INSOL Europe/LexisPSL Joint Project on 'How EU Member States recognise insolvency/restructuring proceedings commenced in third country states'— Germany

23/04/2021

Restructuring & Insolvency analysis: This article looks at how Germany would recognise insolvency or restructuring proceedings commenced in a third country state. In particular, it considers whether the English Part 26 scheme or Part 26A restructuring plan would be recognised in Germany. Written by German country co-ordinator for INSOL Europe, Frank Tschentscher LL M (NTU) at Luther.

Q1. Has your country adopted the UNCITRAL Model law on insolvency?†If not, does it intend to do so in the near future?†

Germany has not adopted the UNCITRAL Model Law on insolvency (the UNCITRAL Model Law) and, as things stand at the moment, does not intend to adopt it in the foreseeable future. For the resolution of cross-border insolvency cases, Germany relies, in the main, on the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L141 5.6.2015 p 19), Recast Regulation on Insolvency (EU Recast Regulation on Insolvency), and for non-EU cases on its domestic insolvency regime which contains a separate set of rules (sections 335 ff of the Germany Insolvency Code (Insolvenzordnung, Insolvency Code)) for the support and the recognition of foreign insolvency proceedings.

Arguably, the German insolvency regime already provides for everything the UNCITRAL Model Law set out to achieve and, in parts, goes beyond the regulatory content of the UNCITRAL Model Law insofar as automatic recognition of foreign insolvency proceedings is meant to be the rule and, further, the application of the *lex fori concursus*, ie the insolvency law of the country in which the proceedings were opened, is explicitly provided for (section 335 of the Insolvency Code: except as otherwise provided, the effects of the foreign insolvency proceeding in Germany are governed by the laws of the jurisdiction where the proceeding was opened). On that basis, it may be argued that the implementation of the UNCITRAL Model Law is obsolete as it would not offer anything over and above what is already available under the German Insolvency regime (for example, see Tashiro is Braun, Insolvenzordnung, Vor ßß 335–358 para [21]). At the very least, the German regime does not conflict with the UNCITRAL Model Law.

Recently though, some scholars have suggested that the adoption of the UNCITRAL Model Law by the EU might offer a solution to the fall-out from Brexit (for example, see Paulus, Entstehende und verlorene Verbindungslinien zu unseren Nachbarn, EuZW 2021, para [238 ff]).

Q2. What are your country's private international law provisions for the recognition of insolvency proceedings commenced in countries outside of the EU Member States (ie Third Party†States like the UK)?

Recognition of foreign (non-EU) insolvency proceedings is available pursuant to section 343(1) of the Insolvency Code. At its core, the section resembles Article 19 of Regulation (EU) 2015/848, the EU Recast Regulation on Insolvency, the marked difference being that recognition pursuant to section 343(1) of the Insolvency Code may be denied should the German courts conclude that the foreign court did not have the (international) jurisdiction to make the order for the commencement of the (foreign) insolvency proceedings. However, a judicial review pursuant to section 343 of the Insolvency Code only takes place if the effects of the foreign court order are relevant in official judicial proceedings in Germany. The German international insolvency law regime does not demand recognition or *exequatur* proceedings without a direct connection or reference to an actual case before the courts (see also: Andres/Leithaus, Kommentar zur Insolvenzordnung, 4th edition, M¸nchen 2018, ß 343 para [3]). Further, recognition will be denied if to do so would violate the German ordre public, ie lead to a result which is manifestly incompatible with fundamental principles of German law.

Dealing in the first instance with the issue of (international) jurisdiction, it is assessed in accordance with German law. This test is often referred to as the so-called Spiegelbildprinzip (loosely translated as 'mirror image principle'). It requires the German courts to examine whether the foreign court would have had jurisdiction to commence the foreign insolvency proceedings if German law were applied to determine the international jurisdiction of that court. In their assessment, the German courts are going to follow primarily the test applied by the European Court of Justice in *Schmid v Hertel* Case C-328/12 and determine international jurisdiction by (simply) applying Article 3 of Regulation (EU) 2015/848, the EU Recast Regulation on Insolvency, the centre of main interests (COMI) test. Should the facts of the case put it firmly outside the scope of Article 1(2) of Regulation (EU) 2015/848, the EU Recast Regulation on Insolvency, the German courts would look to the Insolvency Code where an almost identical test applies: pursuant to section 3 of the Insolvency Code, a court has jurisdiction to commence insolvency proceedings if the center of the debtor's business activity is within the court's district. If the corporate debtor did not engage in any business activities, the courts' jurisdiction is determined by reference to the debtor's place of residence or registered seat (which then is deemed to be the place at which it has its administrative center, see section 3(1) of the Insolvency Code). It follows that foreign insolvency proceedings will not be recognised in Germany unless the debtor has its COMI in the foreign jurisdiction; a close connection for example does not suffice.

Secondly, the foreign proceedings will have to qualify as 'insolvency proceedings' (see Sven-Holger Undritz, in Karsten Schmidt (ed), Kommentar zur Insolvenzordnung (19th edn) (CH Beck, 2016 and Section 343, Vorbemerkung Section 335 Insolvenzordnung, recital 6), which requires that the scope and purpose of the foreign proceedings will have to be similar to insolvency proceedings in the German sense. The main test is whether the procedure in question:

- is rooted in insolvency legislation
- involves all of the debtor's creditors and, further
- whether it has objectives similar to the German insolvency proceedings, for example the best possible creditor satisfaction

For in-court appointments and proceedings, there is little doubt that the German courts would recognise them as an insolvency procedure. However, the wording of section 343(1) of the Insolvency Code makes reference specifically to the 'opening decisions of foreign courts' and, consequently, there might be a question mark as to whether out-of-court appointments, such as the appointment of an administrator under paragraph 22 of Schedule B1 to the Insolvency Act 1986, would be seen as insolvency proceedings for the purpose of section 343(1) of the Insolvency Code. Irrespective of it, and notwithstanding that the term 'insolvency proceedings' under German insolvency law is not necessarily identical with the term as construed under the EU Recast Regulation on Insolvency, it appears very likely that all English insolvency proceedings previously listed in Annex A of the EU Recast Regulation on Insolvency will meet the test, irrespective of whether the appointment of the office holder was in-court or out-of-court (see for instance Andres/Leithaus, Kommentar zur Insolvenzordnung, 4th edition, M¸nchen 2018, ß 335 para [3]; Smid in Leonhardt/Smid/Zeuner (ed), Internationales Insolvenzrecht, 2th edition 2012, ß 335 para [4]). Any other result would be very surprising.

Lastly, as already stated, the proceedings will not be recognised if the recognition leads to a result which is manifestly incompatible with fundamental principles of German law. However, the public policy-exception is to be (and has always been) interpreted narrowly. The decision of the Insolvency Court Nuremberg in *Brochier* (order dated 15 August 2006, court ref. 8004 IN 1326/06) being the obvious exception. On 4 August 2006, the directors of Hans Brochier Holdings Ltd (the Company) appointed English administrators by way of an out of court appointment. These proceedings purported to be main proceedings in accordance with Article 3(1) of Regulation (EU) 2015/848, the EU Recast Regulation on Insolvency, on the basis that the Company's COMI was in England. Later that same afternoon and upon the application of a number of the Company's German employees, a preliminary insolvency administrator was appointed by the Insolvency Court in Nuremberg, Germany, over the Company. In a subsequent hearing, the German insolvency court refused to recognise the English proceedings on the grounds of a (perceived) violation of the German ordre public. The decision was heavily criticised by German academics and professionals alike; it also turned out unnecessary as the English administrators sought to set the English order aside when they found out that the Company had misled them (see *Hans Brochier Ltd v Exner* Case No 5618/06 [2006] EWHC 2594 (Ch), High Court of Justice Chancery Division Ch D Before: Mr Justice Warren). The policy-exception was also only applied in extraordinary circumstances. The German Supreme Court held that the decisive factor for the violation of

'ordre public' is whether the consequence of an application of the foreign law is in such strong contradiction to fundamental principles of German law and policies and the core principles of fairness and justice inherent in them that it would be considered intolerable (see BGHZ 104, p 243; BGHZ 123, para [270]). The Supreme Court namely held that refusing recognition of a foreign judgment on the basis of the 'ordre public' exception is not justified merely because the foreign law differs from mandatory German provisions (see BGHZ 118, para [330]). It is difficult to imagine, therefore, circumstances which would prevent the recognition of an English scheme of arrangement on public policy grounds.

Q3. Would your country recognise an†English scheme of arrangement†(under Part 26 of the Companies Act 2006 (CA 2006)) or an†English restructuring plan†(under CA 2006, Pt 26A) now post†Brexit and on what basis? (eg Lugano Convention, Hague Convention, Rome I or other private international law rules)

Schemes of arrangement

Over the past few years, some German corporate debtors chose to restructure their debts by way of an English scheme of arrangement, some of the best known cases being those of *Rodenstock GmbH*, Urteil des High Courts of Justice vom 6. Mai 2011 [2011] EWHC 1104 (Ch), *Primacom Holding GmbH and others v Credit Agricole and others* [2012] EWHC 164 (Ch) and *Re Apcoa Parking Holdings GmbH and other companies*, Urteil des High Courts of Justice vom 19 November 2014 [2014] EWHC 3849 (Ch). Irrespective of it, recognition of an English scheme of arrangement in Germany was hardly ever tested. Only a few cases went before the German courts but matters were looked at and decided differently in each case and, therefore, what little case law is available is conflicting.

- the insolvency court of Rottweil (Order dated 17 May 2010—court reference 3 O 2/08) came to the conclusion that the scheme of arrangement before it was very similar to the proceedings under Chapter 11 of the US Bankruptcy Code for the reorganisation of companies and was therefore to be recognised in Germany in accordance with section 343 of the Insolvency Code
- the appellate court (Oberlandesgericht) of Celle (Order dated 8 September 2009—court reference 8 U 46/09) as well as the insolvency court of Potsdam (Order dated 27 January 2011—court reference 2 O 501/07) denied recognition of the respective schemes of arrangement before them but cited different reasons. The Celle court held, inter alia, that the approval decision of the English court in a scheme of arrangement was not a 'decision' within the scope of Article 32 of Regulation (EC) 44/2001, Brussels I for lack of adversarial proceedings. The Potsdam insolvency court, on the other hand, held that the approval decision of the English judge was in fact a 'decision' within the meaning of Article 32 of Regulation (EC) 44/2001, Brussels I, which was therefore to be recognised in principle. However, the court ultimately refused to recognise the scheme of arrangement in the specific case because, in its view, it lacked the necessary jurisdiction agreement which would have established the international jurisdiction of the High Court in London

The only case that made it to the German Supreme Court concerns the 'Equitable Life' scheme of arrangement (German Supreme Court (Bundesgerichtshof), order dated 15 February 2012—IV ZR 194/09 'Equitable Life' (OLG Celle)). Regrettably, that case did not provide sufficient clarity as the court ultimately left the matter undecided, although there is a strong argument that the court's decision implied that an English court's sanctioning order would have to be construed generally as a 'judgment' under Brussels I and that, therefore, schemes of arrangements would be recognised:

- at the outset, the court held that the Equitable Life scheme of arrangement was not an 'insolvency procedure' for the purpose of section 343(1) of the Insolvency Code, given that a scheme of arrangement:
  - does not require the corporate debtor to be technically insolvent
  - is usually limited in its application and involves only a particular group or groups of creditors, as opposed to insolvency proceedings that would usually involve all of a corporate debtor's creditors, and

- does not require the appointment of an office holder (whether by a court or otherwise). On that basis, the court held that recognition of a scheme of arrangement was not available under the terms of the German international insolvency regime (Ibid., paras [22] to [24], see also Thole, M¸nchener Kommentar zur Insolvenzordnung, 4th edition 2020, ß 343 para [19]; Andres/Leithaus, Kommentar zur Insolvenzordnung, 4th edition, M¸nchen 2018, ß 335 para [3])

- further, the court held that the scheme of arrangement before it would not be recognised in accordance with Brussels I because of the English court's lack of international jurisdiction, (article 35 of Brussels I). The scheme concerned Equitable Life, an insurance company. The court noted that Article 12 of Regulation (EC) 44/2001, Brussels I, specifically provided that an insurer was to commence insurance litigation against a policyholder only in the jurisdiction of the policy holder's domicile, that domicile in the case before the court being in Germany
- however, irrespective of the facts of the specific case, the Supreme Court continued and commented obiter on the question as to whether a non-insurance related English scheme of arrangement might be viewed generally as a 'judgment' for the purposes of Brussels I. It held that the term 'judgment' pursuant to Article 32 of Regulation (EC) 44/2001, Brussels I, was to be construed broadly and commented that a scheme of arrangement process portrayed many adversarial characteristics and that, therefore, these facts were in favour of construing an English court's order sanctioning a scheme of arrangement as a 'judgment' pursuant to Article 32 of Regulation (EC) 44/2001, Brussels I, which would be recognised pursuant to Article 33 of Regulation (EC) 44/2001, Brussels I (see German Supreme Court (Bundesgerichtshof), order dated 15 February 2012—IV ZR 194/09 'Equitable Life' (OLG Celle), para [26] of the Supreme Court's decision)

Of course, Brussels I was subsequently superseded by Regulation (EU) 1215/2012, Brussels I (recast), but the definition of 'judgment' in Brussels I (recast) (now Article 2(a) of Regulation (EU) 1215/2012, Brussels I (recast)) is identical with that of Article 32 of Regulation (EC) 44/2001, Brussels I. Further, the general principle previously enshrined in Article 33 of Regulation (EC) 44/2001, Brussels I, that a judgment given in a Member State is to be recognised now features identically in Article 36 of Regulation (EU) 1215/2012, Brussels I (recast) and, therefore, the reasoning of the German Supreme Court may still be looked upon as the main guidance on this issue in Germany.

However, following Brexit, the UK is now a Third Party State and, consequently, Brussels I (recast) no longer applies and is no longer available for the purpose of recognition of an English scheme of arrangement (if it ever was). It should be noted that however, by operation of Article 67 of the Agreement on the withdrawal of the UK of Great Britain and Northern Ireland from the EU and the European Atomic Energy Community (2019/C 384 I/01), Brussels I (recast) will still apply in the UK and EU to:

- proceedings commenced before 1 January 2021
- judgments delivered by English or EU courts in such ongoing proceedings (whenever decided)
- settlements 'approved or concluded' before 2021, and
- certain public authority decisions 'drawn up or registered' prior to 2021

In its stead, the UK has applied to re-accede to the Lugano Convention†(Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007) as an independent contracting state. The Lugano Convention governs jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the EU and other contracting parties on terms similar to Brussels I (recast) and would give the greatest continuity if the UK re-accedes. There are, however, important differences. For instance, priority is always given to the court first seised, regardless of whether it is the parties' chosen court, which could open the door to spoiling tactics such as actions for negative declaratory relief in another jurisdiction to create delay. Also, at least one party must be domiciled in a contracting state. However, acceptance of accession to the Lugano Convention requires unanimous agreement of the contracting parties. More specifically, the Lugano Convention states that the other contracting states shall 'endeavour' to give their unanimous consent within one year.†The UK formally requested†to accede to the Lugano Convention in its own right in April 2020. Switzerland, Norway and Iceland have†expressed support†or†approved the UK's accession but the EU (and Denmark) as the remain-

ing parties have yet to provide their consent. In the absence of such unanimous approval, the Lugano Convention cannot provide the legal basis for recognition in Germany. The decision of the district court of Zurich court dated 22 February 2021 should also be noted. This was in relation to the (non) recognition of the UK judgment in Switzerland post-Brexit. Upon request for recognition filed on 18 February 2021, the Zurich court concluded that since 1 January 2021, the Lugano Convention was no longer applicable to requests involving Switzerland and the UK and had to be disregarded as a basis for recognition, see: judgment.

Some scholars have suggested that instead the 'Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' (the Brussels Convention) (1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, paras [32]–[42] (DE, FR, IT, NL)) could be revived and may then provide the necessary framework to recognise English court judgments and orders in Germany (see Dickinson, JPrIL 12 (2016), pp 204-205; Masters/McRae, J int Arb 2016, pp 491–493; Aikens/Dinsmore, EBLR 27 (2016), pp 908–911; Lehmann/Zetsche, EBLR 27 (2016), pp 1004–1006, 1023–1024; the same author in JZ 2017, para [70]; Ungerer in Kramme/Baldus/Schmidt-Kessel (ed), Brexit und die juristischen Folgen, 2017, para [300]; Lehmann/D'Souza, JIBFL 32 (2017), para [103]; Tretthahn—Wolski/Fˆrstel, ÷JZ 2019, para [486]). The Brussels Convention was signed at Brussels in 1968 by the members of the†European Economic Community (as it then was) and sets out a system for the allocation of jurisdiction and for the reciprocal enforcement of judgments between contracting states. The UK acceded to the Brussels Convention in 1978 and it became part of UK law under the Civil Jurisdiction and Judgments Act 1982. The Brussels Convention was of course replaced by Brussels I and subsequently Brussels I (recast); however, it was never terminated or withdrawn, (see Hess, IPRax 2016, para [409 ff] (413); R¸hl, JZ 2017, para [72 ff] (77)) and continues to this day in relation to matters concerning dependent territories of Brussels Convention countries (see Article 68 of Regulation (EU) 1215/2012, Brussels I (recast)). This suggestion was always fraught with difficulties but more importantly, things have moved on. While the Brussels Convention still applied to the UK during the†UK-EU transition period†(which ended at 11.00 pm (UK time) on 31 December 2020), at the end of the transition period, all rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the Brussels Convention were converted into UK law as†'retained EU law' (see: section 4 of the European Union (Withdrawal) Act 2018). Subsequently, the UK government revoked the retained EU law version of Brussels Convention (by way of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479 (as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations, SI 2020/1493)), subject only to some transitional provisions which save the Brussels Convention (in its application to a few dependent territories of EU Member States) regarding its continued application in the UK (unilaterally) in respect of proceedings instituted before the end of the transition period, when appropriate. In light of such revocation on the part of the UK, the Brussels Convention cannot provide a gateway to recognition of a scheme of arrangement in Germany.

Others learned articles, (see Stefan Sax/Artur Swierczok: Die Anerkennung des englischen Scheme of Arrangement in Deutschland post Brexit, Zeitschrift f¸r Wirtschaftsrecht vom 31 M‰rz 2017, Heft 13, S 601–607; the same authors in International Corporate Rescue Vol 14 (2017) Issue 1, The Recognition of an English Scheme of Arrangement in Germany Post Brexit: The Same But Different?) have suggested that following Brexit, recognition of an English scheme of arrangement is (still) available under Regulation (EC) 593/2008 of the European Parliament and of the Council of 17†June 2008 on the law applicable to contractual obligations (Rome I Regulation) (OJ L 177, 4.7.2008, paras [6]–[16]). Although it ceased to be directly applicable in the UK (as regards to the choice of law, the English courts are still likely to respect provisions in contracts that confer jurisdiction by agreement on the English courts regardless of what replaces the Rome I Regulation), the German courts, under the conflict of law rules set forth in the Rome I Regulation (which applies not only to Member States but universally, see Article 2 of Regulation (EC) 593/2008, Rome I Regulation), will still (have to) recognise an explicit choice of English law clause in any agreement as they will continue to apply the Rome I Regulation. However, the most likely way recognition may be available in Germany is pursuant to section 328 of the German Civil Procedure Rules (Zivilprozessordnung, GCPR).

Just as with section 343 of the Insolvency Code, section 328 of the GCPR also contains the principle of an automatic recognition of foreign judgments, although it is worded differently: here, the statutory law lists the reasons that would prevent recognition of a foreign judgment, inferring that in all other instances recognition is always available. Firstly, section 328 of the GCPR applies exclusively to foreign court judgments in civil matters. The test as to whether a court decision is deemed a 'judgment' for the purpose of recognition under section 328 of the GCPR is similar (if not identical) with the test described above in respect of section 343 of

the Insolvency Code: it requires that the decision was rendered by a court following an 'adversarial' procedure pertaining to civil matters. As stated above (decision of the German Supreme Court (Bundesgerichtshof), order dated 15 February 2012—IV ZR 194/09 on 'Equitable Life'(OLG Celle)), the German Supreme Court has acknowledged the existence of such 'adversarial elements' and, therefore, the scheme of arrangement meets this test.

However, it does not stop there: a foreign judgment will not be recognised if any of the exclusion provisions set out in section 328(1) no 1 to 5 of the GCPR apply. These exclusion provisions which give grounds for refusal are very similar to those applying under section 343 of the Insolvency Code, namely that the court sanctioning the scheme of arrangement had jurisdiction in accordance with the German Spiegelbildprinzip and that recognition of such decision does not violate the German ordre public. For the reasons outlined in the last paragraph under Q2 above, it is very hard to imagine how an order sanctioning a scheme of arrangement could be said to violate the German ordre public but looking at the matter purely from a German law perspective, some questions remain: section 328 of the GCPR states, for instance, that recognition is excluded should the 'defendant' not have been served properly with the necessary court documents. In a scheme of arrangement, who is the 'defendant'? One assumes it cannot be the scheme company, as it is the one making the proposal for a re-arrangement of its debt to its creditors. Is it the scheme company's creditors then or only those creditors objecting the sanctioning of the scheme? If they were to be regarded as the 'defendant(s)', the test under the Spiegelbildprinzip would suggest that the English courts do not have jurisdiction if the scheme involves foreign creditors (say creditors residing or being domiciled in Germany) as the 'sufficient connection' test based on the existence of English creditors or (finance) agreements governed by English law does not have any equivalence in German law. To overcome this challenge, the finance documents governing the relationship between the scheme company and its creditors will have to contain a valid jurisdiction (see in that respect section 38 of the GCPR. Of course, the validity of such jurisdiction clause may be challenged, thus adding more uncertainty) clause in favour of the English courts. The UK has acceded to the Hague Convention of 30 June 2005 on Choice of Court Agreements to which EU members are already a party. The Hague Convention provides for allocation of jurisdiction and enforcement of judgments given by a court designated by an exclusive jurisdiction clause and, therefore, its application could further facilitate recognition of schemes of arrangement where parties have submitted to the exclusive jurisdiction of the English courts. That said, it is uncertain as to whether the Hague Convention applies to schemes of arrangement (see its Article 2(2) lit (e) and the exclusion for 'insolvency, composition and analogous matters').

Additionally, section 328 of the GCPR requires reciprocity, meaning that the foreign court would recognise an equivalent judgment if it were handed down by a German court in similar circumstances (see Bach in BeckOK ZPO, 40th edition 2021, ß 328 para [46]). This test, at least, should not cause any major concerns as Germany and the UK, on 14 July 1960, entered into the German-British Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters.

By and large, section 328 GCPR appears to be the most promising gateway to recognition of an English scheme of arrangement in Germany, although as ever, every case will have to be determined on the specific facts and uncertainties remain.

Restructuring plans

A restructuring plan is a new restructuring tool under CA 2006, Pt 26A, introduced in 2020 by the Corporate Insolvency and Governance Act 2020 (CIGA 2020). It provides a company encountering financial difficulties which, as a minimum, could impact its ability to continue business as a going concern with the ability to propose a compromise or arrangement with its creditors and members to restructure its affairs.†As far as its recognition in Germany is concerned, there is no case law available yet to give guidance. However, the starting point for the recognition of a restructuring plan would be as outlined above, meaning that, in principle, there are two possible options for recognition in Germany, ie section 343 Insolvency Code or, alternatively, section 328 of the GCPR.

Given that the framework of the new restructuring plan is based very much on the scheme of arrangement procedure†and taking into account the above analysis, one might assume that the position is identical for a restructuring plan, namely that recognition pursuant to section 343 of the Insolvency Code is not available but that a restructuring plan is likely to be recognised in Germany pursuant to section 328 of the GCPR. However, it is important to draw a distinction between a scheme of arrangement under CA 2006, Pt 26 and

the restructuring plan under†its CA 2006, Pt 26A. For instance, the CA 2006, Pt 26 applies irrespective of the financial state of the company and is available to both solvent and insolvent companies alike whereas CA 2006, Pt 26A is designed exclusively for insolvency situations and applies only if the statutory threshold conditions are satisfied, meaning that a debtor must have 'encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern' and, further, that 'the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties'.

These distinguishing features were highlighted in the case, *Re gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) which recently went before the High Court in London. In summary, the main facts before the court were as follows:

- Gategroup is the largest provider of airline food and catering services in the world. Its business had suffered dramatically as a result of the coronavirus (COVID-19) pandemic and the dislocation that the pandemic has brought to the airline industry. As part of a wide ranging debt restructuring and recapitalisation exercise, Gategroup†launched a restructuring plan to amend and extend the maturity of its senior debt and bond liabilities in order to afford itself some further breathing space to trade through the pandemic. Gategroup's bonds contained an exclusive jurisdiction clause in favour of the courts of Zurich, which would have taken precedence over any assertion of the English court's jurisdiction provided the Lugano Convention applied. One of the questions before the court was, therefore, whether the Lugano Convention had to be construed as applying to restructuring plans

For a Restructuring Plan to fall within the ambit of the Lugano Convention, it was necessary for the court to decide whether restructuring plans constitute 'civil and commercial matters' or, alternatively, falling within the Lugano Convention's exclusion applicable to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. In marked contrast to the generally held view that schemes of arrangement are civil and commercial matters, the court held that restructuring plans contain all the elements of insolvency proceedings and are outside the scope of the Lugano Convention. In his decision, Mr Justice Zacaroli focused on whether restructuring plans would be covered by the EU Recast Regulation on Insolvency. He found the elements of insolvency proceedings as defined by Article 1(1) of Regulation (EU) 2015/848, EU Recast Regulation on Insolvency, to be as follows (Ibid, para [106]):

- they must be collective proceedings
- they must be based on laws relating to insolvency and have as their purpose rescue, adjustment of debt, reorganisation or liquidation, and
- they must encompass at least one of the following:
  - the debtor is partially or totally divested of its assets
  - the assets and affairs of the debtor are subject to control or supervision of a court, or
  - a temporary stay is imposed, by a court or by operation of law, on individual enforcement proceedings to enable negotiations to take place between the debtor and its creditors

Zacaroli J was satisfied that these elements were features of the Gategroup restructuring plan:

- the restructuring plan in Gategroup affected all the company's financial creditors and, thus, met the collective proceedings-test (see *Re gategroup Guarantee Ltd* [2021] EWHC 304 (Ch), paras [109]–[111])†
- given that restructuring plans were introduced by CIGA 2020 and are available only to companies facing actual or anticipated financial difficulties and, further, given that their purpose must be to eliminate, reduce, prevent or mitigate, these difficulties, they were based on laws relating to insolvency (see *Re gategroup Guarantee Ltd* [2021] EWHC 304 (Ch), paras [112]–[121])
- he also found that restructuring plans are subject to the supervision of the court, as plan meetings are convened by court order, the composition of the classes is approved by the court and

the plan is effective only upon sanction by the court (see *Re gategroup Guarantee Ltd* [2021] EWHC 304 (Ch), paras [112]–[133])

On that analysis, Zacaroli J found that the Lugano Convention's 'insolvency exclusion' applied and, consequently, that the English court had jurisdiction in respect of Gategroup's restructuring plan.

Zacaroli J's legal analysis of the EU Recast Regulation on Insolvency and his learned reasoning as to what constitutes 'insolvency proceedings' could (and arguably would) lend weight to the suggestion that restructuring plans may be recognised in Germany pursuant to section 343 of the Insolvency Code. In favour of such recognition pursuant to insolvency law, see Tashiro, 'Das StaRUG im Vergleich zum Restructuring Plan—dem neuen 'Super Scheme', Neue Zeitschrift f¸r Insolvenzrecht, Beilage 2021, pp 77–79. That said, as stated above, the term 'insolvency proceedings' under German law is not necessarily identical with the term as construed under the EU Recast Regulation on Insolvency, which also includes pre-insolvency restructuring proceedings. See Article 1(1) of Regulation (EU) 2015/848, EU Recast Regulation on Insolvency, and also Recital 10, which states that the EU Recast Regulation on Insolvency's scope '(...) should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs (...).' Applying German domestic law only, and having regard to the case law that is available with respect to schemes of arrangement, the German courts may decide that the involvement of all of a debtor's creditors is a distinguishing (and necessary) feature of 'insolvency proceedings' and, therefore, may form a different view in their assessment of English restructuring plans. If they did, recognition could still be available pursuant to section 328 of the GCPR, subject to the challenges and considerations outlined above.

INSOL Europe/LexisNexis table of 'How EU Member States recognise insolvency/restructuring proceedings commenced in third country states'

A table produced by INSOL Europe in partnership with Lexis Nexis (also incorporating information from Lexology Getting The Deal Through) is available here: INSOL Europe/LexisÆPSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country': consolidated table.

We look at how EU Member States would recognise insolvency or restructuring proceedings commenced in a third country, such as the UK (post-Brexit), the US, Japan, Australia or Canada. As always, you should contact local lawyers in the relevant jurisdiction to check the current measures in force.