

**Restructuring in the
European Context,
lessons learned:
Using or being inspired by
Chapter XI, that is the
question**

Three parts

- Part 1: Samples of International Restructuring
- Part 2: Trends and Lessons Learned
- Part 3: Future

Manage expectations

- “Corporations that have value as going concerns should be able to acquire a new capital structure, and those that cannot survive should be able to wrap up their affairs expeditiously. Bankruptcy law cannot work miracles, and more harm than good comes from seeking that which cannot be had.”
 - Douglas Baird in Elements of Bankruptcy, fifth edition, 2010, p. 256
- The Four Phases of Restructuring:



Deny



Resist



Accept



Act

Part I: Samples

Part I: Samples

- I. Prepack NL Suspension of Payment with Composition, combined with Prepack US Chapter XI
 - Versatel (2002)
 - UPC (2003)

- II. EU Forumshopping to restructure debt
 - Rent A Car BRAC (Budget) (2003) Daiseytek (2003), Collins & Aikman (2005), Eurotunnel, Deutsche Nickel (2004), Schefenacker (2007), Wind Hellas (2009), European Directories (2010)

- III. The Scheme of Arrangement Route
 - Rodenstock (2011), Magyar (2013), APCOA (2014)

- IV. The US Chapter XI Route
 - Almatris (2010), Marco Polo (2011)

Sample: NL Suspension of payment plus US Chapter XI

- No NL solution for overstaffing
- Versatel and UPC: Short track formal bankruptcy proceedings
- First out of court restructuring, if that fails, pre-packaged formal bankruptcy proceeding
- Needs to meet both the requirements of both Suspension of payments in NL and Chapter XI in US
- Samples: **Versatel** and **UPC**

2002: Versatel (i)

- Multinational group, Versatel Telecom International Holding N.V. only assets: shares in subsidiaries, business activities in subsidiaries In NL, B, Germany, France, UK
- Business activities: network operator of broadband glass fibernetwork; losses from the start
- Financial structure of Holding Company (non consolidated annual accounts 2001): Equity short 27 million Euro (shares listed both in Adam and NY), 1,7 billion Euro long term liabilities (Bondholders - inter alia - New York law) and 54 million Euro Short Term Liabilities
- Voting agreement between Verstatel and 65% of Bondholders, to vote in favor in suspension of payments of the plan of composition; Voting Record Date (Date on which is assessed who is able to vote), set at July 30, 2002

Versatel (ii)

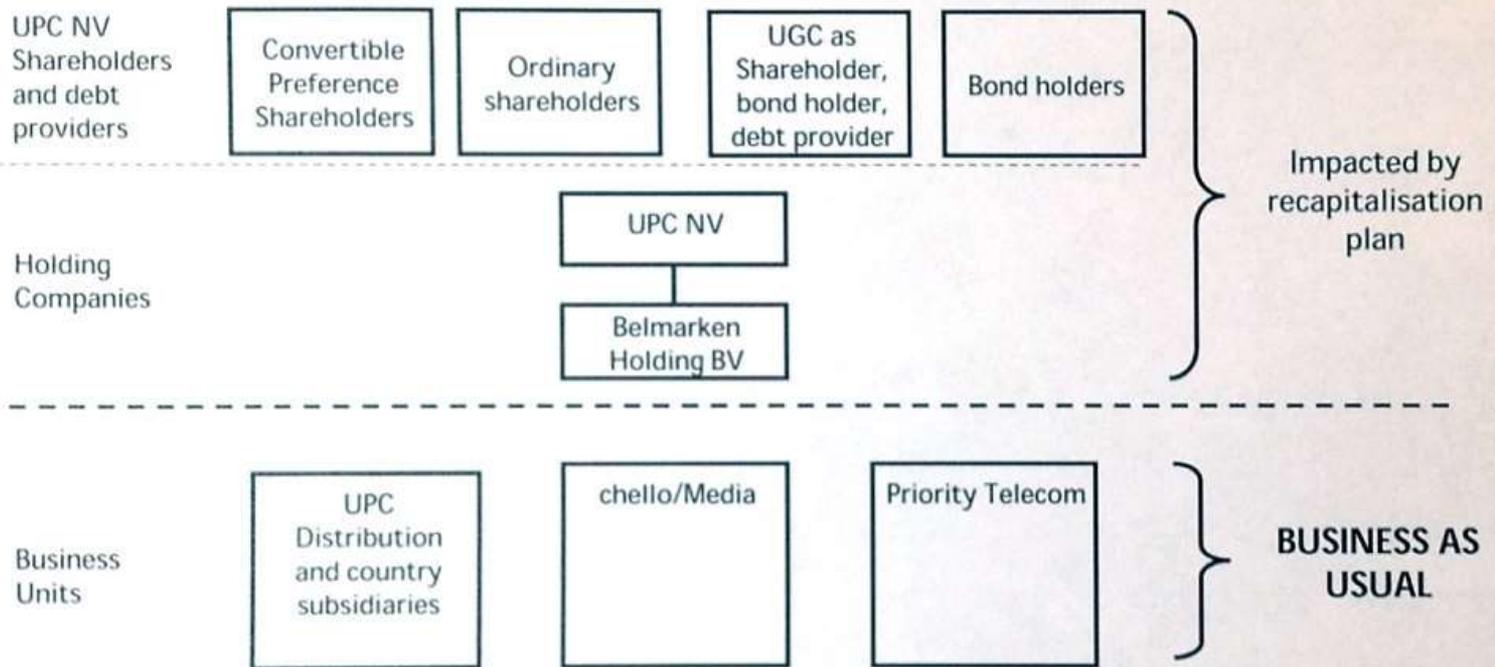
- Juni 19, 2002: **Application for Chapter 11 in US and Suspension of payments in NL**; in suspension of payments, a composition (“akkoord”) is offered. Elements of the composition are part cash payment and part shares. Difference in bondholders according to relevant economic differences of the conditions of the bonds. **Ordinary creditors other than bondholders are paid in full.** At the time of application for bankruptcy 33% agreed and agreed not to transfer; 32% agreed if they would still have the bonds at the time of the voting of the akkoord; Warrants of 4% to existing shareholders
- September 6, 2002: Bankruptcy Judge US confirmed Chapter 11 financial restructuring Versatel
- September 9, 2002 Voting on Dutch composition voted in favor of, by 99,9% of creditors representing 85% of total debt of Versatel
- September 18, 2002: decision of Dutch court on ratification of the composition

UPC (i)

- **United Pan-European Communications B.V.**, multinational group, one of the leading broadband communications and entertainment companies in Europe. UPC provides television, Internet access, telephony and programming services.
- UPC's shares were traded on Euronext Amsterdam Exchange (UPC) and in the United States on the Over The Counter Bulletin Board (UPCOY.OB), bonds issues governed by NY Law, also bank loans
- Overindebted: February 2002: Stop interest payments Bonds, cross default Bank loans
- March 2002: Temporary Waiver Banks cross default

Recapitalisation plan to improve UPC N.V. balance sheet: Business as usual for UPC's operating companies

UPC business units that deliver customer services and conduct operations are separated from the financing and equity ownership changes taking place between UPC NV its finance providers



NOTE - This does not represent a legally complete structure chart.

source press release UPC March 4 2002



UPC (iii)

- September 2002: Agreement with 67% bondholders re restructuring and the banks
- December 2002: **Suspension of payment proceedings in NL and Chapter 11 Proceedings in US**
- Februari 2003: Chapter 11 reorganisation plan confirmed but still subject to approval, composition in NL
- March 2003 Approval Dutch Court, but appeal by non-consenting creditor
- August 2003: Supreme Court decides in favor of UPC

UPC (iv), elements

- Conversion bonds and other debt in equity (debt for equity swap), Shares Newco, not debtor, Newco obtained claims against debtor since its shareholders used such claims to paying up for shares Newco
- Voting creditors could also be only beneficial owners

Limitations Versatel and UPC Solution

- No forced cooperation of any of the NL Secured Creditors involved in Restructuring, Dutch Suspension of Payments does not facilitate that
- Only financial unsecured creditors forced: Dutch bonds have collective actions clauses, no collective action clause in US law governed bonds

Sample II: EU Forumshopping Route

- EU Group of companies chooses favorable regime of foreign EU country insolvency regime to restructure its debt using the somehow flexible COMI definition
- Using the recognition European Insolvency Regulation: Daisytek, Collins & Aikman, Eurofood, Eurotunnel, Deutsche Nickel, Schefenacker, Wind Hellas, European Directories
- But Watch out: Section 5 EIR protection of secured creditor

Sample III: UK Scheme of Arrangement Route

- UK Scheme of Arrangement is used to restructure against the wish of the minority of secured lenders, even if debtor is registered in different (i.e. non UK) jurisdiction.
- Confirmed in **Rodenstock Decision**
 - Court Decision itself: May 6, [2011] EWHC 1104 (Ch), Case No: 2135 of 2011
 - <http://www.bailii.org/ew/cases/EWHC/Ch/2011/1104.html>
- Elements:
 - UK Law governed loan documentation;
 - Jurisdiction Clause UK;
 - Majority Senior Creditors in UK;
 - Company is German (Neither Comi nor Establishment in UK); and
 - Pursuant to German law, decision of UK judge would according to two experts be acknowledged due to the fact that question whether or not secures debt was amended, is to be decided pursuant to German Law

UK Scheme of Arrangement Route shifting COMI

- On December 3, 2013, the English Court sanctioned a scheme of arrangement in respect of a non-UK company in the case of Re **Magyar Telecom B.V.** [2013] EWHC 3800 (Ch).
- Case is of particular interest as it confirms that the English Court is willing to approve schemes which (1) compromise NY law governed bonds and (2) vary/release rights against third parties. COMI of Dutch legal entity was moved to UK
- On December 11, 2013, the New York Bankruptcy Court recognized the English scheme in respect of Magyar under Chapter 15 of the US Bankruptcy Code as a foreign main proceeding providing for related relief and giving full force and effect to the scheme and related documents in the US.

UK Scheme of Arrangement Route changing choice of law and Jurisdiction

- On 14 April 2014 the English Court sanctioned schemes of arrangement for the APCOA Group, including several foreign companies within that Group. The decision is the latest in a line of cases which illustrate the willingness of the English Court to accept jurisdiction over foreign companies. For the first time jurisdiction was established on the basis of a Facilities Agreement whose **governing law and jurisdiction clauses had been changed to English law and the English courts by majority lender consent.**
- Source: Client Briefing Clifford Chance April 15, 2014

Sample IV: The Chapter XI Route

- Choosing Jurisdiction US Bankruptcy Court using Section 109 (a) Chapter 11 Bankruptcy Code: a person has property in the US
- US Chapter 11 has extraterritorial effect as a matter of US law
- Breach outside US of US court order is considered contempt of courting US
- Thus: any creditor with commercial interest in US most likely accepts court order, even though there is no official recognition of US court order in its country
- Sample: **Almatis case** (2010), Disclosure Statement Chapter XI Proceedings, p. 59:
 - “A significant percentage of the Financial Lenders have connections in the United States. This connection provides some measure of assurance that these parties will not take actions in violation of the Bankruptcy Code and, if they do, that the Bankruptcy Court has an adequate remedy.”

The Chapter XI Route

- Elements:
 - Companies in the Netherlands, Germany and the US
 - Overleveraged due to failed acquisition of Dubai International Capital LLC
 - Complicated capital structure with financial creditors
 - Companies applied for Chapter XI in US (Note: although neither the NL nor Germany has implemented Uncitral Model Law on Cross-Border Insolvency)
 - **Pay** the “obligations to numerous foreign creditors, including, but not limited to, vendors, landlords, suppliers, trade creditors, contractors, shippers, common carriers, private concessionaires, public facility operators, warehousemen, distributors, brokers, mechanics, materialmen, utility providers, service providers, customs agents, duty collectors, governmental agencies, quasigovernmental agencies, and taxing authorities (collectively, the “**Foreign Creditors**”)”
 - **Prevent Transfer:** “(1) prevents the transfer of Claims against the Debtors to a Foreign Transferee unless such Foreign Transferee agrees to the jurisdiction of the Bankruptcy Court and to be bound by the automatic stay, and (2) provides the Debtors' advance notice, and an opportunity to object, to any proposed transfers of Claims against the Debtors to a Foreign Transferee. The Bankruptcy Court approved the above procedures by its order on May 17, 2010 [Docket No. 112].

Part 2: Trends and Lessons Learned

Trends: More Options

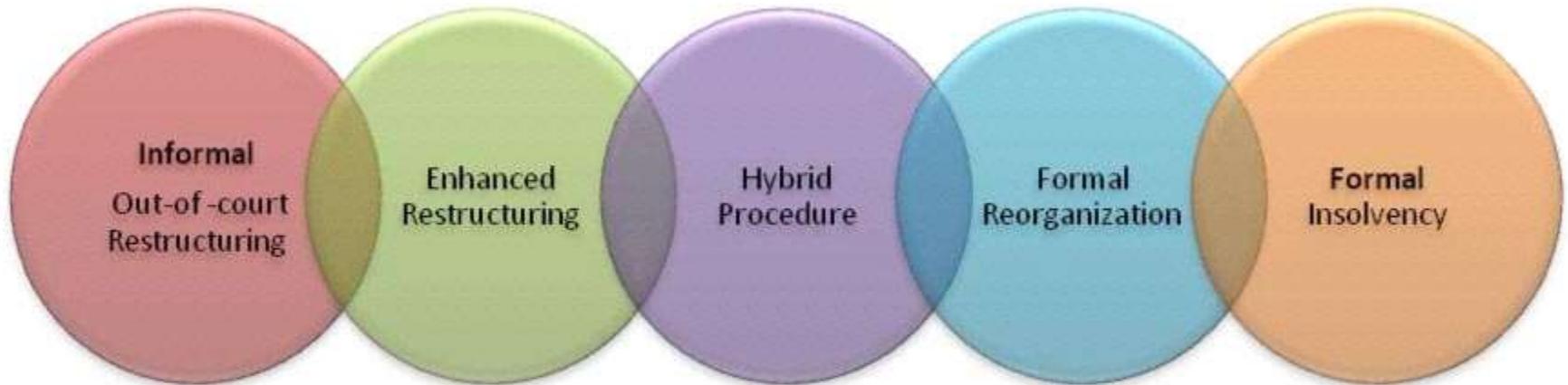


Chart 1: The continuum of procedures for the treatment of financial difficulties.

World Bank Study 2012 Out-of-Court Debt Restructuring
<https://openknowledge.worldbank.org/handle/10986/2230>

Informal versus Formal (i)

- Informal Out of Court Restructuring
 - Pure consensual
- Enhanced Restructuring
 - Consensual supported by code of practises (such as London Approach and Insol 2011 Principles)
- Hybrid Proceeding (pre-pack)
 - Deal with Hold-out through execution or formal insolvency proceeding
- Reorganisation
 - Suspension of payment
- Insolvency
 - Bankruptcy

Pros and Cons Informal

• Advantages Informal

- Flexibility
- Ease of Negotiation
- Timing Issues
- Confidentiality
- Less Stigma
- Continuation business
- Management in place
- No amendments contracts
- No court Involvement
- Lower costs

• Disadvantages Informal

- Analysis debtors
- Punishment fraud
- No avoidance actions
- Availability remedies (f.e. no stay)
- All consent requirement
- Lender liability Issues
- Multi-party negotiations
- Recognition foreign courts

European Market Trends

- Stakeholders choose their own restructuring option
- In Europe practice currently:
 - Focus to try to deal with restructuring without opening formal insolvency proceedings (both costs and value argument)
 - Deal specific arrangements, focused on financial creditors and shareholders, often leaving other ordinary (unsecured) creditors untouched
 - Trying to find loopholes to deal with dissenting individual creditor (or at the most small minority of creditors)
 - UK Scheme of Arrangement Route is hot in Europe

Lessons Learned (i)

- Popular Scheme of Arrangement (but needs often be combined with prepackaged administration, f.e. if majority shareholders don't agree)
- Other countries have been changing their bankruptcy law (such as Germany, Belgium, France, Spain), even repeatedly, but often with limited success
- Need for forced (i.e. against the will of majority shareholder) **debt for equity swap** – or other involvement of shareholders): UK Scheme does not facilitate, US Chapter XI does but needs formal insolvency proceeding
- Additional Disadvantage for secured creditor which are considered to be fully paid in US Chapter XI: losing control to fulcrum security, i.e. the voting creditors
- NL is lacking right legislative tools, but changes are on the way as we speak, dealing both with dissenting unsecured and secured creditor and dissenting shareholder; agreement subject to court approval, no formal insolvency proceeding

Lessons Learned (ii)

- Rethinking of finance documentation could help in the future:
 - More Collective Actions Clauses (but still contrary to US Trust Indenture Act, so no US governed bonds, thus less all lenders consent decisions)
 - Enable in documentation forced cooperation of out of the money stakeholders, including prior shareholders cooperation for change in capital structure (so called pre-agreed debt for equity swap mechanism) (compare bail in debt suggestion for banks)

Deel 3: Future

European Commission

Recommendation March 12, 2014

- Text available at:
http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf
- “The objective of this Recommendation is to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximise the total value to creditors, employees, owners and the economy as a whole. The Recommendation also aims at giving honest bankrupt entrepreneurs a second chance across the Union.” (Whereas 1)
- “Several Member States are currently undertaking reviews of their national insolvency laws with a view to improving the corporate rescue framework and the second chance for entrepreneurs. Therefore it is opportune to encourage coherence in these and any future such national initiatives in order to strengthen the functioning of the internal market.” (Whereas 10)

European Commission

Recommendation March 12, 2014

- “It is necessary to encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby to lower the cost of restructuring for both debtors and creditors. Greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence would also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union. (Whereas 11)
- “A restructuring framework should enable debtors to address their financial difficulties at an early stage, when their insolvency could be prevented and the continuation of their business assured. (Whereas 12).

Problem with European Commission Recommendation March 12, 2014

- “The Member States are invited to implement the principles set out in this Recommendation” (Rec. 34)
- Shareholders position is not dealt with in recommendation
- Too much focus on Fresh Start only relevant for Natural Persons
- How to determine which enterprises are viable or not and which entrepreneurs are honest and which are not
- Members State should look further