedure.

In the event that an agreement is submitted for court confirmation subsequent to voting, dissenting shareholders may request that the court reject the agreement.[15] The legal framework as a whole is designed to prevent shareholders from leveraging their position in a restructuring process to gain an advantage at the expense of creditors. Conduct of this nature would be in direct contravention of the statutory ranking order of creditors and shareholders. However, in the event the creditor agreement does not comply with the requirements of the WHOA and shareholders are unreasonably prejudiced, the agreement can be rejected by the court.

6. Measures for the cram down of shareholders

6.1 Bankruptcy and suspension of payment

Shareholders typically have no role in creditor agreements during bankruptcy or suspension of payment. If shareholders are made part of the agreement as regular creditors, a cram down is possible in the event that more than 50% of the total amount of unsecured and non-preferential creditors, representing at least 50% of the total unsecured and non-preferential claims, vote in favour of the agreement.

6.2 WHOA

The court confirmation of a WHOA agreement is possible upon the request of the debtor, thereby rendering it binding for all creditors and shareholders involved.

In order to reach court confirmation, it is sufficient for one class of creditors who are “in the money” (i.e. would receive distribution in the event of bankruptcy) to cast their vote in favour. The percentage of votes is determined on the basis of the total amount of votes that have been cast, as opposed to the agreement in bankruptcy and suspension of payment, where the percentage is determined by the total amount of creditors. This makes the WHOA a more effective instrument, since the position of creditors who did not cast a vote is not taken into account when determining the outcome of the voting.

In contrast to agreements in bankruptcy and suspension of payment, the WHOA also allows for the forced transfer or cancellation of shares. This is possible when a shareholder is “out of the money” in bankruptcy and unwilling to provide new financing to justify retaining a position in the company. In the event that a shareholder is unwilling to provide further investment to ensure the continuity of the company, they must relinquish their position to new investors who are willing to support the restructuring process.

7. Debt-for-equity swap and consent of shareholders

7.1 WHOA

The WHOA agreement has the potential to facilitate the conversion of debt into equity. In debt-for-equity swaps, the creditor is typically granted shares in lieu of cash, which frequently results in the

[14] Article 379 of the Dutch Bankruptcy Act.
[15] Article 383(8) of the Dutch Bankruptcy Act.

dilution of existing shareholdings. This is new compared to the existing frameworks of bankruptcy and suspension of payment and provides companies with a more effective instrument for restructuring.

Shareholders can be forced to accept a debt for equity swap offered to a creditor of the company, despite the dilution of their own shareholdings. In the event of statutory pre-emption rights or transfer restrictions designed to protect shareholders being in place, these may be overridden by the court upon confirmation, with a view to preventing shareholders from blocking the restructuring. The court's primary function is to determine whether the shareholder is "out of the money" (i.e. would receive no remuneration in the event of bankruptcy) and therefore not disproportionately harmed by the proposed dilution.

8. Conclusion

The position of shareholders in Dutch insolvency law becomes significantly restricted once a company enters financial distress. While shareholders traditionally enjoy extensive governance rights under corporate law, these rights are largely superseded in insolvency proceedings in favour of creditor protection and the continuity of the enterprise.

In the context of bankruptcy, shareholders typically experience a significant diminution in their influence, as the trustee assumes control and initiates the liquidation of the estate. Consequently, the economic interests of shareholders are frequently extinguished. Shareholders generally have no role in creditor agreements during bankruptcy.

During the period of suspension of payment, shareholders formally retain their rights. However, like in bankruptcy, shareholders have no role in a creditor agreement during suspension of payment.

The WHOA introduces a more contemporary restructuring instrument that also places shareholders at a distance, while concurrently enabling the debtor to further limit shareholder rights in favour of the enterprise and other creditors. Shareholders have information and voting rights comparable to the rights of other, regular creditors. Since shareholders are in most cases considered to be "out of the money" in WHOA agreements, their influence in the court confirmation is considered relatively limited.

In summary, shareholders occupy a residual position within Dutch insolvency proceedings; their interests come into play only after all creditors have been fully satisfied. Shareholders have limited (information) rights during bankruptcy and suspension of payment and no particular action is required on their part. In contrast, the introduction of the WHOA requires a more active approach by shareholders to the proposed restructuring, since their shareholdings can be diluted or even transferred if the shareholders do not sufficiently contribute to the restructuring. That means that shareholdings are no longer only a right, but also a responsibility when a company is in financial distress.

UNITEDSTATES OF AMERICA

Introduction

In the United States, restructuring proceedings are governed primarily by federal law, specifically Chapter 11 of the US Bankruptcy Code (11 U.S.C. §§101–1532), which is designed to allow distressed companies to reorganise their debts while continuing to operate. Within this framework, there is not typically an insolvency officeholder. Rather, the individual officers of the insolvent company remain in place but their authority is subject to the constraints of the US Bankruptcy Code and the bankruptcy courts. Creditors typically have priority and dominate negotiations, while shareholders, as residual claimants, occupy the lowest rung under section 507 of the Bankruptcy Code regarding the order of priorities of payment. Still, shareholder rights are not entirely extinguished.

While the federal Bankruptcy Code defines the treatment of equity interests during restructuring, the corporate law of the state of incorporation still governs certain rights, such as shareholder voting, access to information and officer replacement.

This dual system (federal bankruptcy rules overlaid with state corporate law) creates a nuanced legal landscape in which shareholder rights exist but are narrowly tailored and often subordinated to creditor interests, as further analysed in this chapter below.

1. The position of the insolvency officeholder and creditors compared to shareholders

In the US insolvency restructuring system under the Bankruptcy Code, there is not typically an insolvency officeholder. The insolvent company in a Chapter 11 bankruptcy is a "debtor in possession" (DIP) and, pursuant to Bankruptcy Code §1107 (a), the DIP has all the rights and limitations, and shall perform all the functions and duties (with certain exceptions), of a bankruptcy trustee. Creditors have significant rights but the DIP typically has an exclusive period of time to propose a Chapter 11 plan.

The classification of claims and interests is a central feature of the Chapter 11 plan process under the Bankruptcy Code. The Chapter 11 restructuring process involves the formation (typically through negotiations) of a plan of reorganisation and then confirmation of the plan by the bankruptcy court. Under a plan, the property rights of creditors are superior to the rights of shareholders, and creditors typically benefit much more under a plan than do the shareholders. Shareholder rights are subordinate to the rights of creditors.

2. Shareholders' rights to be consulted and to receive information

Outside of bankruptcy, shareholders enjoy a range of rights under state corporate law to access information about the company. For example, Delaware law (DGCL §220) grants shareholders the ability to inspect a corporation's "books and records" upon showing a proper purpose, such as valuing shares or investigating alleged mismanagement. Courts in Delaware interpret "proper purpose" broadly, but they require shareholders to demonstrate a credible basis for their request. Similarly, the Texas Business Organizations Code §21.218 and California Corporations Code §1601 provide statutory rights to the inspection of accounting books, minutes and shareholder lists. These statutes function as important governance tools, allowing shareholders to monitor management and assess the value of their investments.

Once a company files for Chapter 11, however, these state-law rights are heavily constrained. The automatic stay under 11 U.S.C. §362 halts litigation and other actions against the debtor, which can include efforts by shareholders to enforce inspection rights through state courts. Moreover, the centralised authority of the bankruptcy court limits the ability of individual shareholders to pursue information independently, since information requests risk interfering with the debtor's administration of the estate or duplicating the work of creditors' committees. Courts have consistently held that shareholder inspection rights must yield to the overarching goals of bankruptcy: efficient reorganisation and equitable treatment of creditors.

In practice, shareholders must instead rely on the disclosure obligations imposed by federal bankruptcy law. Under 11 U.S.C. §1125, a debtor cannot solicit acceptances of a reorganisation plan without first providing a disclosure statement containing "adequate information" to allow a hypothetical investor to make an informed judgment about the plan. This disclosure regime, however, primarily benefits creditors and other stakeholders with a direct economic stake in the plan. If shareholders are deemed "out of the money" under Bankruptcy Code §1126(g), they are not entitled to vote and, therefore, may not even receive the disclosure statement.

In a Chapter 11 proceeding where there is a credible argument that there will be sufficient funds to make a distribution to equity holders, shareholders may qualify as a "party in interest" under Bankruptcy Rule 2004, and may be allowed by the court to obtain information from the debtor through discovery. It is rare, however, for a court to allow the debtor's shareholders to use Bankruptcy Rule 2004 to obtain information from the debtor.

Shareholders may also attempt to obtain information indirectly through the appointment of an equity committee (see Bankruptcy Code §§1102–1103), as further described below. In a Chapter 11 bankruptcy, an equity committee is specifically identified as a party in interest under Bankruptcy Code §1109(b). However, absent such a committee, shareholders are typically left with whatever public filings are made with the bankruptcy court (schedules of assets and liabilities, monthly operating reports, plan and disclosure statements), or whatever information is voluntarily shared by the debtor.

2.1 Equity committees

The Bankruptcy Code expressly provides for the appointment of official committees of unsecured creditors under 11 U.S.C. §1102, which play a central role in investigating the debtor, negotiating plan terms and ensuring creditor interests are safeguarded. By contrast, the statute only permits, but does not require, the appointment of an official committee of equity security holders (§1102(a)(2)).

Courts have applied the following factors in determining whether to appoint an equity committee under section 1102(a)(2):

(i) whether debtors are likely to prove solvent;

(ii) whether equity is adequately represented by stakeholders already at the table;

(iii) the complexity of debtors' cases; and

(iv) the likely cost to debtors' estates of an equity committee.[1]

Because the debtor is insolvent in most Chapter 11 cases, equity is "out of the money," and the first factor is usually not satisfied. Thus, equity committees are considered the exception, not the rule.

The case law below illustrates situations where equity committees were requested and their respective outcomes:

- ***In re SunEdison, Inc.,* 556 B.R. 94 (Bankr. S.D. N.Y. 2016):** the Bankruptcy Court (Judge Stuart M. Bernstein) denied the request for appointment of an equity committee in a Chapter 11 case involving a renewable energy holding company and its affiliates, concluding after an evidentiary

[1] See *In re Williams Commc'ns. Group, Inc.*, 281 B.R. 216 (Bankr. S.D. N.Y. 2002); *Albero v. Johns–Manville Corp.*, (*In re Johns–Manville Corp.*), 68 B.R. 155 (S.D. N.Y. 1986), appeal dismissed 824 F.2d 176 (2d Cir. 1987); *In re Celsius Network, LLC*, 645 B.R. 165, 171-172 (Bankr. S.D. N.Y. 2022) (adding fifth factor to consider whether delay will result from appointment of equity committee); *In re Kalvar Microfilm*, 195 B.R. 599 (Bankr. D. Del. 1996); *In re Wang Labs., Inc.*, 149 B.R. 1 (Bankr. D. Mass. 1992).

hearing that such a committee was not necessary at that time to ensure adequate representation of shareholders.

- ***In re Pilgrim's Pride Corp.*, 407 B.R. 211 (Bankr. N.D. Tex. 2009):** the Bankruptcy Court granted the ad hoc equity holders' motion to compel the US Trustee to appoint an official equity committee, finding that evidence of potential debtor solvency and inadequate shareholder representation justified appointment, and that while the court could limit the committee's functions, it opted instead to control expenses by requiring the committee to follow a budget.

- ***In re Washington Mutual, Inc.*, 419 B.R. 271 (Bankr. D. Del. 2009):** an official equity committee had been appointed in the Chapter 11 case. The court's published decisions in the case (including on Rule 2019 disclosures) reflect the equity committee's participation and illustrate circumstances where an equity committee was recognised as appropriate in a large, complex case with a colourable path to value for equity.

- ***In re Williams Communications Group, Inc.*, 281 B.R. 216 (Bankr. S.D.N.Y. 2002):** shareholders of Chapter 11 debtors brought a motion for the appointment of an equity committee. The Bankruptcy Court (Burton R. Lifland, J.) held that appointment of an equity committee was not warranted, since the debtors appeared to be hopelessly insolvent, shareholders' interests were adequately represented, and delay due to appointment would have resulted in further devaluation of debtors' assets.

When they are approved, however, equity committees can, as authorised by 11 U.S.C. §1103(a)–(c):

- hire professionals (lawyers, financial advisors) at the estate's expense, giving shareholders a stronger voice;

- investigate the debtor's valuation, challenging creditor assertions that equity is out of the money; and

- propose alternative plans or negotiate for better treatment, sometimes preserving warrants or contingent value rights for shareholders.

The appointment of an equity committee to protect the interests of equity holders is a way for equity holders to protect their interests and to indirectly obtain information, but equity committees are rarely appointed in practice.

2.2 Differences among key States

Although the Bankruptcy Code is federal and applies uniformly across the United States, the regional practices of bankruptcy courts create differences in how shareholder rights are treated during restructuring. Four states in particular (Delaware, New York, Texas and California) play an important role in shaping the contours of shareholder participation and access to information.

Delaware is the most influential jurisdiction for corporate reorganisations, as more than two-thirds of the Fortune 500 companies are incorporated there. The Delaware General Corporation Law (DGCL §220) provides shareholders with rights to inspect books and records for a proper purpose, such as valuation or investigating mismanagement.

However, once a company becomes insolvent, Delaware case law shifts fiduciary duties from solely shareholders to including creditors. Fiduciary duties of corporation directors of insolvent corporations are owed to the corporation for the benefit of its residual claimants, which includes creditors (see *Gheewalla*, 930 A. 2d 92 (Del. 2007)). In practice, the Bankruptcy Court for the District of Delaware consistently enforces creditor primacy, showing a reluctance to grant equity committees

and prioritising efficient case management over shareholder disputes. Cases such as *In re Spansion, Inc.*, 421 B.R. 151 (Bankr. D. Del. 2009) highlight the court's skepticism towards shareholders' efforts to contest valuation unless supported by strong evidence of residual value.

The Southern District of New York (SDNY) is another leading venue, particularly for complex financial restructurings involving Wall Street institutions. Landmark bankruptcies such as Lehman Brothers, Charter Communications and Purdue Pharma have been filed in the SDNY. New York courts generally defer to creditor interests and enforce the absolute priority rule.

The absolute priority rule requires that no junior class in a plan receive or retain property unless senior classes are paid in full (unless the senior classes consent). In *In re Williams Communications Group, Inc.*, 281 B.R. 216 (Bankr. S.D. N.Y. 2002), the court did not authorise an equity committee. Instead, it articulated the demanding standard for appointment and denied the request, emphasising that equity must show a substantial likelihood of meaningful recovery to justify the cost to the estate.

In *SunEdison*, the SDNY likewise found an equity committee unnecessary on the record presented, denying appointment while allowing renewal if circumstances changed. In *Celsius*, the Bankruptcy Court found that preferred equity holders were adequately protected by the unsecured creditors' committee. That said, SDNY has seen exceptional cases with official equity committees, such as Adelphia Communications, underscoring that equity representation can occur, but only in rare situations where residual value is plausibly in play.

In the past few years, Texas has undertaken significant efforts to attempt to disrupt Delaware's dominance in the area of corporate formation and there has been a significant increase in the number of corporations being formed in Texas. In 2025, Texas adopted sweeping amendments to the Texas Business Organizations Code in an effort to entice businesses to the State.

Over the past decade, Texas has become a major hub for large corporate bankruptcies, driven mainly by its debtor-friendly courts. Notable cases include *First Brands*, *Stewart Healthcare, Saks Global, Omnicare, Neiman Marcus, J.C. Penney* and *Chesapeake Energy*. Texas bankruptcy judges often move cases forward aggressively, with a pragmatic focus on cost and expediency. Shareholder rights are correspondingly limited, as courts there are generally reluctant to appoint equity committees or entertain shareholder objections unless the evidence of value is compelling. An important exception, however, was *In re Pilgrim's Pride Corp.*, 407 B.R. 211 (Bankr. N.D. Tex. 2009), where the court overruled creditor objections and directed the U.S. Trustee to form an official equity committee. The case illustrates that even in Texas, where efficiency and creditor interests are usually paramount, equity committees may be authorised in rare circumstances when valuation disputes create a plausible basis for shareholder recovery.

In California, shareholder rights under Chapter 11 are not materially different from those in other states: they remain residual and largely subordinated to creditor claims. However, in highly regulated industries such as utilities, the need for approval from the California Public Utilities Commission (CPUC) and other state authorities can indirectly create leverage points. This is particularly relevant in California because utility bankruptcies often arise from catastrophic wildfires and energy-supply crises, where regulators and policymakers must balance financial stability, consumer protection, and public safety. In such contexts, the CPUC's approval of a reorganisation plan is indispensable and the conditions it imposes can directly affect the value and structure of equity. This does not grant shareholders any additional statutory rights, but it means that large equity investors sometimes gain influence by aligning with regulators or policy goals that must be addressed for any plan to be viable.

These jurisdictional differences underscore that while the federal statutory framework is uniform, the practical treatment of shareholder rights can vary by venue.

The overall pattern is clear. US law and practice prioritise stability, predictability and creditor protection over shareholder participation. Equity holders may retain influence only in exceptional circumstances, such as when valuations are genuinely uncertain, when residual value clearly exists, or when external policy considerations elevate their role. Even then, their influence is usually exercised informally, through ad hoc groups or public campaigns, rather than through statutory entitlements.

3. The composition of classes involving shareholders in the context of a restructuring plan

Section 1123(a)(1) of the Bankruptcy Code mandates that a plan must designate classes of claims and interests, and equity interests, meaning the rights of shareholders must be placed in their own separate classes. The rationale is that shareholders' rights are distinct from those of creditors, not only because they rank last under the Bankruptcy Code, but also because they often have different economic and governance expectations.

Typically in a plan, common shareholders are grouped together in a single class, since their rights are generally uniform. Preferred shareholders, however, may be separated into distinct classes when their rights differ significantly, such as where one series has dividend preferences, liquidation priorities or special conversion rights.

4. Shareholders' voting rights

In practice, equity classes (including shareholders) are frequently deemed to reject a plan under §1126(g), which provides that a class receiving no distribution is conclusively presumed to have voted against the plan. Since most Chapter 11 cases involve insolvent debtors where creditor claims exceed enterprise value, equity classes are commonly eliminated. When this occurs, shareholders are disenfranchised, as they do not vote on the plan and their class is treated as having rejected it.

Still, there are important exceptions. In some cases, equity classes may be impaired but not eliminated, meaning they receive some distribution, even if reduced. This can take the form of residual warrants, contingent value rights or participation in new equity issuances. In these situations, shareholders are entitled to vote on the plan and their acceptance or rejection becomes part of the confirmation calculus.

In sum, the composition of shareholder classes under a Chapter 11 plan is straightforward in principle. Common and preferred shares are separated based on their legal rights, but the practical effect is that most equity classes are eliminated. Only in rare situations where value exceeds debt, or where new money is raised (typically through equity markets), do shareholders retain a meaningful role. In those cases, classification becomes a contested issue, as shareholders may negotiate for continued ownership, warrants or other instruments to preserve some upside.

In Chapter 11, shareholders' ability to participate in the plan confirmation process through voting is highly restricted, as indicated below, and in most Chapter 11 cases equity holders never cast a ballot on the plan, underscoring their residual and subordinated status in insolvency.

5. Circumstances where shareholders may seek to frustrate a restructuring (either via a veto power or by *de facto* interference)

Although shareholders are usually relegated to the role of residual claimants in Chapter 11, they sometimes attempt to exert influence and frustrate the reorganisation process. Common tactics include efforts to replace directors or management, block corporate transactions or initiate litigation against the debtor or its officers.

However, bankruptcy courts have broad authority to restrain such actions. The automatic stay under 11 U.S.C. §362 halts most forms of litigation and shareholder enforcement, including derivative suits

and actions to compel the inspection of books and records. Moreover, courts view reorganisation as requiring centralised control under the supervision of the bankruptcy judge, meaning shareholder actions that interfere with the debtor-in-possession's management of the estate are often enjoined.

Beyond these procedural limits, corporate law doctrines across jurisdictions provide little room for shareholder interference once insolvency arises. Most courts, following the Delaware line of cases such as *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007), and *Quadrant Structured Products Co., Ltd. v. Vertin*, 115 A.3d 535 (Del. Ch. 2015), hold that insolvency does not shift fiduciary duties from shareholders to creditors as such. Rather, the duties of directors remain owed to the corporation itself. Others, like the court in *In re Advanced Modular Power Sys., Inc.*, 413 B.R. 643 (Bankr. S.D. Tex. 2009), aff'd, 2009 WL 7760300 (S.D. Tex. Dec. 30, 2009), have suggested a broader balancing of duties toward creditors once insolvency occurs. Yet, regardless of the jurisdiction or doctrinal framing, both approaches recognise that shareholders cannot use their position to obstruct a restructuring process designed to preserve value for the estate as a whole.

Taken together, these principles reflect a consistent rule: shareholders cannot frustrate restructuring efforts merely to protect speculative residual value. Courts will enforce creditor priority and protect the debtor's ability to reorganise, even if doing so requires limiting traditional shareholder powers. Only in rare circumstances, such as clear evidence of fraud, misconduct, or demonstrable value sufficient to reach equity, will courts permit shareholders to meaningfully intervene in the restructuring process.

6. Measures for the cram down of shareholders

When shareholders do retain value and are entitled to vote, their approval is still not determinative. The Code's cram down mechanism under §1129(b) permits confirmation of a plan over the objection of one or more dissenting classes, including equity, so long as the plan is "fair and equitable" and does not "discriminate unfairly." In the equity context, the "fair and equitable" standard is tied to the absolute priority rule. Consequently, even if equity holders object, a plan can be confirmed so long as it respects the priority of creditor claims and allocates any value consistent with that rule.

The combination of deemed rejection under §1126(g) and the cram down authority of §1129(b) leaves shareholders with minimal voting power in Chapter 11. Their ability to block a restructuring plan exists only in the rare scenario where they are indisputably in the money and can rally sufficient support within their class. Even then, the court may override their rejection through cram-down so long as creditor priorities are preserved.

In sum, shareholders' formal voting rights under the Bankruptcy Code are illusory in most cases. They either cannot vote at all (if out of the money), or their vote may be overridden through cram down. Only when enterprise value exceeds creditor claims, and thus equity has genuine economic weight, do shareholders have a meaningful role in the confirmation process.

7. Debt-for-equity swap and consent of shareholders

On debt-for-equity swaps, creditors exchange their claims for ownership interests in the reorganised debtor, effectively wiping out or diluting prepetition shareholders. This mechanism is particularly common in large corporate bankruptcies where leverage is unsustainable and creditors seek to capture the company's future upside.

A critical distinction between the United States and other jurisdictions, especially the European Union, lies in the role of shareholder consent. At best, shareholders in some circumstances may be able to negotiate, as part of a plan, the right to contribute new capital (invest actual funds) in exchange for ownership (in whole or in part) of the stock in the reorganised debtor entity but this right to invest in

the reorganised entity will likely need to be made available to the debtor's creditors or the creditors will need to have been afforded the opportunity to propose an alternative reorganisation plan.

Under United States bankruptcy law, pre-petition shareholders have no statutory veto over debt-for-equity conversions imposed through a confirmed plan. As previously mentioned, the Bankruptcy Code provides that a plan may be confirmed over shareholder objection under the cram down authority of 11 U.S.C. §1129(b), so long as the plan is "fair and equitable."

Thus, if creditors are not satisfied in full, equity can be cancelled outright without a vote of shareholders.

In comparison, under general company law in many European jurisdictions, shareholder resolutions would ordinarily be required for capital measures such as debt-for-equity swaps. However, the EU Directive on Restructuring and Insolvency of 20 June 2019 seeks to harmonise preventive restructuring frameworks of EU Member States to facilitate corporate rescues under a common framework.

The EU Directive on Restructuring and Insolvency permits members to implement debt restructurings without shareholder consent. Member States have now implemented the EU Directive.

Also, the UK's recently implemented Part 26A of the Companies Act 2006 allows for a restructuring plan without requiring shareholder consent. Similarly, the Dutch WHOA (*Wet Homologatie Onderhands Akkoord*) – adopted on 26 May 2020, following several years of preparation and consultation, and entered into force on 1 January 2021 – is a restructuring framework that permits a restructuring without requiring shareholder consent. Although the WHOA was not envisaged to implement the European Directive on Restructuring and Insolvency, it has still been drafted in line with this Directive. The UK Part 26A and the Dutch WHOA have caused certain companies to initiate restructuring proceedings under Part 26A and / or the Dutch WHOA rather than US Chapter 11.

From a practical perspective, debt-for-equity swaps reshape corporate ownership and governance. Creditors often become the new controlling shareholders, sometimes installing new boards and management teams. Prepetition shareholders are left with little or no recovery, unless they can negotiate warrants or contingent value rights as part of the restructuring. Even then, such concessions usually arise from settlements to avoid litigation, not from any statutory right to consent.

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DRA Dutch Restructuring Association
EISAR Bankruptcy Commission (Saudi Arabia)
FILA Finnish Insolvency Law Association
GDABA Guangdong Association of Bankruptcy Administrators
HKICPA Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
IAIR International Association of Insurance Receivers
IBAJUD Instituto Brasileiro da Insolvência
IBR Instituto Brasileiro de Estudos de Recuperação de Empresas
IIDC Instituto Iberoamericano de Derecho Concursal
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IIIPI-ICAI Indian Institute of Insolvency Professionals of the Institute of Chartered Accountants of India
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INSOLAD Vereniging Insolventierecht Advocaten
IPAM Insolvency Practitioners Association of Malaysia
IPAS Insolvency Practitioners Association of Singapore
IWIRC International Women's Insolvency and Restructuring Confederation
JFIP Japanese Federation of Insolvency Professionals
LCA Law Council of Australia (Business Law Section)
MIA Malaysian Institute of Accountants
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