

# Cross-border Restructuring

## Overview of global restructuring possibilities

---

Dr Alexandra Schluck-Amend  
Glen Flannery

12 November 2020

---

# Agenda

---

- I. CMS Expert Guide to Restructuring and Insolvency Law
- II. The Obligation to Start Restructuring/Insolvency Procedures
- III. The Different Types of Restructuring/Insolvency Proceedings
- IV. Legal Framework for Preventive Restructuring
- V. International co-ordination and co-operation



# I. CMS Expert Guide to Restructuring and Insolvency Law

---

# CMS Expert Guide to Restructuring and Insolvency Law

---



<https://cms.law/en/int/expert-guides/cms-expert-guide-to-restructuring-and-insolvency-law>

---

# CMS Expert Guide to Restructuring and Insolvency Law

---

Overview of various restructuring possibilities in different countries

Highlighting the global expertise of CMS

Extending the knowledge of our international experts



**Every country answered the same 13 questions regarding:**

- Reasons for insolvency/obligation to file for insolvency
- Main restructuring possibilities
- Duties of shareholders and management
- Preventive restructuring framework

## **II. The Obligation to Start Restructuring/Insolvency Procedures**

---

# Overview of German regulations

---

## **Illiquidity (section 17 InsO)**

- Debtor is unable to settle its liabilities when they become due
- All payables due now or in the short-term need to be considered
- All cash positions, bank account credit balances or available overdraft facility lines and short-term receivables are deemed as liquid funds

## **Over-indebtedness (section 19 InsO)**

- Assets of the debtor in a liquidation scenario do not cover the liabilities in a liquidation scenario AND
- No positive going-concern prognosis can be provided (= debtor does not have enough liquidity to cover the due liabilities in the current and the subsequent financial year)



Illiquidity and over-indebtedness trigger  
**obligation to file for insolvency without undue delay**  
non-compliance leads to civil and criminal liability

---

# Overview of English regulations

---

- No standalone obligation to file for formal insolvency
- To avoid personal liability and/or disqualification, decisions must be informed by directors' duties/obligations
- Two key points on the financial decline curve:
  - Insolvency point: When the directors know or should know that the company is or is likely to become insolvent, directors must act in the best interests of creditors as well as shareholders. A company can be insolvent on a cash-flow and/or balance sheet basis.
  - Wrongful trading point: When there is no reasonable prospect of the company avoiding an insolvent administration or liquidation, directors must take every available step to minimise potential loss to creditors as a whole
- Temporary relaxation of sanctions for wrongful trading during pandemic has expired



---

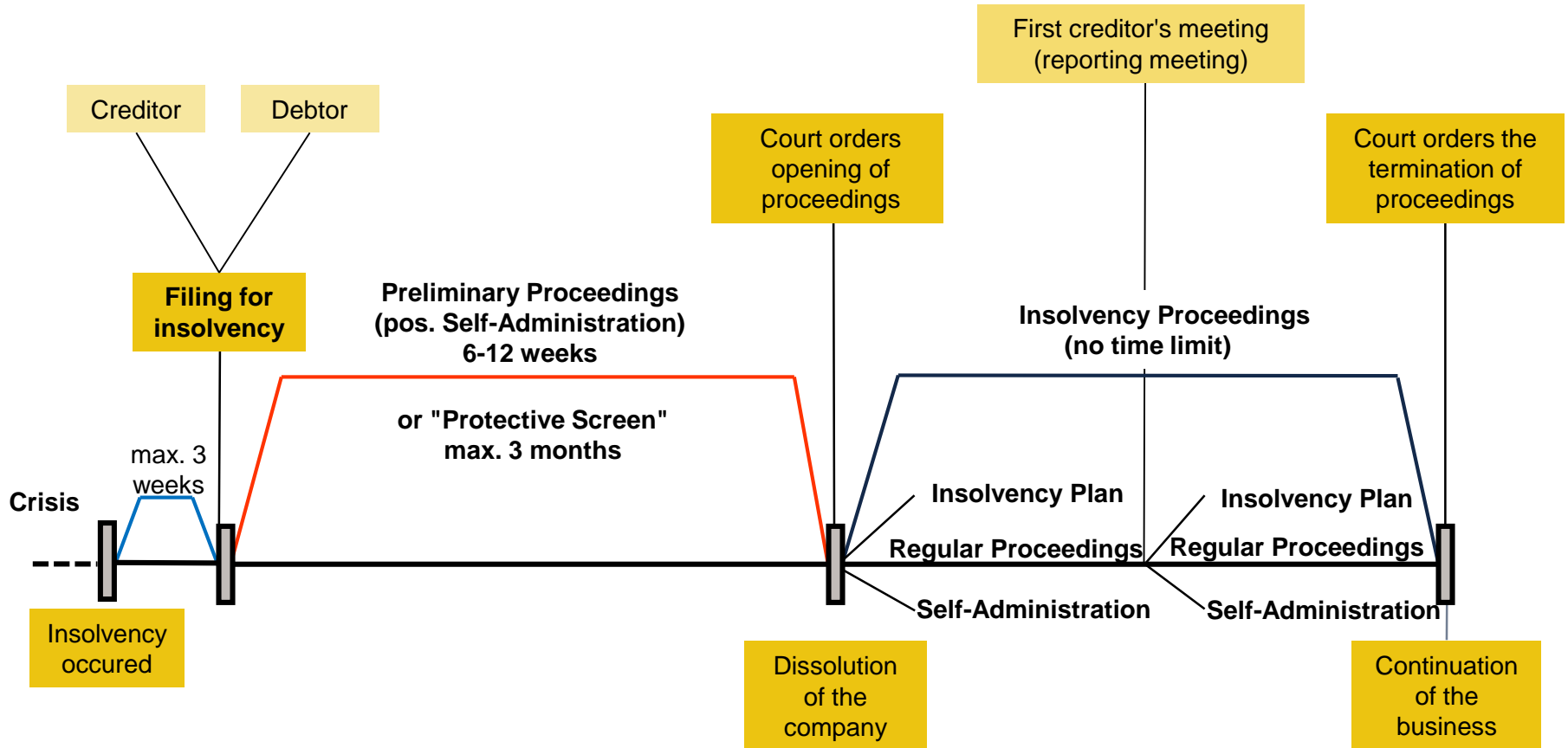
# Overview of international regulations

---

France	Romania	China
<p>Insolvency reason:</p> <ul style="list-style-type: none"><li>▪ cessation of payments (cessation des paiements):</li><li>▪ the situation where a company cannot pay its outstanding debts for lack of sufficient available cash and liquid assets</li></ul>	<p>Insolvency reasons:</p> <ul style="list-style-type: none"><li>▪ insolvency status: the inability of the debtor to pay the creditor receivables over threshold within 60 days of the debt becoming due</li><li>▪ imminent insolvency: prospective inability to pay, at a specific point in time, the due debts with the amounts available at that specific point in time</li></ul>	<p>Insolvency: if the debtor is unable to repay due debts and</p> <ul style="list-style-type: none"><li>▪ its assets are insufficient to repay all debts, or</li><li>▪ it is obviously illiquid</li><li>▪ likelihood that debtor has obviously lost solvency can be a reason</li></ul>

### **III. The Different Types of Restructuring/Insolvency Proceedings**

# Overview of German regulations



---

# Overview of the UK's restructuring toolkit

---

- Company voluntary arrangement – Ability to force a compromise on unsecured creditors by obtaining approval of at least 75% by value of voting creditors and 50+% of shareholders
- Scheme of arrangement – Ability to force a compromise on creditors and/or shareholders by obtaining approval of at least 75% by value and a majority in number of each class
- Administration – Provides the company with the benefit of a moratorium on claims while an administrator formulates and implements proposals to rescue the company as a going concern or achieve a better realisation for creditors than if there were an immediate liquidation
- Administration pre-packs – Sale of the assets/business negotiated before the opening of insolvency proceedings, but executed by the administrator immediately upon appointment
- Restructuring plan – Modelled on the scheme of arrangement, but with special features specifically designed to help restructure companies experiencing financial difficulty

## **IV. Legal Framework for Preventive Restructuring**

---

# Overview of German regulations

---

## Available soon: preventive restructuring framework ("StaRUG")



- **Expected entry into force:** 1 January 2021
- **Aim:** restructuring in an out-of-court scenario



- **Entry requirements:** imminent illiquidity (possibility > 50% not able to cover due liabilities in a period of 24 months)
- **Tools:** restructuring plan, stay of claims, termination of contracts, no ipso-facto clauses, debtor in possession



- **Restructuring plan:**
  - Majority of 75%/class
  - Cross-class cram-down
  - Safeguards for dissenting creditors: best interest test, relaxed absolute priority rule

---

# UK's new restructuring plan – Overview

---

## What?

A method for imposing a restructuring compromise on creditors where not all affected parties agree.

## Who?

Any company under the Companies Act.  
Includes overseas companies with sufficient connection to UK.

## Conditions?

Financial difficulty affecting carrying on business as a going concern.  
Purpose of compromise to eliminate or reduce the effect.

## Subject Matter?

Anything that is lawful and a genuine arrangement or compromise between the company and its creditors.

## How?

Creditors split into classes.  
75% by value of each class to approve (no numerosity requirement, and subject to cross class cram-down).

## Process?

- (i) convening hearing;
- (ii) creditors meetings; and
- (iii) sanction hearing.

### **Key new feature - Cross-class cram-down, subject to two conditions:**

1. Members of dissenting class to be no worse off under plan than under relevant alternative; and
2. At least one class with a genuine economic interest to vote in favour of plan.

## V. International co-ordination and co-operation



---

# International co-ordination and co-operation

---

## Recast European Insolvency Regulation

- Automatically binding throughout EU, except in Denmark
- Main insolvency proceedings opened where the debtor has its “centre of main interests”
- Law of main proceeding has automatic effect throughout the EU, subject to exceptions
- Secondary proceedings opened where the debtor has an “establishment”
- Office-holders in main and secondary proceedings required to communicate and co-operate
- Possibility of group co-ordination
- Have been examples of “forum shopping” and “migration” to achieve better outcomes
- Deutsche Nickel, Rodenstock, Collins & Aikman, MG Rover, Nortel, Lowcosttravelgroup.

## UNCITRAL Model Law on Insolvency

- Only applies in countries that have adopted it – so far in Europe this is Greece, Poland, Romania, Slovenia and UK
- The US version is Chapter 15 of the US Bankruptcy Code
- A foreign office-holder can apply for recognition and relief, e.g. a stay on legal proceedings, help investigating prior transactions



## Other routes to recognition under private international law. For example the UK has:

- **Section 426 Insolvency Act – countries with whom there is a “special relationship”**
- **common law routes to recognition**

**Thank you for your attention!**

# Contact



---

**Dr. Alexandra Schluck-Amend**  
Partner | Attorney at Law

Restructuring & Insolvency

CMS  
Schöttlestraße 8  
70597 Stuttgart

**T** +49 711 9764 278  
**E** [alexandra.schluck-amend@cms-hs.com](mailto:alexandra.schluck-amend@cms-hs.com)



---

**Glen Flannery**  
Partner | Attorney at Law

Restructuring & Insolvency

CMS  
Cannon Place, 78 Cannon Street  
EC4N 6AF London

**T** +44 20 7524 6867  
**E** [glen.flannery@cms-cmno.com](mailto:glen.flannery@cms-cmno.com)

## Ihr kostenloser juristischer Online-Informationsdienst.

E-Mail-Abodienst für Fachartikel zu vielfältigen juristischen Themen.  
**cms-lawnow.com**

---

Dieses Dokument stellt keine Rechtsberatung dar und verfolgt ausschließlich den Zweck, bestimmte Themen anzusprechen. Es erhebt keinen Anspruch auf Richtigkeit oder Vollständigkeit und die in ihm enthaltenen Informationen können eine individuelle Rechtsberatung nicht ersetzen. Sollten Sie weitere Fragen bezüglich der hier angesprochenen oder hinsichtlich anderer rechtlicher Themen haben, so wenden Sie sich bitte an Ihren Ansprechpartner bei CMS Hasche Sigle.

CMS Hasche Sigle ist eine der führenden wirtschaftsberatenden Anwaltssozialitäten. Mehr als 600 Anwälte sind in acht wichtigen Wirtschaftszentren Deutschlands sowie in Brüssel, Hongkong, Moskau, Peking und Shanghai für unsere Mandanten tätig. CMS Hasche Sigle ist Mitglied der CMS Legal Services EEIG, einer europäischen wirtschaftlichen Interessenvereinigung zur Koordinierung von unabhängigen Anwaltssozialitäten. CMS EEIG ist nicht für Mandanten tätig. Derartige Leistungen werden ausschließlich von den Mitgliedssozialitäten in den jeweiligen Ländern erbracht. CMS EEIG und deren Mitgliedssozialitäten sind rechtlich eigenständige und unabhängige Einheiten. Keine dieser Einheiten ist dazu berechtigt, im Namen einer anderen Verpflichtungen einzugehen. CMS EEIG und die einzelnen Mitgliedssozialitäten haften jeweils ausschließlich für eigene Handlungen und Unterlassungen. Der Markenname „CMS“ und die Bezeichnung „Sozialität“ können sich auf einzelne oder alle Mitgliedssozialitäten oder deren Büros beziehen.

### **CMS-Standorte:**

Aberdeen, Abu Dhabi, Algier, Amsterdam, Antwerpen, Barcelona, Belgrad, Berlin, Bogotá, Bratislava, Bristol, Brüssel, Budapest, Bukarest, Casablanca, Dubai, Düsseldorf, Edinburgh, Frankfurt/Main, Funchal, Genf, Glasgow, Hamburg, Hongkong, Istanbul, Johannesburg, Kiew, Köln, Leipzig, Lima, Lissabon, Ljubljana, London, Luanda, Luxemburg, Lyon, Madrid, Mailand, Manchester, Maskat, Mexiko-Stadt, Mombasa, Monaco, Moskau, München, Nairobi, Paris, Peking, Podgorica, Posen, Prag, Reading, Riad, Rio de Janeiro, Rom, Santiago de Chile, Sarajevo, Sevilla, Shanghai, Sheffield, Singapur, Skopje, Sofia, Straßburg, Stuttgart, Tirana, Utrecht, Warschau, Wien, Zagreb und Zürich.

CMS Hasche Sigle Partnerschaft von Rechtsanwälten und Steuerberatern mBB, Sitz: Berlin, (AG Charlottenburg, PR 316 B), Liste der Partner: s. Website.

---