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

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Restructuring & Insolvency analysis: This article looks at how Austria 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 Austria. Written by Gottfried Gassner at Binder Grösswang, Vienna, Austria.

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

Austria has not adopted the UNCITRAL Model Law on insolvency (the UNCITRAL Model Law) and, as far as can be seen, does not intend to adopt it in the foreseeable future.

In relation to cross-border insolvency cases, Austria relies mainly on the Regulation (EU) 2015/848 on insolvency proceedings, Recast Regulation on Insolvency (EU Recast Regulation on Insolvency), and for non-EU cases on the rules of its domestic insolvency regime (sections 217 et seqq of the Austrian Insolvency Code (Insolvenzordnung)).

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)?

Recognition of foreign (non-EU) insolvency proceedings is available pursuant to section 240 of the Insolvency Code. The same applies potentially to EU Member States' insolvency proceedings not falling within the scope of the EU Recast Regulation on Insolvency.

According to this provision the effects of insolvency proceedings opened in another country and judgments rendered in such proceedings shall be recognised in Austria if:

- the centre of main interests (COMI) of the debtor is in such other country, and
- the insolvency proceedings are comparable in their main features to Austrian insolvency proceedings, in particular with Austrian creditors being treated like creditors from the country in which the proceedings were opened

COMI, as the first relevant element, is a concept well developed, known among others from the EU Recast Regulation on Insolvency (and previous rules) and refined by pertinent case law; this criteria means that only main insolvency proceedings can be recognised under this provision; safeguarding and interim measures are not capable of being recognised (see *Slonina* in *Koller/Lovrek/Spitzer*, IO § 240 Rz 7).

The second element (comparability to Austrian insolvency proceedings) leaves a lot of room for interpretation. Little to no guidance is available from Austrian case law, though. Legal literature points in particular to the following criteria (see *Slonina* in *Koller/Lovrek/Spitzer*, IO §240 Rz 6 et seqq):

- the proceedings are rooted in insolvency law (and not, for instance, in civil proceedings)
- the debtor (or its management) are, at least partially, deprived from the authority to dispose over the debtor's assets
- creditors are at least in principle treated equally and foreign (including Austrian) creditors are not being discriminated against
- the proceedings involve all of the debtor's creditors
- whether the proceeding have objectives similar to Austrian insolvency proceedings, for example the best possible creditor satisfaction or restructuring of the debtor

A further observation should be added: as regards the compatibility test, so far the proceedings available under the Austrian Insolvency Code are all public and all include all creditors) In July 2021, the new Austrian Restructuring Code (*Restrukturierungsordnung*) implementing the EU Directive 2019/1023 (on preventive restructuring frameworks) came into force; the new law joins the Insolvency Code and adds restructuring instruments of greater flexibility (for instance, not all creditors must be included) to the Austrian restructuring tool box; it is to be expected that at least those proceedings which are public will be added to Annex A of the EU Recast Regulation on Insolvency and will, therefore, be seen as 'insolvency' proceedings (and need to be recognised as such by the other EU Member States). These developments may also broaden the view on what kind of proceedings can be recognised under section 240 of the Insolvency Code.

Finally, it is worthwhile noting that reciprocity, ie that the other country would recognise Austrian insolvency proceedings as well, is not a requirement for the recognition under the Austrian Insolvency Code:

- recognition will be denied if (main) insolvency proceedings have been opened in Austria or provisional measures have been ordered, or where the proceedings lead to a result which is manifestly incompatible with fundamental principles of Austrian law (*ordre public caveat*; this exception shall be interpreted narrowly)
- conducting foreign insolvency proceedings in Austria may require enforcement acts in Austria based on foreign decisions. If so, such decisions need to have been declared enforceable in Austria (by the Austrian courts), but certain relaxations apply if the enforcement is required to conduct the foreign main proceedings in Austria (section 240 (4) of the Insolvency Code)

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

When it comes to the recognition of English schemes of arrangement (under CA 2006, Pt 26) or English restructuring plans (CA 2006, Pt 26A) in Austria post-Brexit, some direction is given, but the best pathway still remains to be explored:

English schemes of arrangement (under CA 2006, Pt 26)

As far as can be seen, the recognition of English schemes of arrangement have not played an important role in Austria so far. There have been some cases (mainly in a setting where Austrian subsidiaries of a group of companies have been included in the scheme) but none of them have apparently been tested in the Austrian courts. Legal literature, with a few exceptions, is silent in relation to the recognition of English schemes of arrangement in Austria (before and even more so after Brexit).

Prior to Brexit the main argument in legal literature (basically along the lines of the 'Equitable Life' decision of the German Supreme Court (order dated 15 February 2012-IV ZR 194/09)) was that an English scheme of arrangement needs to be recognised in Austria on the basis of Art 2 lit a in conjunction with Article 36 of Regulation (EU) 1215/2012 (Brussels I (Recast)).

Following Brexit, Brussels I (Recast) no longer applies in relation to the UK and is, therefore, no longer available for the purpose of recognition of an English scheme of arrangement (with certain exceptions as proceedings commenced prior to 2021). To date, the EU and UK have not agreed on any new framework.

Some alternative pathways for recognition come to mind but they remain to be analysed and discussed in greater detail in legal literature and tested in practice and, as the case may be, in the courts:

- recognition on the basis of the Austrian private international insolvency laws (see before under Q2) likely fails due to the fact that English schemes of arrangement pursuant to the prevailing Austrian view do not qualify as insolvency proceedings and, therefore, cannot be recognised on these grounds (see *Slonina* in *Koller/Lovrek/Spitzer*, IO § 240 Rz 14)
- the UK sought to join the Lugano Convention in April 2020. Lugano would have offered a similar (although not as modern and practical) framework as Brussel (I) Recast. However, acceding

to Lugano required unanimous consent by all parties, including the EU. The European Commission has deposited a Note Verbale at the Federal Department of Foreign Affairs of Switzerland (in its capacity as Depository for the Lugano Convention) beginning July 2021 stating that the European Union is not in a position to give its consent to inviting the UK to accede to the Lugano Convention (see https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/20210701-LUG-ann-EU.pdf). This door, for the time being, is therefore closed

- it has been proposed in legal literature that the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters could be revived (see for instance *Tretthahn-Wolski/Förstel*, Der Brexit von Rom und Brüssel, ÖJZ 2019/60, 485). This view has meanwhile become obsolete, though, as the UK unilateraly revoked the Convention on its side (see *Tretthahn-Wolski/Förstel-Cherng*, Nein zu Lugano-Zu den Auswirkungen des harten Brexits auf Cross-Border Streitigkeiten, ÖJZ 2021/92)
- some legal writers argue that English schemes of arrangement, if they concern UK governed contracts, could be recognised on the basis of the Rome I Regulation (Regulation (EC) 593/2008); Rome I, pursuant to its Article 2 of Regulation (EC) 593/2008, applies universally and Austrian courts (same as the courts of other EU Member States) would need to recognise an explicit choice of English law clause in any agreement (see *Sax/Swiercok*, Die Anerkennung des englischen Scheme of Arrangement in Deutschland post-Brexit, ZIP 2017, 601). The downside, as mentioned, is that this is a pathway only for liabilities governed by English law
- the Hague Convention (Convention of 30 June 2005 on Choice of Court Agreements) could be a basis for recognition. The Convention is not an EU instrument, but an international convention to which both, the EU and UK are parties. Whether the Hague Convention applies in relation to English schemes of arrangement is not entirely free of doubt as 'insolvency, composition and analogous matters' do not fall within its scope (expressly Art II (2) (e)); if the Hague Convention applied, it would still be required that all contracts to be included in the English scheme of arrangement contain an exclusive choice of UK courts. This on its own potentially takes away a lot of practical potential. Further, among others, there is a discussion around the question whether the Hague Convention in relation to the UK applies to choice of court agreements concluded prior to 1 January 2021 or not; the EU Commission takes the latter position (see *Tretthahn-Wolski/Förstel-Cherng*, Nein zu Lugano-Zu den Auswirkungen des harten Brexits auf Cross-Border Streitigkeiten, ÖJZ 2021/92)
- the journey through potential options is not over yet. There exists a bilateral convention between Austria and the UK on the mutual recognition and enforcement of judgments in civil and commercial matters. This convention dates back to the early 1960s but is still in place; not very surprising, many of its rules have meanwhile fallen out of use. Pursuant to this convention, Austrian courts shall recognise and enforce judgments in civil and commercial matters rendered by a 'superior court' of the UK, with the exception of judgments rendered on appeal in proceedings in which a lower court has given judgment at first instance. The convention defines the following superior courts: For the UK: the House of Lords; for England and Wales: the Supreme Court of Judicature (Court of Appeal and High Court of Justice) and the Courts of Chancery of the Counties; Palatine of Lancaster of Durham; for Scotland: Court of Session and Sheriff Court; for Northern Ireland: the Supreme Court of Judicature). Assuming that English schemes of arrangement are likely not sanctioned by those relevant superior courts the convention does not look like a promising basis for the recognition of English schemes of arrangement in Austria. Even if it would be a 'door opener', implementation would remain difficult because, for instance, a cumbersome exequatur process would need to be followed
- finally, the Austrian Enforcement Act (*Exekutionsordnung*) provides for rules that, if certain requirements are met, foreign judgments shall be recognised and enforced in Austria (section 406 et seqq of the Austrian Enforcement Act). One first and very relevant requirement in that regard is that Austrian judgments would be recognised and enforced in the UK as well (reciprocity) and that such reciprocity must be 'guaranteed' (*verbürgt*) by treaties or other binding rules. As has been explained above, at least from the Austrian side, there are no obvious rules guaranteeing such recognition. Adding to this, legal writers point to the UK 'Rule of Gibbs' as a

potential barrier. In a nutshell its effect is that, unless a creditor submits to a foreign proceeding, a foreign proceeding designed to bring about the cancellation of a debtor's obligations will discharge only those liabilities governed by the law of the country in which that proceeding took place; in other words, if UK governed liabilities would be included in Austrian proceedings this would, as the case may be, not be accepted by UK courts; this potentially jeopardises the reciprocity test (see *Sax/Berkner/Saed*, Anerkennungsmöglichkeiten des englischen Part 26A-Restrukturierungsplans in Deutschland post-Brexit, NZI 2021, 517, in relation to a similar reciprocity test applying between Germany and the UK)

English restructuring plan (under CA 2006, Pt 26A)

- the recognition of the English restructuring plan depends on whether such plan qualifies as an insolvency proceeding or not
- if it does not qualify as an insolvency proceeding, the same applies as in relation to the recognition of English schemes of arrangement
- if it does qualify as insolvency proceedings in principle recognition based on the rules of the Austrian Insolvency Code could be available (see Q2). While UK courts as far as can be seen appear to qualify the proceedings with good arguments as insolvency proceedings, Austrian courts would not be bound to such qualification. Apparently, the English restructuring plan also offers certain flexibility and may look different from case to case (see also *Sax/Berkner/Saed*, Anerkennungsmöglichkeiten des englischen Part 26A-Restrukturierungsplans in Deutschland post-Brexit, NZI 2021, 517 in relation to Germany). The closer the plan is to the proceedings available in Austria (including the public proceedings under the new Restructuring Code) the higher the changes for recognition by Austrian courts are

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.