Cross-Border Restructuring

The Rise of Multi-Process Restructurings

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1. Introduction

Introduction

A rapidly evolving restructuring landscape

1

Jurisdictions across Europe have completely transformed their restructuring regimes in recent years.

2

Global trend towards more debtor-friendly rescue-orientated restructuring regimes, inspired by Chapter 11.

3

This means that in large cross-border situations, there will increasingly be a choice of forum for debtors.

4

Clear uptick in multi-process restructurings, where processes in two or more jurisdictions are necessary to implement a single group restructuring.

Current state of play

Countries which have a restructuring plan

EU countries still to introduce the restructuring plan

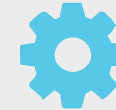
2. Restructuring Plan fundamentals

Core process – the restructuring plan

They are called different things (German StaRUG, Dutch WHOA, French Sauvegard) but the central tool at the heart of every regime is some form of restructuring plan

The essential components of a restructuring plan are as follows:

- A compromise or arrangement with creditors and/or members, which changes the rights creditors/members have against the company.
- To be implemented, the plan must be approved by a requisite majority of creditors/members and be sanctioned by the court.
- Creditors/members are organised into classes for the purpose of voting, based on similarity of rights against the company.
- If a requisite majority of a particular class votes in favour of the plan, it is an assenting class; if the threshold is not met, it is a dissenting class.
- Subject to certain conditions and court approval, the plan can be 'crammed down' on dissenting classes.



There are now a lot of different variations of this essential construct, with each jurisdiction's regime having its own distinguishing features

Key concepts

Restructuring plan

An 'arrangement' or 'compromise' between the company and its creditors and/or shareholders.

Cross-class cram down

The confirmation by a judicial authority of a restructuring plan despite the dissent of one or more affected creditor classes.

Best interest/'no worse off' test

No dissenting party is worse off as a result of the plan than it would be in the specified alternative(s).

Absolute priority rule

Rule requiring the claims of a dissenting class of creditors to be paid in full before any class of creditors junior to such dissenting class may receive or retain any property in satisfaction of their claims.

Relevant alternative

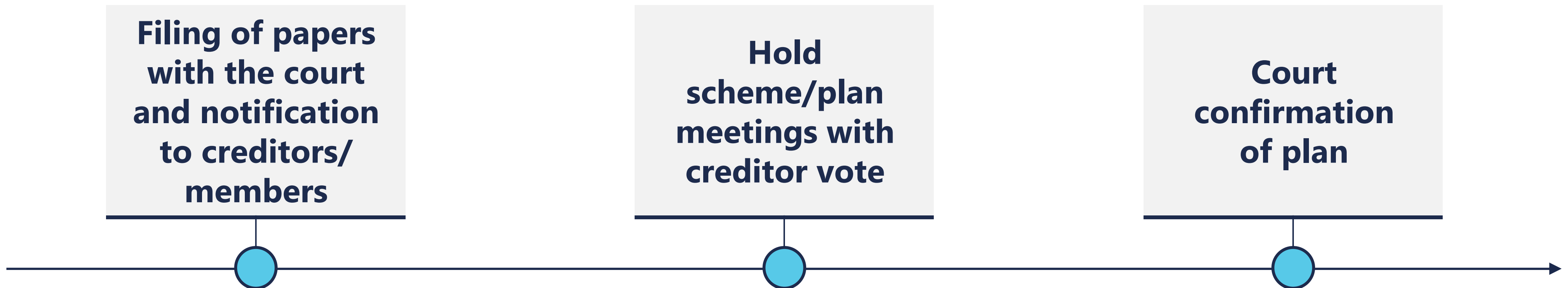
Forms the benchmark against which the best interest/no worse off test is measured. Can be stipulated to be liquidation break up value – but could be a more flexible concept (e.g. "most likely outcome absent the plan").

Sufficient connection v COMI

Some proceedings require a company to be incorporated in a jurisdiction or have its centre of main interest there. Other proceedings have a softer threshold such as 'sufficient connection' with the jurisdiction (which could be assets in the country or debt documents governed by the relevant law).

The (generic) timeline

Some basic steps always take place. Other steps vary by jurisdiction*



***e.g. in some jurisdictions there are two court hearings or certain company law driven filings**

3. Multi-process restructurings

Restructuring processes in multiple jurisdictions

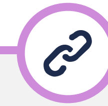
Where separate processes are conducted in more than one jurisdiction to achieve a single group restructuring. The relationships between the processes can vary.

Main process + recognition

One main restructuring process with recognition in other jurisdictions to give effect in those jurisdictions.

Similar, separate processes

Similar separate processes (e.g. a scheme of arrangement in the UK and an offshore process) can be used to increase the effectiveness of the restructuring across multiple jurisdictions.



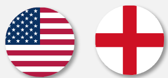
Different, separate processes

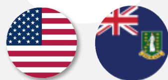
Might be necessary to use very different processes (e.g. a UK Restructuring Plan and a Dutch WHOA) that need to work together. The likely inter-conditionality of the two different processes can add significant complexity.

Increasing complexity

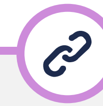
Recent Examples

Main restructuring process recognised in other jurisdictions

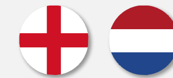




Similar, separate processes



Different, separate processes



Why undertake a multi-process restructuring?

Complex restructurings may need a cross-border toolkit, deploying mechanisms in two or more jurisdictions to produce the desired economic outcome.

Multi-process restructurings may be necessary to bind creditors to the restructuring in other jurisdictions (for instance, because of the 'rule in Gibbs').

As such, multiple restructuring processes may be required to bring greater certainty to the finality of a restructuring as a whole – but add costs and complexity

EU Directive and jurisdictional arbitrage

EU Restructuring Directive

Obligation to offer a pre-insolvency restructuring scheme in respective local law

Explosion in available processes

Recognition concerns

Will jurisdictions that have their own 'restructuring plan' be as willing to recognise others (especially if there is variation in approach)?

Rule in Gibbs

Jurisdictional arbitrage

Increase in choice of forums for restructuring processes

Debtor chooses forum(s) based on likelihood of best outcomes

4. Key considerations

Multiple court proceedings

"Race to court"

Timing and case management

Process arbitrage

Process clashes

Differences in law between jurisdictions

Voting thresholds

Legal tests
e.g. entry criteria and absolute priority

Evidential requirements

Extent of body of law

Additional complexities

Opportunities for challenge

Finality

Inter-conditionality

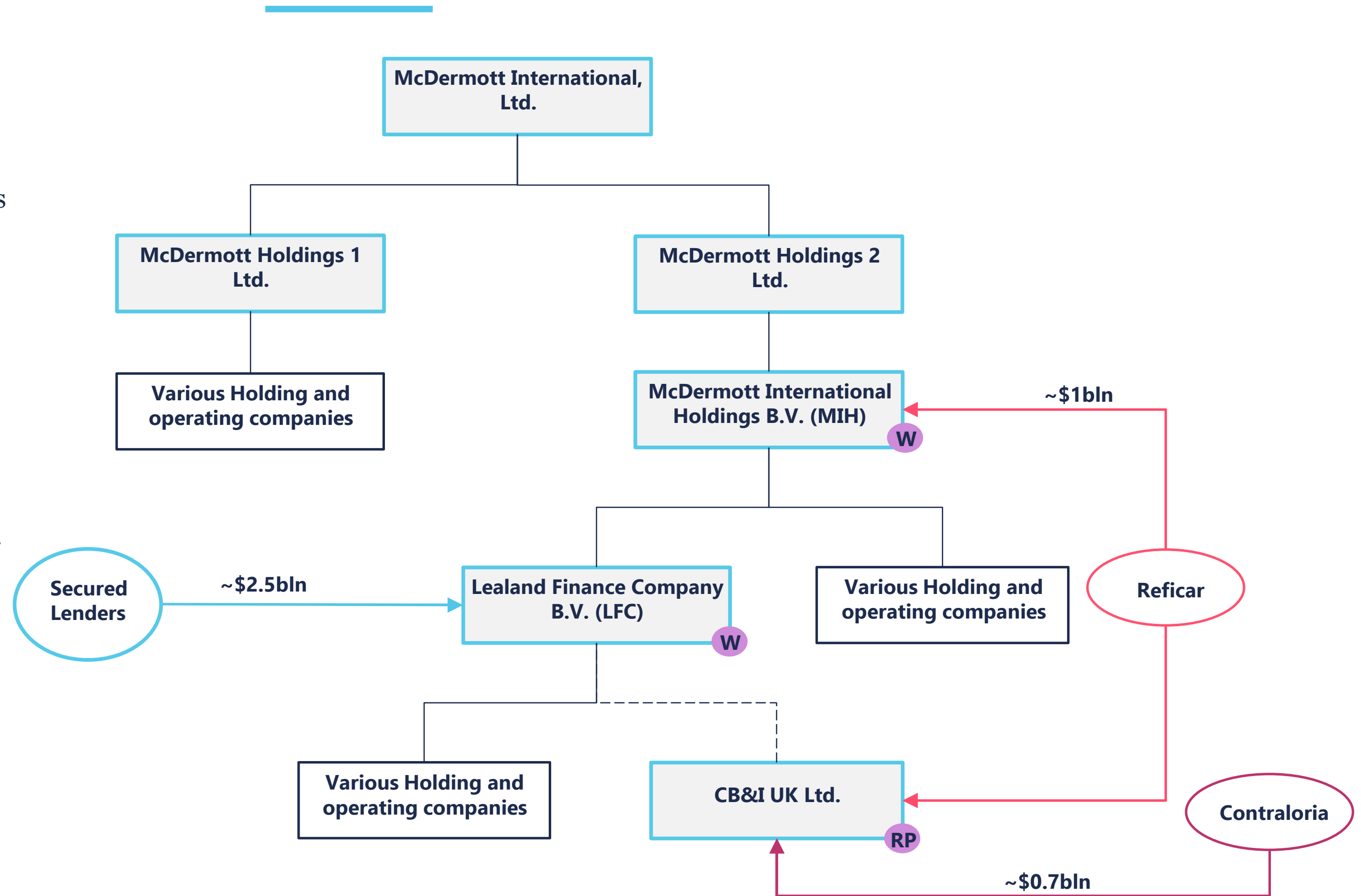
Public policy limitation

5. Case study

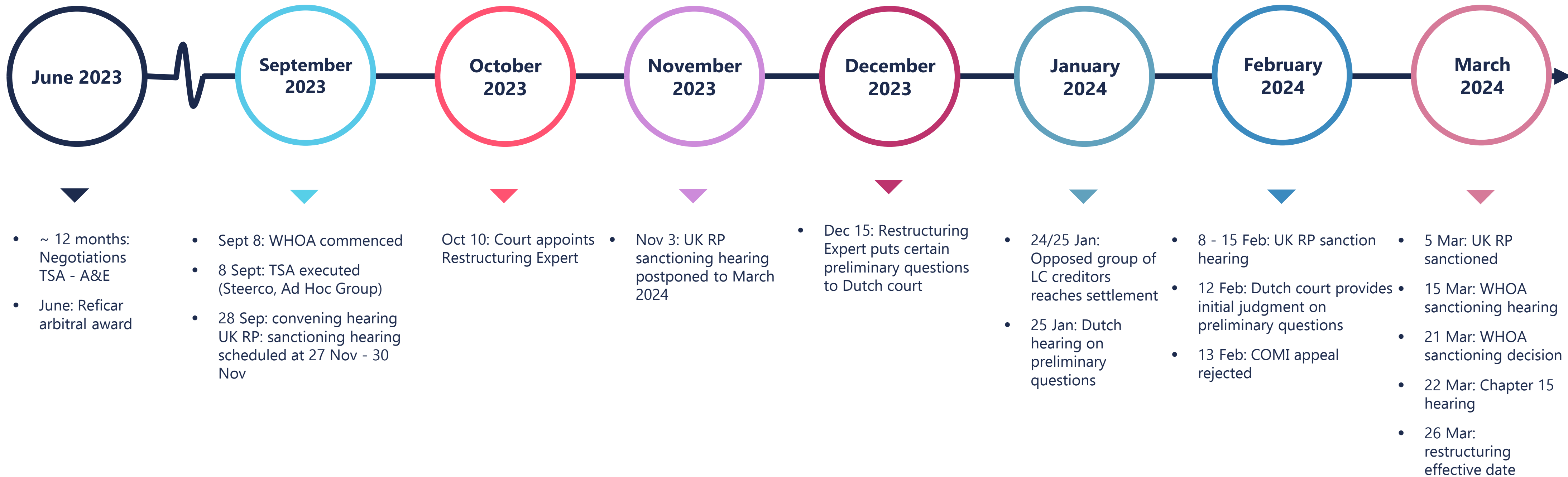
MCDERMOTT

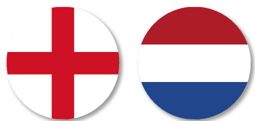
McDermott International Restructuring

- McDermott International is a Houston-headquartered oil and gas engineering group.
- In September 2023, McDermott group companies proposed a UK restructuring plan (RP) and a Dutch WHOA (W).
- Original aim of the restructuring was:
  1. Compromise the $1bn Reficar claim and $0.7bn Contraloria claim
  2. Amend and extend the group's secured debt
- McDermott's proposal was to to compromise the Reficar and Contraloria claims to c.$2m (with possibility of a further c.$2m upside) while leaving the equity intact (noting that a number of the Secured Lenders were also shareholders).



Timeline - key dates





McDermott – multi-process considerations

Process arbitrage

- RP sanction prior to WHOA process – aim to use the English court decision to pressure the Dutch court to rubber stamp.
- Unclear why RP was needed at all – Rule in Gibbs not relevant as NY debt.

Process clashes

- Restructuring Expert appointed at request of opposed creditors. No equivalent in the UK process.
- Dutch process also allowed for preliminary decisions on certain central issues.
- These both facilitate flexibility for the WHOA – WHOA able to change after it has started, harder for an RP.

Evidential requirements

- WHOA has absolute priority rule where cross class cramdown used.
- Absolute priority rule requires evidence of the allocation of 'restructuring surplus' as well as relevant alternative.
- McDermott was therefore required to provide more evidence than in an RP only.

6. Final thoughts

Final thoughts

1

A multi-process approach may be the only way to deliver some restructurings - due to different jurisdictions in play, different approaches to recognition, etc

2

A multi-process approach may also be more attractive – putting together the combination of tools that delivers the most flexible outcome

3

Regardless of necessity or desirability, multi-process approaches bring additional complexities – and therefore cost

4

Use of multiple processes likely to continue to increase – debtors, creditors, courts and advisers will need to continue to adapt

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