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BUSINESS REORGANIZATION & RESTRUCTURING YEAR IN REVIEW

In this publication, we take a look back at some notable restructuring transactions of 2020 and identify key legal issues and trends that will be relevant in 2021 and beyond.

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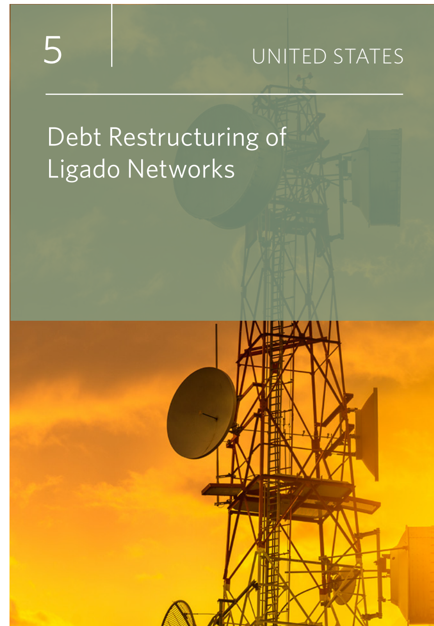
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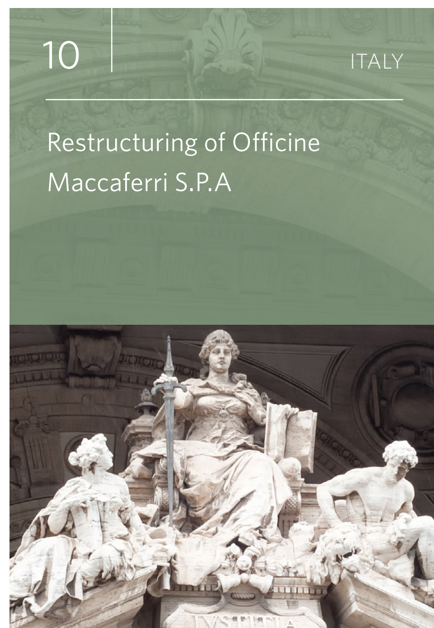
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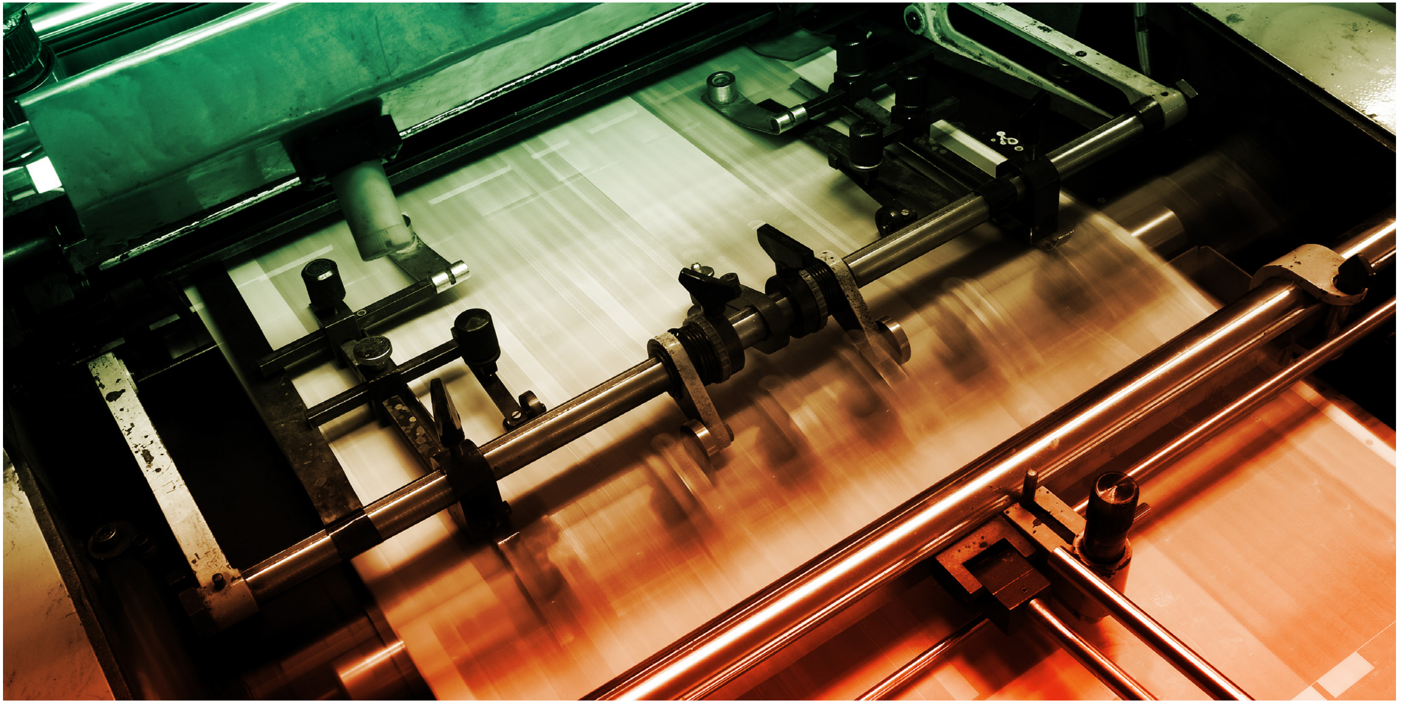

UNITED KINGDOM

RECAPITALISATION OF THE LECTA GROUP

2020 witnessed two restructurings of European paper manufacturer Lecta, on which our London office worked with a cross-border multidisciplinary team from across Willkie's London, Paris, Milan, Washington D.C. and New York offices.

LECTA I - FEBRUARY 2020

Willkie advised a coordinating committee consisting of significant holders of Luxembourg-incorporated Lecta S.A.'s €600 million senior secured notes (the "**SSNs**") on all aspects of the successful, comprehensive financial restructuring of the Lecta group, one of the largest paper manufacturers in southern Europe, with plants in Spain, France and Italy.

The transaction significantly deleveraged Lecta's balance sheet, allowing it to continue its transformation into a speciality paper company.

The innovative transaction was noteworthy for its speed and jurisdictional novelty. It was executed in less than five months and was implemented using an English scheme of arrangement. To ensure sufficient jurisdiction for the scheme, the governing law of the SSNs was amended from New York to English law, and an English subsidiary in the Lecta group assumed full liability for the SSNs alongside Lecta S.A. in order to propose the scheme. The scheme was also granted recognition by the Bankruptcy Court for the Southern District of New York under chapter 15 of the U.S. Bankruptcy Code, and subject to a subsequent Spanish "homologacion" proceeding. In addition, a number of other restructuring steps, including the refinancing of the company's existing revolving credit facility, took place outside of the scheme.

The outcome of the transaction was the transfer of equity ownership of the Lecta group to the holders of the SSNs via a new English holdco, and the partial exchange of the SSNs into new longer-dated debt instruments. The result was a

materially improved capital structure and a company well positioned for transformation and growth.

LECTA II - JUNE 2020

The 'phase I' restructuring had resulted in a significant deleveraging of the Lecta group and the simultaneous provision of new liquidity. However, the group was impacted by the COVID-19 pandemic and also faced tighter working capital terms. While taking extensive action to create operational efficiencies and to preserve liquidity, the company engaged with securityholders and other stakeholders, including relationship banks, regarding a possible recapitalisation in May 2020.

This time round, Willkie advised a group of underwriters comprising certain holders of senior secured notes, junior notes and equity of Lecta Limited, the new English holdco established as part of the Lecta I restructuring (the "**Company**"). The equity holders were largely holders of the SSNs that went through the prior Lecta I restructuring. Willkie negotiated and executed a fully committed and underwritten offer of new securities to qualifying securityholders in the Company in order to raise approximately €100 million for the group. The terms of the recapitalisation comprised: (i) the write-down and cancellation of the junior notes issued as part of the prior restructuring, (ii) the issue of new shares in the Company, (iii) the issue of new senior secured notes, (iv) the issue of new warrants entitling holders to subscribe for shares in the Company at a later date, and (v) the entry into new confirming line and term loan facilities with a Spanish relationship bank, the latter in part guaranteed by the Spanish government pursuant to the range of measures it introduced in response to the COVID-19 pandemic.

The Lecta group emerged from the successful completion of the recapitalisation with an enhanced, sustainable balance sheet and a solid liquidity position which will enable it to move forward and implement its business plan.

https://www.willkie.com/news/2020/02/willkie-advises-on-restructuring-of-lecta

https://www.willkie.com/news/2020/07/recapitalization-of-the-lecta-group

UNITED STATES

DEBT RESTRUCTURING OF LIGADO NETWORKS

Willkie's New York office advised the ad hoc group of preferred equity holders (the "**AHG**") in the financial restructuring of Ligado Networks LLC ("**Ligado**"), an American satellite communications company that owns 40 MHz of spectrum licenses in the L-Band.

Prior to the restructuring, Ligado's capital structure included three tiers of secured funded debt in excess of $8.5 billion, as well as numerous series of preferred and common equity units.

Following complex negotiations with Ligado's second lien term loan lenders and other key economic stakeholders, the AHG entered into a restructuring support agreement, the terms of which governed a comprehensive recapitalisation pursuant to either an in-court chapter 11 proceeding or an out-of-court transaction.

Ultimately, the parties were able to obtain the necessary consents to consummate the transaction out of court. As a result of the transaction:

- Holders of the $2.5 billion in first lien term loan claims and $118 million of 1.5 lien term loan claims received payment in full in cash from proceeds from new first and second lien term loan facilities totalling $4.3 billion of principal obligations;
- Holders of the $5.9 billion in second lien term loan claims received their pro rata share of newly-issued senior preferred units;
- Holders of existing preferred and common units retained such interests; and
- General unsecured claims were satisfied in the ordinary course of business.

In addition, the multi-party transaction negotiations included a complex value-sharing waterfall among the various tiers of Ligado's preferred and common units in connection with anticipated future liquidity events.

The out-of-court consensual recapitalisation closed on 23 October 2020. The transaction avoided complex and time-consuming spectrum license regulatory issues and provided Ligado with a new debt maturity profile. Moreover, Willkie was able to negotiate favourable value waterfall metrics for its existing preferred units without the need for any commitments or contributions of new value from the AHG. Following the resulting recapitalisation transaction, Ligado is in a strong position to benefit from the expected increases in spectrum band auction pricing over the coming years.

UNITED STATES

PRE-PACKAGED RESTRUCTURING OF NORTHWEST HARDWOODS, INC.

Willkie advised an ad hoc group of secured noteholders in a comprehensive financial restructuring of Northwest Hardwoods, Inc. (together with its direct subsidiaries, "**Northwest Hardwoods**"), the largest United States-based manufacturer of North American hardwood lumber, pursuant to a pre-packaged chapter 11 plan of reorganisation.

Pursuant to the terms of the restructuring support agreement that governed the transaction:

- Northwest Hardwoods' existing ABL Facility was refinanced with a new $100 million exit ABL Facility, with a 5-year maturity and a cash interest rate of LIBOR+2.125%;
- Holders of secured noteholder claims received their pro rata shares of (i) 99% of common stock units in the reorganised company and, (ii) $110 million secured term loan takeback debt with a 5-year maturity and a 7.5% cash pay / 9.5% PIK interest toggle at the Company's election;
- General unsecured claims "rode through" the chapter 11 restructuring unimpaired and were satisfied in full in the ordinary course; and
- Holders of existing equity received a 1% equity "tip" recovery to facilitate the restructuring and minimise disruption to Northwest Hardwoods' operations and relationships.

Northwest Hardwoods commenced pre-packaged chapter 11 cases in November 2020 and confirmed its plan of reorganisation less than two months thereafter.

With a significantly deleveraged capital structure, reduced debt servicing, and an outdated maturity runway, reorganised Northwest Hardwoods is now primed for go-forward success.

FRANCE

AIR FRANCE-KLM GROUP'S €7 BILLION AID

On 6 May 2020, the Air France-KLM Group entered into definitive documentation in respect of a €7 billion rescue financing deal, as approved by the European Commission on 4 May 2020.

The various components of the support mechanism dedicated to Air France and the Air France-KLM Group include:

- a €4 billion loan granted by a syndicate of nine banks to Air France-KLM and Air France, up to 90% of which is guaranteed by the French State, with a 12-month maturity and with two consecutive one-year extension options exercisable by Air France-KLM ("State-Backed Loan"); and
- a €3 billion direct shareholder loan from the French State to Air France-KLM with a four-year maturity and two consecutive one-year extension options exercisable by Air France-KLM ("Shareholder Loan").

The main features of the State-Backed Loan include: a coupon (excluding the French State guarantee cost) at an annual rate equal to EURIBOR (floored at zero) plus a margin of 0.75% in the first year, 1.50% in the second year and 2.75% in the third year; a cost of the guarantee granted by the French State initially equal to 0.5% of the total amount of the loan, which will step up to 1% for each of the second and third years; a mandatory partial early repayment of 75% of any new money raised by Air France-KLM or Air France from financial institutions or through debt capital markets (subject to some exceptions); and, a mandatory total early repayment, notably in the event of a change of control of Air France-KLM or Air France.

The main features of the Shareholder Loan include: a coupon payable annually or capitalisable at the discretion of Air France-KLM at a rate equal to EURIBOR 12 months (floored at zero) plus a margin of 7% for the first four years, 7.5% for year five and 7.75% for year six. This rate will be increased by 5.5% if (among other things): (i) the general assembly does not approve a capital increase proposed by the board of directors of Air France-KLM that would enable incorporation in the company's shareholder

equity of all or part of the outstanding shareholder loan, (ii) the general assembly approves, without approval from the French State, a capital increase which would not enable the incorporation of all or part of the outstanding shareholder loan in the company’s shareholder equity, or (iii) a third party, not acting in concert with the French State, alone or in concert, acquires more than 20% of the capital of Air France-KLM. The Shareholder Loan is subordinated to the State-Backed Loan and, in the event of receivership or liquidation, to all of Air France-KLM’s senior bond and bank debt (whether or not all or part of the outstanding Shareholder Loan has been incorporated into the shareholder equity). In addition, an early repayment fee will be payable upon the occurrence of certain events, including on any takeover of Air France-KLM and in cases of default, e.g. a failure by the shareholder AGM to ratify the loan in accordance with L.225-40 of the French Code de commerce or the acceleration of the State-Backed Loan.

The group has also undertaken not to pay dividends until these two loans have been repaid in full.

The provision of this aid package has enabled Air France-KLM to provide Air France with the necessary means to meet its obligations by continuing its transformation in order to adapt in a sector that the global health crisis has severely disrupted, notably due to travel restrictions designed to limit the spread of COVID-19.

The Air France-KLM Group had turnover of €27.2 billion in 2019 and employs 83,000 people. With a fleet of 550 aircraft and 101.4 million passengers carried in 2018, Air France-KLM operates up to 2,300 daily flights and employs 83,000 people.

This transaction is by far the most important in France and across Europe regarding the provision of a French State-backed loan and a direct shareholder loan in order to deal with the economic consequences of the COVID-19 pandemic.

https://www.willkie.com/news/2020/04/air-france-klm-group-and-air-france

https://www.airfranceklm.com/en/air-france-klm-group-and-air-france-secure-funding-eu7-billion-help-overcome-crisis-and-prepare

ITALY

RESTRUCTURING OF OFFICINE MACCAFERRI S.P.A.

Willkie's Milan office (Delfino e Associati) is advising the ad hoc group ("**AHG**") of holders of €190 million senior guaranteed notes due 2021 ("**Notes**") issued by Officine Maccaferri S.p.A. ("**Maccaferri**"), in connection with Maccaferri's debt restructuring. The AHG holds in excess of 54% of the Notes and comprises entities controlled or managed by The Carlyle Group, Man GLG and Stellex Capital.

Maccaferri is the Italy-based holdco of a global group of over 70 companies providing innovative engineering solutions to the construction, geotechnical and mining industries.

In May 2020, Maccaferri obtained an automatic stay from the Bologna court under the Italian Bankruptcy Act's *pre-concordato* procedure.

On 18 December 2020, following complex negotiations with the AHG that were exacerbated by the disruption and restrictions caused by the COVID-19 pandemic, Maccaferri filed a restructuring plan on a going concern basis (*concordato preventivo in continuità aziendale*) which provided for:

(i) €40 million super senior and secured bridge financing, in the form of new bonds to be issued by Maccaferri and listed on the MTF of the Vienna Stock Exchange, to bridge liquidity requirements until the court's sanction of the restructuring plan; and

(ii) €56.5m liquidity injection, comprising €30m capital increase and €26.5 million of new bonds to be issued by Maccaferri and listed on the MTF of the Vienna Stock Exchange, following the court's sanction of the restructuring plan.

It is expected that Maccaferri will enter into a composition with its creditors (*concordato preventivo*) during February 2021, at which point the Italian court will convene a creditors' meeting to vote on the plan. Provided creditors vote in favour, the plan will then be sanctioned (*omologato*)

by the Italian court, with the entire restructuring process taking between nine and 11 months.

Separate from the restructuring plan, but in connection with the overall restructuring of Maccaferri, in October 2020 Stellex submitted an irrevocable and binding offer to purchase the entire share capital of Maccaferri from its parent company, SECI S.p.A. Stellex's offer prompted an application by SECI to the Italian court for the opening of an auction process, pursuant to the Italian Bankruptcy Act, as part of an in-court debt restructuring of SECI.

Stellex was awarded the shares in Maccaferri, which will ultimately be transferred to Stellex by court order once the purchase price and earn-out amounts have been deposited into an escrow account.

Willkie professionals from the firm's Milan, Paris, Brussels and New York offices are working on the transaction.

UNITED KINGDOM

WILL EU STILL RECOGNISE ME?

At 11pm (UK time) on 31 December 2020 the UK's transition period for leaving the EU ended. The deal brokered between the EU and UK (formally known as the EU-UK Trade and Cooperation Agreement) does not provide for any mutual recognition of EU and UK insolvency laws. This means that, as of 1 January 2021 ("**Brexit**"), EU Member States will no longer automatically recognise or give effect to UK insolvency proceedings and vice versa.

RECOGNITION OF UK INSOLVENCY PROCEEDINGS IN THE EU

Prior to Brexit, UK administration, liquidation and CVA proceedings were recognised and enforceable under the EU Insolvency Regulation[1] and judgments of UK courts were recognised and enforceable under the EU Judgments Regulation[2], in each case throughout the EU (except Denmark). UK courts traditionally accepted the EU Judgments Regulation as providing a basis for the recognition of schemes of arrangement and restructuring plans (corporate restructuring procedures not covered by the EU Insolvency Regulation) in Member States.

Post-Brexit, UK insolvency practitioners will have to investigate recognition under the domestic laws of the relevant Member State on a country-by-country basis, which may require significant additional analysis. Things could get more complicated if the national court of a Member State determines that the centre of main interests (COMI) of a debtor undergoing a UK insolvency process is situated in a Member State, because in that case the Member State would apply the EU Insolvency Regulation and might refuse to give regard to any UK court rulings. The UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**") is a possible alternative route for obtaining recognition via domestic laws of certain Member States. It provides for a domestic court to recognise and grant relief, including a stay, in support of a foreign, e.g. UK, insolvency proceeding (albeit on application to the court as opposed to the automatic recognition under the EU Insolvency Regulation). However, only four EU

1 Regulation (EU) 2015/848
2 Regulation (EU) 1215/2012

Member States (Greece, Poland, Romania and Slovenia) have enacted the Model Law into their domestic law. Unless or until there is a wider uptake of the Model Law among Member States, it does not provide a widespread alternative means of recognition.

RECOGNITION OF EU INSOLVENCY PROCEEDINGS IN THE UK

From the perspective of the EU, things may be more straightforward because the UK has enacted the Model Law into UK domestic legislation in the form of the Cross-Border Insolvency Regulations 2006 ("**CBIR**"). The CBIR allows English courts to grant recognition of and assistance to foreign insolvencies opened anywhere in the world, which will now include Member States. However, recognition under the CBIR does not provide for the enforcement of judgments of foreign courts. Notably, the English common law rule in *Gibbs*[3] will continue to mean that, unless the relevant creditor has submitted to the jurisdiction of the foreign court (e.g. by actively participating in the foreign insolvency proceeding), any debt governed by English law cannot be varied/compromised by a foreign insolvency proceeding. The prevalence of English law-governed finance documents and the effect of this rule will likely continue to attract EU-incorporated companies with English law-governed debt to restructure in England.

RECOGNITION OF UK SCHEMES OF ARRANGEMENT AND RESTRUCTURING PLANS IN THE EU

Notwithstanding the loss of recognition under the Judgments Regulation, it may still be possible for UK schemes and restructuring plans to be recognised in the EU under one of the following routes:

- *Rome I Regulation*[4] – if the relevant debt documents are governed by English law, that choice of law will continue to be recognised throughout the EU (and consequently so will the compromise of the English law debt under the scheme/plan) because Rome I applies to all contracting states, and not just those within the EU;
- *Lugano Convention 2007* – if and when implemented into UK law following any consent granted by current signatories to the UK's pending application to join the Convention, and to the extent the relevant debt documents contain an exclusive jurisdiction clause in favour of the English courts; and/or
- *Hague Convention 2005* – to the extent the relevant debt documents contain an exclusive jurisdiction clause in favour of the English courts, the Hague Convention provides for mutual recognition/enforcement of court judgments (both the UK and EU are signatories), but recognition will be subject to schemes/plans falling outside the Hague Convention's insolvency exclusion provision.

Given the prevalence of English law-governed finance documents in cross-border transactions, we expect the Rome I Regulation to provide the most useful route for continued recognition and enforcement of schemes and restructuring plans within the EU. However, there may be issues in circumstances where the governing law has been changed to English for the purpose of establishing a "sufficient connection" with the UK.

CONCLUSION

The sudden removal of the traditional paths to recognition and enforcement that have been used for EU-UK cross-border restructurings and insolvencies for almost two decades will create a number of challenges, but none are insurmountable. In cases where recognition in the EU (in respect of a UK insolvency) or the UK (in respect of an EU insolvency) is required, parallel local proceedings could be used, albeit with additional time and cost implications. The position would be further improved if the EU adopts the Model Law more widely and if the UK is accepted as a member of the Lugano Convention, but time will tell whether either comes to pass.

For further reading, see the Willkie client alert "*Will EU Still Recognise Me? Insolvency Recognition Between the UK and EU Post-Brexit*", available here.

[3] *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399

[4] Regulation (EC) No 593/2008

GERMANY

The New German Restructuring Plan

Hot off the heels of the UK's new restructuring plan enacted in Part 26A of the Companies Act 2006, several EU Member States, including Germany and The Netherlands, are in the process of upgrading their domestic restructuring laws to emulate aspects of the U.S. chapter 11 regime. The new German restructuring framwork passed into law on 1 January 2021. Some key features of the new German restructuring law are:

1. **Debtor-in-possession process:** Management will remain in control, subject to supervision by the German court and, in certain cases, a restructuring officer.

2. **Threshold entry requirements:** The debtor must meet an "imminent illiquidity" test, i.e. it will likely be unable to pay its debts falling due within the next 24 months. Debtors that are illiquid, i.e. technically insolvent, will not be eligible.

3. **Creditors will vote in prescribed classes to approve plan:** Broadly, creditor classes will comprise secured, unsecured and subordinated claims. Secured creditors can vote in the unsecured class to the extent of any unsecured deficiency claims. Shareholders (if affected by the plan) will vote separately.

4. **Cross-class cram-down of dissenting creditors or shareholders available:** Provided certain conditions are met, including (i) the members of the dissenting class must not be 'worse off' than they would be without the plan and (ii) respecting a modified absolute priority rule, e.g. subordinated creditors cannot receive economic value ahead of the dissenting class (subject to limited exceptions).

5. **Will be recognised throughout EU:** From July 2022, in-court 'public' plans will be available and will benefit from recognition under the EU Insolvency Regulation. In the meantime, 'non-public' plans (approved by creditors without public court hearings) can be proposed and these might benefit from recognition under the EU Judgements Regulation.

6. **No ability for court to terminate executory contracts:** Powers for court-ordered termination of certain executory contracts, e.g. lease agreements, had been contemplated in the original draft legislation but were removed shortly before the law was enacted.

7. **Debt for equity swap possible but will be difficult to implement in practice:** Equitisation of debt under the plan requires the consent of each affected creditor and cannot be forced on creditors. If a creditor refuses to exchange its debt for equity, it must receive cash instead.

It will be interesting to see how the new German restructuring plan, and its Dutch counterpart, will compete with the UK's new restructuring plan under Part 26A of the Companies Act 2006, particularly when English judges have the benefit of decades of experience in sanctioning schemes of arrangement.

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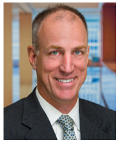

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