Hogan Lovells

Distressed M&A in Europe

Spotlight on France, Germany, the Netherlands, and the UK

Contents

Distressed M&A in Europe

Hogan Lovells is a leading M&A advisor across Europe with substantial experience in distressed M&A transactions.

Our Distressed M&A practice is comprised of members of our top ten ranked European M&A team and our market-leading Business Restructuring and Insolvency team (BRI).

Our M&A and BRI teams have worked together extensively on distressed M&A transactions, allowing us to offer sophisticated, coordinated support on behalf of financial and strategic buyers of, and investors in, distressed M&A assets.

Clients engage our team of lawyers to help navigate the complex journey of acquiring troubled assets. We understand the unique combination of business, regulatory, and legal challenges that arise in these transactions, both inside and outside of insolvency proceedings.

Across industry sectors, we provide our clients with a team-oriented, collaborative approach that offers a full spectrum of legal services necessary for executing restructuring transactions, including debt finance, labor and employment, tax, antitrust, environmental, intellectual property, real estate and employee benefits.

Contents

> Hogan Lovells can deal with the largest of matters and command a team of a size that can get a very complex restructuring done.
>
> *Chambers Global*, 2021

Our capabilities

Executing transactions effectively

Our Distressed M&A team of over 300 M&A and BRI lawyers globally is skilled in guiding clients from structuring a distressed transaction, as either a material asset acquisition or investment opportunity, through closing.

In providing our advice, we partner with our clients to evaluate acquisition and investment opportunities and assess risks across asset classes and capital structures in insolvency proceedings and out-of-court deals.

Successfully executing distressed M&A transactions requires a full understanding of formal insolvency proceedings in court and out-of-court deals, and skillful handling of the complex interplay between corporate and insolvency transactions.

Hogan Lovells experienced dealmakers provide a cohesive team to our clients, drawing on the subject matter knowledge of colleagues across practices, including to ensure compliance of any transaction with regulatory regimes, compensation and benefits requirements, and post-M&A closing proceedings.

We have guided numerous clients in transformative deals through distressed M&A transactions that have empowered weakened or failing operations to become prosperous ventures.

Areas of focus

- Mergers
- Asset and stock purchases
- Composition and restructuring plans
- Debtor-in-possession procedures
- Pre-packaged sales through insolvency process
- Credit bidding
- “Loan-to-own” strategies
- “Exit” financing
- Debt for equity swaps
- Business structure evaluation
- Conduct dispute resolution
- Regulatory issues in Europe
- Receiverships under local law
- Reorganization planning
- Enforcement of security agreements
- IP acquisitions and dispositions

Top 10

Global law firm for Restructuring & Insolvency law

Global Restructuring Review, GRR 30, 2020

600+

Global M&A transactions with a total value in excess of **US$450bn**

(*Mergermarket,* 2018-2020)

Recognized team

Restructuring/Insolvency,

Chambers Europe, 2021

Our experience in France

Alandia Industries

In connection with several matters, including the acquisitions of Lansay, a French toy retailer, within the context of conciliation proceedings, and Continentale Nutrition, a French manufacturer of canned goods and foods for pets, within the context of a sale plan.

Butler Industries

In connection with several matters, including the acquisitions of NextiraOne, an independent leader in digital transformation, as part of one of the first French "pre-pack" sale plans, and Artys Security, an innovative security solutions and high security alarm monitoring company, within the context of a sale plan.

Cheyne Capital

On its investment opportunity related to Montagne et Neige Développement, a French listed company.

Fox Factory

On its proposed takeover of the assets of Mavic SAS, a French equipment manufacturer in the bicycle industry, within insolvency proceedings.

Groupe Bertrand

On its acquisition of the assets of Courtepaille Groupe, a network franchise restaurant chain of over 3,500 employees.

HGZ

On its projected takeover of certain of the assets of Bio C'Bon, a French organic food distribution chain, within insolvency proceedings.

Inteva

In connection with the bankruptcy filing for its wholly-owned subsidiaries in France, as well as in relation to the filing of a bid to purchase its business, totaling over 700 employees.

LGT Private Debt

On the takeover of the 5 à sec Group by LGT Private Debt from BridgePoint and on the subsequent restructuring of 5 à Sec, a major franchising network specialized in cleaning and ironing clothes, and its subsidiaries, within insolvency proceedings.

Montefiore

On its acquisition of the share capital of Solocal, a digital content, advertising solutions, and transactional services company.

Naxicap Partners and Nexstone

On its acquisition of some of the assets of Alès Groupe, a 1,000 employee cosmetics and fragrances company, and the acquisition of some of the assets of JJW, a French hotel group which owns and operates 34 hotels under the Stars Hotels, Median Hotels, Amarante Hotels, and JJW Luxury Hotels brands.

Prada

On its acquisition of some of the assets of a French local specialized tannery within insolvency proceedings.

Towerbrook

In connection with several matters, including the purchase of a portion of Consolis's existing debt, the financial restructuring of ACPS, the acquisition of a stake in Novares, and the debt rescheduling of Kaporal Groupe.

The team is very diligent, professional, technically robust and very well connected. The best team in Paris for me.

Chambers Europe, 2021

Our experience in Germany

DG HYP AG

In connection with the distressed real estate financing of several commercial properties in Germany and in connection with the disposal of a real estate portfolio.

Danpower Biomasse Pfaffenhofen

On the restructuring of Danpower Biomasse Pfaffenhofen GmbH (formerly Biomasse Heizkraftwerk GmbH) by insolvency plan, including a debt for equity swap and subsequent sale of the company.

F.List

On the insolvency proceedings of its insolvent debtor and the acquisition of the debtor's business operations from insolvency by way of a share deal.

FMS Wertmanagement

On its €173bn acquisition of select real estate loans assets, from Hypo Real Estate, and on various debt restructurings.

FMC

On its acquisition of the business and various foreign companies from the insolvent Dradura group – a leading manufacturer for industrially formed wire products.

The Federal Ministry of Defense

On its acquisition of LH Bundeswehr Bekleidungsgesellschaft mbH and on the sale of LHD Group Germany.

Gilead Sciences

On its partial acquisition of the fixed assets of the insolvent stock corporation MOLOGEN AG.

Macquarie Bank

On its acquisition of an aircraft financing portfolio with a value of around €800m from HSH Nordbank.

NORD/LB

On the sale of a ship financing portfolio worth up to US$1.5bn.

Quadriga Capital

On various distressed investments and insolvency proceedings.

Saurer Netherlands

On the termination of insolvency proceedings over the assets of its German subsidiaries and the sale of its business units Winder, Accotex, and Temco to the textile machinery group Rieter Holding Ltd.

Shinhan Investment

In connection with its investment in a portfolio of distressed real estate projects relating to the German Property Group.

Zinc Nacional S.A

On its acquisition of the zinc recycling division of insolvent Harz-Metall GmbH, one of the first German distressed infrastructure M&A transactions in the wake of the COVID-19 pandemic.

International firm with a focus on advising on distressed M&A, often representing foreign investors....

Chambers Europe, 2021

Our experience in the Netherlands

Bank of New York Mellon

On all Dutch insolvency proceedings, acting as indenture trustee, representing a total value of €9bn.

HPS Partners and VTB Capital

On their €1.2bn exposure risk to Croatian conglomerate Fortenova, and most recently in relation to a €380m upsize in order to facilitate the acquisition of Slovenian retail business Mercator.

Gordon Brothers

On interim injunction proceedings initiated against two court-appointed liquidators of Hudson Bay on the post-bankruptcy default by the liquidators under a consultancy agreement that was entered into with Gordon Brothers pre-bankruptcy.

Struik Foods

On its complete restructuring, on its facilities arranged by two major Dutch banks, and on the subsequent sale to a third party.

A provider of technology lifecycle solutions

On its acquisition of all assets in the Netherlands from a distressed recycling business, and dealings with the court appointed bankruptcy trustee.

A Japanese car manufacturer

On the complete restructuring of its European distribution network, involving distributors in 32 jurisdictions.

A UK based consultant/investor

On its role in the restructuring of a German-based retailer in the fashion industry.

A U.S. provider of data center solutions

On its US$44m acquisition of two data centers in the Netherlands from a distressed Dutch company and dealings with the court appointed bankruptcy trustee.

Confidential bidder

On its acquisition of Conservatrix, a distressed Dutch life insurer, which involved a novelty court-led acquisition structure and clearance with the Dutch Central Bank.

The ad hoc committee of lenders

On the restructuring of DTEK Energy B.V. and certain of its subsidiaries through two inter-conditional schemes of arrangement.

Key stakeholders of Vion

On their roles in the restructuring of Vion, a global food company, including the €1.6bn divestment of its ingredients division to Darling International.

Legal excellence, resourcefulness in difficult procedural situations, sensible accounting, easy accessibility.

Legal500 EMEA, 2021

Our experience in the UK

AEA Technology plc

The fully listed UK/U.S. consultancy group AEA on an accelerated M&A process, including arrangements with the PPF, the pension trustees, and the secured lender.

Lenders to Conviviality Group PLC

On the sale of Conviviality Group PLC's direct and retail sales divisions. Conviviality Group had a full listing on the London stock exchange, and in response to some unforeseen liquidity issues had been in the process of a £125m equity raise.

Intriva Capital

On the management buy-out of peer-to-peer lender, Lending Works Limited.

Investec and SC Lowy

On the set up of an acquisition vehicle structure and on JV arrangements in connectiion with Investec and SC Lowy acquisitions of the Gaucho restaurant group out of insolvency.

Lenders to Parabis

On the administration of the law firm Parabis, which included a number of distressed sales to third parties.

Lender to Polestar Printing

In relation to its exposure risk to Polestar Printing Limited, including a pre-packaged administration and subsequent trading administration.

The senior lender syndicate

On the restructuring of the OfficeTeam Group and creditor debt for equity swap and subsequent sale and exit.

Super Senior Lenders

On their unitranche exposure to the Casual Dining Group, which owns and operates the Café Rouge, Bella Italia, and Las Iguanas brands, considering CVA and pre-pack proposals, ahead of the sale and third party exit.

The board of Sepura plc

On a debt restructuring and equity raise via private placing and subsequent sale process.

The holding company for the Turkish army pension fund

In its proposal to acquire the business, assets, and undertaking of British Steel Limited, one of the UK's largest steel producers, which went into liquidation.

> They're highly recommended for complex, multi-jurisdictional matters and world-class legal advice and project management.
>
> *Chambers Europe*, 2021

Key considerations in Europe

The impact of the COVID-19 pandemic on the European market is likely to present opportunities for distressed M&A transactions.

Within Continental Europe, these opportunities will occur against a new legal framework guided by the implementation of the 20 June 2019 European directive (the Preventive Restructuring Directive).

Depending on local implementation, the Preventive Restructuring Directive could offer a broader range of legal tools for implementing distressed M&A transactions.

In the UK, the Corporate Governance and Insolvency Act 2020 has included some of the widest-ranging changes to the UK insolvency law in over 30 years.

It is important for buyers and sellers to consider the legal framework specific to each jurisdiction in order to implement distressed M&A transactions in an optimized manner and to establish the strategy that will best protect their interests.

Our European Distressed M&A team has significant experience and recognized knowledge across jurisdictions, to help guide clients on these types of transactions in collaboration with key players, such as financial advisors.

In the following pages, we provide an overview of the legal frameworks and tools for the implementation of distressed M&A transactions in France, Germany, the Netherlands, and the UK.

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Opportunity and value amidst challenges

Understanding insolvency circumstances that lead to distressed M&A

Distressed M&A transactions primarily involve targets under financial distress, but not necessarily yet cash insolvent or subject to insolvency proceedings. These transactions may be secured by a specific pre-insolvency judicial framework and/or can occur in formal insolvency proceedings.

Acquirers of distressed targets may be faced with two different situations:

- targets wanting to preserve part of their activities and choose to dispose of unprofitable or non-core activities, notably through carve-out transactions; or
- targets experiencing financial difficulties to such an extent that they have no option other than to find another sponsor/owner to ensure the continuation of all or part of their activities.

Impact of COVID-19 on distressed M&A

Confronted with an unprecedented crisis caused by the global pandemic, European jurisdictions have deployed numerous policies, including tax policies, state guaranteed loans, and loan moratoria, that have helped to curb the number of insolvencies. As a result of these policies, distressed M&A opportunities for buyers during the COVID-19 pandemic were reduced and the overall number of insolvencies was ultimately lower than in the pre-pandemic period.

Opportunities and challenges

As Europe endeavors to transition out of COVID-19, there will be potential opportunities for buyers of distressed assets.

- The extensive amount of liquidity provided by banks during the pandemic led to a significant increase of company indebtedness. A key turning point will come when subsidies begin to be gradually withdrawn, creating a risk of insolvencies.
- Compared to previous economic crises, many companies have reported financial difficulties (cash issues) without their viability being questioned.
- Banks may be less inclined to grant financing to distressed companies in contrast to turnaround funds which still have money to invest.
- M&A could be a mechanism to help ensure the continuity of companies that are in distress as a result of the COVID-19 pandemic, but otherwise viable. Policies are likely to encourage such transactions if they help to safeguard viable companies.

However, buyers also should consider the future challenges that they may face:

- A distinction should be made between companies whose financial difficulties are directly a result of the COVID-19 pandemic, but which have a viable business model, and companies that have been kept out of bankruptcy only through the financial aid granted by governments.
- Public administrations and courts may be overwhelmed by the number of insolvencies, which would affect the quality of their analysis regarding the viability of companies. This would potentially put the buyer at risk of acquiring an unviable asset.
- Due to the significant amount of aid granted to companies, without consideration of the companies' viability, the visibility on and traditional mechanisms for assessing the good health of a company have become blurred. The mechanisms traditionally used to assess the viability of companies may no longer be as effective as they were prior to the COVID-19 pandemic.

Preventive Restructuring Directive

The Preventive Restructuring Directive, which aims to harmonize the insolvency law of EU member states (excluding the UK), was implemented into each national legislation on 17 July 2021. Thereafter, depending on the local implementation, the anticipated wave of post-pandemic insolvencies could take place under this new legal framework.

The Preventive Restructuring Directive provides the following guidelines to facilitate distressed M&A transactions through:

- The promotion of prevention tools in order to anticipate difficulties and rescue the business as a going concern before insolvency.
- The possibility to exclude certain stakeholder groups from voting on a restructuring plan.
- The protection of new or interim financing in the restructuring plan.

France

Distressed M&A under conciliation proceedings

In France, distressed M&A transactions are often implemented outside of judicial insolvency proceedings, but within a framework of an "amicable" procedure (*ad hoc* mandate and conciliation). Given its numerous advantages, conciliation is the main proceeding used for distressed M&A transactions.

Ad hoc mandate proceedings are often a prerequisite to the opening of conciliation proceedings due to the absence of time constraints, but are rarely used alone to implement distressed M&A transactions. The conciliator may organize a legal framework for the total or partial sale of the company, generally through a sale of shares or business units. Such a transaction may then be submitted for the "blessing" of the court in order to obtain the full benefits of a sanctioned agreement (accord homologué).

Benefits and challenges

When a distressed M&A transaction agreement is sanctioned (homologué) by the court, it brings security and unique benefits to the various stakeholders.

- In the event of the subsequent opening of insolvency proceedings:
  - the sanctioned agreement may not be cancelled pursuant to the hardening/claw-back period rules (nullités de la période suspecte), because the date of cash flow insolvency cannot be carried back prior to the date of a definitive judgement sanctioning the agreement (except in the case of fraud).
  - the sanctioning (homologation) validates that the transaction is likely to ensure the continuity of the distressed company's business and thus mitigates liability risks for the seller and the buyer.
- A new money privilege is granted to creditors who have provided new money financing (called conciliation). The new money provider ranks senior to any other creditors in the event of a subsequent bankruptcy procedure, except for certain judicial fees and "super privileged" salary related debts.

Despite their numerous benefits, conciliation proceedings may prove burdensome for buyers:

- The sanctioning (homologation) of the transaction requires the publication of the approval judgment, making aspects public even if the transaction itself remains confidential.
- An investment bank or financial advisor must prepare a fairness opinion to ensure the transaction is based on a "fair price." This assessment may present significant costs.
- Parallel negotiations with the company's creditors in order to restructure the company's indebtedness are often necessary because of the transfer of liabilities to the buyer. It can require additional time, and also carry the risk of a failure of its negotiations and potential loss of interest in buying the target.

Process and procedures

The transaction is sanctioned upon the request of the debtor company provided that it is not cash flow insolvent as of the execution of the agreement or that the agreement remedies such a situation. To be sanctioned by the court, the terms and conditions of the transaction should ensure the sustainability of the business.

A two-year business plan, reviewed by a third party, is established to assess such sustainability. The sanctioning of the transaction also requires that the agreement is not detrimental to non-signing creditors.

Other considerations

Given the distressed context of the transaction, time management is a key element and the support of a third party financial advisor is necessary.

- As part of its due diligence, the buyer should proceed with an antitrust analysis to determine whether an approval of the competent authorities is required.
- The buyer also should determine whether the transaction requires prior authorization or notification under the regulations governing foreign investments in France or abroad.

France

Distressed M&A under insolvency proceedings

Ordinary sale plan (plan de cession)

When a company is in insolvency proceedings (redressement judiciaire), potential bidders can submit an offer to acquire all or part of the debtor's business alongside the management's own draft of a reorganization plan. Under safeguard proceedings (procédure de sauvegarde), only a partial sale of the debtor's business can be contemplated.

If the court concludes that the continuation of the business is not possible, a sale plan process may be organized and provide for the sale of assets, and not the company's shares.

Benefits and challenges

A sale plan presents unique benefits for the buyer:

- The buyer can pick and choose the assets, key contracts (e.g., supplier contracts) and work positions to be maintained.
- The assets and business are transferred to the buyer without the associated liabilities (subject to limited exceptions).
- Creditors' approval is not required.

However, a distressed acquisition under a sale plan presents some challenges:

- In order to maximize the value of the business, a public tender process is launched which leads to a competitive process between potential buyers.
- Some liabilities could be transferred to the buyer; most notably, movable and immovable securities granted for a loan to finance an asset included in the takeover scope.

Process and procedures

A public tender process is launched by the judicial administrator(s) who set the timeframe during which offers may be submitted. During this period, potential buyers proceed to due diligence.

Once the timeline has expired, a hearing before the court is held with the bidders. After having heard all involved parties, including employees' representatives, the court selects the offer which presents the best characteristics in terms of number of employees taken over and sale price, and which could ensure the sustainability of the transferred businesses.

In practice, the buyer enters into possession of the business the day after the judgement ruling on the sale plan. The transfer of the ownership of the business occurs on the signing date of the deed of sale.

Other considerations

- The number of employees taken over is a key element in the court's decision making process. Prior discussions with unions and employees are necessary in order to get their support and to avoid any social tensions that could jeopardize the continuation of the business.
- Communication and support of the customers, whose transfer of the contract cannot be ordered by the court, are also crucial to ensure the success of the transaction.
- As part of its due diligence, the bidder should proceed with an antitrust and foreign direct investment analysis to determine whether approval of competent authorities is required.

Focus on the "pre-pack" sale plan

- The "pre-pack" sale plan consists of drawing up, in a complete confidentiality framework, an agreement for the partial or total sale of the company's assets and business before the opening of insolvency proceedings with one or more bidders identified within the framework of amicable proceedings, so that, once the insolvency proceedings are opened, the sale is carried out promptly within this framework.
- The purpose of the "pre-pack" sale is to complete the sale as quickly as possible (one to three months) after the opening of the insolvency proceedings in order to avoid any damage on the ongoing business activity and limit competition.

France

Reorganization plan

There are two options for a reorganization plan, a debt for equity swap and for a third party to submit a reorganization plan providing for a share capital modification.

Benefits and challenges

A reorganization plan presents unique benefits for the buyer:

- The main benefit of this process is the incorporation of an alternate reorganization plan which is assessed concurrently with the management's draft reorganization plan. This differs from a takeover offer (a sale plan offer), which would be examined only in the event of the rejection of the management's plan.

However, a distressed acquisition under a reorganization plan presents some challenges:

- This option, which implies a change of ownership, is usually considered as hostile and requires the agreement of the current shareholders, which may constitute an obstacle, even though their approval could be imposed under restrictive conditions.

Process and procedures

Through a debt for equity swap, the buyer acquires debt in relation to the target company and then converts it into equity as part of a reorganization plan. This option requires the agreement of the shareholders (subject to some restrictive legal exceptions).

The third party reorganization plan option is only available under reorganization proceedings.

> Hogan Lovells displays an exceptional understanding of the international business complexity and specificity. They provide us with services of the highest standard and quality, and help us understand the local problems by transferring their local know-how in a clear and comprehensive manner.
>
> *Chambers Europe*, 2021

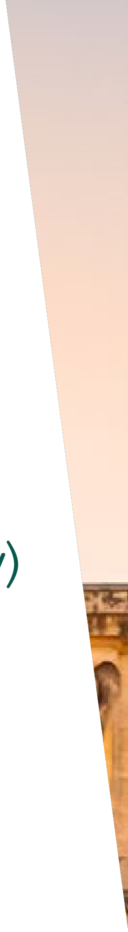
Hogan Lovells results

Case study

Our BRI and M&A teams advised LGT Private Debt as a creditor of 5 à Sec, a major franchising network specializing in dry cleaning and laundry services.

Following the breakdown of discussions in connection with the restructuring of LGT's unitranche claim due to the consequences of COVID-19 pandemic, our team coordinated, in a very short period of time, the acquisition by LGT of all of the debtor's equity and shareholder loans from BridgePoint under a pre-insolvency framework.

We also handled the restructuring of 5 à Sec and its subsidiaries' indebtedness in the context of the insolvency proceedings that opened on the day following the acquisition.



Germany

Distressed M&A in an out-of-court scenario (pre-insolvency)

In Germany it is possible to acquire assets from a distressed seller without any court involvement prior to an insolvency scenario. For example, in the context of a consensual out-of-court restructuring process.

Given that the German Insolvency Code provides for far-reaching protection mechanisms with respect to the insolvency funds for the benefit of all creditors, certain mitigating structure options should be taken into consideration to ring-fence the transaction with respect to such insolvency risks.

Benefits and challenges

Distressed M&A transactions in pre-insolvency stage offer benefits for both buyers and sellers:

- Valuations come under pressure and buyers get the opportunity to acquire a company at a relatively low purchase price and in a relatively short time while the seller has the opportunity to generate liquidity through the entry of the buyer.
- Distressed M&A transactions can offer solutions for both buyer and seller in critical supply chains. For example, a customer can take over a loss-making part of a supplier's business and thus stabilize the supply chain and allow the supplier to navigate through the crisis.

However, distressed M&A transactions in pre-insolvency stage also can pose some challenges:

- In contrast to asset deal transactions in insolvency proceedings, the buyer must assume liabilities (all liabilities in case of a share deal) of the seller if the transaction takes place prior to an insolvency. Even in asset deal transactions, not all liabilities can be cut off.
- While the buyer is generally only liable for liabilities which they expressly assume, liabilities to employees are transferred by virtue of law.
- The buyer also is liable for tax liabilities and may be liable for even more debts if they continue to operate the business under the prior company name.
- If the seller falls into insolvency after the acquisition, certain special risks under German insolvency law arise. To some degree these can be mitigated by the transaction structure.
- If the parties have not yet completely fulfilled their contractual performance obligations at the time of the opening of insolvency proceedings, §103 of the German Insolvency Code allows the insolvency administrator to refuse further performance of the transaction. This can prove risky for buyers who have made advance payments.
- The insolvency administrator may challenge the transaction by applying the statutory claw-back rights, all of which are aimed at the reversal of legal transactions that are disadvantageous to creditors.
- Warranty and indemnity (W&I) claims can become unenforceable and consequently not financially viable in a subsequent insolvency of the seller.

Process and procedures

Claw-back risks, as well as risks connected to the administrator's right to refuse performance, can generally be mitigated by the specific payment mechanisms, including immediate purchase price payment in turn for the transfer of the purchased assets or the refusal of advance payments.

The risks concerning W&I claims may be mitigated to some extent by a thorough due diligence. But even the best due diligence cannot replace certain seller's guarantees, such as guarantees that back the assumptions on which the due diligence is based.

It may be advisable for the buyer to take out W&I Insurance for the seller's warranties. Insurers have developed a wide range of products which may allow to insure claw-back risks in an insolvency event.

The buyer also could ask for third party security, such as parent or bank guarantees. Parent guarantees should be reviewed to assess whether the parent company would remain unaffected from a potential insolvency of its subsidiary (i.e. the target company).

Germany

Insolvency proceedings

Depending on the status and the type of the insolvency proceedings, there are two different transaction structures: asset deals (as in most cases) and share deals (if the target company and not only the business needs to be restructured). For both structure options certain aspects of German insolvency proceedings must be considered.

Benefits and challenges

The acquisition of a target in the context of insolvency proceeding has its benefits:

- If the transaction is structured as an asset deal the buyer is entitled to cherry-picking. They may acquire only those assets (e.g. land, machinery, inventory, IP, etc.) which are valuable and needed for continuing the business operations. Less useful assets can be left with the insolvency estate. The same applies for the target company's debt.
- The buyer also can select the employees to be taken over. The remaining employees are transferred by the insolvency administrator to an employment and qualification company. Employment and tax liabilities prior to the acquisition are not transferred to the buyer.
- Compared to a pre-insolvency asset deal the buyer also may benefit from higher transaction security. There are no risks relating to claw-back law or the administrator's right to refuse performance of the sales contract and generally less liability risk.
- A restructuring of the company via insolvency plan and a subsequent share deal can be advantageous or even unavoidable if the target company holds certain concessions or statutory approvals which cannot be transferred to the buyer and thus would hinder an asset deal.

However, there also are challenges in insolvency proceedings for distressed M&A transactions:

- The previous opening of insolvency may have adverse effects on the target's business, including the loss of clients and employees.
- Competition with other bidders may exist as the administrator is obliged to realize the insolvency estate in the best possible way, taking into account the purchase price offer, as well as the security and speed of the transaction.
- The buyer does not have control over the course of the insolvency proceedings and has limited influence on decisions made by the insolvency administrator or the creditors.
- Insolvency administrators generally do not provide any indemnities or guarantees in the context of the sale, with the exception of the guarantee of ownership of the assets sold. Such risks can, to some extent, be covered by a W&I insurance policy.

Hogan Lovells results

Case study

In the context of the insolvency proceedings in self-administration over the assets of the former recycling company Harz-Metall GmbH, a team of M&A, insolvency, real estate, employment, and environmental lawyers advised the Mexican company Zinc Nacional S.A. in connection with the acquisition of the zinc recycling division of the insolvent company through an asset deal.

Harz-Metall GmbH was part of the German Recylex Group and became insolvent due to the sharp drop of the zinc market. This very complex and fast-paced transaction had to be closed under intense time pressure due to the tight liquidity situation of the insolvent seller.

Process and procedures

In the asset deal scenario, the assets are sold by the court appointed insolvency administrator or (in case of debtor-in-possession proceedings) the target company. To avoid liability risks the seller also will usually involve the creditors, and make the creditors' consent a condition in the asset purchase agreement.

In the share deal scenario, the shares will not be sold by the insolvency administrator but by the shareholder(s) of the target company. However, the creditors also will have a say in that scenario as the successful restructuring of the target company (usually by way of an insolvency plan) requires their consent.

The insolvency plan process is embedded in the formal insolvency proceedings. The plan is voted on in creditor classes, for example, classes of secured, unsecured and subordinated creditors, and allows restructuring of the company's debts by imposing a reduction on its creditors' claims.

Shareholders' rights may be impaired on the basis of the plan (e.g. by way of debt for equity swaps). In this case, the shareholders form a separate class. The acceptance of the insolvency plan requires that a majority of creditors by value and number in the respective creditor classes vote for the plan. Under certain circumstances, dissenting classes can be dismissed.

Germany

New German Scheme: StaRUG

On 1 January 2021 a new restructuring law (the StaRUG) came into effect in Germany which introduced the Stabilization and Restructuring Framework (SRF). In contrast to the traditional approach, the SRF enables a company to be restructured based on the majority decision of the creditors before insolvency proceedings have to be initiated.

Benefits and challenges

Although the new restructuring process is not tailored to distressed M&A scenarios, a buyer may benefit from the SRF:

- In contrast to a share deal in the context of insolvency proceedings, there will be no negative labelling effects if the pre-insolvency restructuring process was conducted discretely. Thus, the adverse effects of the restructuring on the business and its value should be limited.
- While certain insolvency-related risks (e.g. claw-back risks) can potentially be mitigated, but not fully excluded, by the court's approval of the plan, it remains to be seen whether the new restructuring tool will allow sufficient transaction security to serve as a viable platform for distressed M&A transactions.

However, there also are some challenges to overcome in the SRF for distressed M&A transactions:

- The pre-insolvency restructuring process is rather complex and not yet sufficiently court-tested. The consent requirements are stricter than in insolvency plan proceedings and may be hard to reach in practice.
- Contrary to the insolvency plan, the SRF does not allow restructuring of employment and pension liabilities.
- The buyer in an asset deal transaction will not benefit from privileges on liability risks and Transfer of Undertakings (TUPE) as in an insolvency scenario.

> Hogan Lovells offers a high quality of legal services in a timely manner and with high confidence. The team is also good at finding solutions in complex matters which are suitable and acceptable to clients.
>
> *Chambers Europe*, 2020

Process and procedures

The SRF can only be used if the debtor is likely to become cash-flow insolvent within the next two years. The core element of the SRF is the submission of a restructuring plan by the debtor company and its acceptance by the majority of the affected creditors.

The pre-insolvency restructuring is a non-collective procedure (i.e. the debtor may, to a certain extent, choose which creditors are involved in the process). Like the insolvency plan, the restructuring plan can provide for a reduction of the affected creditors' claims and enable the impairments of the shareholders' rights.

The new law gives the debtor a discrete opportunity for restructuring and the process may be run with little or no court involvement.

> They are very adept at looking at issues not just from a legal perspective, but also from a commercial, reputational, and risk and regulatory perspective.
>
> *Chambers Global*, 2020

The Netherlands

Out-of-court proceedings

In the Netherlands, it is possible to enter into debt restructuring arrangements out-of-court. Given that there is no specific legal framework that regulates such arrangements, the general rules of contract law apply.

Benefits and challenges

In certain circumstances, conducting out-of-court distressed acquisitions or investing out-of-court in distressed M&A assets can offer advantages. Potential benefits of an out-of-court transaction include:

- The freedom of contract to arrange whatever the distressed company (and/or the potential investor) and its creditors deem fit to restructure the debt.
- The prevention of the distressed company from entering into insolvency.
- The out-of-court arrangement is not public.

However, out-of-court buyers and investors also can face challenges:

- If a creditor does not agree with the arrangement, that creditor cannot be forced to comply with the debt restructuring arrangement except under certain circumstances.
- The requirement that all of the distressed company's creditors must agree on the arrangement is the biggest downside of the out-of-court debt restructuring arrangement and, therefore, in practice, such arrangements are rarely implemented successfully.
- Only when the creditor should reasonably have accepted the offer and is abusing its position, the debtor offering the out-of-court debt restructuring to all of its creditors could request the district court (in interim injunction proceedings) to order such creditor to agree with the out-of-court debt restructuring arrangement.

> Hogan Lovells through its partner made a very good impression, handling all relevant work streams effectively, coordinating all parties and negotiating results.
>
> *Chambers Europe*, 2021

Process and procedures

A distressed company (as debtor) can offer a debt restructuring arrangement in anticipation of an impending insolvency. Such proposed out-of-court debt restructuring arrangement needs to meet certain criteria to become effective. Among other criteria, the out-of-court debt restructuring arrangement must:

- Be sufficiently substantiated.
- Provide a complete and actual overview of the assets and liabilities of the distressed debtor.
- Ensure that it is likely that the debtor's creditors will be better off compared to an insolvency scenario.
- Ensure that similar creditors are treated equally.
- Be drafted and supervised by an independent expert.

> They are quick, provide good service and give good answers.
>
> *Chambers Europe*, 2021

The Netherlands

Court proceedings

The Dutch Act on the Confirmation of Extrajudicial Restructuring Plans (*Wet Homologatie Onderhands Akkoord*, the WHOA), enacted 1 January 2021, is expected to become an important tool in restructurings and distressed M&A transactions.

The WHOA introduces a formal pre-insolvency procedure in the Netherlands, combining elements of UK and U.S. schemes, such as the ability to implement a plan outside formal insolvency proceedings.

The WHOA provides for pre-insolvency restructuring proceedings, facilitating the restructuring of liabilities of distressed companies, and a statutory framework for distressed M&A deals.

Benefits and challenges

In certain circumstances, participating in court proceedings will offer advantages over pursuing an out-of-court transaction. Potential benefits provided by the WHOA include:

- An efficient debtor-in-possession procedure which allows distressed companies, if they are likely to be unable to pay their debts in the future, to present a debt restructuring plan to their creditors and/or shareholders.
- An innovative law that allows for global restructurings with the flexibility of a UK scheme, combined with the moratorium and certainty of the U.S. Chapter 11, but at a lower cost and within a shorter time frame.
- Unlike similar schemes in other jurisdictions, the WHOA has an advantage when it comes to the restructuring of a multinational group of companies.
- The WHOA provides a platform for restructuring group liabilities through a single procedure. The WHOA also can extend to claims on group companies that have issued a guarantee or bail regardless of guarantors' home jurisdiction. However, the court-approved restructuring plan also will be automatically recognized within the EU under the Recast Insolvency Regulation[1] (if it is offered as part of a public procedure).

However, in some instances court proceedings can bring challenges:

- Creditors or shareholders of the distressed company cannot propose a restructuring plan. They can only petition the court to appoint a restructuring expert who may propose a plan on their behalf.

1 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

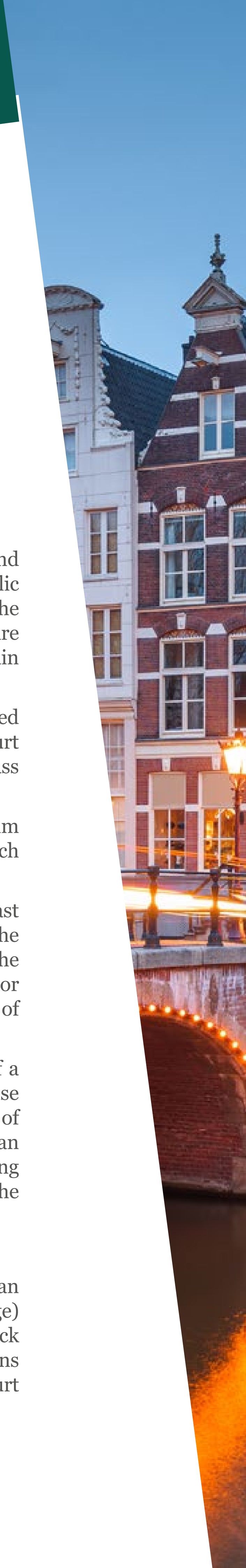
Hogan Lovells results

Case study

Debtors often will seek an initial bid on the relevant business or assets from a "Stalking Horse" bidder prior to filing the bankruptcy action.

In connection with the bankruptcy of a recycle business, Hogan Lovells represented a technology lifecycle solutions company as the Stalking Horse bidder for the acquisition of key strategic assets.

We organized a broad-based team of M&A, bankruptcy, finance, commercial and tax attorneys in a fast paced and ever changing sale process.



The Netherlands

Process and procedures

The restructuring plan can be either a public procedure or a non-public procedure:

- Non-public procedures are confidential to the parties, will not be covered by the Recast Insolvency Regulation and can be entered into by any distressed company (as debtor) with sufficient nexus to the Netherlands.
- In public procedures all hearings and judgements are public, the public procedures will be recognized under the Recast Insolvency Regulation, and are open to entities whose center of main interests is in the Netherlands.

Once the restructuring plan has been drafted, the creditors and/or shareholders affected must vote on the plan. However, the distressed company (as debtor) can go to court before the voting takes place to ask for a ruling on matters such as valuation and class formation.

Secured creditors will generally be classed together, but only for that part of their claim which is “in the money,” based on a liquidation valuation. The remainder of each creditor’s claim will be treated as unsecured for purposes of the WHOA.

Under the WHOA, the court will approve the restructuring plan provided that at least one “in the money” class has voted in favor of the plan. Creditors who voted against the restructuring plan can ask the court to refuse to confirm the plan on the grounds that the plan does not meet the “best interests of creditors test” (i.e. creditors and/or shareholders should receive no less under the plan than they would in the liquidation of the distressed company).

In addition, where a creditor has voted against the restructuring plan and is part of a class which has voted against the plan, the creditor can ask the court to refuse confirmation of the plan in certain circumstances, including where the distribution of the value to the other creditors and/or shareholders under the restructuring plan deviates from statutory or contractual arrangements and, as such, impairs the opposing creditors (unless there are reasonable grounds for deviating and the interests of the creditors/shareholders are not harmed).

The court can make other orders as part of the WHOA process:

- The distressed company (as debtor) or the restructuring expert can apply for a moratorium (or stay) of up to eight months.
- If the plan entails the amendment or termination of long-term contracts (e.g. leases or supplier contracts), the court can approve such steps where counterparties refuse to co-operate with such contract amendment or termination.
- The distressed company (as debtor) can grant security and attract (bridge) financings without the risk of claw-back from third parties and challenge actions if the distressed company obtains court approval for that.

The UK

England and Wales

In contrast to other European jurisdictions, distressed M&A transactions under English law are not court-supervised processes. They are effected either by companies or shareholders themselves, or by liquidators or administrators (referred to as Officeholders) in the course of a liquidation/administration (referred to as Relevant Insolvency Proceedings).

This means that they can be implemented rapidly in a way that helps to preserve maximum total value. However, the truncated timetable also means that it is imperative to quickly engage with the key issues underpinning the transaction.

In England, it is important to understand whether the sale is to be effected inside or outside of Relevant Insolvency Proceedings.

Sales outside of Relevant Insolvency Proceedings

If the sale is effected outside of Relevant Insolvency Proceedings, the buyer would purchase directly from the distressed company / its shareholder.

Benefits and challenges

Completing the sale outside of Relevant Insolvency Proceedings will likely have the following benefits:

- For the selling party, the directors/management retain control and are not displaced by the Officeholders. Relevant Insolvency Proceedings are not "debtor-in-possession".
- For both parties, the stigma of insolvency is avoided, although this may mean that bargains are harder to find.
- Increased scope to facilitate a share sale. Sales in Relevant Insolvency Proceedings are often structured as asset sales.
- Enhanced flexibility as to the purchase consideration, although cash is typically preferred.
- Greater opportunity for detailed due diligence and virtual data rooms.
- Improved ability to negotiate typical contractual protections, such as W&I, as well as Material Adverse Change clause (MAC) termination rights.

"They're highly recommended for complex, multi-jurisdictional matters and world-class legal advice and project management"

Chambers UK, 2022

The challenges in completing a sale outside of Relevant Insolvency Proceedings revolve around two main areas: director liability (of the selling entity) and claw-back risk (of the buying entity).

Regarding liability:

- Whether the M&A process is conducted inside or outside of Relevant Insolvency Proceedings will depend to a large extent on the level of distress the company is facing. Directors of distressed entities owe duties to creditors that may be breached by a distressed M&A transaction.
- Directors also are potentially liable for wrongful trading (and may face having to make a contribution to the company's assets) if they continue to trade in circumstances where the directors knew or ought to have known that there was no reasonable prospect of avoiding an insolvent administration or liquidation, the directors failed to take every step to minimize losses to creditors and the company subsequently enters into an insolvent administration or liquidation.
- In embarking on an M&A process outside of Relevant Insolvency Proceedings, the directors will have to consider whether the additional liabilities incurred during a sales process can be justified, or whether the distress is such that immediate Relevant Insolvency Proceedings (with the Officeholder running the M&A process) would be more likely to minimize losses to creditors.

Claw-back risk:

- From a buyer's perspective, buying from a company whose viability is uncertain can carry claw-back risk. This is the risk that if, following the sale the company enters into an insolvency process within a certain period, the Officeholder may be able to challenge the transaction, for example as a transaction at an undervalue.
- Where the Officeholder brings a successful challenge, the court has wide powers to make an order restoring the position to what it would have been had the transaction not been entered into.
- Where the sale is carried out after the company has gone into Relevant Insolvency Proceedings, there is no equivalent claw-back risk, which is another reason why a buyer may prefer the transaction to be effected by an Officeholder, rather than the company/its shareholder.

The UK

England and Wales

Sales inside of Relevant Insolvency Proceedings

If the seller enters into Relevant Insolvency Proceedings, the Officeholder will displace management and make all relevant decisions for the benefit of creditors as a whole. Officeholders have a wide range of powers under the relevant insolvency legislation, including the power to sell assets in an M&A process. As part of its diligence process, the buyer should ensure that the Officeholder has been validly appointed.

Benefits and challenges

As discussed above, the principal benefits of a transaction effected inside Relevant Insolvency Proceedings are that:

- By choosing to enter Relevant Insolvency Proceedings, instead of pursuing a sales process, the directors of the selling company may reduce their risk of personal liability for wrongful trading or breaches of duties to creditors.
- From the buyer's perspective, purchasing the assets of the selling company from an Officeholder in Relevant Insolvency Proceedings means that there is no claw-back risk.
- Buyers also may benefit from the fact that sales in Relevant Insolvency Proceedings are more likely to be structured as asset sales, with the liabilities remaining behind in the insolvent company.

The challenges in negotiating a transaction from within Relevant Insolvency Proceedings mainly relate to the established market practices that have emerged in such transactions (subject to the parties' relative bargaining position), particularly in the following areas:

- Exclusivity: Officeholders are highly focused on deliverability of the transaction. Exclusivity reduces the pool of possible buyers and so buyers will not always receive exclusivity.
- Cash sales: Given the focus on delivering the best outcome for creditors, there is a preference for transactions where consideration is paid upon completion. Buyers may be able to negotiate deferred consideration where suitable security is provided.
- Due diligence: There may be limited scope to carry out detailed due diligence, meaning buyers and their advisers must focus their attention on key aspects of the deal. While the lack of due diligence can expedite the transaction, the risk is shifted to the buyer.
- Contractual protections: Continuing the trend of shifting risk to the buyer, Officeholders will be unwilling to provide "usual" contractual protections, such as W&I. Officeholders also will likely resist provisions that may impact deliverability of the transaction (e.g. MAC termination rights for events that arise between signing and completion).

Process and procedures

As noted previously, Relevant Insolvency Proceedings will either be a liquidation or an administration, under the Insolvency Act 1986. In the context of a distressed M&A transaction, each process poses similar issues for buyers. However, it should be noted that it is also possible for the parties to structure a sale within Relevant Insolvency Proceedings as a pre-packaged administration, also known as a “pre-pack.”

The essence is that the terms of the sale are agreed between the parties prior to the seller going into administration. The seller then enters administration, an administrator is appointed and the administrator immediately completes the sale upon appointment.

Because the sale agreement has to be one that the administrator is prepared to execute upon appointment, it is vital that the potential administrator be involved during the negotiations. The key advantage is that this process minimizes the time that the business is negatively impacted by an insolvency process and thus better preserves the going concern value.

Buyers, acquiring from an administrator, also benefit from reduced claw-back risk. Pre-packaged administrations have, however, been the subject of criticism, particularly in relation to sales to connected parties. New rules have recently been promulgated providing enhanced protection to creditors in relation to connected party sales and particular care needs to be taken in relation to such sales.

The UK

England and Wales

Sales inside and outside of Relevant Insolvency Proceedings

Regardless of the seller (the company in an asset sale, the shareholder in a share sale or an Officeholder if the company is in Relevant Insolvency Proceedings), buyers will need to consider the following points, on which specialist advice will likely be required:

- Tax: In the case of an asset sale, it will need to be established whether the sale qualifies as a transfer of a business "as a going concern," such that it falls outside the scope of UK VAT. If not, VAT may be payable by the buyer in addition to the purchase price (which, in certain scenarios, will not be recoverable). Share sales are exempt from VAT in the UK.
- Employees: In circumstances where the transaction constitutes the "transfer of an undertaking," all rights and obligations under employee contracts may be transferred by operation of law as a TUPE transfer.
- Pension schemes: It is possible for pension liabilities to transfer across in certain circumstances, including asset sales. It may be worth seeking confirmation that the pensions regulator does not seek to take action.
- Reservation of title: Suppliers may have reserved title in supplies to the target company. In an asset sale, such inventory needs to be identified and an appropriate discount applied.
- Termination of key contracts: Contracts should be reviewed for termination rights on a change of control or insolvency. Termination rights upon entering an insolvency process for the supply of goods and services may be invalid, but there are numerous exceptions.

M&A process also may be pursued in conjunction with a debt restructuring process. In England, that may mean that the M&A process follows an English law debt restructuring transaction or standstill arrangement, concluded consensually, or via a court-sanctioned Scheme of Arrangement or Restructuring Plan (amongst other possibilities). A buyer also could acquire the target's debt, with a view to effecting a loan-to-own transaction.

> Having Hogan Lovells on a transaction is very helpful - they are very good technically, reliable, efficient, [and] thorough.
>
> *Chambers UK, 2022*

Hogan Lovells results

Case study

Hogan Lovells acted for the lenders on a market-leading UK distressed M&A transaction. Conviviality plc, a major player in the wholesale and retail distribution of alcoholic drinks, tobacco, grocery, and confectionery, operating some 700 stores under various brands including Wine Rack and Bargain Booze, approached the market and existing shareholders to raise capital to meet the near-term liquidity needs of the wider group.

Following the failure of this equity raise, Hogan Lovells advised the Group's lenders on the £100m accelerated sale of the wholesale group and the retail group to third party purchasers. These sales were effected through two pre-packaged administrations, and were negotiated and completed in the space of one week, maximizing value preservation for the lender group.

Hogan Lovells results

Case study

Hogan Lovells acted for a tobacco major in bidding in the sale process for, and subsequent acquisition of, the business and assets of Vapestick, a vaping business, from administration, an English insolvency process.

The strategic acquisition by our client was a bolt-on to a related transaction – the distressed acquisition of the business and assets of VIP, an e-cigarette retailer, enabling further expansion of its retail network in the UK.

Our client successfully acquired both businesses out of administration and the Vapestick transaction is a paradigm of the value that can be unlocked in an English distressed M&A transaction.

Market conditions and outlook

Looking ahead

The outlook for the M&A market across Europe indicates favorable market conditions, given the number of high-quality assets and the continued availability of funds. Private equity and venture capital firms are also expected to become increasingly active in the European market.

However, the true impact of the COVID-19 pandemic on the M&A market in Europe will be revealed once the related governmental support programs are reduced and, eventually, withdrawn. The European market is expecting an increased volume of insolvency, distressed M&A, and restructuring activities as a result.

Our Distressed M&A team of lawyers are leaders in their field with the technical experience and in-depth market knowledge to help our clients proactively develop and implement strategies for their distressed transactions.

In the following pages, we have outlined current market conditions, trends, and an outlook for the year ahead.

Contents

Distressed M&A market environment in Europe

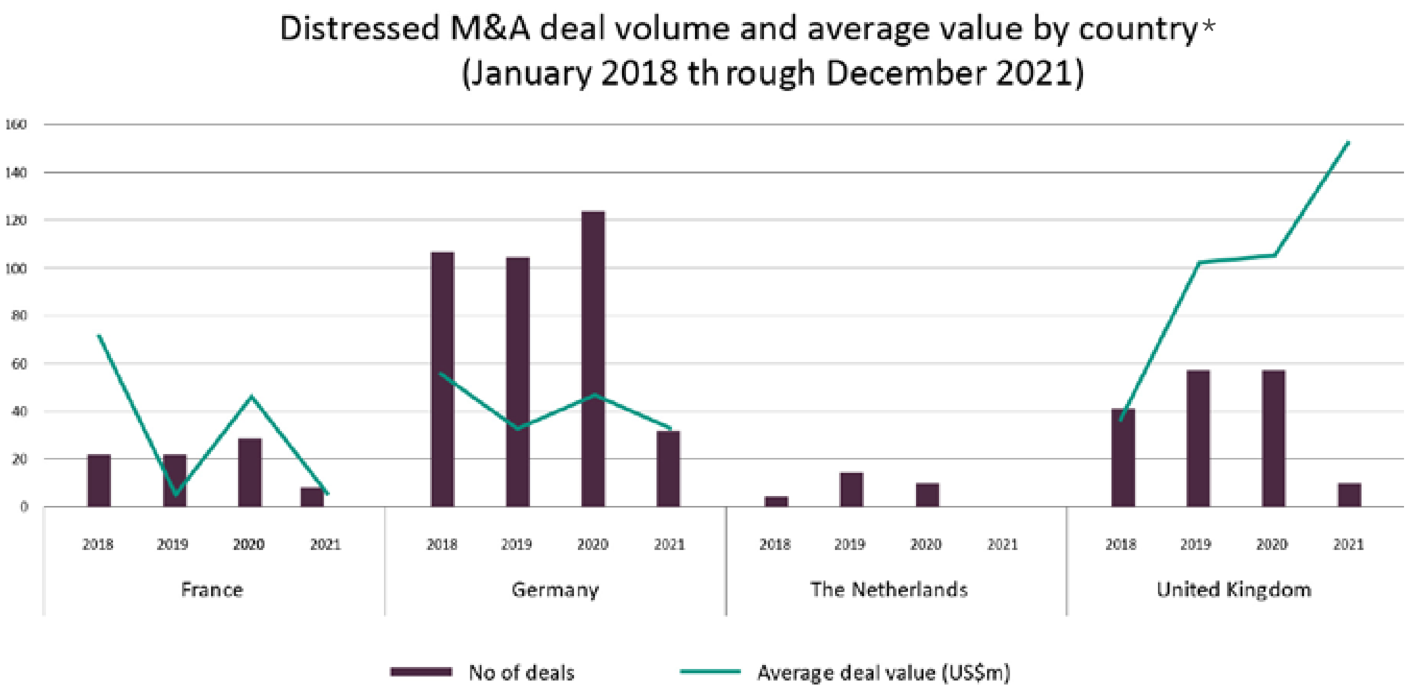
Recent economic turmoil as a result of the COVID-19 pandemic, combined with high levels of potential financial investors' "dry powder" of committed but unallocated capital and low interest rates, has created favorable market conditions for an uptick in distressed M&A.

During 2020, several European jurisdictions sought to suspend or amend existing insolvency laws to ease the immediate burden on companies and to seek to encourage the survival of businesses which might otherwise fail under the burden of immediate lockdown measures and economic slowdown.

In 2021, opportunities in distressed M&A continue to arise as a result of ongoing restructuring activities and corporate defaults and, especially, as government support for businesses is reduced or withdrawn, which can result in distressed and turnaround opportunities for private capital firms such as private equity and venture capital companies. Some businesses will continue to struggle and recovery for these businesses will depend on how long the economic consequences of COVID-19 last.

Distressed M&A in Europe by volume

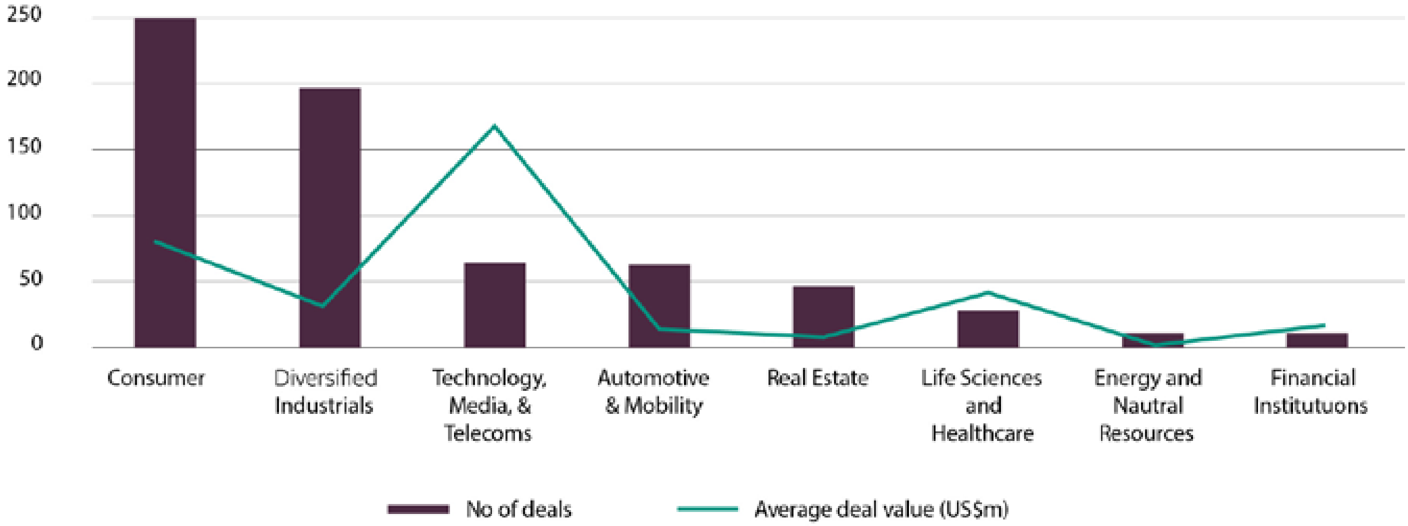
The chart below outlines overall distressed M&A volumes in France, Germany, the Netherlands, and the UK for the period from January 2018 through December 2021.



*Data collected through *Mergermarket*

The chart below shows distressed M&A volumes in the designated countries by industry for the period January 2018 through December 2021, as well as average deal value.

Distressed M&A deal volume and average value by industry*
(January 2018 through December 2021)



Cross-border recognition of insolvency schemes

Prior to 11pm on 31 December 2020 (IPCD), the end of the transitional period during which EU law applied to the UK, the UK was subject to the Recast Insolvency Regulation. Pursuant to the Recast Insolvency Regulation, the UK's listed insolvency processes benefited from automatic recognition across the EU (other than in Denmark).

Post-IPCD, the Recast Insolvency Regulation was onshored into UK law, but, because the regulation relies on reciprocity, it was largely repealed to remove the requirement that the UK should recognize insolvency processes started in EU member states (other than Denmark). As the UK is no longer an EU member state, EU member states no longer have to automatically recognize insolvency proceedings started in the UK.

An English administrator or liquidator's authority to deal with assets overseas will not automatically be recognized by EU member states. Some EU jurisdictions will recognize English insolvency proceedings more readily than others but in each case recognition of the relevant insolvency process and the authority of the relevant insolvency officeholder to deal with the assets in that jurisdiction will be a question of local law.

It is likely that the requirement for, and extent and process of, recognition will differ between jurisdictions. This issue should be considered early in any transaction where the seller has assets in multiple jurisdictions.

France

Given Brexit and the unenforceability of the Recast Insolvency Regulation, the recognition in France of the UK insolvency proceedings will no longer be automatic. To date, no bilateral treaty has been entered into between France and the UK to determine the conditions for the recognition in France of the UK insolvency proceedings post-IPCD. It is private international law that sets the rules for such recognition.

Moving forward, in order for the UK insolvency schemes/proceedings to take effect in France, they have to be subject to an exequatur procedure.

Without a judgment of exequatur, the UK proceedings would not be able to take effect in France. As a consequence, creditors are therefore, able to take recourse against assets located in France despite the UK insolvency schemes/proceedings being initiated.

The exequatur procedure can be initiated by any interested person, such as creditors or an insolvency practitioner. In order to grant the exequatur, the French Court must ensure that the following cumulative conditions are met:

- The UK court has jurisdiction to hear the case.
- The compliance of the decision with international public policy.
- The absence of fraud.

Once the judgement ordering the exequatur has been granted, the UK decision opening insolvency schemes/proceedings will be effective in France.

The exequatur procedure can be time consuming and costly and therefore, it would be beneficial for a more flexible mechanism of recognition to be implemented to resolve these issues.

Germany

Generally, the UK insolvency proceedings are recognized under section 343 of the German Insolvency Code (InsO), if German courts recognize jurisdiction of the UK courts for the relevant insolvency proceedings. A recognition requires that the UK insolvency proceedings are functionally comparable to German insolvency proceedings and that the decision to open proceedings is effective in the UK.

UK solvent schemes of arrangement (SoA) are not recognized under section 343 InsO, because a SoA is not regarded as an insolvency proceeding within the meaning of this provision. Assuming the UK does not accede to the Lugano convention and further assuming that the Hague convention does not apply, a recognition of a SoA could potentially be considered according to Rome I Regulation or section 328 of the German Code of Civil Procedure (ZPO).

Both alternatives are not sufficiently court-tested which is why material uncertainties remain for claims which are not governed by or otherwise connected to English law.

A recognition under the Rome I Regulation would require that the SoA be regarded as a settlement agreement or a multilateral contract and that the claims restructured under the SoA are subject to English law.

A recognition of a SoA also would be possible if the SoA approval decision could be qualified as a decision in the meaning of section 328 ZPO. In this scenario a recognition would further require one of the following:

- The respective creditor's general place of jurisdiction is in the UK.
- The place of fulfilment of the respective claim is in the UK.
- The jurisdiction of an English Court has been established, and if these requirements are not met for every single SoA creditor, that the SoA has a "close connection" with the UK, substantially similar to the "sufficient connection" required by English courts in this regard.

High quality of advice, good management of the time incurred and good coordination with lawyers from other countries

Chambers Europe, 2021

The Netherlands

There is no treaty between the Netherlands and the UK on the recognition of insolvency schemes and/or proceedings. Because there is no such treaty, assets located in the Netherlands would not fall within the UK bankruptcy proceedings. Creditors are therefore, in principle, able to take recourse against assets located in the Netherlands despite the UK insolvency schemes/ proceedings being initiated.

The UK bankruptcy receiver could still perform acts of management and the receiver could dispose of assets in so far as these rights are provided to the receiver on the basis of UK law. This means that, although the assets located in the Netherlands do not fall within the UK bankruptcy proceedings, the UK bankruptcy receiver is authorized to dispose of these assets to the extent the receiver is allowed to do so under UK law.

The bankruptcy receiver does, however, need to respect any attachments that are levied on any of these assets by other creditors, as these attachments are not affected by the UK insolvency schemes/proceedings.

As long as no treaty exists between the Netherlands and the UK on the recognition of insolvency schemes and/ or proceedings, recognition of the UK insolvency schemes/proceedings will be governed by the general rules of private international law. This means the UK insolvency schemes/proceedings are afforded recognition if the following four criteria are met:

- The UK court had jurisdiction in the matter in accordance with standards which are generally accepted internationally.
- The proceedings before the UK court complied with principles of proper procedure and fair trial.
- The relevant judgment does not conflict with the public policy (openbare orde) of the Netherlands.
- Such judgment is not irreconcilable (onverenigbaar) with either a judgment from a Dutch court rendered between the same parties or a former judgment from a foreign court rendered between the same parties in a dispute regarding the same subject and/or the same cause, provided that such former judgment is formally enforceable in the Netherlands.

Recognition of German, Dutch, and French proceedings in the UK

Recognition of German, French and Dutch proceedings might be available in the UK under the Cross-Border Insolvency Regulations 2006 (CBIR), which is the UK implementation of the UNCITRAL Model Law. Recognition is available under the CBIR for a "foreign representative" appointed under a "foreign proceeding" in relation to any debtor (although the CBIR do not apply to certain entities including credit institutions and insurers).

An insolvency proceeding is a "foreign proceeding" if it is a "collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation". A "foreign representative" is a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative in the foreign proceeding.

Recognition under the CBIR is not automatic and requires a court order. The assistance that is then provided by the UK courts also can be more limited than that provided under the Recast Insolvency Regulation.

Where a foreign representative of a foreign "main proceeding" (which is an insolvency proceeding taking place where the debtor has its center of main interests) is recognized, an automatic stay of action against the debtor and the suspension of rights in relation to the debtor's assets will apply.

Where a representative of foreign "non-main proceedings" (an insolvency proceeding taking place where the debtor has an establishment) is recognized, such a stay is not automatic, must be applied for, and is a matter of the court's discretion.

The stay in both cases is equivalent to that triggered by an English winding-up and will not affect certain rights including the right to enforce security or exercise rights of set-off, to the extent that these rights would be exercisable in an English winding-up.

Further relief (including interim relief prior to an application for recognition) may be sought by a foreign representative, including a more extensive stay and even relief entrusting the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative. Such relief may, depending on the nature and scope of the order made by the court, affect the enforcement of security and other creditor rights.

In granting such relief (or varying or terminating such relief, including any automatic stay on the application of an interested party), the court must be satisfied that the interests of creditors and other interested persons (including the debtor, if appropriate) are adequately protected.

If recognition is not available under the CBIR, a foreign representative can look to the English common law for assistance, under which the court retains its residual jurisdiction to recognize proceedings and provide assistance.

> They're terrific, they have a wide variety of expertise and breadth of lawyers.
>
> *Chambers UK*, 2021

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