Will Adler's English Part 26A Restructuring Plan win recognition in Germany?

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German real estate company Adler recently made headlines by successfully implementing a 6 billion euro restructuring by way of a UK Part 26A Restructuring Plan.

The Plan involved the subordination of Adler's existing notes to new money creditors and an asset disposal plan to repay its debts.

The company obtained the English Court's sanction for the Plan on 12 April 2023 notwithstanding vociferous opposition from certain of the company's noteholders.

These 2029 noteholders, represented by Akin Gump, have now filed an application for leave to appeal to the UK's Court of Appeal. This application has yet to be determined.

This is the first time that German law governed debt issued by a Luxembourg holding company was compromised through an English Scheme or Plan.

Whilst all of the notes were German law governed, the company achieved sufficient connection to England for jurisdiction purposes by replacing the Luxembourg note issuer Adler Group S.A. with a newly incorporated English company.

Recognition

It is well known that an English Court does not want to act in vain in sanctioning a Restructuring Plan in respect of a company with assets or creditors outside of the jurisdiction.

This is because lack of recognition could allow creditors to take enforcement action in other jurisdictions and therefore undermine the Plan outcome.

Accordingly, the English Court required credible evidence (through expert submissions) that there was at least a reasonable prospect that the Adler Plan would be recognised and given effect in Germany (as well as Luxembourg) prior to sanctioning the restructuring.

> So far there is no reported case of a UK Restructuring Plan being formally recognised by the German Courts and there is an ongoing debate as to how this might be achieved in practice.

In this article, we set out the routes pursuant to which a UK Restructuring Plan may obtain recognition in Germany.

Possible pathways to recognition of restructuring plans in Germany

Recognition pursuant to section 343 InsO

One route to obtain recognition of a Restructuring Plan in Germany may be under section 343 of the German Insolvency Code (InsO) which provides for the recognition of foreign insolvency proceedings without the need for a separate application with the German Courts, subject to certain exceptions.

The German Federal Supreme Court previously held that Schemes of Arrangement do not qualify as insolvency proceedings within the meaning of section 343 InsO since they do not require the Scheme company to be insolvent and do not aim at the partial satisfaction of all creditors of the Scheme company, but have much in common with settlement arrangements among a specific group of creditors.

Given the similarities between Schemes of Arrangement and Restructuring Plans, some commentators have questioned whether the German Courts would therefore recognise Restructuring Plans as insolvency proceedings within the meaning of section 343 InsO.

Lugano Convention

However, unlike Schemes, a company can only utilise a Restructuring Plan if it has encountered, or is likely to encounter, financial difficulties that may affect its ability to carry on business as a going concern. Indeed, the English Courts determined in the Gategroup decision that Restructuring Plans are insolvency proceedings for the purposes of the bankruptcy exclusion to the Lugano Convention.

> In addition, German public StaRUG proceedings are considered insolvency proceedings under the Recast Insolvency Regulation and these proceedings bear significant similarities to UK Restructuring Plans.

In light of the above, there are good arguments to support the view that UK Restructuring Plans should qualify as insolvency proceedings within the meaning of section 343 InsO.

However, section 343 InsO would likely only find application in circumstances where the English Court accepted jurisdiction with respect of the Plan company by virtue of its COMI being in the UK.

To simplify, this is because recognition under section 343 InsO requires that the English Court would also have had international jurisdiction to open insolvency proceedings under German law (known as the "mirror principle").

The acceptance of jurisdiction by an English Court for Restructuring Plan purposes based on sufficient connection (e.g. by virtue of the debt documents being English law governed) rather than COMI of the debtor would not satisfy the requirements under section 343 InsO.

An overseas company would therefore need to shift its COMI to the UK to obtain recognition in Germany under section 343 InsO.

Procedural recognition pursuant to section 328 ZPO

Recognition of Restructuring Plans may also be possible under section 328 of the German Code of Civil Procedure (ZPO), which provides a mechanism to give effect to judgments of a foreign Court in civil matters in Germany.

Foreign judgments are automatically recognised in Germany by operation of law without need for application proceedings unless one of the exclusions set out in the law applies. Sanction orders granted by English Courts in the case of Schemes of Arrangement are

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considered "judgments" within the meaning of section 328 ZPO.

Given the similarities between the sanction orders for Schemes and Restructuring Plans, it is likely that a sanction order in respect of UK Restructuring Plans would be treated in Germany as is the case for Scheme sanction orders.

However, the requirement for reciprocity under section 328 ZPO may present an obstacle to the recognition of Restructuring Plans. Recognition of a foreign decision under section 328 ZPO is conditional on the principle of reciprocity. In other words, German judgments must also be recognised and enforced in the relevant foreign state and should not encounter significantly greater difficulties than the corresponding recognition and enforcement of foreign judgments in Germany.

The "Rule in Gibbs"

According to the English law "Rule in Gibbs", only English Courts can validate the compromise or discharge of English law governed debt unless the creditor submits to the foreign proceedings.

It is therefore unlikely that English Courts would recognise the decision of a German Court in StaRUG proceedings seeking to compromise English law debts in circumstances where the creditor has not submitted to the jurisdiction of the German Courts.

> Against this background, the German Courts may therefore consider that the requirement of reciprocity under section 328 ZPO is not met.

In addition, section 328 ZPO also requires that the English Court has international jurisdiction to open insolvency proceedings under German law i.e. the "mirror principle" mentioned above in relation to section 343 InsO also applies here.

Accordingly, an overseas company would therefore need to shift its COMI to the UK to obtain recognition in Germany under section 328 ZPO.

Rome I Regulation

Another potential alternative recognition route is under German private international law principles applying the Rome I Regulation.

The Regulation allows parties to choose the law which will govern a contract and sets out rules to determine which law should apply in the event that the contract does not make this clear and the recognition of such rules among EU Member States.

It has been argued that, at least regarding solvent Schemes, to the extent that a Scheme compromises English law governed debts, German law should also recognise the substantive consequences of the Scheme as determined by English law.

The question as to what extent the rationale for recognition of Schemes of Arrangement on the basis of the Rome I Regulation may be applicable to Restructuring Plans has not yet been clarified.

> However, the German Courts are yet to consider this point and the legal situation under German law therefore remains uncertain.

Whether a compromise of claims under a Restructuring Plan is of contractual nature within the meaning of Rome I or whether it should be considered a matter of insolvency law and therefore outside of Rome I remains an open question and a matter for the European Court of Justice to decide.

Given the requirement for the Plan company to be in financial difficulties, it may well be that the ECJ might consider Restructuring Plans to fall outside of Rome I.

Article 8 of the Hague Convention on Choice of Court Agreements

Finally, in limited circumstances Restructuring Plans may obtain recognition in Germany on the basis of Article 8(1) of the Hague Convention on Choice of Court Agreements ("Hague Convention") which promotes the enforcement of exclusive choice of Court agreements between parties to international transactions.

Accordingly, where a Restructuring Plan compromises debts in respect of which the English Courts have exclusive jurisdiction, the Hague Convention may have application.

However, the Hague Convention does not apply to "insolvency, composition and analogous matters".

It is therefore questionable whether the Convention finds application in relation to Restructuring Plans given the 'financial difficulty' requirement.

Conclusion

Clearly, there is significant legal uncertainty regarding the ability to obtain recognition of UK Restructuring Plans in Germany.

Given this uncertainty, how then did the English Court get comfortable on recognition in Germany to sanction the Adler Plan?

The key point is that the English Court does not require absolute evidence of recognition. Adler put forward evidence to the Court in the form of expert witness submissions regarding the likelihood of recognition in Germany.

Following review of the evidence, the English Court was satisfied on the balance of probabilities that there is a reasonable prospect that the Plan would be recognised in Germany.

To date, no creditor has yet challenged the recognition of a Restructuring Plan in Germany. In part, this may be due to the fact that international financial creditors may be reluctant to act in contravention of an English Court order sanctioning a Plan.

Given the high stakes involved in large restructurings with a German nexus, challenging recognition in Germany may be one avenue for creditors to oppose a Restructuring Plan.

Allen & Overy and Shearman & Sterling to merge

'Magic Circle' law firm Allen & Overy is merging with New York-based Shearman & Sterling, following an announcement just months after the US firm abandoned merger talks with Hogan Lovells.

The merger will give Allen & Overy a massive boost in the key US market, which UK-based firms have found difficult to penetrate, not least due to the languishing pound. Shearman & Sterling meanwhile will gain access to A&O's extensive global network, which includes finance, corporate, capital markets, and litigation, as well as advanced delivery and solutions.

The new firm Allen Overy Shearman Sterling will have over US$1 billion in revenue in the US, 30 per cent coming from the UK and 40 per cent in the rest of the world. It will have around 4,000 lawyers spread across 49 offices.

The deal will be put to partners before the summer, with a completion target within six to twelve months. The link-up was heralded in a joint statement as "An unparalleled combination: A new industry leader with truly global capabilities".

Allen & Overy had revenues of UK£1.9 billion in the year to the end of April 2022 and employs about 5,800 staff globally. Shearman has 1,350 staff and reported revenues of US$907 million in calendar year 2022.

Significantly, both firms said they were aiming to add expertise in private equity (PE), life sciences and energy transition. A strong PE practice is seen by many as key to building a strong global law firm, without which a lot of deals will go to rivals.