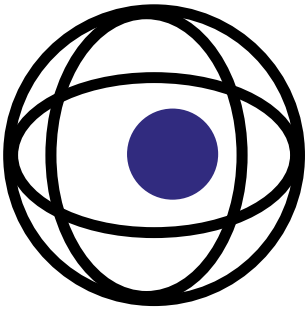

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Joint Project on

‘How EU Member States recognise insolvency and restructuring proceedings of a third country’

January 2022

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INSOL Europe/LexisPSL Joint Project on

‘How EU Member States recognise insolvency and restructuring proceedings of a third country’

(January 2022)

The presentation of material in this publication does not imply the expression of any opinion whatsoever on the part of INSOL Europe or LexisPSL concerning the description of the legislation in each country covered by the Joint Project.

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Preface

The INSOL Europe/LexisPSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country' was finalised in October 2021.

The project arose from the initiative of LexisPSL which was of the opinion that a proper consideration should be given to providing information for all professionals interested in questions arising under the International Private Law of Insolvency. In particular, attention has been paid to how EU Member States would recognise insolvency or restructuring proceedings commenced in a third country, such as the UK (post Brexit).

Early 2021, the Executive of INSOL Europe agreed to bring its assistance to LexisPSL in this ambitious project. This document was prepared by most of the INSOL Europe Country coordinators with the assistance of INSOL Europe members and non members. The readers can now have access to the rules applicable to the recognition of third countries' judgements in the 27 Member States of the European Union.

The questions to be answered by each contributor were as follows:

The first question considers whether the UNCITRAL Model law on Insolvency has been adopted in that particular country and, if not, whether there are any plans to consider its adoption as the application of the UNCITRAL Model law by a country would greatly improve visibility on the process and likelihood of the third country gaining recognition of its relevant insolvency/restructuring proceeding.

The second question considers how each country will recognise insolvency/restructuring proceedings commenced in a third country (ie a country which is not an EU Member State, such as the UK (post-Brexit)), which may be through the Convention of 30 June 2005 on Choice of Court Agreements (Hague Convention), 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) or other private international law rules.

The third question looks at how this approach would apply specifically to the example of seeking recognition of proceedings commenced in a third country (the UK) in respect of an English Part 26 scheme of arrangement or Part 26A restructuring plan.

These individual answers resulted also in the production of a table summarising their findings which is reproduced in Appendix I which is still available at https://www.insol-europe.org/technical-content/recognition-in-third-states

Disclaimer:

You should always contact local lawyers in the relevant jurisdiction to check the current measures in force and the impact of any particular circumstances or nuances on your case.

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COUNTRY REPORTS

Austria

(as at 28/07/2021)

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 seq 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 seq):

- the proceedings are rooted in insolvency law (and not, for instance, in civil proceedings)

- the debtor (or its management) are, at least partially, deprived of the authority to dispose of 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 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 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 for 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 (Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007) in April 2020. Lugano would have offered a similar (although not as modern and practical) framework as Brussels (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/volkerrecht/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 unilaterally 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; Rome I, pursuant to its Article 2 of Regulation (EC) 593/2008, applies universally and Austrian courts (as for 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 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 contained 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 surprisingly, 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 seq 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 treat the proceedings (with good arguments) as insolvency proceedings, Austrian courts would not be bound by 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 chances for recognition by Austrian courts are.

Belgium

(as at 05/08/2021)

Written by Jan Ravelingien and Jari Vrebos at MVVP

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

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted as such in Belgium, but some provisions of national law were inspired by the UNCITRAL Model Law.

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)?

The Belgian law of 16 July 2004 contains the national rules of international private law (Belgian IPL Code), and contains a chapter on insolvency proceedings.

A foreign judgment concerning the opening, the conduct or the closure of insolvency proceedings will be recognised or declared enforceable in Belgium in accordance with the general principles of the Code (art 121 ß 1 Belgian IPL Code).

These general principles of the Belgian IPL Code stipulate that a foreign judgment will be recognised in Belgium without there being a need for the application of an exequatur procedure. A foreign judgment, which is enforceable in the State in which it was rendered, will be declared enforceable on the basis of an ex parte exequatur procedure (art 22 Belgian IPL Code). The term 'judgment' means any decision rendered by an authority exercising judicial power.

A foreign judgment shall not be declared enforceable or its recognition can be challenged if the rights of defence were violated or if the judgment would still be subject to an ordinary recourse in the originating state (art 25 § 1 Belgian IPL Code).

The recognition means that the insolvency practitioner may exercise all powers conferred on them by the foreign judgment. They may in particular request territorial proceedings or temporary and conservative measures in Belgium.

However, there are some instances where the law of another state other than the state where the insolvency judgement was rendered will be applied, such as art 119 § 2 Belgian IPR Code:

- the effects of opening the insolvency proceedings on the rights in rem of third parties in respect of assets belonging to the debtor which are located within the territory of another state when the proceedings are opened are governed by the law applicable to those rights in rem

- the rights on the reservation of title of the seller of an asset at the time of the opening of the proceedings is located within the territory of another state are governed by the law applicable to the rights in rem on the asset
- the rights of a creditor to demand set-off of their claim against the claim of the debtor, are governed by the law applicable to the insolvent debtor's claim

The Belgian Code of Economic Law provides further stipulations on cross-border insolvency, among others:

- the identity of the insolvency practitioner is published in the Belgian State Gazette upon request of the insolvency practitioner (art. XX.213 Belgian Code of Economic Law)
- the insolvency practitioner can exercise the competences attributed to them under foreign law (art XX.216 Belgian Code of Economic Law)

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

Belgium recognises foreign insolvency proceedings on the basis of its national law (Belgian IPL Code).

The Belgian IPL Code states in its chapter on collective insolvency proceedings that the chapter applies to 'insolvency proceedings and procedures for collective debt settlement' (art 116 Belgian IPL Code) without further definitions, but Annex A of the European Insolvency Regulation mentioned UK voluntary arrangements under insolvency legislation as 'insolvency proceedings'.

The Belgian IPL Code is applicable without prejudice to the application of international treaties and the European Insolvency Regulation. The 2 May 1934 bilateral treaty between Belgium and the UK on the execution of judgments was not relevant pre-Brexit and has 'revived' now, but in any case this treaty is not applicable to insolvency proceedings (see art 4 (3) of the treaty).

Bulgaria

(as at 04/03/2021)

Written by Stela Ivanova LL.M. at bnt attorneys in CEE, Sofia, Bulgaria

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

Bulgaria has not adopted the UNCITRAL Model law on Cross-Border Insolvency. A reform on insolvency and insolvency-related law is pending (as at March 2021) but is not expected to bring in changes in respect of this.

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)?

The current legislation contains a limited number of inter-state recognition rules. These are partially related to insolvency and partially to international civil procedure law. They apply independently of EU-membership and read:

Recognition rules related to insolvency: Applicable articles are article 757 through article 760 of the Commercial Act.

Article 757 Recognition of a Foreign Act of Court on Insolvency: The Republic of Bulgaria will, under the premises of mutuality, recognise an act of a foreign court proclaiming insolvency given the foreign court is the court of a state in which the debtor is seated.

Article 758 Rights of an Insolvency Practitioner appointed by a foreign court: The IP appointed by a foreign court's act has the rights entrusted to him/her by the law of the state where the insolvency proceedings have been opened as long as these rights do not contradict the public order in the Republic of Bulgaria.

Article 759. Ancillary Insolvency Proceedings: (1) Upon application by the debtor, the foreign IP or a creditor the Bulgarian court can open ancillary insolvency proceedings with regard to a merchant with substantial assets in Bulgaria, given a foreign court has declared insolvency in respect of that merchant.

(2) The act of (the Bulgarian) court under section 1 is only effective over the debtor's assets in Bulgaria.

Article 760. Effects of Ancillary Insolvency Proceedings (1) Claims to challenge certain transactions initiated by the main or ancillary IP are considered initiated in both proceedings.

(2) A creditor who has received partial payment in the main proceedings only participates in the recoveries of the ancillary proceedings when the part such creditor would be entitled to receive is bigger than the respective part the remaining creditors in the ancillary proceedings would be entitled to.

(3) A plan under article 696 (scheme of arrangement) in the ancillary proceedings can only be adopted with the main IP's consent.

(4) After attribution to the creditor, the remaining recoveries of the ancillary proceedings are transferred to the mass under the main proceedings.

Main recognition rule related to international civil procedure law: Applicable article is article 117 from the Code on International Private Law. Competent court is the City Court in Sofia.

Article 117. Decisions and acts by foreign courts and other foreign authorities are recognised and their execution is permitted when:

- the foreign court or authority was, under Bulgarian law, competent to issue the act in question; however, such competence cannot be based only on the claimant's citizenship or registration in the state of the foreign court
- the debtor has been served a transcript of the claim, the parties have duly been summoned and basic principles of Bulgarian law on a fair hearing have not been violated
- no decision by a Bulgarian court between the same parties on the same legal grounds and for the same claim has entered into force
- no claim between the same parties, on the same legal grounds and for the same claim is pending before a Bulgarian court when the Bulgarian procedure was initiated before the foreign one
- recognition and execution would not contradict Bulgarian public order

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules).

It is questionable whether Bulgaria would recognise an English scheme of arrangement or an English restructuring plan. The main points of concern are: (1) Lack of explicit legislative regulation covering recognition of such plans. Bulgarian courts tend to follow a formalistic approach and face difficulties when dealing with untypical cases; (2) International jurisdiction in England based on COMI other than the place of debtor's formal registration might cause problems; (3) Such plans cause the loss of rights by creditors against their will. This might raise issues of public concern although the notion is not unfamiliar in Bulgarian law. The risk is especially high in the case of a cram down by an English restructuring plan as functionally similar instruments in Bulgaria challenge the contractual nature of the plan; (4) Bulgarian legislation encourages ancillary insolvency proceedings and there is practically no instrument permitting the main IP to prevent them.

The chances for recognition and execution appear higher for a scheme of arrangement with no cram down in the case of a debtor formally registered in England. However, formal arguments and the mutuality requirement can prevent recognition here, too.

Apart from this, Bulgaria is bound by the Lugano Convention, the Rome I Convention and The Hague Convention.

Croatia

(as at 08/07/2021)

Written by Jelenko Lehki at Lehki Law Office, Country co-ordinator for INSOL Europe

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

Croatia has not adopted the UNCITRAL Model law on Insolvency. There are no plans to adopt it in the near future since the matter (including applicable law) is already included in Chapter 11 of the Croatian Insolvency Act.

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)?

The procedure for recognition of the foreign court decision on opening the insolvency proceedings (Third Party states outside EU Member States which would be done under EIR Recast) has been based on provisions of the Insolvency Act (National Gazette 71/15, 104/17) articles 400–427.

The petition for recognition must include:

- the original decision and a translation into Croatian language, or a certified copy
- a certificate of enforceability, and
- a list of known assets of the debtor in the territory of the Republic of Croatia

The decision will be recognised if:

- the court that delivered the decision had international jurisdiction according to Croatian law
- the decision is enforceable according to the law of the country of origin, and
- if the recognition wouldn't be contrary to public policy

The effects of the foreign decision are determined by the law of the country of origin if it is not contrary to Croatian public policy. If the foreign decision states that it will have the effect of opening the insolvency proceedings for the debtor in Croatia, the decision on recognition will have that effect and will be published in the same way as a domestic decision on opening the proceedings.

The decision on recognition can be challenged by the foreign debtor, foreign insolvency office holder and creditors.

Q3. Would your country recognise an English scheme of arrangement (under Part 26 of the Companies Act 2006) or an English restructuring plan (under Part 26A of the Companies Act 2006) now post Brexit and on

what basis? (eg Hague Convention, Rome I or other private international law rules)

As per Article 427 of the Insolvency Act, provisions on the recognition of a foreign decision on the opening of insolvency proceedings shall apply mutatis mutandis to the recognition of a foreign decision approving a restructuring plan or scheme, as well as the recognition of a foreign decision made in another similar procedure.

The same applies to the recognition of precautionary measures taken in connection with a proposal to open bankruptcy or similar proceedings, as well as to other decisions taken for the implementation and completion of these recognised foreign proceedings.

Cyprus

(as at 10/03/2021)

Written by Irina Misca at CITR, Country Co-ordinator for INSOL Europe

Q1. Has your country adopted the United Nations Commission on International Trade Law (UNCITRAL) Model law on insolvency? If not, does it intend to do so in the near future?

The UNCITRAL Model Law on cross-border insolvency has not yet been adopted in Cyprus.

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)?

There are no private international law provisions for the recognition of insolvency proceedings commenced in countries outside of the EU Member States. Thus, in the absence of legislative framework providing for the recognition of foreign insolvency proceedings in Cyprus, such recognition may be achieved under the principles of common law or based on a bilateral agreement.

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)

At this moment, there is no legal framework to ensure recognition of an English scheme of arrangement (under CA 2006, Pt 26) or an English restructuring plan (under CA 2006, Pt 26A) post-Brexit.

Czech Republic

(as at 01/03/2021)

Written by Ernst Giese at Giese & Partner, Country Coordinator for INSOL Europe and Ondřej Rathouský at Giese & Partner

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

No, the Czech Republic does not intend to adopt the UNCITRAL Model law on Insolvency in the near future.

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 insolvency proceedings commenced in countries outside the EU Member States is governed by the general provision contained in section 111 (5) of Czech Act No 91/2012 Coll., on international private law, pursuant to which: Foreign decisions in matters of insolvency proceedings shall be recognised under the condition of reciprocity, provided the debtor's main interests are concentrated in the foreign state in which the said decisions have been issued and provided the debtor's property in the Czech Republic is not the subject of proceedings which have already commenced. In these cases, and otherwise, if no proceedings have been commenced by a Czech court against the property which has become the subject of the insolvency proceedings abroad, the debtor's property which is located in the Czech Republic will be submitted to the foreign court upon request, provided this involves a court in a state which preserves the principle of reciprocity. The debtor's property may, however, only be transferred abroad, once the rights for the exclusion of an item from the assets and the priority rights of secured creditors which were acquired earlier than the request was received from the foreign court or from any other appropriate body have been satisfied.

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules)

English scheme of arrangement:

It is not clear what approach the Czech court would have to the English scheme of arrangement. Generally, the Czech court might consider the scheme of arrangement from two possible perspectives (i) as a contract or (ii) as a court decision.

If the scheme of arrangement is concluded with the consent of all creditors, the Czech court might come to the conclusion that in fact even if approved by the court, it is a contract between the debtor and the creditors. Subsequently,

the Czech court would consider such contract applying regulation Rome I or Czech principles of private international law on the law of contracts.

If the consent of some creditors is missing, the Czech courts would most likely not regard the scheme of arrangement as a contract but rather as a decision of the English court. As it is not decisive for the scheme of arrangement whether the company in question is insolvent or not, the Czech court would not regard the respective decision of the English court as a decision issued within the foreign insolvency proceedings (similarly as ruled by the English courts that the scheme of arrangement falls under the scope of EU Brussels Convention and not under the EU Recast Regulation on Insolvency 2015/84). Therefore, general provisions of Czech international private law on recognition of the foreign court decisions would have to be applied. In this respect, the Czech court shall not recognise English scheme of arrangement if:

a) the matter falls under the exclusive jurisdiction of the Czech courts or if the proceedings could not have been undertaken by an authority in a foreign state, if the provisions pertaining to the jurisdiction of the Czech courts had been applied when assessing the jurisdiction of the foreign authority, unless the participant in the proceedings, against whom the judgement is made, has voluntarily submitted to the jurisdiction of the foreign authority,

b) if proceedings are underway before a Czech court with regard to the same legal relations and if the said proceedings commenced prior to the proceedings abroad, in which the judgement whose recognition has been proposed was issued,

c) if a Czech court has already issued a valid judgement about the same legal relations or if the valid judgement of the body of a third state has already been recognised in the Czech Republic,

d) if a participant in the proceedings, with regard to whom the judgement is to be recognised, has been deprived of the ability to duly participate in the proceedings by means of a procedure adopted by a foreign authority, especially if the said participant has not been delivered a summons or the motion to commence the proceedings,

e) any such recognition would clearly contravene public order, or

f) reciprocity has not been guaranteed; reciprocity is not required if the foreign judgement is not aimed at a citizen of the Czech Republic or a Czech legal entity.

English restructuring plan:

We understand that according to the recent ruling of the High Court of England and Wales dated February 17, 2021 the English restructuring plan shall be regarded as insolvency proceedings falling outside the scope of the Lugano Convention (see Re gategroup Guarantee)). The most decisive argument in this respect is that in order for a debtor to avail itself of a restructuring plan, it 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.

Pursuant to our opinion, the Czech court would also consider this aspect and recognise the English restructuring plan as a decision issued in the course of

the insolvency proceedings. In such case, the general provision contained in section 111 (5) of Czech Act No 91/2012 Coll., on international private law, on recognition of foreign insolvency proceedings commenced in countries outside the EU Member States shall apply.

Pursuant to above statutory provision, the foreign decisions in matters of insolvency proceedings shall be recognised under the condition of reciprocity, provided the debtor's main interests are concentrated in the foreign state in which the said decisions have been issued and provided the debtor's property in the Czech Republic is not the subject of proceedings which have already commenced. In these cases, and otherwise, if no proceedings have been commenced by a Czech court against the property which has become the subject of the insolvency proceedings abroad, the debtor's property which is located in the Czech Republic will be submitted to the foreign court upon request, provided this involves a court in a state which preserves the principle of reciprocity. The debtor's property may, however, only be sent abroad, once the rights for the exclusion of an item from the assets and the rights of the secured creditors which were acquired earlier than the request was received from the foreign court or from any other appropriate body have been satisfied.

Denmark

(as at 01/03/2021)

Written by Michala Roepstorff at Plesner Advokatpartnerselskab, Country co-ordinator for INSOL Europe

Q1. Has your country adopted the United Nations Commission on International Trade Law (UNCITRAL) Model law on Insolvency? If not, does it intend to do so in the near future?

Denmark has not adopted the UNCITRAL Model law on Insolvency. Currently, there is no pre-legislative work or attempt to do so in the near future.

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 insolvency proceedings in EU Member States

Due to Denmark's opt-out relating to judicial co-operation, Denmark is not part of the EU Recast Regulation on Insolvency, Regulation (EU) 2015/848. No Danish authority applies to recognition of insolvency proceedings commenced in other EU Member States. However, the Directive on recovery and resolution of credit institutions and investment firms is applicable in Denmark and establishes the legal basis for Danish courts' recognition of insolvency proceedings commenced against credit institutions and investment firms in EU Member States. Denmark is also part of the Nordic Bankruptcy Convention, leading to the recognition of insolvency proceedings commenced in Finland, Iceland, Sweden, and Norway.

Recognition of insolvency proceedings in Third Party States

According to the Danish Insolvency Act, the Minister of Justice may lay down regulations in pursuance of which decisions by foreign courts of law and authorities in respect of bankruptcy, restructuring and other similar insolvency proceedings are to have a binding effect and be enforceable in Denmark, provided that they have such binding effect and are enforceable in the foreign state where the decision has been taken and provided that such recognition and enforcement would not be obviously incompatible with the Danish legal system. The statutory authority has not been made use of so far.

Due to the Nordic Bankruptcy Convention, Danish courts recognise insolvency proceedings commenced in Norway. Danish courts also recognise insolvency proceedings commenced against credit institutions and investment firms in Third Party States to the extent that EU has agreed upon with the Third Party State in question. If no agreement has been entered into between EU and the Third Party State, Finansiel Stabilitet (an independent public company owned by the Danish State through the Danish Ministry of Industry, Business and Financial Affairs) may decide whether a Third Party State's insolvency proceedings against a credit institution or investment firm must be recognised.

Apart from the situations mentioned above, Denmark does not recognise insolvency proceedings commenced in Third Party States.

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules)

An English scheme of arrangement or an English restructuring plan is not enforceable in Denmark, neither prior to Brexit nor post-Brexit.

Estonia

(as at 23/02/2021)

Written by Signe Viimsalu at SIGN9, Country coordinator for INSOL Europe.

Q1. Has your country adopted the UNCITRAL Model law on insolvency?

No, and it has never been considered for adoption. UNCITRAL Model laws have instead been a source of good inspiration or good examples for law makers in law making in Estonia.

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)?

Provisions regarding forum can be found in the Bankruptcy Act and more relevantly in the Code of Civil Procedure as in insolvency matters, which are not directly regulated by the Bankruptcy Act, the Code of Civil Procedure is applicable. The Bankruptcy Act § 3 (2) stipulates that the Code of Civil Procedure is applicable for bankruptcy proceedings if the Bankruptcy Act does not regulate differently in a particular matter. Thus, special norms are stipulated in the Bankruptcy Act and general norms in the Code of Civil Procedure. According to the Code of Civil Procedure § 8 (1), the conduct of civil proceedings by the court in a matter is based on the Estonian civil procedure law. Recognition and enforcement of court decisions in civil matters (including insolvency matters) and other enforcement instruments of foreign states (including third party states like the UK) is stipulated in Chapter 62 of the Code of Civil Procedure.

The relevant provisions are the following:

§ 620. Recognition of court decisions of other foreign states in civil matters

(1) A court decision in a civil matter made by a foreign state is subject to recognition in the Republic of Estonia, except in the case where: [RT I 2008, 59, 330—entry into force 01.01.2009]

> 1) recognition of the decision would be clearly contrary to the essential principles of Estonian law (public order) and, above all, the fundamental rights and freedoms of persons
>
> 2) the defendant or other debtor was unable to reasonably defend the rights thereof and, above all, if the summons or other document initiating proceedings was not served on time and in the requisite manner, unless such person had a reasonable opportunity to contest the decision and the person failed to do so within the prescribed term
>
> 3) the decision is in conflict with an earlier decision made in Estonia in the same matter between the same parties or if an action between the same parties has been filed with an Estonian court
>
> 4) the decision is in conflict with a decision of a foreign court in the same matter between the same parties which has been earlier recognised or enforced in Estonia
>
> 5) the decision is in conflict with a decision made in a foreign state in the same matter between the same parties which has not been recognised in Estonia, provided that the earlier court decision of the foreign state is subject to recognition or enforcement in Estonia

6) the court which made the decision could not make the decision in compliance with the provisions of Estonian law regulating international jurisdiction

(2) A court decision of a foreign state is recognised in Estonia only if the decision has entered into force pursuant to the law of the state which made the decision unless, pursuant to law or an international agreement, such decision is subject to recognition and enforcement as of the time such decision can be enforced in the state of the location of the court which made the decision.

(3) A court decision of a foreign state is recognised in Estonia without the need to conduct separate court proceedings. However, resolution of the matter of recognition may be requested in accordance with the rules prescribed in this Chapter for declaring a decision enforceable if there is a dispute on recognition or if it is necessary to a person due to another reason for the purpose of exercising his or her rights.

[RT I 2008, 59, 330—entry into force 01.01.2009]

§ 621. Rule concerning enforcement of court decision of foreign state

Unless otherwise provided by law or an international agreement, a court decision of a foreign state is eligible for enforcement in Estonia only after the decision has been declared to be subject to enforcement by the Estonian court.

§ 622. Petition for declaring court decision of foreign state enforceable

(1) A petition for declaring a court decision of a foreign state enforceable is submitted in writing, and the following is annexed thereto:

1) a transcript of the court decision authenticated pursuant to the requirements of the law of the state of the location of the court which made the decision

2) a document which confirms that the action, summons or other document initiating proceedings has been served in time on at least one occasion pursuant to the law of such state on the defendant or, according to the decision, on another debtor who did not participate in the proceeding

3) a document which certifies that the decision has entered into force pursuant to the law of the state where the decision was made and has been communicated to the defendant or based on the decision, another debtor

4) documents concerning the enforcement of the decision if enforcement has already been attempted

5) documents concerning the enforcement of the decision if the decision has already been enforced

6) translations into Estonian of the documents specified in clauses 1–5 of this subsection made by a sworn translator

[RT I, 23.12.2013, 1—entry into force 01.01.2020]

(2) A court may set the petitioner a term for submission of the documents specified in subsection (1) of this section. If the circumstances allow, the court may resolve the matter without requiring such documents.

(3) In order to secure a petition by way of provisional legal protection, the court may apply the measures for securing an action.

§ 623. Order on declaring court decision of foreign state enforceable

(1) When dealing with a petition for declaring a court decision of a foreign state enforceable, the court examines the prerequisites for recognition of the court decision. The court does not verify the correctness of the court decision in the part of the merits of the matter.

(2) [Repealed (I 2008, 59, 330) entry into force 01.01.2009]

(3) If necessary, the court may hear the debtor and the claimant, and obtain an explanation from the court whose decision is to be recognised or enforced. [RT I 2008, 59, 330—entry into force 01.01.2009]

(4) If enforcement of a decision depends on the provision of a security by the person who, based on the decision, is the claimant, or on other circumstances, or if declaration of enforceability of a decision is requested by a person other than the person specified in the decision as the claimant, or if enforcement of a decision is requested in respect of a person other than the person specified in the decision as the debtor, the court evaluates the existence of the prerequisites for enforcement of the decision based on the law of the state of the location of the court which made the decision and based on the evidence provided by the participants in proceedings.

(5) [Repealed (RT I 2008, 59, 330) entry into force 01.01.2009]

(6) In an order, the court makes a reference to the right of the claimant to submit the court decision declared to be subject to enforcement to an Estonian bailiff for enforcement.

(7) The order denying the petition is served on the claimant. The order granting the petition is served on the claimant and the debtor.

§ 624. Amendment or annulment of court decision declared to be subject to enforcement

(1) If a court decision declared to be subject to enforcement is annulled or amended in the state of the location of the court which made the decision, and the debtor can no longer rely on such fact in proceedings for declaring the decision enforceable, the debtor may file a petition for annulment or amendment of the declaration of enforceability of the decision with the court which declared the decision to be subject to enforcement.

(2) The court resolves the petition specified in subsection (1) of this section in accordance with the rules for resolving petitions for declaration of a court decision enforceable.

(3) Among other things, the court may, in order to secure a petition by way of provisional legal protection, suspend enforcement proceedings arising from the decision declared to be subject to enforcement, permit continuation of enforcement proceedings only against a security or revoke the enforcement action.

(4) If a petition is granted, the court annuls or amends the declaration of a court decision to be subject to enforcement.

§ 625. Filing of appeal against order

(1) The claimant may file an appeal against an order on refusal to declare a court decision of a foreign state to be subject to enforcement or an order on annulment of declaring such decision enforceable.

(2) The claimant and the debtor may file an appeal against an order on declaring a court decision of a foreign to be subject to enforcement or an order on amendment of declaring such decision enforceable. The term for filing an appeal against an order is one month after the date of service of the order or, in the case of service of the order in a foreign state, two months after the date of service thereof.

(3) Until the end of the term for filing appeals against an order on declaring a decision of a foreign state to be subject to enforcement or the entry into force of a decision made concerning an appeal against the order, only the measures prescribed for securing an action may be applied for the compulsory enforcement of a court decision of a foreign state. The debtor has the right to prevent compulsory enforcement by providing a security in the amount in which the petitioner is entitled to request compulsory enforcement of the judgment. However, seized movables may be sold in the course of an enforcement proceeding and the money received from the sale may be deposited with the permission of the court if the seized property could otherwise be destroyed or its value could significantly decrease or if deposition of the property is unreasonably expensive.

§ 626. Compensation for damage caused to debtor

If an order on declaring a court decision of a foreign state to be subject to enforcement or a declaration of such court decision to be subject to enforcement is annulled or amended, the claimant shall compensate the debtor for the costs incurred by the debtor as a result of enforcement proceedings or the costs incurred thereby in order to prevent compulsory enforcement.

§ 627. Recognition of other enforcement instruments of foreign states

(1) The provisions of this Chapter correspondingly apply to the recognition and enforcement of enforcement instruments notarially authenticated in a foreign state or other public enforcement orders, unless otherwise provided by this section.

(2) A public document prepared in a foreign state is recognised in Estonia as an enforcement instrument if:

1) its format complies with the requirements set for enforcement instruments subject to immediate enforcement prepared in Estonia, and

2) it is subject to immediate enforcement is the state of its preparation, and

3) it is not contrary to Estonian public order

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules).

It appears based on information received from the Ministry of Justice that Estonia would apply other private international law rules, including the Code of Civil Procedure (Chapter 62) in these situations and would recognise an English scheme or English restructuring plan in Estonia.

Finland

(as at 23/06/2021)

Written by Jan Lilius, Partner at Hannes Snellman, Country coordinator for INSOL Europe and Olli Mäkelä, Senior Associate at Hannes Snellman.

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

Finland has not adopted the UNCITRAL Model Law and we are not aware of any plans for such adoption.

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 an insolvency arrangement in a Third Party State is possible only on the grounds of an international treaty or convention providing such recognition in Finland. Currently, no international provision requires complete recognition of third country insolvency proceedings in Finland.

The Nordic Bankruptcy Convention provides a legal framework for the cross-border recognition and enforcement of bankruptcies between Denmark, Sweden, Norway, Iceland, and Finland. According to the Convention, bankruptcy declared in one contracting state is recognised in all other contracting states.

Apart from the Nordic Bankruptcy Convention, there are no other treaties that Finland has entered into regarding Third Party States. There are relatively few cross-border insolvency cases in Finland relating to Third Party States where recognition would have been tested, and consequently we are also not aware of relevant court practice to draw procedural practices from. However, despite not granting Third Party State insolvency proceedings similar legal effect as domestic proceedings, certain competences of the officeholders may be recognised, for example, regarding taking over the handling of the assets.

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

Post Brexit, the UK is regarded as a Third Party State. Thus, with reference to our answer to Q2, there is no international treaty or convention providing for recognition of an English Scheme of Arrangement or Restructuring Plan.

France

(as at 23/06/2021 – Update 03/01/2022)

Written by Jean-Luc Vallens, Former Judge at the Court of Appeal of Colmar and Emeritus Associate Professor at the University of Strasbourg.

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

France has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. About two years ago, it entrusted a group of experts and academics with the task of preparing a code of private international law covering all private law matters, including insolvency. This work is still in progress.

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)?

The only French law provisions in force for the recognition of foreign insolvency proceedings relate to the exequatur procedure which is an adversarial procedure between a claimant (the foreign insolvency practitioner, a creditor, the public prosecutor or the debtor) and a defendant (as a rule, the debtor).

The procedure is conducted before the President of the Judicial Court (C Org Jud, art R 212-8). The judgment rendered is subject to appeal. The Code of Civil Procedure lays down a general rule followed by special provisions on the enforcement of judgements given by courts of the EU Member States and the Member States of the European Free Trade Association (CPC, Art 509 et seq). The applicant is not to be assisted by a lawyer before the court.

The conditions for the recognition of foreign judgments are defined by case law and have not yet been codified. Several judgments of the French Supreme Court have defined these conditions (Civ 1, 7 January 1964 (Munzer); Civ 1, 4 October 1967 (Bachir); Civ 1, 20 February 2007 (Cornelissen); Civ 1, 6 February 1985 (Simitch)).

These conditions are as follows:

- the foreign court must have jurisdiction: there must be a sufficient connection between the application and the court seized by a party
- the foreign procedure must comply with international public policy in terms of substance and procedure; with a flexible approach adopted by the case law, these conditions concern the means of defence open to the defendant and the fairness of the procedure; as regards substance, the case law considers that the stay of individual proceedings and the principle of an equal treatment of creditors are part of international public policy; the approach is more flexible as regards the actual content of the foreign law

- the foreign decision must not be obtained by fraud (abuse of legal rules or fraudulent forum shopping)
- finally, no insolvency proceedings must be pending in France against the same debtor (by reference to the classic condition of incompatibility with another decision)

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)

The Lugano Convention could apply to the extent that the UK has applied to accede to it, but it would not be applicable if the UK scheme of arrangement was to be considered a procedure similar to insolvency proceedings. There is no case law from the French courts on this point yet.

Conversely, one should observe that English courts have recognised a French conciliation procedure as insolvency proceedings under the Cross Border Insolvency Regulations 2006 (based on the UNCITRAL Model Law on Cross-Border Insolvency).

An agreement could also be recognised, not by the exequatur procedure, but as a contract, according to the provisions of the Rome I Regulation in order to define the law applicable to the effects of such an agreement. This recognition is not equivalent to the exequatur of a foreign judgment because only a court decision could be subject to an exequatur and to enforcement measures. This additional condition was taken into account when drafting Regulation (EU) 2015/848, where the creditors' voluntary winding up procedure 'with confirmation by the court' is recognised as proceedings under its scope and listed in Annex A.

As mentioned above, the Lugano Convention would not be applicable if the UK scheme of arrangement procedure is considered to be a procedure similar to insolvency proceedings. The same applies if the withdrawal of the United Kingdom would make applicable (again) the Convention concluded between the United Kingdom and France on the recognition of judgements on 18 January 1934. According to the analysis of the Legal High Committee for Financial Markets of Paris (Haut Comité pour la Place Financière de Paris) this Convention seems to exclude from its scope bankruptcies and similar proceedings.

It is therefore private international law that is currently applicable.

As to an agreement sanctioned by a court under CA 2006, Pt 26A (introduced by the Corporate Insolvency and Governance Act 2020), recognition probably could be granted as soon as an English court approves it: an analysis of the grounds (financial difficulties) and of the rules (an agreement similar to a scheme of arrangement with a judicial sanction) however could lead French courts to apply the same process as the one provided for insolvency proceedings. The procedure of exequatur therefore seems likely applicable.

As regards the Hague Convention, it could be applied subject to the exclusions provided for in its Article 9, in particular the refusal of recognition or enforcement if the agreement was null and void under the law of the State of the chosen court, in case of fraud, conflict with local public policy or inconsistency with an earlier judgment given in another State between the same parties on the same cause of action.

Germany

(as at 23/04/2021)

Written by Frank Tschentscher LL M (NTU) at Deloitte Legal, Country co-ordinator for INSOL Europe

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 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 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, München 2018, ß 343 para [3]). Further, recognition will be denied if to do so would violate the German public order, 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 the EU Recast Regulation on Insolvency, the COMI test. Should the facts of the case put it firmly outside the scope of Article 1(2) of 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 debtor's COMI 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, München 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 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, Munchener Kommentar zur Insolvenzordnung, 4th edition 2020, ß 343 para [19]; Andres/Leithaus, Kommentar zur Insolvenzordnung, 4th edition, Munchen 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 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 remaining 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/ Förstel, ÷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 Marz 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 Rome I (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 Rome I), the German courts, under the conflict of law rules set forth in Rome I (which applies not only to Member States but universally, see Article 2 of Rome I, will still (have to) recognise an explicit choice of English law clause in any agreement as they will continue to apply Rome I. 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 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 the 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 the 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.

Greece

(as at 11/06/2021)

Written by Georgios Nikopoulos-Exintaris at n-Solution Consultants Ltd, Country co-ordinator for INSOL Europe

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

Greece has adapted its legislation to the UNCITRAL Model Law on Cross-Border Insolvency by virtue of Law Nr 3858/2010. The appearance of the law in practice is scarce; so is the case law with respect to legal scholarship.

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)?

The recognition of international insolvency proceedings in Greece is determined by L 3858/2010. L 3858/2010 stipulates through articles 15 to 24 (Chapter C of the Law) the procedure for the recognition of international proceedings in third countries. Below are the relevant articles (amended by the author to align them with the new Bankruptcy Law L 4738/2020 as L 3858/2010 has references regarding the previous Bankruptcy Law L 3855/2007):

Article 2 Definitions

For the purposes of this law:

- 'foreign proceedings' means collective legal or administrative proceedings in another state, including interim bankruptcy proceedings, which requires the insolvency of the debtor and entails the partial or total deprivation of the administration of his property (bankruptcy expropriation) and the appointment of a trustee for the purpose of liquidation or reorganization
- 'foreign main proceedings' means the foreign proceedings conducted in the state, where the debtor has its COMI
- 'foreign non-main proceeding' means the foreign proceeding, which is not a main proceeding and is conducted in the state where the debtor has an establishment within the meaning of the case in this article
- 'foreign bankruptcy trustee' means the person or body, including the temporary appointee, who has jurisdiction under the foreign procedure to administer or liquidate the insolvency estate or to supervise the management of the debtor's cases
- 'foreign court' means the judicial or other authority of another state which is competent to control or supervise a foreign main or non-main proceedings

- ‘installation’ means the place of business where the debtor carries out any non-temporary economic activity in which he uses the human factor and other assets
- ‘Bankruptcy Code’ means all the provisions of Law 4738/2020 ‘Debt settlement and provision of second chance and other provisions’ (Government Gazette A 207/27-10-2020), as it is in force from time to time
- ‘Bankruptcy Code procedure’ means the bankruptcy procedure in Greece

Article 15 Application for recognition of a foreign procedure

1. The foreign bankruptcy trustee has the right to submit an application to the competent court for the recognition of the foreign procedure in which a trustee has been appointed.

2. The application for recognition shall be accompanied by:

- a certified copy of the decision to initiate foreign proceedings and to designate the foreign bankruptcy trustee, or
- a certificate from the foreign court certifying the existence of the foreign proceeding and the appointment of the foreign bankruptcy trustee, or
- in the absence of such documents, any other evidence acceptable to the court as to the existence of the foreign proceeding and the appointment of the foreign bankruptcy trustee

3. The application for recognition is accompanied by a statement of the foreign bankruptcy trustee, which identifies all the foreign procedures known to him regarding the debtor.

4. The court may require a translation into Greek of the documents submitted in support of the application for recognition.

Article 16 Evidence of recognition

1. If the decision or attestation referred to in paragraph 2 of the preceding Article states that the foreign proceedings are proceedings within the meaning of Article 2 (a) (foreign proceedings), and that the foreign bankruptcy trustee is a person or body within the meaning of Article 2 (d), the court is entitled to consider that they are self-presumptive.

2. The court has the right to consider that the documents submitted are genuine, regardless of whether they are certified or not.

3. Unless proven otherwise, the place of the debtor’s registered office or habitual residence, in the case of a natural person, is presumed to be the debtor’s COMI.

Article 17 Decision for recognition of a foreign procedure

1. Without prejudice to Article 6, the foreign procedure shall be recognised if:

- is a procedure within the meaning of Article 2 (a)

- the foreign liquidator seeking recognition is a person or body within the meaning of Article 2 (d)
- the information referred to in Article 15(2) is submitted with the application, and
- the application has been submitted to the court referred to in Article 4 (competent court according to the Greek Bankruptcy Code L 4738/2020)

2. The foreign procedure is recognised:

- as a foreign main proceeding, if it takes place in the state where the debtor has its principal interests, or
- as a foreign non-principal proceeding, if the debtor has an establishment within the meaning of Article 2 (f) in another state

3. The decision for the recognition of a foreign procedure is issued as soon as possible.

4. The provisions of Articles 15, 16, 17 and 18 do not prevent modification or withdrawal of recognition, it is established that the conditions for recognition were fully or partially lacking or have ceased to exist.

Article 18 Subsequent information

Upon filing the application for recognition or from the recognition of the foreign procedure, the foreign bankruptcy trustee must inform the court, without due delay, of:

- any material change concerning the foreign procedure or his appointment, and
- any other proceedings concerning the same debtor of which he is aware

Article 19 Potential temporary protection on the basis of an application for recognition of a foreign procedure

1. From the filing of the application for recognition until the issuance of the decision, the court may, at the request of the foreign bankruptcy trustee, provide temporary protection, if there is an urgent need to protect the debtor's assets or the interests of the creditors. Temporary protection measures are in particular:

- the suspension of enforcement on the debtor's assets
- entrusting the management or disposal of all or part of the debtor's assets located in Greece, to a foreign bankruptcy trustee or to another person designated by the court, in order to protect and maintain the value of the assets, which from the by their nature or due to other circumstances, are subject to deterioration, devaluation or otherwise endangered

2. The temporary protection measures are made public in accordance with the provisions of paragraph 2 of article 84 of the (new) Bankruptcy Code (Law 4738/2020).

3. The measures of temporary protection of this article shall cease with the issuance of the decision on the application for recognition, unless they are extended, in accordance with the case in paragraph f of article 21.

4. The court may refuse the provision of temporary protection, according to this article, if it affects the foreign main procedure.

Article 20 Effects of the recognition of a foreign main procedure

1. The recognition of a foreign main procedure suspends:

- the commencement or continuation of individual creditor proceedings in respect of the debtor's assets, rights, obligations or liability
- enforcement on the debtor's assets, and
- the right to transfer, charge or otherwise dispose of any assets of the debtor

2. The extent, the modification or the removal of the suspension of the cases of the previous paragraph are regulated according to articles 84, 86 and 87 of the (new) Bankruptcy Code (Law 4738/2020).

3. Article 21(1)(a) does not affect the creditor's right to request the necessary measures to secure his claim against the debtor.

4. The consequences of the recognition of the foreign main procedure according to paragraph 1 of this article do not affect the creditor's right to request the initiation of proceedings, according to articles 75, 76, 77, 78, 79 of the (new) Bankruptcy Code (L 4738/2020) nor the right to announce his claims, according to articles 152, 153 and 154 of the (new) Bankruptcy Code (Law 4738/2020).

Article 21 Potential legal protection based on the recognition of a foreign procedure

1. At the same time or after the recognition of a foreign proceeding, whether principal or non-principal, the court may, at the request of the foreign bankruptcy trustee, provide any appropriate protection if the debtor's assets or creditors' interests need to be protected. Protection measures are in particular:

- the suspension of the commencement or continuation of individual proceedings concerning the assets, rights, obligations or liability of the debtor, in so far as it has not been suspended, in accordance with Article 20(1)(a)
- the suspension of enforcement on the debtor's assets, in so far as it has not been suspended, in accordance with Article 20(1)(b)
- the suspension of the right to transfer, charge or otherwise dispose of the debtor's assets, in so far as that right has not been suspended, in accordance with Article 20 (1)(c)

- the examination of witnesses, the taking of evidence or the provision of information concerning the debtor's assets, cases, rights, obligations or liability
- the assignment of the management or disposal of all or part of the debtor's assets, located in Greece, to the foreign bankruptcy trustee or to another person appointed by the court
- the extension of rendered legal protection, in accordance with Article 19(1)
- the provision to the foreign trustee of any additional power conferred by Greek Law on the bankruptcy trustee

At the same time or after the recognition of a foreign procedure, main or non-main, the court may, at the request of the foreign liquidator, assign the distribution of all or part of the debtor's assets, located in Greece, to a foreign bankruptcy trustee or to another person, appointed by the court, if the court is convinced that the interests of creditors in Greece are adequately protected.

3. When providing legal protection, according to this article, to a foreign bankruptcy trustee of a non-main procedure, the court must be convinced that the protection is related to assets which, according to the Bankruptcy Code, were to be managed by a foreign, non-main procedure, or relates to information required for the procedure.

Article 22 Protection of creditors and other interested persons

1. When granting or denying legal protection, in accordance with Articles 19 or 21, or in amending or removing protection, in accordance with paragraph 3 of this Article, the court must be satisfied that the interests of creditors and other interested parties, including the debtor, are adequately protected.

2. The court may make the provision of legal protection, provided for in Articles 19 or 21 of this law, subject to conditions that it deems appropriate.

3. The court may, on its own initiative or at the request of the foreign judge or person whose legitimate interests are affected by the protection afforded, in accordance with Articles 19 or 21, amend or revoke that protection.

Article 23 Actions to cancel actions harmful to creditors

1. Upon recognition of a foreign proceeding, the foreign bankruptcy trustee is entitled before the Greek courts to request the revocation, cancellation or recognition of the inactivity of acts harmful to the creditors.

2. In the case of a foreign non-main proceeding, the court must be convinced that the actions of the foreign liquidator are related to assets which, according to the Bankruptcy Code, are subject to the management of a foreign non-main proceeding.

Article 24 Intervention of a foreign bankruptcy trustee in bankruptcy proceedings in Greece

Upon recognition of a foreign proceeding, the foreign bankruptcy trustee is entitled to intervene in any proceeding in which the debtor is a party, provided that the conditions of the Bankruptcy Code are met.

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)

To my understanding Greece would recognise an English Scheme of Arrangement or an English restructuring plan, following the most recent available legal framework currently in force. Today this is the combined application of L 3858/2010 (based on the UNCITRAL model) and the new Greek bankruptcy code (L 4738/2020).

Hungary

(as at 21/07/2021)

Written by Zoltan Fabok at DLA Piper, Country co-ordinator for INSOL Europe

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

Hungary has not adopted UNCITRAL Model Law on Insolvency. However, the new Statute on Private International Law (section 108(4) of Act No XXVIII of 2017 (PIL Statute)) leaves open the possibility that additional conditions and special rules of procedure may be established by law regarding the recognition of legal effects related to the main insolvency proceedings conducted abroad. In the academic literature the idea emerged that UNCITRAL Model Law may be adopted in the future on the basis of that authorisation of the PIL Statute. However, we have no information about any decision or even intention of the policymakers in this regard.

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)?

Since no multilateral, regional or bilateral treaties, which Hungary is a party to, seem to address recognition of foreign insolvency judgments, the party seeking recognition needs to rely on the provisions of the PIL Statute.

General provisions

Section 109 of PIL Statute:

> (1) A judgment adopted by a foreign court shall be recognised if:
>
> a) jurisdiction of the foreign court is considered legitimate under this Act;
>
> b) the judgment is construed as definitive by the law of the State in which it was adopted, or equivalent; and
>
> c) neither of the grounds for denial defined under subsection (4) apply.
>
> (2) Unless otherwise provided for in this Act, jurisdiction of the acting foreign court shall be construed legitimate under paragraph a) of subsection (1), if the underlying grounds of jurisdiction would justify the jurisdiction of a Hungarian court in accordance with this Act.
>
> (3) As regards the recognition of judgments relating to the personal status of persons and in family law matters, in determining whether jurisdiction of the acting foreign court should be construed legitimate any other citizenship of the Hungarian citizen shall also be taken into account.
>
> (4) A foreign judgment shall not be recognised if:
>
> a) doing so would be contrary to Hungarian public policy;
>
> b) the party against whom the decision was made did not attend the proceeding either in person or by proxy because the subpoena, statement of claim, or other document on the basis of which the proceeding was initiated was not served at his place of residence or habitual residence properly or in a timely fashion in order to allow adequate time to prepare his defense;
>
> c) proceedings involving the same cause of action and between the same parties are brought in Hungarian courts before the opening of foreign proceedings;

d) a Hungarian court has already adopted a definitive substantive decision in an action involving the same cause of action and between the same parties; or

e) the court of a foreign state, other than the State of the court that has already adopted a judgment in an action involving the same cause of action and between the same parties, has adopted a definitive substantive decision that is found in compliance with the requirements for recognition in Hungary.

Section 110

A settlement which has been approved by a foreign court or other authority may be recognised and enforced in Hungary under the conditions applicable to judgments.

Special provisions regarding recognition of judgment delivered in insolvency proceedings

Section 114:

- additionally, the recognition of judgments in insolvency proceedings is subject to reciprocity between Hungary and the State of the court which delivered that judgment
- recognition of main insolvency proceedings conducted abroad shall not preclude the opening of secondary insolvency proceedings before a Hungarian court
- in Hungary a foreign judgment opening main insolvency proceedings shall impart legal effects provided for in the law of the State of the opening of proceedings only if no secondary insolvency proceedings are opened in Hungary
- additional conditions and special rules of procedure may be established by law regarding the recognition of legal effects related to the main insolvency proceedings conducted abroad

Given that for the time being, no reciprocity in respect of insolvency proceedings is in place between Hungary and other countries, the recognition of foreign insolvency judgments delivered in a third country is rather uncertain. We are not aware of any relevant case law.

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

Scheme of arrangement

In the pre-Brexit period (including the transition period that ended on 31 December 2020) recast Brussels I Regulation (RBR) could, at least in theory, be a legal basis of recognition and enforcement of an English scheme of arrangement (scheme) in Hungary. English case law (eg *Magyar Telecom BV, Re* [2013] EWHC 3800 (Ch); *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch)) seems to suggest that schemes fall within the scope of the RBR meaning that English schemes should be recognised and enforced In Hungary. This may be correct but as far as we are aware, the question has remained untested by Hungarian courts so far.

In the post-Brexit period, the RBR does not apply to the UK anymore so it may not be a legal basis for recognition and enforcement of schemes in Hungary.

In the post-Brexit period, the Lugano Convention could logically come into play but its application for recognition of schemes is just as untested by Hungarian courts as it is in the context of the RBR. Furthermore, the UK has not yet managed to access to the Lugano Convention in its own right after it ceased to be a member state of the EU.

Both the UK and Hungary are contracting parties to the Hague Convention. However, the application of the Hague Convention for recognition of schemes is questionable. First, because the jurisdiction of English courts is not necessarily based on the exclusive choice of courts agreement of the parties which is a precondition to the application of the Hague Convention. Second, because the Hague Convention embraces an insolvency exception excluding 'insolvency, composition and analogous matters' from its scope (Article 2(2)(e) of the Hague Convention), it cannot be excluded that schemes fall within that exception. There is no case law in Hungary available.

Rome I (having universal application) does not address recognition of foreign judgements. Having said that, if all creditors support the scheme, Hungarian courts may conclude that the scheme is binding on the parties based on the law they have chosen. By contrast, in the event the scheme binds dissenting creditors, then no such indirect route appears to be feasible.

If an English scheme under no international treaties or EU law is recognised in Hungary, the applicability of the PIL Statute should be examined. A scheme which falls within the category of commercial (ie non-insolvency) matters means that a sanctioned scheme, in order to be recognised on the basis of the Hungarian PIL Statute, requires that the scheme meets the general requirements of recognition (see section 109 of the PIL Statute above) and, beyond that, reciprocity between Hungary and the UK would be required (section 113 of the PIL Statute). However, no reciprocity exists between the two countries.

The requirement of reciprocity may be disregarded if:

- the jurisdiction of Hungarian courts are excluded or
- the jurisdiction of the foreign court which delivered the judgment was based on an agreement that followed Hungarian law

As for the first sub-condition (excluded jurisdiction), the sanctioning of a scheme does not appear to be included in section 89 of the PIL Statute listing exhaustively the types of cases where the jurisdiction of the Hungarian court is excluded. As for the second sub-condition, the jurisdiction of the UK court is not necessarily based on the agreement of the parties. Therefore, the recognition of schemes under the PIL Statute appears to be rather questionable.

A scheme which falls within the category of insolvency matters means that a sanctioned scheme, in order to be recognised on the basis of the Hungarian PIL Statute, requires that the scheme meets the general requirements of recognition (see section 109 of the PIL Statute above) and, beyond that, reciprocity between Hungary and the UK would be required (section 114 of the PIL Statute). However, no reciprocity exists between the two countries so the recognition of the scheme on this legal basis is rather uncertain.

Restructuring plan

The English High Court recently concluded in *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch) that Part 26A restructuring plans, unlike Part 26 schemes, fall within the insolvency exclusion under the Lugano Convention

meaning that that convention does not apply. Consequently, it seems to be likely that the Lugano Convention cannot be the legal basis of the recognition of the restructuring plan in Hungary. The UK has not yet managed to access to the Lugano Convention in its own right after it ceased to be a member state of the EU.

The application of the Hague Convention for recognition of schemes is more than questionable. First, a restructuring plan probably falls within the scope of the insolvency exception (cf *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch) and Article 2(2)(f) of the Hague Convention). Second, the jurisdiction of English courts is not necessarily based on the exclusive choice of courts agreement of the parties which is a precondition to the application of the Hague Convention.

As for Rome I, see what we discussed under the title 'Scheme of arrangement' above.

As for the applicability of PIL Statute, see what we discussed under the title 'Scheme of arrangement' above.

Italy

(as at 08/03/2021)

Written by Giorgio Corno, Head at Studio Corno Avvocati, Country co-ordinator for INSOL Europe and in his capacity of INSOL Europe Vice President as well as Italy reserved seat holder

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

It has not been adopted. We do not expect it to be adopted in the near future.

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)?

The existing provisions are limited. Specifically:

- with regard to jurisdiction, art 9 and 161 of Italian insolvency law established jurisdiction with regard to winding up (fallimento) and restructuring (concordato preventivo) proceedings
- with regard to recognition and enforcement of third countries' foreign judgments, art 64 and ff of Law 218/1995, on Italian private international law, apply

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules)?

The situation is still unclear.

No specific convention exists between the UK and the Republic of Italy for matters regarding restructuring and insolvency.

The UK and the Republic of Italy entered the Convention between for the Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters, which was signed in Rome on 7 February 1964, with an amending Protocol signed in Rome on 14 July 1970.

While UK was a member of the EU because of Regulation 1346/2000 and, afterwards, the EU Recast Regulation on Insolvency such a Convention was not considered applicable by Italian scholars (De Cesari-Montella, *Insolvenza transfrontaliera e giurisdizione italiana*, Milano, 42).

Following the UK's withdrawal from the EU, the said Convention could be applicable to recognition of judgments in bankruptcy proceedings (art. IV.3.c). (Leandro, *Brexit and cross-border insolvency. Looking beyond the withdrawal agreement*, in Dir. Comm. Intern. 2020, 179-180, n. 57 states: "As regards the relations between Italy and the UK, even envisaging the revitalization of the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 7 February 1964 and

amended with Protocol of 14 July 1970 (which is not listed in Art. 85, EIR), that Convention slightly touches upon insolvency matters as it only governs the circulation of judgments 'in bankruptcy proceedings' (the Italian version refers to them as "sentenze su controversie in materia fallimentare"). Furthermore, the Convention provides that, in the case of judgments in bankruptcy proceedings, "the jurisdiction of the original court shall be recognized in all cases where such recognition is in accordance with the country of the court applied to" (Art. IV (3): by comparing with the Italian version, this means that the assessment as to so-called 'indirect jurisdiction', as a ground of recognition, lacks a common provision to the parties, being operational upon the law of the requested State).

Recognition and enforcement of court orders issued at the sanctioning hearing approving the plan or the scheme could be sought under the said Convention. Otherwise, recognition and enforcement could be sought under the above-mentioned existing rules on recognition and enforcement of third countries' foreign judgments (art 64 and ff of Law 218/1995 on Italian private international law).

Ireland

(as at 02/08/2021)

Written by Judith Riordan & Anthony Strogen at Mason Hayes & Curran LLP

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

Ireland has not yet adopted the UNCITRAL Model law on Insolvency. There has been much discussion on the issue and practitioners are in favour of it but, currently, there is no indicative timeframe for its adoption.

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)?

Insolvency proceedings commenced outside of EU Member States can be recognised in Ireland under common law rules of recognition. The Irish High Court has inherent jurisdiction pursuant to the common law to give recognition to insolvency proceedings in jurisdictions outside the EU. This jurisdiction can be exercised where relief is sought for a legitimate purpose and not in the nature of enforcement and derives from the underlying principle of universality of insolvency proceedings. The legitimate purpose requirement is usually satisfied by a request for relief in Ireland under the Companies Act 2014 (CA 2014) to aid the foreign insolvency proceedings. The High Court will also have regard to the equivalence between Irish insolvency law and the law of the country in which the foreign insolvency proceedings are taking place, to ensure recognition is not contrary to Irish law. If the legitimate purpose and equivalency requirements are established and there is no discretionary reason for withholding recognition (such as prejudice to a creditor in the jurisdiction or the infringement of any local law), the High Court will generally be satisfied to grant recognition and proceed to consider whatever orders are appropriate in aid of the foreign insolvency proceedings.

These applications for recognition can be made on an ex parte basis to the Irish High Court and are made in the name of the company which is the subject of the foreign insolvency proceedings. If recognition is granted, it is usually a term of the resulting order that that any party against whom the recognition and assistance order is made shall be at liberty, on notice to the foreign insolvency applicant, to challenge the jurisdiction of the court to grant recognition and assistance insofar as it affects that party.

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 Hague Convention, Rome I or other private international law rules)

While Irish courts will assess recognition applications on a case-by-case basis, applying the common law principles of relevance, we believe Irish

courts would likely recognise an English scheme of arrangement or an English restructuring plan. Ireland has a similar scheme of arrangement regime under CA 2014, Pt 9, and the similarities between the Irish regime and the English provisions of CA 2006, Pt 26 should satisfy the requirement of equivalence. In turn, given the similarities between the provisions of CA 2006, Pt 26A with CA 2006, Pt 26 in Ireland, recognition of both would likely be possible in an application before the Irish High Court. It should be noted that the limited Irish case law on common law recognition of foreign insolvency proceedings has focused on liquidations and bankruptcies rather than rescue processes such as schemes of arrangement. Given the presence of rescue mechanisms in Irish insolvency law, this is not of major consequence and should not be a significant hurdle to recognition, but it bears noting that the common law recognition principles are relatively untested in respect of foreign rescue regimes.

Latvia

(as at 09/03/2021)

Written by Edvīns Draba at Sorainen, Country co-ordinator for INSOL Europe

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

No

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)?

On the basis of international agreements on mutual legal assistance and/or national norms of private international law, as well as the norms of civil procedure governing the recognition and enforcement of foreign judgments in general; there are no norms of private international law or civil procedure governing the recognition of foreign insolvency proceedings in particular.

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)

Judgments made with respect to an English scheme or a restructuring plan would need be recognised on the basis of norms of private international law, as well as the norms of civil procedure governing the recognition and enforcement of foreign judgments in general. Customary grounds for the refusal of recognition (e.g. lack of competence of the foreign court, which gave the ruling, to examine the dispute or conflict with the public policy (ordre public) in Latvia) would apply. The question as regards the recognition of an English scheme or a restructuring plan cannot be answered without regard to the circumstances of each particular case.

Lithuania

(as at 02/03/2021 – Update 04/01/2022)

Written by Frank Heemann at bnt attorneys in CEE, Country Coordinator for INSOL Europe and Andrius Juškys at bnt attorneys in CEE.

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

No.

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)?

Lithuanian legislation lacks special legal regulation on insolvency proceedings commenced in third-party states. The recognition of related court judgments follows the general *exequatur* recognition procedure established in Art 809 et seq of the Code of Civil Procedure (CPC).

Pursuant to Art 810 CPC, judgments of foreign courts are recognised in accordance with the rules in international bilateral agreements if they exist. In the absence of such agreements, the Court of Appeal of Lithuania as the competent institution for the recognition of foreign decisions ex officio checks there are no grounds for refusing recognition of a judgment on the grounds listed in the Art 810(1) CPC. The relevant criteria are inter alia: the entry into force of the judgment in the country of origin, adherence to the obligation to duly inform all affected parties who were not participating in the court proceedings, non-violation by the foreign judgment of rules of public order (ordre public). The court has no power to analyse the application of law and facts of the judgment, for which recognition is sought.

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules)

The recognition of an English scheme or a restructuring plan would require a related approving judgment or other decision of an English court. This decision would have to be formally recognised by a Lithuanian court.

A request submitted by the interested parties will be assessed by the competent Court of Appeal under the general procedure as stated in Art 809 et seq CPC. The court will not analyse the application of law and facts of the related judgment and its powers to review the decision will be limited. However, a recognition request may be rejected based on grounds listed in Art 810 CPC, inter alia due to violation of the public order principle (ordre public) or the violation of an obligation to duly inform all parties affected by the English scheme or restructuring plan.

It remains uncertain whether English schemes or restructuring plans would be recognised in Lithuania. This uncertainty stems from (i) the lack of special provisions on the recognition of insolvency-related decisions taken in third-party states, (ii) the absence of a bilateral treaty between the UK and Lithuania that would cover the subject-matter, (iii) the lack of relevant precedent case law, and (iv) the case-by-case nature of the exequatur procedure.

The relevant procedural norm for a refusal of recognition, Art 810 CPC, is phrased as an exemption. It could be understood that the court should refuse recognition only in exceptional cases. This understanding is confirmed by existing court practice that has interpreted the norm rather narrowly. Despite this, the risk remains that recognition requests could be rejected.

The court for its recognition decision would carefully examine particularities of the procedures for the adoption of the English scheme and restructuring plan, including: timely notice to all creditors affected by the scheme or restructuring plan, so that all affected parties have a possibility to defend their interests; the possibility to form different creditor classes (which does not exist in Lithuanian law, where restructuring proceedings know only two classes: secured and unsecured creditors).

Luxembourg

(as at 02/03/2021)

Written by Christel Dumont at Dentons, Country co-ordinator for INSOL Europe

Q1. Has your country adopted the United Nations Commission on International Trade Law (UNCITRAL) Model law on Insolvency? If not, does it intend to do so in the near future?

No, Luxembourg has not adopted the UNCITRAL Model law on Insolvency and there is no intention to do so in the near future.

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)?

Luxembourg applies the universality principle.

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules)

An English scheme of arrangement or an English restructuring plan should in principle be recognised post-Brexit, based on the Lugano convention.

Malta

(as at 04/10/2021)

Written by Simon Pullicio at Mamo TCV Advocates

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

Malta has not adopted the UNCITRAL Model Law on Insolvency and, at present, there are no indications that Malta will adopt the Model Law in the foreseeable future. The recognition and enforcement of cross-border insolvency cases is primarily regulated, from the Maltese position, under the framework of EU Recast Regulation on Insolvency, and for cases falling outside the scope and ambit of the aforesaid Regulation, on its domestic rules on the recognition and enforcement of judgements delivered outside Malta, primarily provided for under the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta).

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)?

Where recognition is not possible under the relevant applicable EU legislation, recognition of insolvency proceedings commenced outside Malta may be recognised in Malta in terms of Maltese private international rules or, limited in the case of the UK, in terms of a specific piece of Maltese legislation which may experience a resurgence in application as a result of Brexit.

The domestic rules are provided for under the Code of Organisation and Civil Procedure which establish the conditions under which any judgement delivered by a competent court outside Malta and constituting a final, definitive judgement (res judicata) (including any judgement opening insolvency proceedings which may or may not involve the appointment of an insolvency practitioner) may be enforced by the competent courts in Malta in the same manner as judgements delivered by a Maltese court.

In order for enforcement in Malta to be possible, an application (rikors) requesting a declaration of enforcement must be instituted before the competent court in Malta.

Recognition and enforcement is not automatic. While a Maltese court considering enforceability would not be required or requested to re-examine the merits of the judgement, a declaration of enforceability would not be possible if in the opinion of the inquiring court:

1. if the judgement sought to be enforced may be set aside on any of the grounds contemplated for under the Code of Organisation and Civil Procedure for a new trial
2. in the case of a judgement by default, if the parties were not contumacious according to foreign law
3. if the judgement contains any disposition contrary to public policy or to the

internal public law of Malta

Maltese public policy rules are not exhaustively listed anywhere under Maltese legislation and what amounts to a public policy issue is determined by the Maltese courts on a case-by-case basis. In view of the implications behind it, however, local Courts have developed the concept of public policy in a restrictive manner. However, given that the Maltese legal system does not adopt the principle of binding precedents, the position currently obtaining on matters of public policy may be determined differently by Maltese Courts in the future.

Also, specifically, in relation to judgements delivered by a superior court of the United Kingdom, recognition and enforcement may possibly be sought under the terms of the British Judgements (Reciprocal Enforcement) Act (Chapter 52 of the Laws of Malta). This legislation (which was superseded by overriding EU legal instruments) applies a specific definition of the term 'judgement' where it is defined as:

'any judgment or order given or made by a court in any civil or commercial proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable'

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 Hague Convention, Rome I or other private international law rules).

Admittedly, the position remains unclear and to the best of our knowledge remains unaddressed by the Maltese courts. At this moment, there is no legal framework to ensure recognition of an English scheme of arrangement (under CA 2006, Pt 26) or an English restructuring plan (under CA 2006, Pt 26A).

Post-Brexit, it could be argued that English schemes of arrangements could be regarded as a contractual matter to be recognized on the basis of Rome I which continues to apply. Application of recognition on the basis of Rome I would inevitably be subject to the possible disapplication of English law (as the governing law) and the application of overriding mandatory principles of Maltese law where required in terms of the Rome I framework.

The Hague Convention could also possibly serve as a basis for recognition. This route is not itself without doubt given that insolvency, composition and other analogous matters fall outside the scope of the Convention (Article 2(2)(e) of the Convention).

(The) Netherlands

(as at 06/04/2021)

Written by Michael Veder at Radboud University

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

No.

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)?

The effects of the opening of insolvency proceedings in other non-EU jurisdictions (including Denmark, which has opted out of the EU regulation on insolvency) are only to a certain limited extent recognised in the Netherlands.

This recognition may be challenged if the principles of due process and fair trial have not been observed in the foreign procedure.

In cases where there was an absence of a treaty and where the predecessor or the EU regulation on insolvency did not apply, the Dutch Supreme Court has consistently decided that the foreign insolvency proceedings only have a territorial effect, meaning that they do not affect the debtor's assets located in the Netherlands and the legal consequences attributed to the bankruptcy pursuant to the bankruptcy law of such foreign country cannot be invoked in the Netherlands to the extent that it would result in any unpaid creditors no longer being able to take recourse against the assets of the debtor located in the Netherlands (either during or after the relevant foreign insolvency proceedings).

In Dutch case law it is determined that a foreign insolvency office-holder is allowed to invoke their rights as available pursuant to the foreign domestic insolvency law, including over assets that are located in the Netherlands. The office-holder is also allowed to sell these assets and consider the proceeds part of the assets of the foreign bankruptcy estate. Notwithstanding that the foreign insolvency procedure's seizure is regarded as having only territorial effects of the foreign insolvency, the effects are de facto recognised in the Netherlands, because the foreign insolvency office-holder is able to exercise their power under the lex concursus.

Note, however, that the effect of foreign insolvency proceedings (and any actions by a foreign insolvency office-holder related thereto) on assets located in the Netherlands can be set aside by a Dutch court, if the court determines such proceedings to have been in violation of public policy.

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: probably yes. In the absence of case law on this matter, no conclusive answers can be given. The prevailing opinion in the Netherlands is that a scheme of arrangement will be recognised and given effect in the Netherlands on the basis of either the Regulation (EU) 1215/2012 (Brussels I recast) or Dutch domestic private international law.

Restructuring plans: unclear. It is not at all certain whether the same is true for the new restructuring plan. While, in principle, a restructuring plan is likely to be recognised in the Netherlands under rules of domestic private international law, the effects of recognition will be limited if the restructuring plan is considered an insolvency proceeding for purposes of applying Dutch private international law.

Poland

(as at 02/03/2021 – Update 04/01/2022)

Written by Michał Barłowski at Wardynski & Partners, Country co-ordinator for INSOL Europe

Q1. Has your country adopted the United Nations Commission on International Trade Law (UNCITRAL) Model law on Insolvency? If not, does it intend to do so in the near future?

Yes Poland has adopted the UNICITRAL Model law on Insolvency.

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)?

The UNCITRAL Model Law was enacted by the Bankruptcy and Recovery Act of 9 April 2003, introduced as it Part II of the act which deals with international bankruptcy proceedings. This was the source of "insolvency" law until a major reform of insolvency law which came into force in 2016 where the Bankruptcy and Recovery Act (law) became the Bankruptcy Law and a new Restructuring Law started to regulate proceedings aimed at the avoidance of bankruptcy proceedings by way of restructuring of a business where the major element of such proceedings is reaching of an arrangement with creditors.

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

Both an English scheme of arrangement and restructuring plan would most likely be recognised on the basis of Part II of the Bankruptcy Law: '*Regulations dealing with international bankruptcy* 'if no exclusive jurisdiction of a Polish court applies and there is no breach of general principles of the Polish legal order (similar to a public order exemption) (see Article 392 of the Bankruptcy Law). In practice, it may well be that if one deals with an English scheme opened against a debtor who is not endangered by a risk of insolvency, then recognition may be denied. In such a case, the rules of Polish Private International Law, which is based on the Rome I (and Rome II) convention, would apply.

Portugal

(as at 05/03/2021)

Written by Alberto Nunez Lagos at Uria Menendez, Country co-ordinator for INSOL Europe and David Sequeira Dinis and Luis Bertolo Rosa at Uria Menendez Lisboa

Q1. Has your country adopted the United Nations Commission on International Trade Law Model law on insolvency? If not, does it intend to do so in the near future?

No

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)?

(1) The recognition of insolvency proceedings commenced in third-party states is governed by the provisions of sections 288 et ss of the Portuguese Insolvency and Corporate Recovery Code (PICRC).

(2) The general rule laid down in the PICRC is that any judgment opening insolvency proceedings handed down by a court of a third-party state shall be recognised in Portugal if the debtor's COMI is situated outside the territory of all Member States of the European Union.

The same general rule applies to (i) preservation measures taken after the opening of insolvency proceedings as well as to (ii) any decisions taken with a view to carrying out or closing the proceedings (but see section 4 below).

However, there are two exceptions to this general rule. Recognition shall be refused in the event that:

> '(a) The jurisdiction of the court of the third-party state was not based on the same (or equivalent) criteria foreseen in the PICRC, ie the debtor's seat, domicile or COMI; or
>
> (b) The effects of recognition would be manifestly contrary to the public policy of the Portuguese State.'

(3) Provided that the abovementioned conditions are met, the competent Portuguese court shall order the publication in Portugal of:

> '(a) the essential content of the judgment opening insolvency proceedings;
>
> (b) the decision appointing the insolvency practitioner; and
>
> (c) the decision closing the insolvency proceedings.'

In this regard, the PICRC draws a distinction between two types of situations. If the debtor has an establishment in Portugal, then (i) the abovementioned publications shall be ordered ex officio by the Portuguese court and (ii) the competent court shall be the one with jurisdiction over the area where the establishment is situated. By contrast, if the debtor does not have an establishment in Portugal, then (i) the publications have to be requested by

the foreign insolvency practitioner and (ii) the competent court shall be the courts of Lisbon. In either situation, the competent court is always a court of first instance (and not a court of appeal).

(4) On a different note, the PICRC contains a specific provision that restricts significantly the scope of the general rule described in section 2 above.

This specific provision states that:

> 'the decisions handed down in a foreign insolvency proceeding may only be enforced in Portugal after being reviewed and confirmed; however, such decisions do not have to be final and definitive (res judicata) in order to be reviewed and confirmed.'

According to some of the most influential Portuguese legal scholars, the general rule and the specific provision translate into the following:

> '(a) Pursuant to the general rule, the foreign insolvency practitioner may act in Portugal in accordance with the powers granted to him by the laws of the third-party state (provided that the judgment opening the insolvency proceedings has been duly publicised in Portugal);
>
> (b) However, in order to resort to the Portuguese courts or the Portuguese authorities and enforce (coercively) the decisions handed down in the foreign insolvency proceeding, it is necessary for the decision to be reviewed and confirmed.'

(5) In the scenario mentioned in section 4, the revision and confirmation of the decisions handed down in the foreign insolvency proceedings shall be carried out in accordance with the Portuguese Code of Civil Procedure.

In a nutshell, the key steps of the revision and confirmation proceeding are the following:

> '(a) The applicant (eg, the foreign insolvency practitioner) shall file an application for the revision and confirmation of the foreign decision with the competent Portuguese court of appeal. The defendant shall be the person(s) against whom the applicant wishes to enforce the foreign decision. If the identity of the person(s) is unknown, then the application may be filed against "unknown adversaries", who shall be represented by the Public Prosecutor.
>
> (b) The defendant(s) shall be summoned to submit a statement of reply within 15 days.
>
> (c) The applicant may then counter-reply within 10 days.
>
> (d) After any steps deemed indispensable by the judge have been taken, the parties and the Public Prosecutor have 15 days to present their final arguments.
>
> (e) Finally, the court of appeal hands down its decision, which is subject to appeal to the Supreme Court.'

Having said that, the rule in this type of proceedings is that the Portuguese court of appeal shall not analyse the merits of the foreign decision and may only refuse to confirm it in the event that:

> '(a) There are doubts regarding the authenticity or content of the foreign decision;
>
> (b) The jurisdiction of the foreign court has been established fraudulently or the decision relates to a matter over which Portuguese courts have exclusive jurisdiction. This could be the case in relation to insolvency proceedings if the insolvent-debtor is (i) an individual domiciled in Portugal or (ii) an entity with separate legal personality, a company or a partnership whose seat is located in Portugal;
>
> (c) There is lis pendens in relation to a case pending before a Portuguese court, except if it was the foreign court that prevented jurisdiction;
>
> (d) Portuguese courts have already issued a final and definitive decision (res judicata) in relation to the same issue, except if it was the foreign court that prevented jurisdiction;
>
> (e) The defendants were not duly summoned to the foreign proceedings and/or the foreign proceedings did not comply with the adversarial principle and/or the principle of equality of the parties;
>
> (f) The foreign decision is deemed incompatible with the international public policy of the Portuguese State;

(g) A final and definitive judgement has established that the foreign decision resulted from a crime committed by the foreign judge in the exercise of his/her functions;

(h) A document is presented to the Portuguese court of appeal whose existence the defendant was unaware of (or could not use in the foreign proceedings), provided that such document alone is deemed sufficient to modify the decision in favor of the defeated party; or

(i) The foreign decision is based on a sham litigation and the foreign court has not prevented the parties from reaching their goal.'

If none of the situations described in items (a) to (i) above apply, then the Portuguese court of appeal should confirm the foreign decision.

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules)

In principle, yes.

It is important to highlight from the outset that Portuguese courts and Portuguese legal scholars have been entirely silent both before and after Brexit in relation to the grounds for recognition of an English schemes of arrangement or an English restructuring plan. It was not possible to retrieve a single ruling from the Portuguese upper courts (ie the courts of appeal and the Supreme Court) containing the slightest reference to an English schemes of arrangement or a restructuring plan. Consequently, our analysis is contingent on the absence of reliable guidance from previous court rulings and opinions from legal scholars.

The difficulty of providing a definitive answer to this question is compounded by the issues surrounding the characterisation of the English schemes of arrangement and the restructuring plan as (i) a public collective proceedings, for the purposes of the EU Recast Regulation on Insolvency, or (ii) a judgment on civil or commercial matters, for the purposes of the Recast Brussels Regulation, or even (iii) a court settlement, for the purposes of the same Recast Brussels Regulation.

In this scenario, the conservative approach would be to consider that the recognition of an English schemes of arrangement or the restructuring plan would be subject to the default provisions of the Portuguese Code of Civil Procedure on the recognition of foreign judgments (applicable to all civil and commercial matters). In the instant case, the foreign judgement would be the English court decision that sanctioned the English scheme of arrangement or the restructuring plan.

In a nutshell, the interested party (eg, the debtor) would have to institute a proceeding for the revision and confirmation of the English judgment with a Portuguese court of appeal. The key steps of this proceeding would be the following:

'(a) The applicant would file an application for the revision and confirmation of the foreign decision with the competent Portuguese court of appeal. The defendant would be the person(s) against whom the applicant wished to enforce the foreign decision, in particular (i) the known creditors domiciled in Portugal and (ii) against unknown creditors (the latter being represented by the Public Prosecutor);

(b) The defendant(s) would be summoned to submit a statement of reply within 15 days;

(c) The applicant would then be entitled to counter-reply within 10 days;

(d) After performing any steps deemed indispensable by the judge, the parties and the Public Prosecutor would have 15 days to present their final arguments;

(e) Finally, the court of appeal would hand down its decision, which would be subject to appeal to the Supreme Court.'

The Portuguese court of appeal should review and confirm (ie, recognise) the English judgement, except in the event that:

'(a) There are doubts regarding the authenticity or content of the English judgement;

(b) The English judgement is not yet final and definitive (res judicata) according to the laws of England and Wales;

(c) There is lis pendens in relation to a case pending before a Portuguese court, except if it was the English court that prevented jurisdiction;

(d) Portuguese courts have already issued a final and definitive decision (res judicata) in relation to the case, except if it was the English court that prevented jurisdiction;

(e) The defendants were not duly summoned to the English proceedings and/or the English proceedings did not comply with the adversarial principle and/or the principle of equality of the parties;

(f) The English judgment is found to be incompatible with the international public policy of the Portuguese State;

(g) A final and definitive judgement has established that the English judgement resulted from a crime committed by the English judge in the exercise of his/her functions;

(h) A document is presented to the Portuguese court of appeal whose existence the defendant was unaware of (or could not use in the English proceedings), provided that such document alone is deemed sufficient to modify the decision in favor of the defeated party;

(i) The English judgment is based on a sham litigation and the English court has not prevented the parties from reaching their goal;

(j) The jurisdiction of the English courts had been established fraudulently or the judgement related to a matter over which Portuguese courts have exclusive jurisdiction; or

(k) The jurisdiction of the English courts has been established fraudulently or the judgement related to a matter over which Portuguese courts have exclusive jurisdiction.'

Item (k) could be a source of concern in some cases. For instance, Portuguese courts have exclusive jurisdiction in relation to insolvency and rescue proceedings of (i) individuals domiciled in Portugal and (ii) legal entities, companies and partnerships with registered office/seat in Portugal. Consequently, there is a risk of Portuguese courts refusing to recognise an English judgment sanctioning a schemes of arrangement or a restructuring plan of individuals domiciled in Portugal and of legal entities, companies and partnerships with registered office/seat in Portugal.

Romania

(as at 02/03/2021)

Written by Cristina Ienciu at CITR, Country co-ordinator for INSOL Europe

Q1. Has your country adopted the United Nations Commission on International Trade Law (UNCITRAL) Model law on insolvency. If not, does it intend to do so in the near future?

Yes, Romania has adopted the UNCITRAL Model law on insolvency.

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)?

The provisions of Romania's private international law for the recognition of insolvency proceedings initiated in countries outside the EU Member States (ie third countries) are the provisions contained in the Insolvency Law No 85/2014 on cross-border insolvency.

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)

Yes, under certain conditions provided by the Civil Procedure Code (Article 1096).

Slovakia

(as at 02/03/2021)

Written by Dávid Oršula at bnt attorneys in CEE, Country co-ordinator for INSOL Europe

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

No. There is no chance it will be adopted in the near future.

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)?

Act No 97/1963 on International Private and Procedural Law ('Private International Law Act') contains the following rules, which prevent recognition:

- res judicata
- exclusive jurisdiction of Slovak courts
- the decision is not final or enforceable in the country of issuance
- the decision is not on the merits
- the defendant did not receive notice of the proceedings in sufficient time to enable him to defend, and
- order public

If none of the rules above apply, the court may recognise the judgment.

If the question applies exclusively to commencement (meaning opening) of insolvency proceedings, then most probably such a decision will not be recognised as it would not be considered a decision on the merits.

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules)

Schemes of arrangement and restructuring plans are confirmed by a court's decision.

If England accedes to the Lugano Convention and the court decision qualifies within the definition of Article 32, they may be recognisable. The Slovak courts might, however, reject recognition based on public policy grounds.

As a last resort, general recognition rules under the Private International Law Act apply. However, the Slovak courts might reject recognition based on public policy grounds.

Slovenia

(as at 22/09/2021)

Written by Mag. Blaž Možina, Head of office, Analysis and Research Office, Supreme Court of the Republic of Slovenia

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

Yes, the UNCITRAL Model Law on Insolvency was adopted in 2007.

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)?

These provisions are contained in the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (Official Gazette of the Republic of Slovenia, No 126/2007 and subsequent), Chapter VIII.

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)?

The general rules on the recognition and enforcement of foreign judgments, as provided for in the Private International Law and Procedure Act apply to the recognition of foreign insolvency proceedings. If certain requirements (Chapter 4), such as reciprocity, compliance with public order etc. are met, foreign judgments shall be recognised and enforced in Slovenia.

Furthermore, the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act contains certain special provisions in this regard (Ch 8, Section 8.3). A domestic court may refuse to recognise a foreign insolvency proceeding or a request from a foreign court or administrator for assistance or cooperation if this could adversely affect the sovereignty, security or public interest in the Republic of Slovenia.

If the above-mentioned conditions are met, English schemes or restructuring plans would then be recognised in Slovenia.

Spain

(as at 07/04/2021)

Written by a Spanish member of INSOL Europe

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

No. Despite the fact that the Spanish legislation has not expressly adopted the UNCITRAL Model law (Model Law), it is noteworthy that the Recast Insolvency Act (RIA) contains a number of rules of private international law inspired by those of the EU Recast Regulation on Insolvency and of the Model Law itself.

In this respect, the RIA can be considered an all-encompassing text, which in addition to the recognition of foreign proceedings and the co-ordination between them, regulates international jurisdiction and the determination of the applicable law, all in a more ambitious manner than the EIR and the Model Law themselves.

Specifically, the rules contained in the RIA allow for a certain amount of flexibility so that, in the event that it is more efficient to carry out the financial restructuring of a company in a state other than Spain and there is a close link between the company's activity and such state, the effect on business operations in Spain becomes minimal.

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)?

The recognition of insolvency proceedings commenced in countries outside of the EU Member States is regulated in Spain in Title III of Book Three of the RIA (Articles 742 to 748 of the RIA).

As the RIA states in its explanatory memorandum, the reason for the postponement of the rules of private international law to the last book of this body of law is that they are applicable both to insolvency proceedings (Book One) and to pre-insolvency proceedings (Book Two). However, it should be noted that the current wording of the RIA only takes into account insolvency proceedings, so that some adaptations are necessary when applying its solutions to pre-insolvency proceedings (eg the RIA's references to the insolvency administrator).

Notwithstanding the above, it must be pointed out that in Spain there is no recognition of insolvency or pre-insolvency proceedings as such, but of the judgments that approve their commencement (Article 742 of the RIA) as well as those issued in the framework of those proceedings, as long as they are founded in the insolvency regulation (Article 744 of the RIA).

Recognition of judgments that approve the commencement of the proceeding

Regarding the judgments that decide the commencement of such insolvency or pre-insolvency proceedings, the Spanish legislator demands their recognition through an exequatur procedure in accordance with the procedural rules provided for Law 29/2015, of 30 July, on international legal co-operation in civil matters (LILC), within which the fulfilment by such judgment of the recognition requirements established in Article 742.1 of the RIA is verified.

The requirements established in Article 742.1 of the RIA for the recognition of the judgments of commencement of the proceedings are mainly the following:

- that the judgment refers to a collective proceeding in which all or a significant part of the creditors of the debtor participate and which is founded on the insolvency of the debtor or on the aim to avoid it. The assets and activities of the debtor must be subject to the control or supervision of a court or of a foreign public authority for the purposes of their reorganisation or liquidation, which would include, in principle, those debtor in possession proceedings. However, proceedings based on Company Law which have not been exclusively conceived for insolvency situations may fall out of the scope established in the above paragraph
- that it is a definitive judgment according to the law of the state of commencement, that is, that it puts an end to the instance, irrespective of whether the judgment is firm and final or not. However, Article 742.4 of the RIA provides for the possibility to suspend the exequatur procedure when the judgment of commencement were subject, in its state of origin, to an ordinary appeal or when the term to appeal had not yet expired
- that the jurisdiction of the court or the authority that has opened the proceeding is based on any of the criteria contemplated in the RIA, for instance, that the COMI or an establishment of the debtor is located in the state of commencement, or in any other reasonable connection of similar nature. Therefore, this requirement would not be met when the only connection with the state of the opening of the proceedings were the submission of agreements to the law of such state. It should also be noted that the nature of the jurisdiction criterion used in the state of origin is relevant in determining whether the foreign proceeding can be recognised as a main insolvency proceedings (where the COMI of the debtor or an equivalent related criterion is located in the state of origin) or as a territorial insolvency proceedings (where an establishment of the debtor or an equivalent related criterion is located in the state of origin). The foregoing is relevant because, while in the first case the effects of the foreign proceeding may reach all of the debtor's assets (including those located in Spain), in the second case the proceeding will only affect the debtor's assets located in the state of commencement

- that the judgment has not been rendered in default of the debtor or, otherwise, that it has been preceded by delivery or service of a writ of summons or equivalent document, in due time and form for opposition
- that the judgment does not contravene the Spanish public order, thus safeguarding the essential principles of the Spanish legal system, both in material and procedural terms. As regards procedural public order, this is comprised by the fundamental rights that govern a due process (ie principles of hearing, contradiction, effectiveness of protection, presentation and practice of evidence, etc). As for the material public order, it is basically embodied in the principle of non-discrimination on the basis of nationality and respect for the right to property. With respect to the first of these principles, an example where it would not be respected would be a ruling imposing a greater economic sacrifice on some creditors simply because of their nationality. As regards the right to property, a violation of this right would occur if the declaration of insolvency were in fact a disguised confiscation or the imposition of an arbitrary or manifestly disproportionate sacrifice on any of the creditors

Recognition of the remaining judgments issued in the proceedings

However, for the rest of the judgments issued in the framework of the insolvency or pre-insolvency proceedings the principle of automatic recognition operates. Such principle allows, among other circumstances, to obtain the incidental recognition before the judicial or extrajudicial authority (eg commercial registrar) before which it is invoked.

Nonetheless, if the exequatur of the judgment of commencement is denied, it will not be possible to automatically recognise the other decisions issued in the framework of the proceedings, and in the absence of an international agreement, the general procedural rules of recognition of foreign decisions contained in LILC and the grounds for refusal of such recognition provided for in the RIA must be applied.

As regards the judgments covered by this principle of automatic recognition, it could be understood that it includes all those judgments other than the judgment of commencement that deal with typically insolvency matters, that is, those in whose resolution a certain authority does not actually act as a judge in charge of settling a dispute but as a simple agent pursuing the collective realisation of the interests of creditors and, in exceptional cases, of other interested parties.

This would include, therefore, resolutions adopted in the framework of foreign pre-insolvency proceedings, such as, for example, the judicial resolution validating a restructuring plan. But, in addition, those resolutions that, as indicated in Article 56 of the RIA, have their origin in actions that derive directly from the insolvency proceedings and are immediately related to the latter, will also be automatically recognised.

In order to proceed with this automatic recognition, Article 744 requires conditions analogous to those required by Article 742 for the recognition of foreign commencement decisions. The only difference lies in the qualification made to the content of Article 742.1.4 of the RIA, as it is now stated that the requirement of prior delivery or notification of the writ of summons or equivalent document will also be required in respect of any person other than the debtor who has been sued in the foreign insolvency proceedings and in relation to the decisions affecting them.

In any case, and despite the admissibility of automatic recognition for judgments other than the judgment of commencement, it should be clear that Spanish legal system differentiates between recognition and enforcement and that, even for judgments other than the judgment of commencement, enforcement is necessarily conditional upon obtaining the declaration of enforceability through the exequatur of the judgment to be enforced.

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)

As explained below, the possibility of recognising an English scheme of arrangement or a restructuring plan in Spain is an uncertain issue under Spanish law. Prima facie, the following options may be identified for their recognition in Spain:

RIA

As explained in Q2, in order to recognise the judgment of commencement of insolvency or pre-insolvency proceedings in Spain, it is necessary (i) that it refers to a collective proceeding which is based on the debtor's insolvency or on the purpose to avoid it; (ii) that the debtor's assets and activities must be subject to control or supervision by a foreign court or public authority for the purposes of its reorganisation or liquidation; and (iii) that the jurisdiction of the relevant court that resolved the opening of the proceeding must be based on one of the criteria contained in the RIA; among other requirements.

By virtue of the foregoing, it is questionable whether the scheme of arrangement and the restructuring plan may be recognised in Spain if we take into account the following:

- in both cases, these are procedures based on corporate law (CA 2006) and in the case of the scheme of arrangement it is not designed exclusively for insolvency situations. It should be noted that a restructuring plan could be considered as a proceeding based on the insolvency of the debtor, given that only companies 'facing or likely to face financial difficulties that affect, or may affect, its ability to carry on business as a going concern' may accede to it. Additionally, a recent English court decision has stated that a restructuring plan should be considered as an insolvency proceeding *(Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch))

- these are procedures that may not be collective since they only affect the relevant assets and liabilities that the debtor decides to submit to the scheme of arrangement or to the restructuring plan
- judicial monitoring is limited to the necessary process to achieve the scheme of arrangement or the restructuring plan but it does not globally affect the debtor's estate, and
- territorial jurisdiction of English courts may be based on insufficient criteria, as the fact that the relevant debt to be restructured in the scheme of arrangement or the restructuring plan being subject to English Law is not an equivalent connection to the COMI of the debtor

In any case, it should be noted that regardless of whether the scheme of arrangement and the restructuring plan are included or not in the scope of application of the RIA, what is clear is that if a scheme of arrangement or a restructuring plan are filed in the UK and the COMI of the debtor is located in Spain, they would either not be recognised in Spain or, at the most, would be recognised as a territorial proceeding (i.e. without affecting assets located in Spain).

Rome I Regulation

Given the quasi-contractual nature of the scheme of arrangement and restructuring plans, their recognition in Spain could also be approached through conflict-of-law rules regarding contractual obligations under Rome I.

However, the aforementioned is not free of uncertainty if we take into account that the cram-down mechanism inherent to schemes of arrangement and the cross-class cram-down of restructuring plans, these do not easily fit in with their alleged contractual nature.

In this regard, the Court of Justice has insisted on numerous occasions that in order for a given obligation to be contractual in nature and thus subject to Rome I, it must have been freely and voluntarily established between the parties, which is not the case for these cram-down mechanisms (see: *Hazte* Case C-26/91 of June 17, 1992; and *RÈunion* Case C-51/97 dated October 27, 1998).

Lugano Convention

Although the UK applied on 8 April 2020 to rejoin the Lugano Convention as an independent contracting state, such accession will not be possible until all Member States of the Lugano Convention consent, which has not yet happened. To date, only Switzerland has given its formal consent to the accession of the UK.

In any event, in the hypothetical case that all Member States of the Lugano Convention agree to the accession of the UK, it should be noted that bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of application of the Lugano Convention.

In this regard, diverging from the general line that English courts have maintained on not considering schemes of arrangement as insolvency proceedings, a recent English court decision in *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) has declared that a restructuring plan must be considered as an insolvency proceeding. Therefore, a restructuring plan would be excluded from the scope of application of the Lugano Convention, to which it will not be possible to resort in order to recognise a restructuring plan outside the UK.

Hague Convention of 2005

As in the case of the Lugano Convention, bankruptcy arrangements between the insolvent debtor and its creditors and similar matters are excluded from the scope of application of the Hague Convention, which is currently applicable to the UK.

For this reason, the same English court decision referred to above also stated that a restructuring plan cannot be recognised outside the UK under the Hague Convention as it falls outside its scope of application due to the fact that it is considered an insolvency proceeding, which may not be the case of the scheme of arrangement depending on its content.

LILC

In the absence of the above alternatives, the only alternative that would remain in order to obtain the referred recognition is through the LILC, whose scope of application is defined in very broad terms. Therefore, it could be attempted to include schemes of arrangement and restructuring plans under its scope.

The recognition regime included in this regulation sets out the need for an exequatur procedure, in which recognition of a scheme of arrangement or the restructuring plan may be denied, among other reasons, if it refers to matters over which the Spanish courts have exclusive jurisdiction or if the relevant jurisdiction of the foreign court does not comply with a 'reasonable connection'.

In this respect, such connection will be considered reasonable when the international jurisdiction of the foreign court is based on criteria similar to those provided for in the Spanish legal system. Therefore, a scheme of arrangement or a restructuring plan would only be recognised in Spain under the LILC if the debtor has its COMI, registered address or an establishment in the UK.

Sweden

(as at 01/03/2021)

Written by Niklas Alvestrand Körling at Wistrand, Country co-ordinator for INSOL Europe and Louise Ahlberg at Wistrand

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

No

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)?

Under the Nordic Multilateral Bankruptcy Convention of 7 September 1993 (concerning Denmark, Finland, Iceland, Norway and Sweden), there is automatic recognition.

Non-statutory rules which apply to all other countries. Therefore, Sweden may recognise foreign insolvency proceedings but does not grant any rights to deal with assets located in Sweden.

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? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules).

If the scheme of arrangement or restructuring plan is considered a part of insolvency proceedings, there would be no automatic recognition.

If the scheme of arrangement or restructuring plan is considered part of contract law, recognition could be possible if based on choice of English law (Rome I), or if an exclusive jurisdiction clause in favour of the English courts applies (Hague).

This is if:

- the relevant parties that are bound by a contract that is governed by English law, or
- a creditor has entered into the composition by choice

APPENDIX I

Consolidated Table

(as at 05/10/2021)

Country	(i) Has the UNCITRAL Model law on Insolvency adopted? (ii) If not, is adoption being considered ?(Q1)	Recognition of insolvency/restructuring proceedings commenced in a third country (Q2)	Would your country recognise (i) an English Scheme or (ii) English restructuring plan? (Q3)
Austria	No and No	Recognition of foreign (non-EU) insolvency proceedings is available pursuant to section 240 of the Insolvency Code. The effects of insolvency proceedings opened in another country and judgments rendered in such proceedings shall be recognised in Austria if: • the 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	Schemes: remains to be seen, but potential arguments include: -Rome I pursuant to its Article 2, 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. The downside is that this is a pathway only for liabilities governed by English law - the Hague Convention could be a basis for recognition. 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 - the Austrian Enforcement Act (Exekutionsordnung)

			provides for rules that, if certain requirements are met, foreign judgments shall be recognised and enforced in Austria. One very relevant requirement is that Austrian judgments would be recognised and enforced in the UK as well (reciprocity) and that such reciprocity must be "guaranteed" (verb¸rgt) by treaties or other binding rules. At least from the Austrian side, there are no obvious rules guaranteeing such recognition. Also, legal writers point to the UK "Rule of Gibbs" as a potential barrier Plans: remains to be seen: 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. While UK courts appear to qualify the proceedings as insolvency proceedings, Austrian courts would not be bound to such qualification. 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
Belgium	No	The Belgian law of 16 July 2004 contains the national rules of international private law (Belgian IPL Code), and contains a chapter on insolvency	Schemes and Plans: possibly: The Belgian IPL Code states in its chapter on collective insolvency proceedings that the chapter applies to 'insolvency

		proceedings. A foreign judgment concerning the opening, the conduct or the closure of insolvency proceedings will be recognised or declared enforceable in Belgium in accordance with the general principles of the Code (art 121 ß 1 Belgian IPL Code). A foreign judgment shall not be declared enforceable or its recognition can be challenged among others if the rights of the defence were violated or if the judgment would still be subject to an ordinary recourse in the originating state (art 25 ß 1 Belgian IPL Code).	proceedings and procedures for collective debt settlement' (art 116 Belgian IPL Code) without further definitions, but Annex A of the European Insolvency Regulation mentioned UK voluntary arrangements under insolvency legislation as 'insolvency proceedings'.
Bulgaria	No and No	The main recognition rule related to international civil procedure law is Art. 117 from the Code on International Private Law: Decisions and acts by foreign courts and other foreign authorities are recognized and their execution is permitted when: 1. The foreign court or authority was, under Bulgarian law, competent to issue the act in question; however, such competence cannot be based only on the claimant's citizenship or registration in the state of the foreign court; 2. The debtor has been served a transcript of the claim, the parties have duly been summoned and basic principles of Bulgarian law on fair hearing have not been violated; 3. No decision by a Bulgarian court between the same parties on the same legal grounds and for	Unclear: It is questionable whether Bulgaria would recognise an English scheme of arrangement or an English restructuring plan. The main points of concern are: (1) Lack of explicit legislative regulation covering recognition of such plans; (2) International jurisdiction in England based on COMI other than the place of debtor's formal registration might cause problems; (3) Such plans cause the loss of rights by creditors against their will. This might raise issues of public concern although the notion is not unfamiliar in Bulgarian law. The risk is especially high in the case of a cram down by an English restructuring plan as functionally similar instruments in Bulgaria challenge the contractual nature of the plan; (4) Bulgarian legislation encourages ancillary insolvency proceedings and there is practically no instrument permitting the main IP to prevent them. Schemes: The chances for recognition and execution

		the same claim has entered into force; 4. No claim between the same parties, on the same legal grounds and for the same claim is pending before a Bulgarian court when the Bulgarian procedure was initiated before the foreign one; 5. Recognition and execution would not contradict Bulgarian public order.	appear higher for a scheme of arrangement with no cram down in the case of a debtor formally registered in England. However, formal arguments and the mutuality requirement can prevent recognition here, too.
Croatia	No and No	Under the Insolvency Act (National Gazette 71/15, 104/17) articles 400 – 427, the petition for recognition has to include: (i) the original decision and translation into Croatian, or a certified copy, (ii) a certificate of enforceability and (iii) a list of known assets of the debtor in the territory of the Republic of Croatia. The foreign decision will be recognised if: (i) the court that delivered the decision had international jurisdiction according to Croatian law, (ii) the decision is enforceable according to the law of the country of origin and (iii) if its recognition wouldn't be contrary to public policy.	Yes — Article 427 of Insolvency Act provisions on the recognition of a foreign decision on the opening of insolvency proceedings shall apply to the recognition of a foreign decision approving a restructuring plan or scheme, as well as the recognition of a foreign decision made in another similar procedure.
Cyprus	No	There are no private international law provisions for the recognition of insolvency proceedings commenced in countries outside of the EU Member States. Thus, in the absence of legislative framework providing for the recognition of foreign insolvency proceedings in Cyprus, such recognition may be achieved under the principles of common law or based on a	No — At this moment, there is no legal framework to ensure recognition of an English scheme of arrangement (under CA 2006, Pt 26) or an English restructuring plan (under CA 2006, Pt 26A) post-Brexit.

		bilateral agreement.	
Czech Republic	No and No	Recognition of foreign insolvency proceedings commenced in countries outside the EU Member States is governed by the general provision contained in section 111 (5) of Czech Act No 91/2012 Coll., on international private law, pursuant to which: Foreign decisions in matters of insolvency proceedings shall be recognised under the condition of reciprocity, provided the debtor's main interests are concentrated in the foreign state in which said decisions have been issued and provided the debtor's property in the Czech Republic is not subject of proceedings which have already commenced.	Scheme—Unclear: It is not clear what approach the Czech court would have to the English scheme of arrangement. Generally, the Czech court might consider the scheme of arrangement from two possible perspectives (i) as a contract or (ii) as a court decision Plan—Yes: Following *gategroup Guarantee Limited*, the Czech court would also consider this aspect and recognise the English restructuring plan as a decision issued in the course of the insolvency proceedings. In such cases the general provision contained in section 111 (5) of Czech Act No 91/2012 Coll., on international private law, on recognition of foreign insolvency proceedings commenced in countries outside the EU Member States shall apply.
Denmark	No and No	According to the Danish Insolvency Act, the Minister of Justice may lay down regulations in pursuance of which decisions by foreign courts of law and authorities in respect of bankruptcy, restructuring and other similar insolvency proceedings are to have a binding effect and be enforceable in Denmark, provided that they have such binding effect and are enforceable in the foreign state where the decision has been taken and provided that such recognition and enforcement would not be obviously incompatible with the Danish legal system. Under the Nordic Bankruptcy Convention, Danish courts recognise insolvency proceedings	No: An English scheme of arrangement or an English restructuring plan is not enforceable in Denmark, either prior to Brexit nor post-Brexit.

		commenced in Norway. Danish courts also recognise insolvency proceedings commenced against credit institutions and investment firms in Third Party States to the extent that the EU has agreed upon with the Third Party State in question.	
Estonia	No and No	Yes under Chapter 62 of the Code of Civil Procedure. A court decision in a civil matter made by a foreign state is subject to recognition in the Republic of Estonia, unless: —it is contrary to public order and the fundamental rights and freedoms of persons —the debtor did not have a chance to defend the proceedings —the decision is in conflict with an earlier decision made in Estonia in the same matter between the same parties or if an action between the same parties has been filed with an Estonian court —the decision is in conflict with a decision of a foreign court in the same matter between the same parties which has been earlier recognised or enforced in Estonia —the decision is in conflict with a decision made in a foreign state in the same matter between the same parties which has not been recognised in Estonia, provided that the earlier court decision of the foreign state is subject to recognition or enforcement in Estonia	Yes and Yes

		—the court which made the decision could not make the decision in compliance with the provisions of Estonian law regulating international jurisdiction	
Finland	No and No	The Nordic Bankruptcy Convention provides a legal framework for the cross border recognition and enforcement of bankruptcies between Denmark, Sweden, Norway, Iceland and Finland. According to the treaty, bankruptcy declared in one treaty state is recognised in all other treaty states. There are very few cross-border insolvency cases in Finland and consequently there is no relevant court practice to draw procedural practices from.	No: there is no international treaty or convention providing for recognition of an English Scheme of Arrangement or Restructuring Plan.
France	No	The only French law provisions in force for the recognition of foreign insolvency proceedings relate to the exequatur procedure. The conditions for the recognition of foreign judgments are defined by case law: —the foreign court must have jurisdiction: there must be a sufficient connection between the application and the court seized —the procedure followed must comply with international public policy in terms of substance and procedure; with a flexible approach adopted by the case law, these conditions concern the means of defence open to the defendant and the fairness of the procedure; as regards substance,	Schemes: An agreement could be recognised, not by the exequatur procedure, but as a contract, according to the provisions of Rome I. Plans: probably yes; recognition could be granted as soon as an English court approves it: an analysis of the grounds (financial difficulties) and of the rules (an agreement similar to a scheme of arrangement with a judicial sanction) however could lead French courts to apply the same process as the one provided for insolvency proceedings. The procedure of exequatur therefore seems likely applicable. The Hague Convention could also be applied subject to the exclusions provided for in its Article 9, in particular the refusal of recognition or enforcement if the

		the case law considers that the stay of individual proceedings and the principle of an equal treatment of creditors are part of international public policy; the approach is more flexible as regards the actual content of the foreign law —the foreign decision must not be obtained by fraud (abuse of legal rules or fraudulent forum shopping) —finally, no insolvency proceedings must be opened in France against the same debtor (by reference to the classic condition of incompatibility with another decision)	agreement was null and void under the law of the State of the chosen court, fraud, conflict with local public policy or inconsistency with an earlier judgment given in another State between the same parties on the same cause of action.
Germany	No and No (although arguably, the German insolvency regime already provides for everything the Model Law set out to achieve and, in parts, goes beyond the Model Law eg	Recognition of foreign (non-EU) insolvency proceedings is available pursuant to section 343(1) of the Insolvency Code. Recognition may be denied if (i) 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 (ii) recognition would violate the German *ordre public*, ie lead to a result which is manifestly incompatible with fundamental principles of German law). A court has jurisdiction to commence insolvency proceedings if the debtor's COMI is within the court's district. 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 does not suffice.	Possibly: Brussels I recast no longer applies, Lugano Convention (the EU has now rejected the UK's application) and Rome I application is doubtful. For schemes, however, section 328 of the German Civil Procedure Rules (*Zivilprozessordnung*, "GCPR") may assist cases which (i) do not violate public policy (ii) have finance documents containing a valid jurisdiction clause in favour of the English courts and (iii) satisfy the reciprocity test, meaning that the foreign court would recognise an equivalent judgment if it were handed down by a German court in similar circumstances. For restructuring plans, there are two possible options for recognition in Germany: section 343 Insolvency Code or, alternatively, section 328 GCPR. Zacaroli's J legal analysis of the EU Recast Regulation on Insolvency in *gategroup Guarantee Ltd* and his reasoning as to what constitutes "insolvency

	automatic recognition of foreign insolvency proceedings and the application of the *lex fori concursus*, i.e. the insolvency law of the country in which the proceedings were opened, is explicitly provided for)		proceedings" could lend weight to the suggestion that restructuring plans may be recognised in Germany pursuant to section 343 Insolvency Code. However, the term "insolvency proceedings" under German law is not necessarily identical with the term as construed under the Recast Regulation on Insolvency, which also includes pre-insolvency restructuring proceedings. 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.
Greece	Yes	The recognition of international insolvency proceedings in Greece is determined by L 3858/2010. L 3858/2010 stipulates through articles 15 to 24 (Chapter C of the Law) the procedure for the recognition of international proceedings in third countries.	Greece would recognise an English Scheme of Arrangement or an English restructuring plan following the most recent available legal framework currently in force. Today this is the combined application of L 3858/2010 (based on the UNCITRAL model) and the new Greek bankruptcy code (L 4738/2020).
Hungary	No	Under Section 109 of Private International Law Statute where:	Schemes: rather questionable post Brexit. Plans: similarly questionable post Brexit.

		a) jurisdiction of the foreign court is considered legitimate under this Act; b) the judgment is construed as definitive by the law of the State in which it was adopted, or equivalent; and c) neither of the grounds for denial apply. Reciprocity is also required.	
Ireland	No	Insolvency proceedings commenced outside of EU Member States can be recognised in Ireland under common law rules of recognition. This jurisdiction can be exercised where relief is sought for a legitimate purpose and not in the nature of enforcement and derives from the underlying principle of universality of insolvency proceedings. The High Court will also have regard to the equivalence between Irish insolvency law and the law of the country in which the foreign insolvency proceedings are taking place, to ensure recognition is not contrary to Irish law.	Schemes and Plans: probably recognised under common law.
Italy	No and No	The existing provisions are limited. Specifically: (i) jurisdiction is dealt with under art. 9 and 161 of Italian insolvency law with regard to winding up (fallimento) and restructuring (concordato preventivo) proceedings. (ii) recognition and enforcement of third countries' foreign judgments is dealt with under the general conflict of law rules and, specifically, art. 64 and ff of Law 218/1995, on Italian private international law, to	Unclear: No specific convention exists between the UK and the Republic of Italy in matters regarding insolvency and restructuring. The UK and the Republic of Italy entered the Convention between for the Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters, which was signed at Rome on 7 February 1964, with amending Protocol signed at Rome on 14 July 1970. Following withdrawal from the EU, the Convention could

		be applied taking into account the peculiarities of foreign insolvency proceedings.	be applicable to recognition of judgments in bankruptcy proceedings (art. IV.3.c) . Recognition and enforcement of court orders issued at the sanctioning hearing approving the plan or the scheme could be recognised in accordance with the Convention if qualified, under English law, as judgments issued in bankruptcy proceedings. Otherwise, recognition and enforcement could be sought under the existing rules on recognition and enforcement of third countries' foreign judgments (art. 64 and ff of Law 218/1995 on Italian private international law).
Latvia	No	On the basis of international agreements on mutual legal assistance and/or national norms of private international law, as well as the norms of civil procedure governing the recognition and enforcement of foreign judgments in general. There are no norms of private international law or civil procedure governing the recognition of foreign insolvency proceedings in particular.	Unclear: Judgments made with respect to an English scheme or an English restructuring plan would need be recognised on the basis of norms of private international law, as well as the norms of civil procedure governing the recognition and enforcement of foreign judgments in general. Customary grounds for the refusal of recognition (eg lack of competence of the foreign court, which gave the ruling, to examine the dispute or conflict with the public policy (ordre public) in Latvia) would apply.
Lithuania	No	The recognition of related court judgments follows the general exequatur recognition procedure established in Art 809 et seq of the Code of Civil Procedure (CPC). The relevant criteria are inter alia: the entry into force of the judgment in the country of origin, adherence to the obligation to duly inform all affected parties who were not participating in the	Unclear: It remains uncertain if English schemes or restructuring plans would be recognised in Lithuania. This uncertainty stems from (i) the lack of special provisions on the recognition of insolvency-related decisions taken in third-party states, (ii) the absence of a bilateral treaty between the UK and Lithuania that would cover the subject-matter, (iii) the lack of relevant precedent case law, and (iv) the case-by-case nature of

		court proceedings, non-violation by the foreign judgment of rules of public order (ordre public). The court has no power to analyse the application of law and facts of the judgment, for which recognition is sought.	the exequatur procedure. Although the court should refuse recognition only in exceptional cases, the risk remains that recognition requests could be rejected.
Luxembourg	No and No	Luxembourg applies the universality principle.	Yes: An English scheme of arrangement or an English restructuring plan should in principle be recognised post-Brexit, based on the Lugano Convention, but the UK's application to accede has been rejected by the EU.
Malta	No and No	Foreign judgments can be recognised and enforced under the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta). Any judgement delivered by a competent court outside Malta and constituting a final, definitive judgement (res judicata) (including any judgement opening insolvency proceedings which may or may not involve the appointment of an insolvency practitioner) may be enforced by the competent courts in Malta in the same manner as judgements delivered by a Maltese court. While a Maltese court considering enforceability would not be required or requested to re-examine the merits of the judgement, a declaration of enforceability would not be possible if in the opinion of the inquiring court:	Unclear for schemes and plans; it could be argued that English schemes of arrangements could be regarded as a contractual matter to be recognized on the basis of the Rome I which continues to apply. Application of recognition on the basis of Rome I would inevitably be subject to the possible disapplication of English law (as the governing law) and the application of overriding mandatory principles of Maltese law where required in terms of the Rome I framework. The Hague Convention could also possibly serve as a basis for recognition. This route is not itself without doubt given that insolvency, composition and other analogous matters fall outside the scope of the Convention (Article 2(2)(e) of the Convention).

		—the judgement sought to be enforced may be set aside on any of the grounds contemplated for under the Code of Organisation and Civil Procedure for a new trial —in the case of a judgment by default, if the parties were not willfully disobedient according to foreign law, or —if the judgment is contrary to public policy or to the internal public law of Malta Also, specifically, in relation to judgements delivered by a superior court of the UK, recognition and enforcement may possibly be sought under the terms of the British Judgements (Reciprocal Enforcement) Act (Chapter 52 of the Laws of Malta). This legislation (which was superseded by overriding EU legal instruments) applies a specific definition of the term 'judgement' where it is defined as: 'any judgment or order given or made by a court in any civil or commercial proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable'.	
The Netherlands	No	The effects of the opening of insolvency proceedings in other non-EU jurisdictions are only to a certain limited extent recognised in the Netherlands. This recognition may be challenged if the principles of due process and fair trial have not been observed in the foreign procedure.	Schemes: probably yes: In the absence of case law on this matter, no conclusive answers can be given. The prevailing opinion in the Netherlands is that a scheme of arrangement will be recognised and given effect in the Netherlands on the basis of either the Regulation (EU) 1215/2012 (Brussels I recast) or Dutch domestic private international law.

		The Dutch Supreme Court has consistently decided that the foreign insolvency proceedings only have a territorial effect, meaning that they do not affect the debtor's assets located in the Netherlands and the legal consequences attributed to the bankruptcy pursuant to the bankruptcy law of such foreign country cannot be invoked in the Netherlands to the extent that it would result in any unpaid creditors no longer being able to take recourse on the assets of the debtor located in the Netherlands (either during or after the relevant foreign insolvency proceedings). If a foreign insolvency office-holder is allowed to invoke their rights as available pursuant to the foreign domestic insolvency law, including over assets that are located in the Netherlands, the office-holder is also allowed to sell these assets and consider the proceeds part of the assets of the foreign bankruptcy estate. Note, however, that the effect of foreign insolvency proceedings (and any actions by a foreign insolvency office-holder related thereto) on assets located in the Netherlands can be set aside by a Dutch court, if the court determines such proceedings to have been in violation of public policy.	Plans: Unclear—It is not at all certain whether the same is true for the new restructuring plan. While, in principle, a restructuring plan is likely to be recognised in the Netherlands under rules of domestic private international law, the effects of recognition will be limited if the restructuring plan is considered an insolvency proceeding for purposes of applying Dutch private international law.
Poland	Yes	The UNCITRAL Model Law enacted by the Bankruptcy and Recovery Act of 9 April 2003.	Yes: Both an English scheme of arrangement and restructuring plan would be recognised on the basis of

			Part II of the Bankruptcy Law: 'Regulations dealing with international bankruptcy' if no exclusive jurisdiction of a Polish court applies and there is no breach of general principles of the legal order of Poland (similar to a public order exemption) (see art 392 of the Bankruptcy Law). In practice, it may well be that if one deals with an English scheme opened against a debtor who is not endangered by insolvency, then recognition may be denied. In such a case, the rules of the Private International Law which is based on the Rome I (and Rome II) convention would apply.
Portugal	No	(1) The recognition of insolvency proceedings commenced in third-party states is governed by the provisions of sections 288 et ss. of the Portuguese Insolvency and Corporate Recovery Code ('PICRC'). (2)The general rule laid down in the PICRC is that any judgement opening insolvency proceedings handed down by a court of a third-party state shall be recognised in Portugal if the debtor's COMI is situated outside the territory of all Member States of the European Union. However, there are two exceptions to this general rule. Recognition shall be refused in the event that: • The jurisdiction of the court of the third-party state was not based on the same (or equivalent) criteria foreseen in the	Yes, in principle. It is important to highlight from the outset that Portuguese courts and Portuguese legal scholars have been entirely silent both before and after Brexit in relation to the grounds for recognition of an English schemes of arrangement or an English restructuring plan. The conservative approach would be to consider that the recognition of an English schemes of arrangement or the restructuring plan would be subject to the default provisions of the Portuguese Code of Civil Procedure on the recognition of foreign judgments (applicable to all civil and commercial matters). In the instant case, the foreign judgement would be the English court decision that sanctioned the English scheme of arrangement or the restructuring plan.

		PICRC, *i.e.* the debtor's seat, domicile or COMI; or • The effects of recognition would be manifestly contrary to the public policy of the Portuguese State.	
Romania	Yes	The provisions of Romania's private international law for the recognition of insolvency proceedings initiated in countries outside the EU Member States (ie third countries) are the provisions contained in the Insolvency Law No 85/2014 on cross-border insolvency.	Yes - Under certain conditions provided by the Civil Procedure Code (article 1096).
Slovakia	No and No	Act No 97/1963 on International Private and Procedural Law ('Private International Law Act') contains the following rules, which prevent recognition: —res judicata —exclusive jurisdiction of Slovak courts —the decision is not final or enforceable in the country of issuance —the decision is not on the merits —the defendant did not receive notice of the proceedings in sufficient time to enable him to defend, and —order public If none of the rules above apply, the court may recognise the judgment.	Possibly yes: As a last resort, general recognition rules under the Private International Law Act apply. However, the Slovak courts might reject recognition based on public policy grounds.
Slovenia	Yes	The general rules on the recognition and enforcement of foreign judgments, as provided	Potentially yes for both, provided that the conditions mentioned are satisfied.

		for in the Private International Law and Procedure Act apply to the recognition of foreign insolvency proceedings. If certain requirements (Chapter 4), such as reciprocity, compliance with public order etc. are met, foreign judgments shall be recognised and enforced in Slovenia. The Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act also contains certain special provisions (Ch 8, Section 8.3). A domestic court may refuse to recognise a foreign insolvency proceeding or a request from a foreign court or administrator for assistance or cooperation if this could adversely affect the sovereignty, security or public interest in the Republic of Slovenia.	
Spain	No, but the Recast Insolvency Act (RIA) contains a number of rules inspired by the Model Law itself.	The recognition of insolvency proceedings commenced in countries outside of the EU Member States is regulated in Spain in Title III of Book Three of the RIA (Articles 742 to 748 of the RIA). There is no recognition of insolvency or pre-insolvency proceedings as such, but of the judgments that approve their commencement (Article 742 of the RIA) as well as those issued in the framework of those proceedings, as long as they are founded in the insolvency regulation (Article 744 of the RIA). Judgments that approve the commencement of Non-EU insolvency proceedings are recognised in Spain through the exequator proceedings,	Uncertain for both as under the RIA (i) they are based on corporate law (CA 2006) and in the case of the scheme of arrangement it is not designed exclusively for insolvency situations (ii) they are procedures that may not be collective since they only affect the relevant assets and liabilities that the debtor decides to submit to the scheme of arrangement or to the restructuring plan (iii) they have judicial monitoring limited to the necessary process to achieve the scheme of arrangement or the restructuring plan and (iv) territorial jurisdiction of English courts may be based on insufficient criteria, as the fact that the relevant debt to be restructured in the scheme of arrangement or the restructuring plan being subject to English Law is not an

		provided that the following requirements set out in the Insolvency Act are met: —the judgment refers to a collective proceeding in which all or a significant part of the creditors of the debtor participate and which is founded on the insolvency of the debtor or on the aim to avoid it. The assets and activities of the debtor must be subject to the control or supervision of a court or of a foreign public authority for the purposes of their reorganisation or liquidation, which would include, in principle, those debtor in possession proceedings —it is a definitive judgment —the jurisdiction of the court or the authority that has opened the proceeding is based on any of the criteria contemplated in the RIA, for instance, that the COMI or an establishment of the debtor is located in the state of commencement, or in any other reasonable connection of similar nature. —the judgment has not been rendered in default of the debtor or, otherwise, that it has been preceded by delivery or service of a writ of summons or equivalent document, in due time and form for opposition —the decision is not against public policy	equivalent connection to the COMI of the debtor. Uncertain under Rome I given the cram-down mechanism inherent to schemes of arrangement and the cross-class cram-down of restructuring plans, which do not easily fit in with their alleged contractual nature. Uncertain under the Lugano (the EU has now refused the UK's application to accede)) and Hague Conventions as following *gateGroup Guarantee Limited*, restructuring plans are excluded.
Sweden	No and No	Under the Nordic Multilateral Bankruptcy Convention of 7 September 1993 (concerning Denmark, Finland, Iceland, Norway and	If the scheme of arrangement or restructuring plan is considered a part of insolvency proceedings, there would be no automatic recognition.

		Sweden), there is automatic recognition. Non-statutory rules which apply to all other countries. Therefore, Sweden may recognise foreign insolvency proceedings but does not grant any rights to deal with assets located in Sweden.	If the scheme of arrangement or restructuring plan is considered part of contract law, recognition could be possible if based on choice of English law (Rome I), or if an exclusive jurisdiction clause in favour of the English courts applies (Hague).