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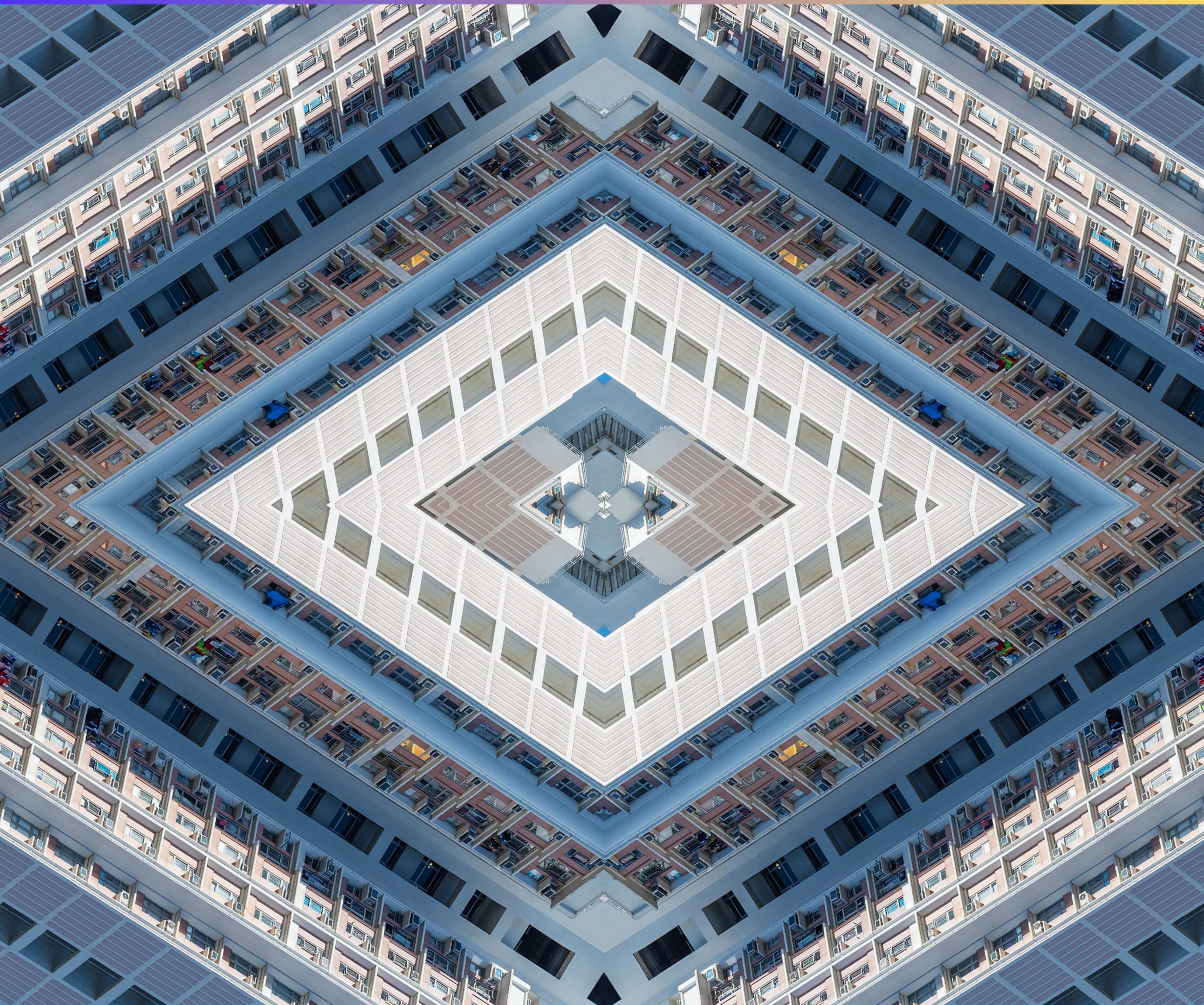
# Inside Europe's liability management landscape



# Introduction

How legal frameworks and creditor behavior influence the execution of LME transactions across Europe.

LMEs have become a defining feature of post-Covid-19 restructuring strategies. These transactions, often implemented outside formal insolvency, allow debtors to extend maturities, reduce leverage or engineer creditor dynamics through mechanisms such as exchange offers, consent solicitations, covenant stripping and debt-for-equity swaps, as well as the more aggressive drop-down, uptier and pari-plus transactions. While some of the LME tools may appear familiar across markets, the legal frameworks and market tolerances vary by jurisdiction.

In this special RX101 series, we explore the evolving landscape for liability management exercises, or LMEs, across Europe. With insights sourced directly from leading local counsel, this series, published over the next few weeks, breaks down the legal tools, restructuring tactics and cultural norms shaping how debtors approach LMEs in key jurisdictions, including **Italy, France, Germany, Spain, the Netherlands, Luxembourg and England.**

Each LME RX101 installment in this series sets out the responses of leading restructuring lawyers to a common questionnaire designed by the Octus team.

# England

## Key takeaways

1. **Few public LMEs outside court process:** English LMEs executed out of court remain rare. Most LME-style transactions have relied on schemes of arrangement or Part 26A restructuring plans for in-court implementation.
2. **Court-sanctioned LMEs are dominant:** Transactions involving uptiering or asset transfers, such as in McDermott, were implemented via restructuring plans. The flexibility and judicial certainty of Part 26A make it the preferred tool for LME implementation in the UK market.
3. **Directors' duties constrain aggression:** Under Sequana, directors must consider creditors' interests where insolvency is probable. This fiduciary duty limits the scope for aggressive out-of-court LMEs that could prejudice dissenting creditors.
4. **Cultural conservatism limits US-style LMEs:** UK advisors tend to avoid US-style coercive tactics, favoring consensus and fairness. Reputational risk, judicial skepticism and commercial norms shape a more cautious approach.
5. **High litigation risk on technical grounds:** Even if legally permitted, LMEs could be challenged in court on grounds of contractual breach or improper valuation, especially where creditor treatment is unequal or documentation interpretation is stretched.
6. **Clawback risk if insolvency follows:** Antecedent transaction rules under the Insolvency Act 1986 expose LMEs to clawback within a six-month to two-year window, depending on the nature of the counterparty and solvency status at the time of the transaction.
7. **Restructuring plans offer cramdown power:** Part 26A allows cross-class cramdown if one class approves and dissenting classes are not worse off than under the relevant alternative. This enables non-consensual LME implementation via court.
8. **Courts police coercive tactics:** English courts have shown a willingness to strike down coercive exchanges, as seen in Assénagon and continue to balance restructuring utility with creditor protection in Part 26A decisions.

***Octus in - house restructuring Lawyers:*** *Shan Qureshi and Chetna Mistry*

## Detailed questionnaire

**LME: Please provide recent examples of any successful or attempted LME by debtors in your jurisdiction.**

There have been very few public examples of English LMEs executed outside a court process. Most UK restructurings with LME features, such as uptiering or asset transfers for new money, have instead been implemented through a Part 26A restructuring plan or scheme of arrangement.

Notable examples include McDermott and Haya, where aggressive creditor reordering was achieved with court sanction. This reflects both legal risk and cultural caution, detailed below. Unlike in the United States., UK boards are generally more hesitant to pursue extrajudicial tactics due to director liability concerns and less flexible English law documentation. Further the flexibility, speed and efficiency of the Part 26A tool makes the court route more attractive.

**Is there anything in the Director's Duties regime of your jurisdiction that could restrict or affect an LME?**

The UK directors' duties regime could impose constraints on LMEs, especially when a company is nearing insolvency. Under Section 172(1) of the Companies Act 2006, directors must act in a way they consider, in good faith, would promote the success of the company for the benefit of its members as a whole. However, Section 172(3) modifies this duty, stating that it is subject to any rule of law requiring directors, in certain circumstances, to consider or act in the interests of the company's creditors.

The UK Supreme Court's decision in BTI 2014 LLC v. Sequana SA [2022] UKSC 25 clarified the existence and scope of this so-called "creditor duty." The court held that directors are required to consider the interests of creditors when they know, or ought to know, that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable.

This duty is not a standalone obligation but forms part of the directors' fiduciary duty to act in the interests of the company. The weight given to creditors' interests increases as the company's financial difficulties deepen. Once insolvent liquidation or administration becomes inevitable, the interests of creditors become paramount.

Directors must ensure that any LME does not unfairly prejudice creditors' interests, especially when the company is in financial distress. For instance, actions such as obtaining credit, disposing of assets at an undervalue, or giving preferential treatment to certain creditors could lead to personal liability for directors if they worsen the company's financial position.

Moreover, the duty to consider creditors' interests can override shareholders' interests when the company is insolvent or nearing insolvency. This means that directors cannot prioritize shareholder interests over those of creditors in such scenarios.

In summary, the UK's directors' duties regime, particularly the creditor duty as clarified in Sequana, could impose significant constraints on LMEs when a company is bordering on insolvency or an insolvency is probable. Directors must carefully consider the interests of creditors when the company is facing financial difficulties, ensuring that any restructuring efforts do not unfairly prejudice creditors and that they act in good faith to promote the company's success within the bounds of the law.

**Are there cultural norms or indicative behavior from management that would restrict aggressive LME?**

While English law does not prohibit aggressive LME, in practice they remain relatively uncommon compared with the United States and that is not simply down to legal doctrine. A range of cultural norms and behavioral constraints within the UK restructuring ecosystem act as informal but powerful guardrails, shaping how distressed companies and their advisors approach potential LMEs.

Professional culture has a large impact. Unlike the US, where document-driven LMEs, such as drop-downs or uptierings, may be viewed as savvy structuring, the UK market generally prizes consensus-building and procedural fairness. Advisors may be wary of endorsing strategies that, even if legally defensible, could be perceived as undermining creditor equality or exploiting intercreditor loopholes. Judicial attitudes reinforce this, as English courts are traditionally skeptical of transactions that favor form over substance, particularly where there is creditor disenfranchisement or insider-led maneuvering.

Looking at market practice, in syndicated deals or broadly held debt structures, UK lenders, particularly institutional funds, CLO managers and banks, often expect engagement, even where consent thresholds permit unilateral action. A borrower pursuing a coercive LME without broad creditor consultation risks not only legal challenge but also commercial backlash, including future capital market exclusion.

Third, director behavior is influenced by risk aversion and post-Sequana duties (as set out above). Directors of English companies must now consider creditors' interests when facing a real prospect of insolvency and prioritize them once insolvency becomes inevitable. This fiduciary shift makes aggressive LMEs, particularly those that deepen insolvency or favor certain stakeholders, more difficult to justify. Boards, especially those with independent directors, are often unwilling to sanction such transactions without court supervision, pushing companies instead towards formal tools like Part 26A plans or CVAs.

**Are LMEs likely to be vulnerable to later antecedent (clawback) claims if a debtor enters insolvency and if so, what is the look-back period? How can this be mitigated?**

In England, LMEs may be vulnerable to challenge if the debtor enters a formal insolvency process, particularly where the transaction appears to have conferred an advantage on one group of creditors at the expense of others. The key statutory tools available for such a challenge are the antecedent transaction provisions under the Insolvency Act 1986, including transactions at an undervalue (section 238), preferences (section 239) and transactions defrauding creditors (section 423).

**The relevant look-back periods vary:** for transactions at an undervalue and preferences, the period is six months before the onset of insolvency, extended to two years where the transaction involves a connected party. To bring a claim, the administrator (or other appointed officeholder) must show that the debtor was insolvent at the time of the transaction or became insolvent as a result. The section 423 regime, which does not require insolvency at the time, has no fixed look-back period but requires proof of intent to prejudice creditors.

Certain features of LMEs (such as the transfer of assets into a newco structure, the granting of new security, or the subordination of certain creditors) can raise red flags under these provisions, particularly if undertaken close to insolvency or without adequate value flowing back to the debtor.

Mitigating the risk of a clawback challenge requires a careful and well-documented process. Directors should ensure the board receives robust legal and financial advice and that the commercial rationale for the transaction is clear. Engaging with a broad cross-section of creditors and avoiding selective treatment can help blunt later claims that the transaction was unfair or intended to prejudice. In higher-risk scenarios, the use of a court-sanctioned process such as a restructuring plan or scheme of arrangement may offer greater protection and finality (see below).

**What other challenges (under your bankruptcy regime) may a debtor seeking to use an LME face?**

In the United Kingdom, debtors pursuing LMEs may face litigation risks that go beyond clawback actions. Two of the most likely challenges are based on contractual interpretation and disputes over valuation.

Contractual challenges could typically arise where creditors argue that the LME breaches the terms of the governing debt documents. These may relate to covenant restrictions on asset transfers, limitations on incurring additional debt, or pro rata sharing clauses. A creditor who finds themselves structurally subordinated or excluded from a deal may claim that the debtor acted outside its contractual authority or that majority lenders have exercised their voting powers improperly.

Valuation disputes may occur in the context of dropdowns or uptierings. Creditors may argue that the assets transferred to a new vehicle were undervalued or that new instruments issued in exchange for old debt unfairly skew economic rights. These disputes could turn on whether the company was solvent, how the assets were valued and whether the process used to determine value was robust.

Although English courts are reluctant to override the commercial arrangements made between sophisticated parties, they have shown a growing willingness to test the fairness of complex transactions, particularly where creditor groups are treated unequally or where there is a perceived abuse of process. For debtors, thorough documentation and early creditor engagement remain the best defense.

**What restructuring technology exists (in brief) for in-court non-consensual implementation of an LME? What is the level of consent required? Can a non-consenting class be crammed down?**

In England, the key court-supervised tool for implementing a non-consensual LME is the restructuring plan under Part 26A of the Companies Act 2006. Introduced in 2020, the restructuring plan allows a company in actual or likely financial distress to propose a compromise or arrangement with its creditors or members. Crucially, it includes a cross-class cramdown mechanism, enabling the court to impose the plan on dissenting classes of creditors if certain conditions are met.

Approval typically requires a vote in favor by at least 75 percent in value of creditors or members present and voting in each class. However, where one or more classes vote against the plan, the court can still sanction it if two key tests are satisfied. First, the court must be satisfied that none of the dissenting classes would be worse off under the relevant alternative, usually administration or liquidation. Second, the plan must have been approved by at least one class who would receive a payment or have a genuine economic interest in the relevant alternative.

This tool has become central to UK liability management strategy, allowing companies to override holdouts, restructure priority and engineer capital structures through court-backed transactions. In Re Virgin Active Holdings Ltd., the court sanctioned a plan despite objections from landlords who felt unfairly treated, noting that the plan met the statutory requirements and was not unjust. However, in Re Adler Group S.A., the Court of Appeal set aside the sanction of a restructuring plan, emphasizing the need for fairness and proper consideration of alternative solutions.

These cases underscore a nuanced approach by UK courts. While they recognize the necessity of restructuring mechanisms, they remain vigilant against tactics that could unfairly prejudice minority stakeholders.

“UK courts have shown a willingness to strike down coercive exchanges, reaffirming their role as gatekeepers of fairness.”

**What is the case law on coercive exchanges? Are there any recent examples?**

In the evolving landscape of UK restructuring law, the concept of "coercive exchanges," where debtors pressure creditors into accepting less favorable terms, has garnered significant attention. Robert Peel's analysis in "Assessing the Legality of Coercive Restructuring Tactics in UK Exchange Offers" delves into this issue, highlighting how tactics like 'exit consents' and 'covenant strips' can undermine minority bondholders' rights. While such strategies have been more prevalent and, at times, accepted in US practice, UK courts have shown a willingness to scrutinize and, in certain cases, invalidate them.

A pivotal case in this context is Assénagon Asset Management S.A. v. Irish Bank Resolution Corporation Limited, where the English High Court invalidated an exchange offer that effectively expropriated non-consenting bondholders' rights. The court emphasized that majority bondholders should not use their power to coerce minorities into unfavorable positions, reinforcing the principle against abuse of power in corporate governance.

The decision in Assénagon remains the leading UK authority on coercive exchange tactics. The court found that an exchange offer that stripped non-consenting noteholders of value by redeeming their notes for a nominal sum was an abuse of majority power and void for illegality. Justice Briggs held that the consent mechanism had been deployed oppressively to force minority participation, violating the principle that power must be exercised for proper purposes. The case drew a clear line against coercion in bondholder vote; however, although the fact patterns in Assénagon were rather extreme, the principle should be considered in current LMEs.

## Court-supervised certainty and the limits of aggression

While the UK remains Europe’s benchmark for court-driven LME execution, France is building a new identity. Backed by recent reforms and increased sponsor confidence, the French restructuring landscape is embracing more coercive LME tactics once considered incompatible with its legal tradition.

# France

## Part 1: France – Key takeaways

1. **First of their kind:** France's LME playbook has been rapidly expanding, with Atalian (2024) and Altice (2025) marking the jurisdiction's first fully fledged LME transactions.
2. **Accelerated safeguard as an "incentive":** The 2021 French insolvency reforms enable cramdowns at a two-thirds creditor threshold using accelerated safeguard proceedings, a powerful incentive in out-of -court negotiations.
3. **Cultural shift underway:** Traditional hesitation around non-pro-rata tactics is waning. Anglo-style coercive strategies are gaining traction among sponsors and counsel alike.
4. **No creditor-centric duty shift:** Directors' duties remain focused on corporate interest, with a flexible doctrine that allows for value transfers if done at fair market value, in compliance with the finance documents and justified on a group basis.
5. **Covenant stripping works:** Atalian demonstrated that dissenting creditors can be left holding structurally subordinated, protection-lite instruments when majority-backed exchanges go ahead.
6. **Clawback risk is real:** France's hardening period can be backdated up to 18 months. Transactions during this window face both automatic and discretionary avoidance risks.
7. **Mitigation is possible:** Independent valuations, audited business plans and Rozenblum-compliant intra-group support structures are essential to LME defensibility.
8. **No case law, but clear practice:** While coercive exchanges haven't yet faced full judicial scrutiny, recent transactions show a de facto tolerance where the restructuring is commercially fair and well structured.

***Law firm contributor:*** White & Case LLP France

## Detailed questionnaire

**LME: Please provide recent examples of any successful or attempted LME by debtors in your jurisdiction**

LME transactions are increasingly frequent in France and have been facilitated thanks to the 2021 French insolvency law reform that introduces the cramdown mechanism and accelerated safeguard proceedings in our system. These tools are effective and can now be used as a "stick" to facilitate amicable LME transactions. Atalian (2024) and Altice (2025) are the first plain-vanilla LME transactions in France.

**Atalian**

In 2024, Atalian successfully completed a consensual refinancing through an exchange offer backed by 98% of its bondholders. This operation involved a mandatory cash repayment of €300 million, supplemented by an additional €100 million cash payment for supporting bondholders. Since this supporting fee was offered to all bondholders, who were free to tender their bonds in due time and thereby participate in its allocation, the fee did not constitute an improper vote-buying practice under French law. The remaining debt was restructured through the exchange of €836 million in senior secured notes maturing in June 2028, bearing an interest rate of 8.5%, composed of 3.5% payable in cash and 5% payable in kind, or PIK. This transaction effectively extended Atalian's debt maturity profile while enhancing creditors' protections through the granting by Atalian of a series of securities, including, notably, the implementation of a 'Double LuxCo' structure.

The transaction is notable because it is the first example on the French market where a majority of creditors among several issuances forces a transaction over dissenting creditors through the threat of an accelerated safeguard which would allow to implement a transaction at a 2/3 threshold (compared with a 90% threshold under the HY finance documents).

Under this transaction, creditors who did not accede to the transaction would have remained holders of the original debt but deprived of all their material protections through a covenant strip imposed by the supporting creditors.

## Altice France

In 2025, Altice France undertook a significant financial restructuring aimed at reducing its substantial debt burden of approximately €24 billion, mostly composed of high-yield bonds. The restructuring, achieved outside of formal insolvency proceedings, reduced the group's consolidated net debt by €8.6 billion through one of the largest debt-for-equity swaps in France. This brought the group's net debt down to €15.5 billion.

**Key features of the transaction include:**

- **Substantial debt reduction:** Roughly €7.9 billion debt reduction to bring consolidated net debt to €15.5 billion, resulting in a 1.7x net deleveraging to 4.6x net leverage;
- **Maturity extention:** 90% of AF S.A. debt maturing in 2029+ (i.e., around 2.75-year average maturity extension for the AF S.A. TL/SSNs) and AFH SUNs pushed to 2033;
- **Coupon increase:** About 137.5 bps increase to existing coupons/margins for AF S.A. TL/SSNs.
- **Equitization:** AF S.A. creditors receive a 31% equity stake and AFH S.A. creditors receive a 14% equity stake (while existing shareholders were diluted down to a 55% equity stake); and
- **Strengthened AF S.A. creditor protections:** Tightened covenants and addition of "Double LuxCo" guarantor structure and pledge with a tailored preferred share mechanism.

### Is there anything in the Director's Duties regime of your jurisdiction that could restrict or affect an LME?

Under French law, there is no shift in fiduciary duties to creditors when a company becomes insolvent. Directors are not legally required to prioritize creditors' interests nor provide equality of treatment for creditors outside of insolvency proceedings, even during financial distress. French case law acknowledges that the broader interests of a corporate group may justify value transfers to a financially distressed parent company, provided such transfers are aimed at preserving the overall group's common interest, including the protection of employees and the sustainability of the business.

While the notion of corporate interest ("intérêt social") remains imprecisely defined in French law, it is generally interpreted to imply that, in the event of an asset transfer, such transfer must occur at fair market value. More broadly, it necessitates a demonstration (on an entity-by-entity basis and supported by a medium-term business plan (typically covering a two- to three-year horizon)) that any diminution of assets (through the transfer) or increase in liabilities (such as the incurrence of additional debt) is not such as to endanger the viability of the entity's operations over the relevant planning period.

Corporate interest of the company is a concept broadly defined under French law to encompass not only the company's profitability but also its social purpose, sustainability, and the preservation of its assets.
The corporate interest doctrine permits directors to consider the interests of the company as a whole, including employees and other stakeholders, while ensuring the company's continued operation.

It should further be noted that French case law affirms the fundamental right of any debtor to propose measures aimed at accelerating its deleveraging and to make use, in that context, of any favorable leverage it may hold in relation to its creditors.

**Are there cultural norms or indicative behavior from management that would restrict aggressive LME?**

Under French law, there are no legal norms that inherently restrict the use of aggressive LMEs. Historically, French companies in financial distress have favored formal restructuring procedures such as mandat ad hoc and conciliation, which require unanimity for bank debt or a supermajority for bond debt. Additionally, cultural barriers did exist among certain investment funds, which prioritized maintaining constructive relationships with lenders and, as a result, tended to perceive LME transactions as overly aggressive towards them. This traditional preference for consensual approaches has resulted in LMEs being relatively rare in France. However, this rarity is due to entrenched practices rather than any legal prohibition. On the contrary, French law does not prohibit the implementation of LMEs, provided they respect contractual obligations of the company and do not constitute a misuse of assets or breach the corporate interest principle.

The Atalian restructuring in early 2024 exemplifies a turning point, demonstrating how aggressive LME strategies can be effectively deployed to achieve favorable outcomes. By offering enhanced securities and immediate payments to consenting creditors while effectively stripping non-consenting creditors of financial protections, the transaction created strong incentives for participation without resorting to formal insolvency proceedings. This innovative and assertive approach, inspired by Anglo-Saxon practices, highlights the increasing openness to LME strategies within the French restructuring landscape. As these techniques prove effective, there is every reason to expect their usage to become more frequent and widely accepted. In essence, while aggressive LMEs are not yet commonplace, the legal framework is fully compatible with their implementation, and their adoption is likely to expand significantly in the near future.

**Challenges: Are LMEs likely to be vulnerable to later antecedent (clawback) claims if the debtor enters insolvency, and if so what is the look-back period? How can this be mitigated?**

Under French law, there is a significant risk of clawback actions associated with LMEs, particularly when conducted during periods of financial distress. This risk arises from the statutory hardening period (période suspecte), which extends from the date the company is deemed insolvent until the opening judgment of insolvency proceedings. Critically, the court has the authority to retroactively set the commencement of the hardening period to a date up to 18 months prior to the insolvency judgment. Transactions executed during this period may be declared void if deemed contrary to the company's interests, whether automatically by law or at the court's discretion.

Under Article L. 632-1 of the French Commercial Code, several transactions are automatically void if performed during the hardening period. These include gratuitous transfers of assets, agreements where the debtor's obligations are disproportionately greater than those of the counterparty, payments for debts not yet due, and security interests granted for antecedent debts unless replacing prior equivalent security. Furthermore, other transactions may be voided at the court's discretion if conducted during the hardening period with knowledge of the debtor's insolvency.

However, the risk of clawback can be effectively mitigated through careful structuring and compliance with applicable legal standards. In particular, when an LME involves asset transfers, it is essential to ensure that such transfers are executed at fair market value, or FMV, and that the company is not insolvent at the time of the transaction. Where relevant, French law requires the appointment of a contribution auditor (commissaire aux apports) to provide an independent assessment of the value of non-cash contributions, thereby significantly reducing the risk of subsequent challenges on valuation grounds.

**More specifically:**

- Asset transfers must occur at FMV. Any asset transfer contemplated under an LME, whether structured as a sale, contribution in kind, or otherwise, must be executed at fair market value. This principle is fundamental to mitigating recharacterization or clawback risks and is often substantiated through independent valuation reports. The set-out of a third-party valuation of both the contributed assets and the consideration received (e.g. shares or cash issued by the subsidiary) will be key.
- Where the transaction involves the transfer of assets or cash, it is essential to ensure that the relevant subsidiaries remain financially sound. This can be demonstrated through a third-party audited business plan evidencing the subsidiary's ability to meet its post-transaction debt obligations.
- Upstreaming funds from a subsidiary to its parent is not prohibited per se. This type of transaction may benefit from the application of the Rozenblum doctrine, which allows intra-group financial support provided that the transaction serves the group's overall interest and does not result in a disproportionate sacrifice by the contributing subsidiary.

While clawback risk is inherent to LMEs conducted under financial distress, adherence to these protective measures provides substantial legal protection against successful clawback claims.

**Challenges: What other challenges (under your bankruptcy regime) may a debtor seeking to use an LME face?**

In addition to the risk associated with the hardening period, a debtor seeking to implement an LME may face several legal challenges beyond creditor coordination and financial structuring under the French bankruptcy regime. Two other notable legal risks include (i) the risk of criminal liability for abus de biens sociaux, or ABS, and (ii) potential challenges based on the action paulienne.

First, directors may be exposed to criminal liability for abus de biens sociaux, i.e., the misuse of company assets in violation of the company's interest, particularly where a subsidiary incurs obligations or transfers assets primarily for the benefit of its parent company or the wider group. While the Rozenblum case law provides some protection by recognizing that intra-group financial support may be lawful if justified by a legitimate group interest and proportionate to the subsidiary's financial capacity, these conditions must be carefully met. An LME involving upstream loans or intercompany asset transfers could give rise to ABS exposure if the transaction is not demonstrably in the subsidiary's corporate interest and leads to an unjustified financial burden.

Second, creditors may attempt to challenge an LME transaction through the action paulienne, which allows a creditor to render unenforceable against the creditor a transaction made in fraud of their rights. However, this remedy is subject to strict limitations that render it difficult to enforce under French law compared with the concept of "fraudulent conveyance":

- The transaction must have prejudiced the creditor by diminishing the debtor's assets and impairing the creditor's ability to enforce their claim;
- The debtor must have acted fraudulently, meaning with the intent to impair creditors' rights or to organize their own insolvency; and
- In the case of a transaction for value (as opposed to a gratuitous act), the creditor must further demonstrate that the beneficiary of the transaction knew of the fraudulent intent.

These cumulative conditions make the action paulienne difficult to implement in practice, particularly in the context of a restructuring transaction like an LME that is transparently offered to all creditors on equal terms. It should also be noted in turn that no act of fraud upon creditors may be established where the transaction is carried out in full compliance with the terms of the financial documentation. Furthermore, the remedy is limited in scope: it does not grant the creditor a direct recovery but only restores the asset to the debtor's estate, where it may be subject to enforcement or collective proceedings.

In summary, while French law does provide tools that may be used to challenge LME-related transactions, each is subject to significant legal and evidentiary constraints. A carefully structured LME that adheres to fair market value principles, respects the corporate interest of all entities involved, and is properly documented will significantly reduce the risk of successful challenge under any of these grounds.

In addition to this, financial creditors' ability to initiate claims is limited by the requirement that a certain percentage of the debt, as specified in the relevant financing documentation, must be held by the initiating creditors. This threshold is usually 90% in high-yield bond documentation and 100% in credit documentation.

**Implementation: What restructuring technology exists (in brief) for in-court nonconsensual implementation of an LME? What is the level of consent required? Can a non-consenting class be crammed down?**

Under French bankruptcy law, the mechanisms available for the in-court, nonconsensual implementation of LME depend significantly on the degree of creditor support and classification under the relevant financing instruments. The applicable restructuring tools are designed to strike a balance between the debtor's interest in restructuring its debt and the protection of creditors' rights, particularly through adherence to the absolute priority rule and the best interest test.

Where a sufficient majority of creditors consents to the proposed LME, the debtor may proceed with an entirely consensual restructuring outside formal insolvency proceedings. Such agreements are generally governed by the applicable financing documentation, which often requires 90% creditor approval for high-yield debt, reflecting the heightened risk profile and contractual structuring of such instruments, and 100% creditor approval for bank debt, where unanimity is typically required due to the bespoke nature of credit agreements. Achieving these thresholds allows for an out-of-court restructuring, preserving confidentiality and minimizing procedural complexity and operational impact.

When the thresholds for consensual restructuring are not met but significant creditor support exists, the debtor may turn to a court-supervised, two-step process combining a brief, technical conciliation (only used to access the accelerated safeguard mechanism) with an accelerated safeguard procedure. In practice, the terms of the LME will already have been negotiated and documented (typically through a lock-up agreement) ahead of these proceedings, making the conciliation a procedural step rather than a forum for substantive negotiation. The purpose of the conciliation in this scenario is to enable the debtor to launch accelerated safeguard proceedings, which allow for the binding of dissenting creditors, thereby lowering the consent threshold to a two-thirds majority (per class) under a structured voting process.

In such an event, the restructuring plan must comply with the absolute priority rule, ensuring that senior creditors are paid in full before any recovery is granted to junior creditors or shareholders. It should be noted, however, that this rule is applicable solely where a class has opposed the plan through a negative vote. Additionally, the plan must satisfy the best interest test, ensuring that dissenting creditors receive at least as much as they would under a liquidation scenario.

Once these requirements are met, the court may confirm the plan, making it binding on all affected creditors, including dissenters. This cramdown mechanism allows the debtor to proceed with an LME even in the face of creditor opposition, provided that fairness and creditor protection standards are respected. The French framework for LMEs thus offers a structured approach for nonconsensual implementation when necessary, particularly through accelerated safeguard proceedings backed by the absolute priority rule and the best interest test.

**Implementation: What is the case law on coercive exchanges? Are there any recent examples?**

There is no established case law on the matter; however, such transactions have been implemented in practice. We are not aware of any specific legal grounds that would allow for a general challenge to coercive exchanges. Since French law does not prohibit a company from repaying near-term maturities while extending longer-dated debt, provided that its viability is supported by a third-party audited business plan. Likewise, differential treatment of creditors in the context of out-of-court, consensual transactions is not, in itself, unlawful.

*With thanks to the team at White & Case LLP for their expert contribution to this jurisdictional insight.*

## From consensus to coercion

Where France is accelerating with new tools and assertive structuring, Germany continues to emphasize predictability and creditor consensus. Legal conservatism, combined with strong fiduciary oversight and limited market scale, has constrained the use of aggressive liability management strategies.

# Germany

## Germany - 8 Key Takeaways

1. **Limited use of aggressive LMEs:** Aggressive liability management exercises such as dropdowns, uptierings, or double-dip transactions are rare in the German market due to typically simpler capital structures and cautious legal and cultural environments.
2. **Director duties and conservative culture:** German directors face stricter fiduciary duties and a risk-averse legal culture, making them more hesitant to implement aggressive or potentially litigious LME strategies, especially when a company nears insolvency.
3. **Focus on less aggressive tools:** German debtors prefer less “aggressive” tools like discounted debt buybacks, distressed exchanges, and debt-to-equity swaps, often implemented via StaRUG or other court-supervised schemes.
4. **Legal and market constraints:** The German Act on Debt Securities imposes restrictions on offering selective incentives and gives dissenting bondholders rights to challenge LMEs, slowing down or even blocking transactions.
5. **Clawback and personal liability concerns:** Directors and stakeholders are wary of clawback risks and potential personal liability if a LME is later deemed to have disadvantaged creditors, reinforcing a conservative approach.
6. **Coercive exchange offers are rare:** Coercive exchanges face legal and regulatory hurdles in Germany, including securities prospectus requirements and potential legal challenges from dissenting creditors, which hinder their use.
7. **Smaller market, relationship sensitivities:** Germany's smaller credit market and the importance of maintaining lender relationships discourage aggressive tactics that might alienate creditors for future financings.
8. **Cross-border and alternative restructuring tools:** German debtors often utilize English schemes or restructuring plans in addition to StaRUG, as these are cost-effective alternatives to chapter 11 and provide flexible restructuring frameworks.

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## Detailed questionnaire

**LME: What are the typical LMEs that are undertaken by debtors in your jurisdiction? Are Dropdowns, Uptierings, DoubleDips etc common?**

Until now, more aggressive LMEs such as dropdowns, uptierings or double dip transactions are not commonly used in the German market. In addition to the other factors discussed below, this in particular reflects the limited number of German debtors with complex capital structures that are most suitable for complex LMEs. While certain challenges to implementing LMEs are driven by issues that arise only when the debt documentation is governed by German law, other issues (such as directors’ duties or clawback risks) arise whenever a German debtor is party to the transaction and irrespective of the governing law (which often is English or New York law). When German debtors have engaged in LMEs in distressed situations, they have focused on capturing discounts through debt buy backs or distressed pro rata debt exchanges/debt-equity-swaps. Distressed debt exchanges have been implemented both out-of-court using the German Act on Debt Securities as well as in-court proceedings such as a German scheme process (so-called StaRUG).

**LME: Please provide recent examples of any successful or attempted LMEs by debtors in your jurisdiction.**

As mentioned above, there are no publicly known precedents for aggressive LMEs such as dropdowns, uptierings or double dip transactions under German law. DEMIRE successfully completed a value capture transaction by repurchasing a portion of its outstanding bonds using, among other sources, liquidity provided by its largest shareholder in the context of a distressed refinancing transaction in 2024.

***For full disclosure:*** *Latham & Watkins LLP acted as counsel to DEMIRE in connection with the transaction.*

**Management: Is there anything in the Director's Duties regime of your jurisdiction that could restrict or affect a locally incorporated debtor from implementing a LME?**

Like in most continental European jurisdictions, directors of a German debtor are duty bound to act in the best interests of the debtor taken as a whole, which typically aligns with the interests of the shareholders or sponsor. Other than, for example, in the U.K. there is, however, no statutory "shift of duties" towards creditors once a debtor is in financial difficulty. While LME's are primarily shaped by the underlying credit documentation which for German credits is typically either New York law, English law or German law, there is an important local law factor as well.

**Key considerations resulting from the German directors' duties regime for LME's are:**

- Fiduciary responsibilities are generally stricter on directors in Germany compared to the U.S. In addition to a cultural aspect (see the next question below), directors perceive their duties more from a 'defensive' aspect. It is often at the top of their mind as to how actions can be justified later. There is less of a focus on proactive value creation or capturing discounts.
- In reality, this makes it less likely for directors to propose structuring solutions that disadvantage certain creditors or a certain group of them, especially if it might be perceived as aggressive, risky or potentially subject to subsequent litigation.
- This dynamic becomes more evident the closer a borrower is to actual financial distress and insolvency as scrutiny then increases. Directors then typically become increasingly concerned around not just clawback risks (see below) in a potential subsequent insolvency but also around potential personal liability for having disadvantaged creditors in case the resulting transaction (for example, in case of successful subsequent litigation) did not leave the debtor fully funded and on a stable financial footing.
- Thus, compared to the U.S., directors in Germany are more likely to take a conservative assessment on LME's generally. This combines with typically smaller capital structures in Germany, so risk and reward also come into play. Directors will consider, given there is - comparatively speaking – less upside with a creative and potentially risky transaction, whether there is enough reward to warrant pursuing a LME transaction.

As a result, directors will typically be more inclined towards the less aggressive spectrum of LMEs such as, for example, capturing discounts. While there are ways for shareholders and sponsors to mitigate this impact, German directors' duties remain a key factor that needs to be considered and addressed prior to any LME implementation.

**Management: Are there cultural norms or indicative behavior guidelines for management that would restrict an aggressive LME?**

In addition to the limitations resulting from directors' duties, sponsors and debtors alike will also consider additional factors for LMEs:

- The German credit market is smaller than the U.S. and U.K. markets. If as a sponsor you disadvantage certain creditors, there is a non-zero chance you will face relationship considerations in subsequent financing rounds for the relevant borrower or other portfolio companies.
- Institutional relationships continue to shape the market and there is a smaller pool of relevant players compared to larger markets.
- Costs of restructuring processes are not as high as with chapter 11 processes. Thus, there is less of an incentive to avoid a formal restructuring process, other than German insolvency which is typically still considered the least-desirable outcome for creditors. Depending on the fact pattern, German debtors have the choice between (at least) the implementation processes of a German scheme (so-called StaRUG), the English scheme of arrangement and the English restructuring plan. All of these are by now tried-and-tested for German debtors and typically incur less transaction costs compared to a Chapter 11 process.
- From a cultural perspective, LME assessments in Germany tend to be viewed more from a value preservation rather than from a proactive value creation perspective. German directors will keep in mind that in case a LME transaction fails, they will still need to complete a refinancing or restructuring transaction so may shy away from any transaction that introduces friction into their creditor universe.

For aggressive LME's, it is very much a risk/reward assessment in the context of German directors' duties.

**Challenges: Are LMEs likely to be vulnerable to later antecedent (clawback) claims if a debtor enters insolvency and if so what is the look back period? How can this be mitigated?**

There is an extensive playbook of potential LME transactions and any clawback assessment in a subsequent debtor insolvency (and, mostly theoretically, also by other creditors outside of insolvency) will be dependent on the specific type of LME transaction that was utilized.

**Key mitigants from a clawback perspective are:**

- Debtors and consenting creditors alike will want to ensure that following any LME transaction the debtor will be fully funded and on a stable financial footing. This can be papered by way of an IBR or German restructuring opinion, the choice and scope of which can be chosen based on the extent of the financial difficulties the debtor faces at that time. In light of this aspect, German LME transactions are unlikely to include particularly aggressive features or accept likely follow-on litigation as a "cost" of the transaction as both can lead to tail-risks that potentially tip over the risk/reward assessment for both debtors and consenting creditors alike, including for clawback reasons.
- In case a transaction includes new collateral, debtors and consenting creditors alike will want to consider including a new money component to solidify clawback protections. Collateral granted especially by non-debtor / group entities purely for amend & extend transactions is subject to much greater clawback scrutiny. There are, however, case law exceptions for transactions that include new money components.
- Any transactions involving asset transfers (for example, drop-down transactions) will need to be at fair market value to solidify clawback protections. Often, the art is in properly documenting fair market value for specific types of assets while considering balance sheet and tax impact.

Overall, LME transactions can be safeguarded against clawback claims by several protections. Thus, lookback periods for clawback claims become less relevant. The more aggressive the LME transaction, however, the less safeguards may be available, which can tip the risk/reward balance.

**Challenges: What other challenges (under the local bankruptcy regime, for example) may a debtor seeking to use a LME face?**

Other challenges are often dependent on the underlying documentation and the governing law of the financing documentation (typically English, German or New York law) and the following answers are limited to issues that may arise under German law documentation.

To the extent the terms of German law bonds need to be amended for a LME to be implemented, issuers and creditors will need to navigate the requirements of the German Act on Debt Securities, which limits the use of certain incentive structures that are typical of more aggressive LMEs and grants dissenting bondholders significant rights to challenge LMEs. In particular, the German Act on Debt Securities prohibits the granting of individual advantages (such as consent payments, improved collateral or the right to participate in a new super senior financing) on a non-pro rata basis if such advantage is granted as a consideration for exercising voting rights in a certain manner. Issuers and creditors will therefore have to structure LMEs carefully to comply with these requirements, for example by permitting also holders who do not support the LME to participate in any upside on a pro rata basis.

Furthermore, dissenting bondholders can block the implementation of LMEs by contesting bondholder resolutions in court. Under the German Act on Debt Securities, the filing of a contestation action results in an automatic stay of the implementation until such contestation has been resolved. While German law provides for an expedited clearance of contestation actions, completing these proceedings typically takes at least three months, thereby giving dissenting bondholders significant hold out value.

**Implementation: What restructuring technology exists (in brief) for in-court nonconsensual implementation of a LME? What is the level of consent required? Can a nonconsenting class be crammed down?**

Depending on the fact pattern, German debtors can have the choice between (at least) the implementation processes of a German scheme (so-called StaRUG), the English scheme of arrangement and the English restructuring plan. These are tried and tested for German debtors by now and typically incur less transaction costs compared to a chapter 11 process.

A German StaRUG, for example, allows for flexible class composition and both cram-downs within a class of creditors with a consent requirement of 75% of nominal value as well as cross-class cram-downs, subject to certain priority considerations and value protections which need to be assessed on a case-by-case basis.

**Implementation: What is the case law in your jurisdiction on coercive exchanges? Are there any recent examples of coercive exchanges?**

German law does not directly regulate coercive exchange offers and there is no case law dealing with coercive exchange offers. However, a number of legal considerations that can significantly impact the ability to consummate a coercive exchange offer need to be taken into account and have likely contributed to the lack of coercive exchange offers in the German market. As before, certain challenges (such as the requirement for a securities prospectus) are relevant irrespective of the governing law of the underlying documentation whereas others are jurisdiction-specific.

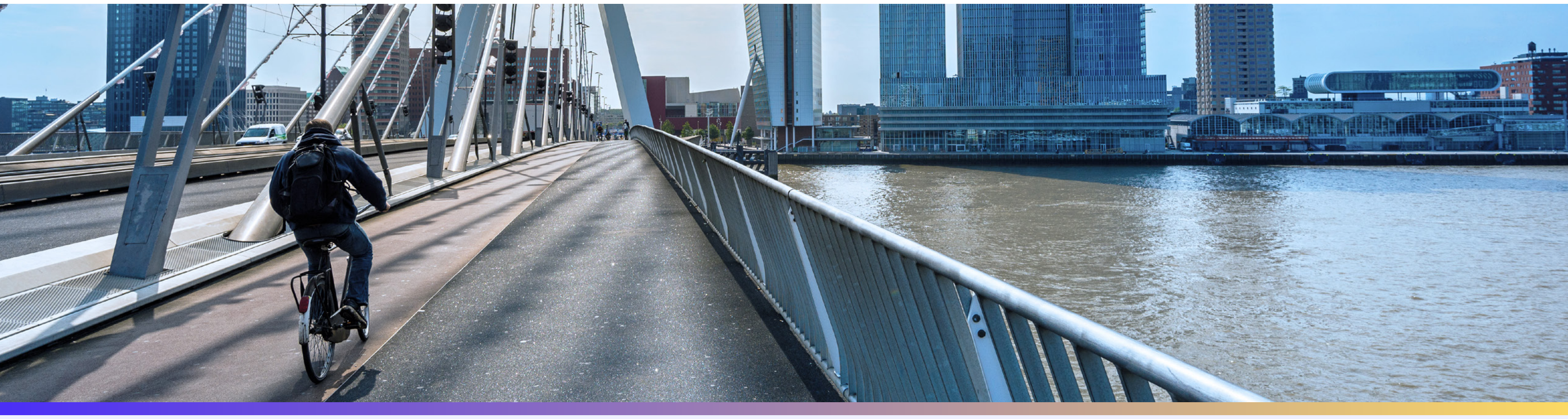
- An offer to all holders of a widely held bond to exchange their bonds for new bonds will be considered a public offer of securities. Therefore, an approved securities prospectus will be required unless an exemption under the EU Prospectus Regulation applies. While this is typically not an issue for high yield bonds that most often have a minimum denomination of €100,000, issues may arise where the bond has initially been placed in smaller denominations.
- To the extent the coercive exchange entails an exit consent or other changes to the terms of the existing bonds (example to grant priming status), the issuer will need to comply with the requirements under the German Act on Debt Securities discussed above. This may significantly impair the coercive potential of an exchange offer.
- While German law generally does not recognize fiduciary duties among bondholders and does not provide for a review of bondholder resolutions on their merits, there is a risk that coercive exchanges could be challenged by dissenting bondholders. Certain legal scholars have taken the view that a bondholder resolution may be invalid in extreme cases if a group of bondholders, representing the required majority of votes cast, colludes with the issuer. This may be the case if the majority follows other individual economic goals to the detriment of the minority. As no specific case law on this matter exists, issuers will need to assess this risk on a case-by-case basis prior to engaging in any coercive exchange offer.

*With thanks to Daniel Splittgerber and Jan Penselin at Latham & Watkins LLP, Germany, for their expert contribution to this jurisdictional insight.*

## Preservation over tactics: A conservative LME playbook

Germany's cautious legal climate stands in contrast to the Netherlands, where the WHOA has delivered a modern, efficient in-court restructuring mechanism. The Dutch approach favors early intervention and judicial clarity over the complexity and risk of out-of-court LME tactics.

# The Netherlands



## 8 Key takeaways

1. **LMEs are rare in the Netherlands — for good reason:** LMEs like dropdowns and uptiers are uncommon in the Netherlands due to a combination of legal, cultural, and structural barriers. Directors face heightened liability risks under Dutch law when operating near insolvency, and successful, cost-effective in-court tools like the WHOA reduce the need for aggressive out-of-court strategies.
2. **Directors face personal liability in the zone of insolvency:** Unlike the U.S. business judgment rule, Dutch directors can be held personally liable if an LME prejudices creditors during financial distress. Transactions that deprive creditors of recourse, like selective uptiers or asset transfers, may trigger tort-based claims and clawbacks unless well-documented and objectively justified.
3. **WHOA is the preferred restructuring route:** The Dutch WHOA has proven effective, efficient, and relatively low-cost. It allows for cramdowns, including changes to in rem priority (priming), and can be deployed pre-insolvency. Its increasing use is driving a rise in predictable out-of-court restructurings, reducing the appeal of LMEs.
4. **Dutch courts have limited precedent on LMEs, but examples exist:**
   - **McDermott:** A US-based dropdown affected a Dutch holding company, transferring IP and business units to an unrestricted subsidiary for new senior-secured debt.
   - **Hunkemoller:** Agreed to an uptier with Redwood Capital, elevating some notes' position. Non-participating creditors launched litigation in New York over potential contractual breaches.
5. **Structural barriers in documentation:** Dutch intercreditor agreements generally follow the English LMA model, often requiring unanimous consent for amendments to collateral arrangements. This makes executing LMEs, especially asset transfers and lien releases—technically and practically difficult without full creditor cooperation.
6. **Stakeholder governance model discourages creditor-on-creditor violence:** Dutch directors are expected to balance stakeholder interests and resist shareholder demands that harm others. Coupled with a less aggressive creditor culture than in the U.S., this creates a less fertile environment for coercive LMEs.
7. **Clawback risk exists — but can be mitigated:** LMEs may be vulnerable to clawback in bankruptcy if creditors can show "knowledge of prejudice." Risks are lower if the LME is mandatory or underpinned by an independent business review. Transparent rationale, stakeholder engagement, valuation support, and a detailed paper trail are essential.
8. **Coercive exchanges are rare, but out-of-court workouts are growing:** Distressed exchanges remain voluntary and depend on broad creditor support. However, the growing predictability of WHOA case law has boosted confidence in out-of-court amend-and-extend deals, with the first quarter of 2025 seeing a notable rise in consensual restructurings versus the first quarter of 2024.

***Local Counsel Contributor:*** *RESOR: Sebastiaan van den Berg, Sits Schreurs and Raif Al*

## Detailed questionnaire

**LME: What are the typical LMEs that are undertaken by debtors in your jurisdiction? Are Drop-downs, Uptierings, DoubleDips etc. common?**

LMEs are uncommon in Europe in general and the Netherlands in particular. The relative unpopularity of LMEs in the Netherlands compared to the U.S. can be attributed to several factors, including but not limited to:

- Personal liability. Directors in the U.S. are generally protected by the business judgment rule, which, broadly speaking, means that the courts will defer to board decisions unless these decisions lack any rational business purpose. Directors in the Netherlands, however, may face personal liability for detrimental transactions that are pursued within sight of insolvency. Given the lack of precedent in Dutch courts regarding LMEs, directors are likely to be hesitant to pursue an LME over a formal restructuring procedure.
- Success and relatively limited costs of formal restructuring procedures. Even though Chapter 11 has proven to be successful, it is time-consuming and costly. The Dutch equivalent to Chapter 11–the WHOA– is more flexible and cost-effective, also compared to the UK Restructuring Proceedings, the costs of which are recently criticized by the respective judges (see, for example, Re CB&I, §19, and Re Thames Water Utilities Holdings Ltd, §300). This means that the WHOA has a lower barrier of entry. There is likely less need for LMEs because of the success of in-court restructuring procedures in the Netherlands.
- LMA intercreditor agreements. Intercreditor agreements in the Netherlands follow the English LMA model. Therefore, unanimous consent for changes to collateral is often required. This makes pursuing LMEs in the Netherlands impractical or highly challenging when there is no unanimity amongst creditors.

**LME: Please provide recent examples of any successful or attempted LME by debtors in your jurisdiction.**

**McDermott**

Before the multi-process (U.K. RP and NL WHOA) restructuring proceedings initiated by the McDermott group, a LME was implemented containing what seems to be defined as "Drop-down financing," where the borrower transferred specific assets, such as a separate business unit or intellectual property, to an unrestricted subsidiary or a non-guarantor restricted subsidiary (NewCo). This transfer effectively released the lien securing the existing credit facility, thereby freeing the assets to serve as collateral for new indebtedness provided by new creditors. The new debt, secured by these unencumbered assets, is structurally senior to the claims of existing lenders. Although this drop-down financing was implemented in the U.S., carrying out such transactions can potentially affect the position of directors of a Dutch (indirect) holding company.

***Full disclosure:*** *in the WHOA restructuring proceedings, RESOR acted as Dutch counsel to Refinería de Cartagena SAS.*

**Hunkemoller**

In June 2024, the Dutch lingerie maker Hunkemöller announced that it had agreed to an uptier transaction with Redwood Capital Management ("RCM"), a U.S. alternative investment manager. RCM agreed to provide new financing pari passu with an existing super senior. In exchange, the notes that RCM already held would be elevated in the payment waterfall by exchanging them into new "Up-Tiered Notes," which left some of the other bondholders in a junior position. Some bondholders filed a complaint with a New York court in November 2024 against Hunkemöller.

The bondholders allege that the uptier transaction does not comply with a section of the underlying contract that prevents Hunkemöller from offering consideration to any noteholder unless such consideration is offered to all noteholders. At the time of writing, it is unclear what the New York Court will conclude regarding the uptier transaction.

***Full disclosure:*** *RESOR is acting as Dutch counsel to Redwood Capital Management in respect of various aspects of Dutch law.*

**Management: Is there anything in the Director's Duties regime of your jurisdiction that could restrict or affect a locally incorporated debtor from implementing an LME?**

According to Dutch law, the directors should act in the interest of the company as a whole. The interests of the company usually align with the shareholders' interests. However, when the company is (nearly) insolvent, the interests of the creditors play a more substantial role: a director that enters a transaction that, as he knows or should have known, will prejudice creditors of the company because it deprives them of recourse, may be liable to them.

This regime could prevent a locally incorporated debtor from implementing an LME. However, it is difficult to make any general statements regarding the permissibility of LMEs under Dutch law, given that liability would likely be based on tort, which is very fact-dependent, and the fact that LMEs differ greatly from each other. It is therefore necessary to investigate the particulars of the LME in question. An uptier transaction, for example, grants certain creditors an elevated position in the payment waterfall by amending the existing financing agreements. Consequently, the non-participating creditors are left with subordinated debt. Raising financing against collateral is not in itself problematic, but selectively exchanging existing debt for new senior priming debt can be troublesome in light of the Dutch director's duties regime, especially if this means that certain creditors remain unpaid and no valid justification therefore exists.

"Drop-down financing," for example, where the borrower transfers specific assets, such as a separate business unit or intellectual property, to an unrestricted subsidiary or a non-guarantor restricted subsidiary (NewCo), will be investigated thoroughly in (unforeseen) subsequent insolvency proceedings. In order to limit potential clawback or related risks, the following elements can be considered:

1. Define a clear rationale, involve advisors early and make sure important stakeholders are aligned, thereby communicating transparently.
2. Impact on existing lenders (e.g., collateral and recovery prospects), thereby considering offering the existing lenders group the opportunity to participate in new debt instruments.
3. Incentivize Participation: encourage lender participation by reserving new money for the negotiating groups and offering compensation.
4. Valuation analysis in respect of possible internal restructuring transactions.
5. Paper trail: detailed records of the LME decision-making process, advice received and compliance with existing loan documentation (restrictions and conditions) and efforts to protect against future scrutiny.

**Management: Are they cultural norms or indicative behavior guidelines for management that would restrict an aggressive LME?**

Given that the permissibility of LMEs is by and large dependent on the underlying financial documentation, implementing LMEs in the Netherlands can be challenging. As previously stated, intercreditor agreements in the Netherlands generally follow the English LMA model. In this model, unanimous consent among creditors is often required for changes to the underlying collateral, thereby making implementation of LMEs impractical or even impossible.

Additionally, European creditors are usually smaller and historically more cooperative than creditors in the U.S. These economic and cultural factors have so far been de facto restrictions on aggressive LMEs, as European creditors were not as inclined to engage in creditor-on-creditor violence by way of LMEs.

Lastly, the Netherlands has traditionally applied the stakeholder model of corporate responsibility and governance: directors have a duty to act in the best interest of the company as a whole. Therefore, directors are expected to resist the demands of the shareholders insofar as the interests of other stakeholders might be harmed as a result. This may mean that there is less inclination to pursue LMEs.

Especially since the WHOA proceedings - that will in high-profile cases, most likely receive court involvement by means of a court-appointed observer or restructuring expert - allows a restructuring plan to change the order of priority among creditors, provided it meets the requirements for sanctioning (Dutch Supreme Court 25 October 2024 (IHC)). The possibility to change the order of priority among creditors does not only apply to a change in the contractual ranking but also in rem (i.e., priming). This judgment thus allows for super senior financing, thereby enhancing the ability to provide financing to facilitate the implementation of the restructuring plan once the plan is confirmed.

**Challenges: Are LMEs likely to be vulnerable to later antecedent (clawback) claims if the debtor enters insolvency, and if so, what is the look-back period? How can this be mitigated?**

LMEs can be vulnerable to clawback claims by the trustee in bankruptcy proceedings (and theoretically also by other creditors outside bankruptcy). There are two separate sets of criteria for the annulment of transactions by the trustee in insolvency, one for mandatory transactions and one for voluntary transactions. The criteria for the annulment of mandatory transactions are much more stringent. Given that LMEs are usually, from a legal point of view, of a voluntary nature at the time of contracting, the less stringent set of criteria will apply.

There are four cumulative requirements for the annulment of voluntary transactions by the bankruptcy trustee. It must concern a legal act performed by a debtor (i) without obligation (ii) for benefit, as a result of which other creditors were (iii) adversely affected while the debtor and the relevant counterparty (iv) knew or should have known that the legal act would prejudice the other creditors ("knowledge of prejudice"). The main hurdle for the trustee to challenge the LME will be proving that the debtor and the counterparty had, or should have had, knowledge of prejudice.

The main way of mitigating the risks of a clawback by the bankruptcy trustee in bankruptcy proceedings is either by a proper IBR or, even better, by ensuring that the LME and specifically the security interest granted therein, is mandatory. This second option ensures that the more stringent set of criteria applies when the trustee challenges the LME transaction. It should be noted that the legal act by which the LME transaction becomes mandatory can itself be challenged by the bankruptcy trustee.

**Challenges: What other challenges (under the local bankruptcy regime, for example) may a debtor seeking to use an LME face?**

(Please see above.)

**Implementation: What restructuring technology exists (in brief) for in-court non-consensual implementation of an LME? What is the level of consent required? Can a non-consenting class be crammed down?**

The WHOA restructuring proceedings are the main instrument for the non-consensual implementation of an LME. The WHOA can be aimed at restructuring the capital structure and continuing the enterprise or at liquidating the assets of the company and providing for a controlled wind-down out of formal bankruptcy proceedings - providing more deal certainty.

**Very briefly summarized, we note that:**

- The WHOA allows the debtor company to impose a restructuring plan on dissenting creditors.
- To qualify for the WHOA, the debtor company needs to be in a state of "pre-insolvency," meaning that the debtor company is in a condition in which it is reasonably likely that it will not be able to proceed with the payment of its debts (this can be well in advance of the actual insolvency status).
- At least one “in the money” class of creditors or shareholders (i.e., a group that would be entitled to distribution in bankruptcy proceedings) needs to vote in favor of the plan. A class votes in favor if at least 66 2/3 of the creditors/shareholders support the plan (per value of right, no head count applies).
- A cross-class cramdown is possible under strict conditions, one of which is the Dutch priority rule, which is inspired by the U.S. absolute priority rule. The Dutch priority rule basically states that the statutory or contractual order of priority may not be disregarded with respect to the non-consenting class, unless there is a reasonable ground to deviate and the deviation is not detrimental to the non-consenting creditors.

**Implementation: What is the case law in your jurisdiction on coercive exchanges? Are there any recent examples of coercive exchanges?**

We understand that a distressed exchange offer is an offer by an issuer to repurchase its (or one of its affiliate's) outstanding bonds on an out-of-court basis in exchange for new bonds with different terms, which may include:

- Reduction in principal
- Improved security (either via collateral or structural seniority)
- Change in coupon (change in rate and/or cash vs. PIK)
- Extended maturity
- Occasionally additional securities, such as equity, warrants and/or the ability to invest new capital, are offered along with the new bonds

Such exchange offers are based on voluntary participation and thus can only be successful if a critical mass participates.

What we experience in the Dutch market is that as the total number of WHOA proceedings increases, the growing number of judicial rulings is providing clearer legal boundaries, making the restructuring process more predictable. In our experience, this predictability has led to a notable rise in out-of-court consensual restructurings in the first quarter of 2025 compared with the first quarter of 2024, as parties are gaining clearer expectations of the process and the potential outcomes of various restructuring scenarios. Notably, this trend reflects the objective the Dutch legislator had when drafting the WHOA.

The bulk of these out-of-court consensual restructurings contains debt-for-debt instruments, i.e., new debt instruments with different terms, so basically executing an amend-and-extend strategy, all against the backdrop of the alternative WHOA procedure.

*With thanks to the team at RESOR for their expert contribution to this jurisdictional insight.*

## Predictability through WHOA over LME complexity

As the Netherlands consolidates its position as a hub for formalized pre-insolvency procedures, Spain is adapting its restructuring tools to accommodate more flexible creditor realignments. Although coercive LMEs remain infrequent, recent reforms have opened the door to more strategic plan-based execution.

# Spain

## Spain – 9 Key takeaways

1. **LMEs are rare but structurally feasible in Spain:** While U.S.-style nonconsensual, non-pro rata LMEs have not occurred in Spain, tools like dropdowns are increasingly used, primarily in new money contexts rather than exchanges.
2. **Dropdowns are more prevalent than uptierings:** Dropdowns are favoured due to their flexibility under Spanish corporate law and their relative immunity from clawback actions in insolvency. Lender subordination is usually achieved contractually and via layered security.
3. **Structural limitations restrict aggressive LMEs:** Releasing Spanish-law security often requires unanimous lender consent, unless a bond structure allows trustee discretion. This makes bank-heavy capital structures more resistant to coercive LMEs unless consent thresholds are met.
4. **Business judgment rule generally applies to director liability**: While Spanish courts have no LME-specific director liability precedent, business judgment rule generally applies in corporate contexts, with special directors' protection in case of court sanctioned plans.
5. **LME challenges via clawback actions are context-specific:** Clawback risk is low for LMEs confined to adjusting creditors (banks, bondholders, shareholders), but high if non-adjusting creditors (example suppliers, tax authorities) are negatively impacted. Bankruptcy clawback has a two-year lookback and civil clawback actions four years with proof of fraud.
6. **Restructuring plans allow for nonconsensual implementation:** Spanish homologación (court-sanctioned pre-insolvency plans) permits intra-class and cross-class cramdowns. This process protects LME elements, including asset transfers and new money, from clawback risk if the plan meets consent thresholds.
7. **Spanish courts will respect foreign law intercreditor agreements in the context of Spanish restructuring plans:** LMEs may be embedded within a Spanish restructuring plan, in which case the Spanish court will apply the relevant intercreditor agreements and make potential fairness determinations taking the latter into consideration. In the alternative, LMEs may be executed immediately before a Spanish restructuring plan, so that the class formation within the subsequent plan already takes account of, for instance, an uptier resulting from the previous LME. Should a dissenting class challenge based on fairness be dismissed, that would raise the point of whether potential litigation abroad would have been rendered moot.
8. **Minority protections depend on syndicate thresholds:** In intra-class cramdowns of syndicated facilities, minority lenders lose the right to challenge if syndicate majorities vote in favour, unless they show class formation was defective or thresholds unmet. This framework gives weight to intercreditor agreements.
9. **Coercive exchange precedent is cautionary:** In Abengoa II, a court struck down a coercive exchange offer due to its punitive structure and impairment of defense rights and lack of intercreditor agreement. These elements should therefore be carefully weighted when structuring exchange offers.

***Local Counsel Contributor:** Adrian Thery and José Miguel Pinillos (Garrigues), Spain*

## Detailed questionnaire

**LME: What are the typical LME that are undertaken by debtors in your jurisdiction? Are Dropdowns, Uptierings, DoubleDips etc common?**

In Spain, dropdowns and uptierings are commonly used to enhance credit support in stressed or distressed situations. These are more frequently structured around new money rather than exchange offers. Among these techniques, dropdowns are more prevalent than uptiering. The reason for this preference is that dropdowns can be structured under general corporate law in a way that offers stronger protection against  potential clawback actions.

However, strictly speaking, no proper LME has yet taken place in Spain involving a Spanish debtor. By "proper LME", we mean a U.S.-like LME, that is a nonconsensual non-pro rata liability management exercise. Credit agreements in Spain generally do not offer much room for interpretation in favor of non-pro rata LMEs. Accordingly, the premise of this article is a "liability management exercise" carried out by a Spanish debtor in Spain, in relation to financing agreements governed by U.S. law.

On the other hand, lender subordination is a combination of contractual subordination via intercreditor agreement and the layering of in rem security interests. When the debt is composed of bank loans, Spanish security interests cannot generally be released without the consent of each secured creditor. However, when the debt is a combination of both bank loans and bonds, then trustees and agents are usually empowered to release security interests. This latter context is therefore more propitious for LME, as Spanish courts are not empowered to grant priming liens over preexisting security interests.

**LME: Please provide recent examples of any successful or attempted LME by debtors in your jurisdiction**

Strictly speaking, no contentious non-pro rata LME has still taken place with respect to a Spanish debtor in Spain. In 2020, a super-senior €70 million priming facility was granted to Naviera Armas by a non-preexisting lender/bondholder through a dropdown - although it was not discussed nor litigated.

**Management: Is there anything in the Director's Duties regime of your jurisdiction that could restrict or affect a locally incorporated debtor from implementing an LME?**

There is no case law in Spain regarding directors' liabilities in the context of LME. However, the business judgment rule applies in Spain, as a protective presumption favoring corporate directors and officers,  shielding them from personal liability for their business decisions as long as their conduct was informed, rational, and made without conflicts of interest or bad faith.

On the other hand, if the standalone LME ensures the company's viability as a going concern, directors may argue they had no viable alternative other than the relevant LME. In such cases, should legal action be taken against directors, a Spanish court may well find that the directors acted in the best corporate interest and that any distributional disputes over the LME should be resolved among sophisticated creditors in bilateral (non-bankruptcy) declaratory judicial proceedings.

**Management: Are they cultural norms or indicative behavior guidelines for management that would restrict an aggressive LME?**

No, as long as the LME only affects adjusting creditors (banks, bondholders, and shareholders) and does not impact non-adjusting creditors (employees, suppliers, public agencies, and tort claimants).

**Challenges: Are LME likely to be vulnerable to later antecedent (clawback) claims if the debtor enters insolvency and if so what is the look back period? How can this be mitigated?**

A distinction must be made between (a) LMEs affecting only financial adjusting creditors and (b) LMEs also impacting non-adjusting creditors.

If an LME affects non-adjusting creditors, it may be at significant risk of clawback. Spanish bankruptcy clawback actions can be initiated upon the commencement of bankruptcy proceedings, have a two-year lookback period (counting backward from the bankruptcy filing), and do not require fraudulent intent—only a determination of prejudice to the estate. In contrast, civil clawback actions ("actio pauliana") do not require a bankruptcy filing, have a four-year lookback period (counting backward from the lawsuit), but require proof of fraud.

Conversely, if an LME only affects adjusting creditors, the clawback risk should be relatively low. Recent Spanish case law tends to be more restrictive regarding clawback actions for preferential treatment. This is particularly true where affected creditors have pre-agreed to a contractual framework governing their recoveries. In such cases, preference disputes shift from tort law (clawback) to contractual law: breach of the intercreditor agreement (please note that, in this article, we take a broad concept of "intercreditor agreement", meaning not only the agreement that governs the relation between different credit instruments, but also the agreement that governs the relation between creditors within one sole credit instrument, for instance, in relation with requisite majorities applicable to consent solicitations).

**Challenges: What other challenges (under the local bankruptcy regime, for example) may a debtor seeking to use an LME face?**

Spanish bankruptcy law provides for the equitable subordination of creditors or counterparties whose actions jeopardize the performance of contracts crucial to the debtor.

While unlikely, if an LME is heavily litigated and results in the debtor's financial collapse (example by critically affecting working capital), it could lead to equitable subordination or similar consequences for the responsible lenders.

**Implementation: What restructuring technology exists (in brief) for in-court nonconsensual implementation of an LME? What is the level of consent required? Can a non-consenting class be crammed down?**

Spanish law allows restructuring plans to be sanctioned (or "homologated") by commercial courts in an expedited pre-insolvency process with minimal court involvement. The debtor retains possession throughout the process. Procedurally, Spanish homologation is similar to Dutch or British restructuring plans.

The plan does not necessarily need to cover all of the debtor's liabilities; it may target only a subset of specific liabilities within a defined perimeter, generally affecting only the capital structure and excluding non-adjusting creditors.

**Key aspects of homologation relevant to LME include:**

I Homologation allows for both intra-class and cross-class cramdown.

**Intra-class cramdown:** The requisite majority of votes in favor to deem a certain class of creditors as an accepting class is set at 66% of the claims in the class (for unsecured classes) or 75% (for secured classes).

In the case of syndicated creditors, they will be bound to the plan if creditors within the syndicate voting in favor represent the aforementioned thresholds (unless the intercreditor agreement sets forth a lower threshold, in which case the latter will apply for intra-class cramdown). Importantly, if the requisite majority for intra-class cramdown of syndicated creditors is met, the minority syndicated creditors will be deemed accepting and will lose their right to challenge the plan on fairness or other grounds (except for pleading that class formation was defective or that the intra-class majority was not actually met in the first place). The loss of challenge rights for minority syndicated creditors may be highly relevant in the context of LME. Beyond formal grounds, the main substantive reason for dissenters (except for minority syndicated creditors) to challenge intra-class cramdown is a breach of the best interest of creditors test.

**Cross-class cramdown:** The plan must be adopted by at least one class of creditors that is in-the-money, according to the enterprise valuation to be performed by a restructuring expert designated by the plan proponent and appointed by the court. Alternatively, the cramdown plan may also be adopted and proposed by a majority of affected classes, provided that at least one of them holds a privileged ranking (whether special privilege—secured creditors—or general privilege—public creditors).

The primary additional reason to challenge a cross-class cramdown—beyond the grounds for intra-class cramdown challenges—is the violation of the fairness test (absolute priority rule, its corollary, and the prohibition of unfair discrimination) vis-à-vis dissenting classes.

Homologation may also entail that fresh money, as well as the rest of the plan's contents (including not only the restructuring of liabilities but also of corporate assets), become protected against potential clawback actions should the debtor subsequently enter bankruptcy. Fresh money includes both interim financing (that is supplied pre-plan during the plan negotiations) and new money (supplied through the plan itself).

The requisite majority for such clawback protection is met when the plan affects at least 51% of the debtor's overall liabilities—provided that the fresh money is infused by parties not connected to the debtor. If fresh money is contributed by connected parties, then that threshold increases to 60% (disregarding, in both the numerator and the denominator, any pre-petition claims held by such connected parties).

Last but not least, an LME involving a Spanish debtor may imply litigation abroad concerning the interpretation of intercreditor agreements (as per the definition above), particularly when these are governed by foreign law. It is worth noting that intercreditor agreements are enforceable in both Spanish restructuring and bankruptcy proceedings. Therefore, treatments provided under a restructuring plan that comply with such agreements will also be deemed to satisfy the fairness test. Furthermore, Spanish courts are likely to assess a restructuring plan's alignment with the relevant intercreditor agreements based on their own interpretation—often drawing on expert opinions regarding the applicable foreign law. Spanish courts are generally reluctant to stay restructuring plan proceedings on the grounds of lis pendens.

**LMEs in Spain are likely to be channeled through court-sanctioned restructuring plans:**

a. Providing ex-ante certainty (once the plan has been confirmed, after having heard dissenters, the plan becomes firm and no further appeal is admissible) and

b. Preventing later scrutiny in bankruptcy (both from the standpoint of clawback and directors' liabilities).

Therefore, LMEs may be embedded within a Spanish restructuring plan, in which case the Spanish court will apply the relevant intercreditor agreements and make potential fairness determinations taking the latter into consideration (res iudicata effects abroad being a private international law issue depending on the jurisdictions involved). In the alternative, LMEs may also be executed immediately before a restructuring plan, so that the class formation within the subsequent plan already takes account of, for instance, an uptier resulting from the previous LME. Dissenting classes would have the right to challenge the plan pleading, for instance, a breach of the fairness test. Should such a challenge be dismissed, that would raise the point of whether potential litigation abroad would have been rendered moot.

Just for the sake of completion, Spanish law would also allow for a hybrid procedural alternative: for the plan to be homologated ex parte by the court through a non-final resolution, granting affected stakeholders the right to be heard exclusively after the plan has been sanctioned. If objections are then upheld, the homologation could be reversed (in case class formation was flawed or requisite majorities not really met), or the challengers' claims could ride through the plan (in case of breach of the fairness test or the best interest of creditors test).

**Implementation: What is the case law in your jurisdiction on coercive exchanges? Are there any recent examples of coercive exchanges?**

The most relevant case is "In re Abengoa II" (2017, Seville Commercial Court #2), where an exchange offer presented two financially unequal alternatives. An ad hoc group of U.S. Sureties challenged the refinancing agreement.

The court ruled in favor of the challengers, finding that the less favorable option had a dissuasive purpose, rendering the exchange offer inadmissible.

**However, key factors in the Abengoa II case were:**

a. The Sureties were not bound by an intercreditor agreement with the banks and funds leading the refinancing.

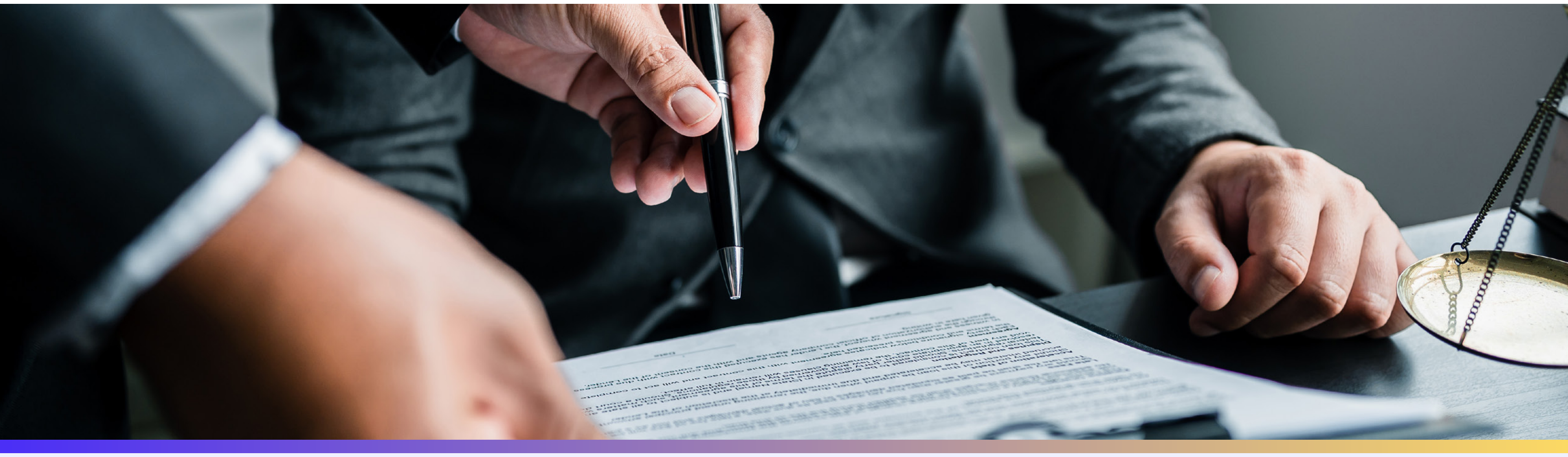
b. The exchange offer penalized creditors who challenged the refinancing by stripping them of the right to choose between alternative options, infringing upon their defense rights.

*With thanks to Adrian Thery and José Miguel Pinillos the at Garrigues for their expert contribution to this jurisdictional insight.*

## Restructuring law modernizes amid structural resistance

Spain's modernization efforts emphasize creditor class design and court engagement. In Luxembourg, the role is more structural. As a preferred jurisdiction for holding companies and bond issuers, Luxembourg plays a critical function in enabling cross-border LME implementation through legal recognition and deal structuring flexibility.

# Luxembourg



## Luxembourg - 9 Key Takeaways

1. **LMEs in Europe are still uncommon:** Liability management exercises are relatively new in Europe. Traditional restructuring methods like amend-and-extend or formal proceedings (for example, U.K. Part 26A, U.S. chapter 11, Luxembourg JRP) are still favored. More LME cases have however been emerging over the last couple of years.
2. **Luxembourg's strategic role:** Despite limited local use, Luxembourg frequently appears in European LME transactions due to its role as a domicile for holding and financing structures, positioning it as a key jurisdiction to watch for evolving practices.
3. **Growing trend:** Though still rare, practitioners expect LMEs to become more prevalent in Europe as a hybrid tool between refinancing and full reorganizations.
4. **Relevant cases:** Altice France used LME tactics such as designating subsidiaries as unrestricted, triggering concerns over asset sales. This led to significant debt restructuring (over €8 billion reduced) via exchanges and extended maturities, avoiding formal proceedings. Ardagh used various LME tools: uptiering, debt swaps, write-downs, asset partitioning, but faced legal pushback from creditors over value diversion. The restructuring plan is still under judicial scrutiny in the U.S.
5. **Director duties and legal risk:** In Luxembourg, directors owe duties to the company, not directly to creditors, even during distress. However, they risk personal liability if LME-related actions are later found to harm the company or its creditors (for example, undervalue sales, unjustified asset transfers etc.).
6. **Cultural considerations:** European financial culture, especially in Luxembourg, prioritizes long-term creditor relationships and reputational concerns, discouraging aggressive U.S.-style LMEs. However, more aggressive tactics are beginning to emerge.
7. **Legal constraints and voidable transactions:** Transactions made within six months and 10 days of bankruptcy may be voidable, especially those involving undervalued asset transfers or dealings with insiders who knew of insolvency.
8. **Legal remedies:** Outside of bankruptcy, Luxembourg law offers tools such as action pauliana and unjust enrichment to challenge harmful transactions when other redress avenues are unavailable.
9. **Luxembourg JRP, or judicial reorganization proceedings:** Since November 2023, debtors in Luxembourg can seek court-sanctioned restructuring plans under JRP. These plans can "cram down" ordinary creditors if legal thresholds are met, but "cram up" on protected creditors is difficult. No cases have yet been finalized.

***Local Counsel Contributor:** Sebastien Binard - Arendt & Medernach, Luxembourg*

## Detailed questionnaire

**LME: What are the typical LMEs that are undertaken by debtors in your jurisdiction? Are drop-downs, uptierings, double dips etc. common?**

Liability management exercises represent a relatively recent development in the European financial landscape, having been primarily imported from the United States. To date, Europe has witnessed only a limited number of such cases. Consequently, techniques such as drop-downs, uptierings and double dips remain uncommon in Luxembourg. Most Luxembourg debtors continue to favor traditional approaches to achieve balance sheet restructurings, either through a consensual refinancing or amend-and-extend transactions. Alternatively, they may pursue comprehensive reorganization through formal proceedings such as UK Part 26A Restructuring Plans, US chapter 11 proceedings, or – since late 2023 – the newly established Luxembourg Judicial Reorganization Proceedings.

Nevertheless, given Luxembourg's distinctive position in the international financial ecosystem - serving as a strategic domicile for numerous investment and financing structures - Luxembourg-incorporated entities frequently feature in most European LME transactions that do occur. This positions Luxembourg as a significant jurisdiction for observing evolving LME trends despite their relative novelty in the European context.

A final observation is that while LME cases remain limited in Europe, there is a distinct sense among practitioners that these transactions will become more common in the near future, finding their way somewhere between classic refinancings and fully fledged reorganization proceedings.

**LME: Please provide recent examples of any successful or attempted LMEs by debtors in your jurisdiction.**

Two recent examples of attempted LMEs that involved Luxembourg were Altice France and Ardagh Group, both with very large capital structures by European standards and key issues to solve for these companies in a difficult economic context. These cases are both ongoing.

### Altice France

Altice France operates as a stand-alone branch of telecommunications group Altice and notably houses SFR, a large French communications operator. Over time, its debt stack increased to a very significant figure (at least by European standards) of €24 billion. Out of this, around €4 billion of junior debt was issued by the Luxembourg parent of Altice France, Altice France Holdings SA.

As the pressure of this debt mounted on the group, Altice France took the market by surprise by announcing during an earnings call its intention to deleverage the business, with creditors expected to bear the burden of such exercise (at least in part). Altice France then designated certain of the subsidiaries it intended to sell as "unrestricted subsidiaries" so as to carve them out of the security perimeter (a classic in the LME playbook), which in turn created concern that the asset sale proceeds would not be used for the purposes of deleveraging the business.

Senior and junior creditor groups formed, engaged legal and financial advisors, and entered into protracted negotiations with Altice, which ultimately resulted in debt-for-debt and debt-for-equity exchanges cutting more than €8 billion of debt from the group's capital structure and transferring 45% of its equity to participating creditors. This direct buyback and exchange of securities at negotiated terms is the essence of a liability management exercise, aiming to improve leverage ratios without resorting to formal reorganization proceedings. The group also obtained extended maturities on newly issued notes to alleviate near-term refinancing pressure and improve liquidity metrics (another hallmark of LMEs).

**Ardagh Group**

Ardagh Group, a leading packaging business divided into “glass packaging” and a “metal packaging” business units undertook various initiatives from 2024, which similarly qualify as liability management exercises.

Targeted measures were used by the group to rework its debt stack (amounting to more than €10 billion), which comprised senior secured notes, senior unsecured notes and more junior structurally subordinated PIK debt.

In April 2024, Ardagh Investments Holdings Sarl, an unrestricted subsidiary of the group parent Ardagh Group SA contracted a €1 billion credit facility with Apollo, which was intended to partially deleverage the group (up to €750 million) to be exchangeable into PIK notes issued by Ardagh Group SA’s own holding parent, effectively having the potential for uptiering such notes.

In April 2025, Ardagh put forward a proposal to (among others) swap its outstanding SSNs for longer maturity instruments and have the SUNs write down a portion of their principal in exchange for equity in Ardagh’s underperforming glass business. The plan essentially partitioned the business into a new entity holding the profitable metal packaging arm (AMP), with reinstated SSNs as creditors, while the glass unit was allocated to unsecured creditors. Ardagh engaged in out-of-court negotiations, soliciting consent from noteholders on the proposed exchange terms, which broke down when hedge funds Arini and Canyon Partners, unsecured creditors, claimed before New York courts that the proposed restructuring plan siphons value away from creditors. The case is ongoing.

Ardagh is a very good illustration of the LME playbook, comprising measures such as debt exchanges, uptiering, maturity extension, debt write-downs and asset transfers.

**Management: Is there anything in the Director’s Duties regime of your jurisdiction that could restrict or affect a locally incorporated debtor from implementing an LME?**

As a matter of general context, directors of a Luxembourg company owe their duties to such company at all times. Unlike, e.g. in the U.K., there is no formal shift of duties towards creditors in situations of financial difficulties and directors will rather focus their attention on the survival of the entity itself by means that may or may not be in the creditors’ or shareholders’ own interests.

Directors will, however, be wary of being on the receiving end of personal liability claims. In that respect, certain measures envisaged in LMEs may give rise to such claims by the company itself (acting through its shareholders’ meeting or, further down the road, bankruptcy receiver). That may, for instance, be the case for transactions detrimental to the relevant borrower/issuer, such as a sale at an undervalue, the voluntary loss of control of an asset, or the assumption of a parent company’s debts without proper consideration. Distributing assets to, e.g., a parent entity as a strategy to take assets away from creditors may also result in liability if they are made without meeting a balance sheet test or if at a later stage, they are deemed to have contributed to the bankruptcy.

**Management: Are there cultural norms or indicative behavior guidelines for management that would restrict an aggressive LME?**

In the European context, and particularly in Luxembourg, cultural norms significantly influence management behavior during liability management exercises. Unlike the United States, where transactional approaches to debt restructuring are more commonplace, European lender-borrower relationships traditionally emphasize long-term partnerships and collaborative solutions. This distinction is most pronounced when creditors are established credit institutions rather than private funds or bondholders. Companies tend to consider reputational implications carefully before pursuing aggressive LMEs that might be perceived as opportunistic.

The Luxembourg financial ecosystem, built on institutional trust and relationship banking, often favors measured approaches that preserve future financing options. This cultural preference for relationship preservation does not legally preclude aggressive LMEs but may influence how they are structured and communicated. Particularly in cases involving domestic lenders or syndicated facilities with significant European participation, companies typically engage in more extensive consultation processes than might be observed in purely U.S.-driven transactions. Things are changing however, and more aggressive tactics have been observed of late, some of which will be described below. It is still difficult to see if these practices will hold in Europe in the longer term.

**Challenges: Are LMEs likely to be vulnerable to later antecedent (clawback) claims if a debtor enters insolvency and if so what is the look-back period? How can this be mitigated?**

Certain transactions would be at risk of voidance (or even automatically void, in some cases) if they take place within six months and 10 days of the bankruptcy declaration. These include, for instance, transactions made at an undervalue, exchange transactions where consideration is paid in kind, transactions with controlling shareholders or other parties deemed to have had knowledge of the cessation of payments of the bankrupt entity, etc.

Absent a bankruptcy or outside the applicable hardening period, transactions harming creditors and the company may be more difficult to challenge. Luxembourg law, however, provides useful instruments in that respect, some of which are variations of similar constructs in other continental European jurisdictions. These constructs, which are “last resort” alternatives applicable only where other means of seeking redress are unavailable, are the action for “unjust enrichment” (where a party is deprived of assets and another correspondingly benefits from an asset transfer, both without valid cause) and the “action pauliana” (where assets are transferred in fraud of creditors' rights).

**Challenges: What other challenges (under the local bankruptcy regime, for example) may a debtor seeking to use an LME face?**

(Please see above.)

**Implementation: What restructuring technology exists (in brief) for in-court nonconsensual implementation of an LME? What is the level of consent required? Can a nonconsenting class be crammed down?**

Since November 2023, Luxembourg law allows for Luxembourg corporate debtors to petition for the opening of judicial reorganisation proceedings, or JRP, being the local equivalent of US chapter 11 or UK Part 26A proceedings and fully compliant with the EU Restructuring Directive. Under the JRP, a debtor can either aim to seek a moratorium to achieve an agreement with certain specific lenders or do the same with a view to having a restructuring plan adopted by a majority of creditors (by principal value and by headcount), which will be binding on all creditors once sanctioned by the Luxembourg courts. The voting threshold must be complied with at the level of an “extraordinary creditors” class (comprising super-privileged claims and certain secured claims) and "ordinary creditors" (comprising all other claims). While it would be difficult in practice to “cram up” extraordinary creditors because they benefit from special protection by law, it is absolutely possible to “cram down” ordinary creditors provided the usual “best of creditors’ interest test” is met.

**Implementation: What is the case law in your jurisdiction on coercive exchanges? Are there any recent examples of coercive exchanges?**

None so far. As a general matter, differential treatment between creditor groups or even certain creditors is not prohibited per se under Luxembourg law (subject to contractual restrictions and the absence of abuse of rights).

*With thanks to Sebastien Binard at Arendt & Medernach, Luxembourg, for his expert contribution to this jurisdictional insight.*

## Cross-border coordination hub with flexible recognition

Where Luxembourg enables LME execution at the group level, Italy is focused on recalibrating its domestic restructuring framework. With updated preventive restructuring tools and court-led mechanisms, Italy is increasing its capacity to support both consensual and non-consensual liability reordering.

# Italy

## Italy – 6 Key Takeaways on LMEs

1. **LMEs uncommon — traditional restructurings dominate:** Drop-downs, uptierings and other aggressive LME techniques are rare in Italy. Debtors typically engage in holistic out-of-court or semi-in-court processes like Composizione Negoziata or Accordi di Ristrutturazione dei Debiti. There are no recent publicly known LME transactions.
2. **Directors face personal liability risk:** Under Articles 4 and 16 of the new Crisis and Insolvency Code, directors must prioritize creditor interests in financial distress. Implementing an LME that disadvantages creditors may trigger civil and criminal liability post-insolvency.
3. **Clawback exposure: Up to 12-month lookback:** LMEs may be subject to clawback if they occur shortly before insolvency and creditors were (or should have been) aware of financial distress. The lookback period is six to 12 months depending on the transaction features. Proper due diligence and documentation are key mitigants
4. **Structural and cultural frictions to LME strategy:** Italy's debt market is largely private, relationship-driven and dominated by domestic banks. Tight documentation, small creditor groups and limited inter-lender competition make it harder to execute or justify aggressive LME tactics.
5. **Cramdown available under new restructuring tools:** Italian law permits both intra-class and cross-class cramdown in semi-in-court and fully in-court scenarios. Thresholds include 75% or 60% of participating creditors in the same class or majority class consent including a secured class or one in-the-money class.
6. **Coercive exchanges practically non-existent:** No significant case law on coercive exchanges exists in Italy, reflecting the private nature of most debt arrangements. The only public analogue, a failed 2010s recapitalization attempt by two distressed banks, ended in insolvency and state intervention.

***Local Counsel Contributor:*** *Orrick, Milan*

**LME: What are the typical LMEs that are undertaken by debtors in your jurisdiction? Are drop-downs, uptierings, double dips etc. common?**

In Italy, Liability Management Exercises, or LMEs, such as Drop-downs, Uptierings and DoubleDips are not commonly undertaken. Italian financially stressed debtors typically engage in more traditional debt restructuring methods which usually involve joint negotiations with all financial creditors and possibly new money providers: such negotiations generally take place in the context of out-of-court (e.g. Composizione Negoziata della Crisi or Piano Attestato di Risanamento) or semi-in-court restructuring proceedings (Accordi di Ristrutturazione dei Debiti).

**LME: Please provide recent examples of any successful or attempted LME by debtors in your jurisdiction.**

There are no publicly known examples of LMEs recently carried out or attempted by financially stressed debtors in Italy. Something similar to an LME that became public was carried out in the 2010s by two ailing private local banks: the exercise aimed at strengthening the banks' capital structure by forcing borrowers to underwrite the banks shares with a portion of the borrowed funds; the exercise failed, the banks were put into insolvency and the State had to intervene to protect customers.

**Management: Is there anything in the director's duties regime of your jurisdiction that could restrict or affect a locally incorporated debtor from implementing an LME?**

Under the newly enacted Italian insolvency law (articles 4 and 16 of the Crisis and Insolvency Code), whenever a debtor approaches insolvency the duty of care of directors switches toward creditors: this means that any management decision "harming unfairly creditors" (like LMEs may do) exposes directors to a personal liability that may under certain circumstances be both civil and criminal in nature.

There is no clear definition of what constitutes an "unfair harm" to creditors that may prevent for example an LME transaction (like a disposal of assets) and the limit seems to be the protection of the going concern (unless the insolvency is irreversible). It is left to the directors to balance the creditors interest with the business continuity needs and the decision becomes more censurable the more the debtor approaches a late stage of insolvency.

**Management: Are there cultural norms or indicative behavior guidelines for management that would restrict an aggressive LME?**

The legal framework does not per se prohibit LMEs. However, various factors have till now kept away LMEs: firstly, the looming liability of directors and secondly the mostly private nature of the debt universe in addition to the limited dimension of the financial community: lenders tend to be domestic banks/credit funds that rarely cannibalize each other; debt is mainly private, characterized by small lender groups and tighter documentation that makes it less suitable for LMEs.

**Challenges: Are LMEs likely to be vulnerable to later antecedent (clawback) claims if debtor enters insolvency, and if so, what is the look-back period? How can this be mitigated?**

In Italy, LMEs may be vulnerable to clawback claims if the debtor later enters insolvency, provided that the LME was carried out in the look period and the creditor was aware of the looming insolvency. The look back period for such claims runs from 6 months to 1 year depending on whether the LME incorporates some dodgy elements (e.g. financial unbalance between the parties' obligations, new securities for existing debts, payments in kind).

A claw back risk is best mitigated by documenting that the lender had no knowledge of the looming insolvency of the borrower at the time of the LME: to this end, a thorough exam of the borrower's financial situation pre and post LME is needed.

**Challenges: What other challenges (under the local bankruptcy regime, for example) may a debtor seeking to use an LME face?**

Debtors seeking to use an LME face substantially the risk of civil and (possibly) criminal liabilities in the event of insolvency; in addition, the tighter debt documentation used in the Italian private debt market tends to enable non-participating lenders capturing the financial distress (for example from the LME attempt) to accelerate the respective debts and/or terminate short term credit lines thereby derailing the LME attempt and possibly forcing an in-court restructuring. Finally, an LME transaction may be challenged by non-participating lenders through an ordinary claw-back action making the relevant transaction not enforceable against the non-participating lenders: the action to be successful requires demonstration that (i) the transaction harmed the non-participating lenders and (ii) the debtor and the participating lenders were aware of the prejudice caused to the participating lenders (if the case of a transaction for value).

**Implementation: What restructuring technology exists (in brief) for in-court nonconsensual implementation of an LME? What is the level of consent required? Can a nonconsenting class be crammed down?**

The most common practice of raising new debt in a financial distress scenario is by having the bankruptcy court authorize (super-senior) new money (that may include securities on free assets) in the context of semi-in-court consensual restructurings or in-court restructurings. Any such new money does not require the consent of non-participating lenders.

Other than that, the newly enacted insolvency law empowers the debtor to force a debt restructuring upon non-participating lenders in semi-in-court and in-court restructurings, provided the relevant debt restructuring does not impose new performances on the "dragged/crammed down lenders" (like for example new loans or new credit lines): the debt may be rescheduled and/or restructured but no more (and not swapped into equity according to the leading doctrine).

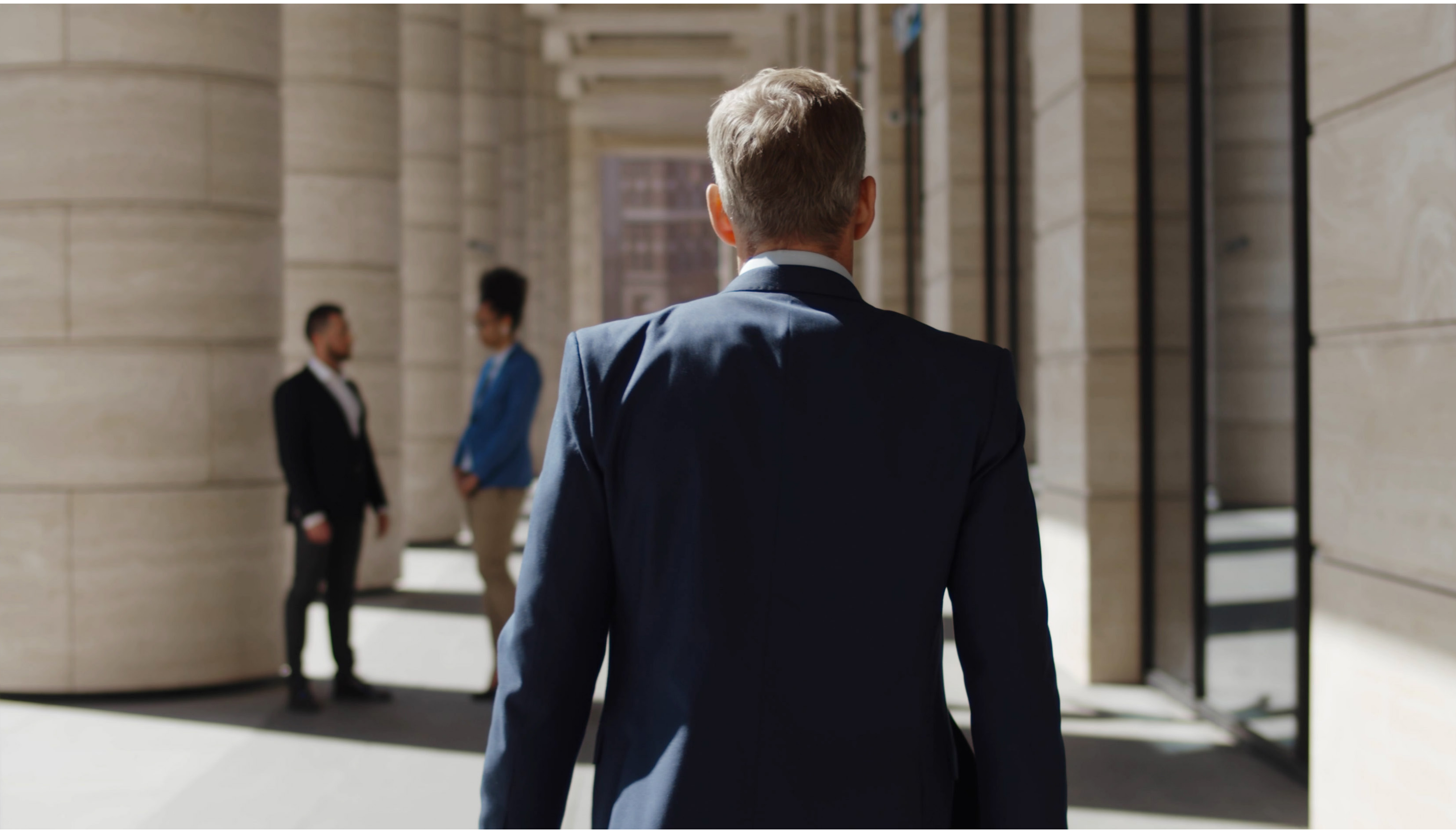
Semi-in-court consensual restructurings enable under certain circumstances the cram down of non-participating lenders with a 75% consent of participating lenders (included in the same class): such majority may be lowered to 60% in certain instances. In-court non-consensual restructurings enable the (cross class) cram down of dissenting creditors under certain circumstances with the consent of either the majority of the classes (one of which composed of secured creditors) or one class "in-the-money" (i.e. a class that would receive a better treatment in an insolvency scenario).

**Implementation: What is the case law in your jurisdiction on coercive exchanges? Are there any recent examples of coercive exchanges?**

In Italy the debt market is mostly private and coercive exchanges are a rarity: consequently, there is not a substantial body of case law specifically addressing coercive exchanges.

*With thanks to the team at Orrick, Milan for their expert contribution to this jurisdictional insight.*

# Conclusion



The LME landscape across Europe is increasingly defined by jurisdictional nuance and procedural specialization. While England, the Netherlands and France offer tested frameworks for court-sanctioned restructurings with cramdown capability, other jurisdictions like Germany and Spain emphasize creditor protection, enforceability and commercial legitimacy. Legal doctrines on director responsibility, clawback exposure and creditor equality vary widely, directly impacting transaction design and litigation risk.

For cross-border practitioners, there is no universal LME template. Execution strategies must be tailored not only to the legal tools available, but also to local restructuring cultures, court behavior and creditor coordination norms. As financial conditions tighten and sponsors pursue more complex refinancings, success will depend on technical fluency in each jurisdiction's restructuring regime and the ability to structure outcomes that balance legal defensibility with market credibility.