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Author: Arthur Swierczok

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RECOGNITION OF ENGLISH SOLVENT SCHEMES OF ARRANGEMENT IN GERMANY

Arthur Swierczok

English solvent Schemes of Arrangement under the Part 26 of the Companies Act 2006 have proved to be a valid restructuring device for non-English companies. Since 2010 for example four German companies, Tele Columbus GmbH, Rodenstock GmbH, Primacom GmbH and Monier Group Services GmbH, which were all financially distressed but solvent, have restructured themselves via an English solvent Scheme of Arrangement. However, from a legal perspective, what is very remarkable in all of these three cases is the fact that the English courts did not demand a shift of the companies' seat or Centre of Main Interest for the application of the Scheme of Arrangement. This leads to significant and contentious recognition questions and problems in the country of the SoA company's origin, which this paper – particularly for Germany – will address.

THE BACKGROUND AND PROBLEM

Until recently in continental Europe the question of corporate debt restructurings has been solely or mainly an issue dealt with in insolvency situations. However, at present a new trend is observable in the realm of pre-insolvency restructurings, which would regularly allow the company in distress to reach a compromise with its stakeholders such as shareholders and creditors.¹ The first advantage of this approach to corporate troubles is its flexibility and the ability for the company to negotiate with all its creditors at an early stage. The second advantage is the avoidance of typical indirect insolvency costs, such as the loss of goodwill and reputation, which usually occurs in an insolvency scenario.

While this trend is embraced in some jurisdictions², Germany has been slow to deal with this new development.³ Rather, the strong thinking in a strict dualistic sense still prevails here, which means that a company is either flourishing, or insolvent.⁴ Consequently, something 'in-between', in the sense of a legally-

¹ Christoph G Paulus, 'Das englische Scheme of Arrangement – ein neues Angebot auf dem europäischen Markt für außergerichtliche Restrukturierungen' [2011] ZIP 1077, 1081.

² For instance in France, where the law offers several pre-insolvency restructuring procedures such as the the „mandat ad hoc“ (L 611-3 Code de commerce) or the “Sauvegarde financière accélérée (SFA). Further in Italy, where the law offers the “accordo di ristrutturazione dei debiti” (Art. 182 a Italian Insolvency Code) or the “piano di risanamento attestato”.

³ Christoph G Paulus, 'Das englische Scheme of Arrangement – ein neues Angebot auf dem europäischen Markt für außergerichtliche Restrukturierungen' [2011] ZIP 1077, 1081.

⁴ However, Germany is on the move and has significantly reformed its insolvency law through the ESUG (Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen) in 2012. See Franz Bernhard Herding 'Germany is on the move: the new Germany insolvency law survives its first test' (2013) 3 CRI 95.

regulated and/or court-supervised, pre-insolvency restructuring mechanism, with the aim of proactively avoiding or preventing a threatened insolvency, does not exist in Germany at present.⁵

Against this background, it is thus not surprising that financially distressed but solvent German companies have looked to other jurisdictions, and particularly the UK, with the hope of finding better legal restructuring mechanisms than the domestic ones. And indeed, the English solvent Scheme of Arrangement (SoA), regulated in Part 26 of the Companies Act 2006 (CA 2006), does appear to offer a better corporate restructuring device. Up to now, four financially distressed but solvent German companies with their seat and COMI in Germany, *Tele Columbus GmbH*⁶, *Rodenstock GmbH*⁷, *Primacom GmbH*⁸ and *Monier Group Services GmbH*⁹ have taken advantage of a solvent SoA for restructuring purposes.¹⁰ Other German companies have already announced their interest in the procedure.

However, to be of real value for the German corporate restructuring practice it is essential that the legal effects of a sanctioned SoA will be recognised in Germany. Otherwise, dissentient parties to the SoA, especially creditors, may disregard the scheme and enforce their claims or other rights against the company, despite the fact that they have been 'extinguished' under the terms of the SoA.¹¹ Furthermore, without recognition a dissentient creditor may also seek to initiate separate restructuring or insolvency proceedings in another jurisdiction, which could potentially conflict with the SoA and lead to a tangled mess of conflict of laws. Considering this, the following paper will address the important question of solvent SoA recognition in Germany.

STRUCTURE OF THE PAPER

The analysis starts with an outline of what is actually meant by the term 'recognition' in this context. Thus, the term basically covers two different options, on the one side a procedural duty of recognition and on the other side, a material duty of recognition. Concerning a possible procedural duty of recognition of solvent SoA, it will first be necessary to deal with an insolvency-based approach of recognition pursuant to Art. 16 (1), 25 (1) European

⁵ Christoph G Paulus, 'Das englische Scheme of Arrangement – ein neues Angebot auf dem europäischen Markt für außergerichtliche Restrukturierungen' [2011] ZIP 1077, 1081.

⁶ *Tele Columbus GmbH* (Ch, 14 December 2010).

⁷ *Re Rodenstock GmbH* [2011] EWHC 1104, [2011] Bus LR 1245.

⁸ *Primacom Holding GmbH* [2012] EWHC 164.

⁹ *Monier Group Services GmbH* [2013] EWHC 3919.

¹⁰ Also the three Spanish Scheme cases of *Corrtifel SA* (*Cortifel SA* [2012] EWHC 2998) *La Seda de Barcelona SA* (*La Seda de Barcelona SA* [2010] EWHC 1364) and *Metrovacesa SA* (unpublished) should be mentioned as well as the first Italian Scheme case of *Seat Pagine Gialle SPA* (*Seat Pagine Gialle SPA* [2012] EWHC 3686).

¹¹ Jo Windsor and Paul Sidle, 'International recognition of Schemes of Arrangement' (2010) 25(9) JIBFL 523.

Insolvency Regulation¹² (EIR) and § 343 (1) Insolvenzordnung¹³ (InsO), which is part of the autonomous German international insolvency law. As I will show, none of these two options is viable. Next, it will further be necessary to deal with a pure procedural duty of recognition of solvent SoA pursuant to Art. 33 (1) European Judgment Regulation¹⁴ (EJR). In this regard, the paper will particularly examine whether the sanctioning order to a SoA does constitute a judgment in the sense of the above provision. And finally, the question of a material duty of recognition of solvent SoA arises. Such a duty may exist under Art. 12 (1) (d) of Rome I Regulation¹⁵ (Rome I), if certain specific circumstances are fulfilled

MEANING OF ‘RECOGNITION’ IN THE CONTEXT OF SOA

At the beginning of the analysis it is first helpful to clarify what exactly is meant when talking about SoA recognition. And indeed, there are two separate questions which have to be answered here. The first is the question of a procedural duty of recognition.¹⁶ In this case, the result would be that an action of a dissentient to the SoA before a German court would have to be dismissed because of inadmissibility.¹⁷ There would be no legitimate interest in obtaining a second ruling on the SoA by a German court.¹⁸ The decision of the English court would be regarded as legally effective and binding, regardless of any substantive submissions against the SoA.¹⁹ Second, even if a procedural duty of recognition does not exist, a SoA is still an act of English substantive law.²⁰ A German court could thus be obliged to recognise the substantive law effects of a SoA upon the legal relationships affected by it.²¹ Keeping this in mind, we can now start the analysis with the question of a procedural duty of recognition of solvent SoA. Such a duty may exist under European legislation, as well as national German law.

Recognition under Art. 16 (1), 25 (1) EIR

According to Art. 16 (1) and Art. 25 (1) EIR, any judgment, opening insolvency proceedings or concerning the course and closure of such proceedings, issued by a responsible court of a Member State, must be recognised in all of the other

¹² COUNCIL REGULATION (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] QJ L 160/1.

¹³ German Insolvency Statute: http://www.gesetze-im-internet.de/englisch_inso/index.html.

¹⁴ COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] QJ L 12/1.

¹⁵ REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] QJ L 177/6.

¹⁶ Kirsten Schümann-Kleber, ‘Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement’ [2011] IILR 447, 448.

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ See § 322 Zivilprozessordnung (German Code of Civil Procedure): http://www.gesetze-im-internet.de/englisch_zpo/index.html.

²⁰ Jo Windsor and Paul Sidle, ‘International recognition of Schemes of Arrangement’ (2010) 25(9) JIBFL 525.

²¹ *ibid.*

Member States. However, to benefit from these provisions, solvent SoA would have to fall within the scope of the EIR. Looking closer at the regulation, it only covers proceedings which materially fulfil the criteria set down in Art. 1 (1) EIR and are, pursuant to Art.2 (a) EIR, also formally listed in Annex A of the regulation. The list in Annex A thereby has a comprehensive and exclusive function.²² As solvent SoA are not mentioned in the list, they consequently do not fall within the ambit of the EIR. A procedural duty of recognition pursuant to Art. 16 I and Art. 25 I EIR does not exist.

Recognition under § 343 (1) InsO (analogous)

Interestingly, the *Rottweil Regional Court* has assumed an insolvency-based procedural duty of recognition of solvent SoA pursuant to § 343 (1) InsO, which is part of the autonomous German international insolvency law.²³

In contrast though, the *Potsdam Regional Court*²⁴, the *Celle Higher Regional Court*²⁵ and the *German Federal Supreme Court (BGH)*²⁶ have rejected such an insolvency-based procedural duty of recognition. The three courts reasoned that a solvent SoA does not constitute an 'insolvency proceeding' in the sense of the above provision. And in fact, the decision of the *Rottweil Regional Court* seems very difficult to justify.

Thus, the starting point of the analysis has to be § 343 (1) InsO itself. The provision states that 'the opening of foreign insolvency proceedings shall be recognized'. As we can see, the provision is only applicable to foreign insolvency proceedings. However, what exactly is meant by this term, and whether an English solvent SoA does constitute such a proceeding, as assumed by the *Rottweil Regional Court*, is now examined.

Insolvency proceeding in the sense of § 343 (1) InsO

A comprehensive definition of the term insolvency proceeding in the sense of § 343 InsO (1) does not exist. This is the case because the legislator of § 343 (1) InsO held the view that it was impossible to define exactly the essential features of such a proceeding.²⁷ Thus, the question of whether we have a foreign insolvency proceeding has to be answered on a case by case basis. Looking at the legislative materials to § 343 InsO, according to them, the central criterion for the determination is whether the proceeding in question pursues the same, or at least similar goals to the proceedings of the InsO.²⁸ However, what these goals are, and whether solvent SoA meet them, is questionable.

Pursue the same or at least similar goals to the proceedings of the InsO

²² Peter Kindler, *Münchener Kommentar zum BGB* (5. edition, Beck 2010) VO (EG) 1346/2000 Art.2 Definitionen para 2.

²³ LG Rottweil, 3 O 2/08.

²⁴ LG Potsdam, 2 O 501/07.

²⁵ OLG Celle, 8 U 46/09, para 76.

²⁶ BGH, IV ZR 194/09, para 24

²⁷ Peter Kindler, *Münchener Kommentar zum BGB* (5. edition, Beck 2010) § 343, para 6.

²⁸ Bundestag-Drucksachen. 15/16, 21.

§ 1 s 1 InsO states that the primary function of the insolvency proceedings of the InsO is the best possible collective satisfaction of a debtor's creditors.²⁹ Against this background, any kind of foreign liquidation, (court) settlement or restructuring proceeding can qualify as an insolvency proceeding in the sense of § 343 InsO, insofar as it primarily aims at the best possible collective satisfaction of a debtor's creditors.³⁰

However, a solvent SoA does not seem to meet this decisive criterion. Pursuant to its basic legal conception, a solvent SoA is not primarily aimed at the best possible collective satisfaction of a debtor's creditors. This can particularly be concluded from the fact that SoA do not necessarily have to involve all the company's (existing) creditors.³¹ Rather it is solely in the company's hands which creditors are involved in the SoA and whether they can participate in the whole procedure or not.³² Altogether, a solvent SoA, as correctly held by the *Potsdam Regional Court*, the *Celle Higher Regional Court* and the *BGH*, does not constitute an insolvency proceeding in the sense of § 343 (1) InsO. An insolvency-based procedural duty of recognition pursuant to this provision does therefore not exist.

Art. 33 (1) EJR

As we have seen, an insolvency-based procedural duty of recognition of solvent SoA does not exist under European nor national German insolvency law. However, a solvent SoA may fall under the matters caught by the EJR on the recognition of foreign (European) judgments. If this was the case, the German courts would be obliged to recognise a solvent SoA on procedural law grounds.

Looking at the EJR, the relevant provisions, dealing with recognition issues can be found in Chapter III, Art. 32-37. Thus, Art. 33 (1) EJR states that 'A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'. Whether this provision is applicable to solvent SoA, though, is controversial at present. First, it is quite unclear whether a solvent SoA is within the scope of the EJR at all. Second, it is questionable whether a SoA, or more precisely the sanctioning order to a SoA, can be regarded as a judgment in the sense of the above provision.

SOLVENT SOA WITHIN THE SCOPE OF THE EJR?

In *Re DAP Holding NV*³³, it was held by Lewison J, referring to the judgment of Pumfrey J in *Re La Mutuelles du Mans Assurances IARD*³⁴ that SoA themselves are excluded by Art. 1 (2) (b) EJR from the scope of the EJR. Lewison J stated:

²⁹ Hans G Granter, *Münchener Kommentar zur Insolvenzordnung* (3. edition, 2013) § 1 para 20.

³⁰ BGH, X ZR 79/06, para 8.

³¹ Artur Swierczok, *Das englische Scheme of Arrangement und seine Rezeption in Deutschland* (1. edition, Nomos 2014) 165.

³² *ibid.*

³³ *Re DAP Holding NV* [2005] EWHC 2092, [2006] BCC 48.

³⁴ *Re La Mutuelles du Mans Assurances IARD* [2005] EWHC 1599, [2006] BCC 11.

The court should not, through arguments based on the hypothesis that a company may be liable to be wound up when solvent, permit that clear exclusion to be displaced by some sort of implied exclusion. I consider, therefore, that the sanction of a scheme under ss.425 and 426 of the Companies Act is expressly excluded from the scope of the Judgments Regulation.³⁵

However, whether this assumption is correct appears to be very questionable, at least for solvent SoA. The reason for this legal uncertainty results from the wording of Art. 1 (2) (b) EJR itself. It excludes 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' from the scope of the EJR. By using the words 'judicial arrangements' and 'compositions' the provision *prima facie* also seems to exclude other than just pure insolvency related proceedings, for example SoA, as assumed by Lewison and Pumfrey JJ.³⁶

However, before I will analyse whether this is really the case, it is first important to note that, according to paragraph 53 of the Schlosser Report³⁷, the EJR and the EIR were 'intended to dovetail almost completely with each other'. Given this fact, it can fairly be assumed that the bankruptcy exclusion in Art. 1 (2) (b) EJR is intended to and should exclude from the EJR nothing more, and nothing less, than that which was included within the ambit of the EIR.³⁸ It is thus reasonable and necessary to start the following analysis with the question of whether SoA are within the scope of the EIR. As we have seen above in section B. II. 1 though, this is not the case.

To exclude them from the scope of the EJR, as done by Lewison and Pumfrey JJ, would consequently result in a legal gap and clearly be in contradiction with the EU/EEA legislator's intention to create a conclusive legal system. It would further mean that SoA are not capable of being automatically recognised and/or enforced under Chapter III of the EJR in cases of EU/EEA companies having their seat, COMI, establishment or assets in another Member State than the UK. This would significantly reduce the attractiveness of SoA, as well as the utility of their sanctioning by an English court. However, in my view, the strongest argument for the proposition that SoA, and especially solvent SoA, are not covered by Art. 1 (2) (b) EJR and that only insolvency-related proceedings are excluded, can be drawn from a comparative analysis of the intermediary part ('judicial arrangements' and 'compositions') of the article with translations in other European jurisdictions.

Looking, for instance, at the Spanish version of the article, it states: 'la quiebra, los convenios entre quebrado y acreedores y demás procedimientos análogos'.

³⁵ *Re DAP Holding NV* [2005] EWHC 2092, [2006] BCC 48 [14].

³⁶ Peter Mankowski, 'Anerkennung Englischer Solvent Schemes of Arrangement in Deutschland' [2011] WM 1201, 1203

³⁷ Peter Schlosser, 'REPORT ON THE CONVENTION on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice' (1979) Official Journal of the European Communities No C 59/71.

³⁸ *Re Rodenstock GmbH* [2011] EWHC 1104, [2011] Bus LR 1245 [47].

The word *quebrado* in this phrase means insolvency debtor.³⁹ This can be concluded from its linguistic proximity and the similar etymology with the word *quiebra*, which means insolvency.⁴⁰ A similar picture arises from a look at the intermediary part of the Italian version. It states: ‘i fallimenti, i concordati e la procedure affini’. *Concordati* here unquestionably refers to *concordato preventivo*, which is a formal Italian insolvency procedure.⁴¹ In contrast, an out-of-court settlement is called *compromesso* and a court settlement, according to the Italian version of Art. 58 EJR, *transazione*.⁴²

We can clearly see from this comparative analysis that the exclusion of Art. 1 (2) (b) EJR in the translations of the two other Member States is restricted to pure insolvency-related proceedings. That kind of linguistic statutory implementation is also in line with the Schlosser Report, where the relevant explanatory notes to this issue are placed and discussed under the heading of ‘bankruptcy and other proceedings’.⁴³ As the solvent SoA is not an insolvency-related proceeding (see section B. II and III) it is also not excluded by Art. 1 (2) (b) EJR from the scope of the EJR. Lewison and Pumfrey JJs’ above argumentation is consequently not sustainable.⁴⁴

SANCTIONING ORDER TO A SOA AS A JUDGMENT IN THE SENSE OF ART. 33 (1) EJR.

The question of whether a SoA, or more precisely the sanctioning order to a SoA, can be regarded as a ‘judgment’ in the sense of Art. 33 (1) EJR, was first judicially considered by the *Celle Higher Regional Court* in 2009. In this decision, the court came to the conclusion that the sanctioning order to a SoA does not constitute a judgment in the sense of Art. 33 (1) EJR.⁴⁵ The court justified its reasoning primarily on three grounds.

First, a SoA does not constitute an adversarial proceeding.⁴⁶ This though, is an essential requirement for a judgement.⁴⁷ Rather, a SoA only involves the mere ‘wish/ desire’ of a company to financially restructure itself outside a formal insolvency proceeding.⁴⁸ Second, the scheme proceeding or concept is primarily driven and elaborated by the parties involved, and not by the court.⁴⁹ The court

³⁹ Peter Mankowski, ‘Anerkennung Englischer Solvent Schemes of Arrangement in Deutschland’ [2011] WM 1201, 1203.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Artur Swierczok, *Das englische Scheme of Arrangement und seine Rezeption in Deutschland* (1. edition, Nomos 2014) 96.

⁴⁵ OLG Celle, 8 U 46/09, para 84.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid.*

has no independent decision-making function, but solely serves as a control mechanism, which is further irreconcilable with a judgment.⁵⁰

Third, the necessity to file the SoA sanctioning decision with the registrar, in order to make the SoA effective, speaks also against the presence of a judgment. This is rather typical for an agreement within the company, for example a shareholder decision, but not a court judgment.⁵¹

The decision of the *Celle Higher Regional Court* was appealed to the *BGH*. It was pending there for over three years until the *BGH*, on the 15.02.2012, finally reconsidered the matter (*Equitable Life Insurance*⁵²). Meanwhile in 2010, however, the *Potsdam Regional Court*, in contrast to the *Celle Higher Regional Court*, recognised the sanctioning order to a SoA as a judgment in the sense of Art. 33 (1) EJR.⁵³ In its very short reasoning the *Potsdam Regional Court* pointed out that the actual presence of an adversarial proceeding is not a prerequisite for the qualification.⁵⁴ Rather, it is sufficient that an adversarial proceeding could potentially proceed.⁵⁵ This means it is enough for a judgment, if the parties have the possibility to be judicially heard, even if they do not exercise their right(s).⁵⁶ This, though, according to the *Potsdam Regional Court*, is obviously the case within a SoA proceeding including the sanctioning hearing. And, indeed, the recent *BGH* decision seems to confirm and support the reasoning of the *Potsdam Regional Court*. Although the *BGH* in its judgment, because of the special circumstances of the case, did not have to decide finally upon the question of whether the sanctioning order to a SoA can be regarded as a judgment in the sense of Art. 33 (1) EJR⁵⁷, the court nevertheless stated in an *obiter dictum* that there appear to be at least two good reasons for doing so. On the one side the (potential) adversarial features of a SoA proceeding, including the sanctioning decision.⁵⁸ And on the other, the required broad interpretation of the term judgment within the EJR.⁵⁹ Unfortunately, besides that, the *BGH* made no further useful remarks on the whole issue. Therefore, the decision does not tell us anything about the correctness of the above arguments raised by the *Celle Higher Regional Court* against the qualification. It is consequently necessary for us to examine whether these arguments are in fact valid.

⁵⁰ *ibid.*

⁵¹ *ibid* para 87.

⁵² BGH IV ZR 194/09.

⁵³ LG Potsdam, 2 O 501/07.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ The case concerned an English insurance company with its seat and COMI in England. The company had used an English SoA in 2002 for restructuring purposes, which *inter alia* cut down German creditor policies/claims. Some of the German creditors now nevertheless tried to enforce their claims in Germany. In respect to the question of recognition the *BGH* decided that, since this was an insurance case, Art. 8, 12 I, 35 I were applicable and there was no obligation to recognise the effects of the SoA in Germany, irrespective of the question of whether the sanctioning order to a SoA could be regarded as a judgment in the sense of Art. 33 (1) EJR. This point, however, was itself totally missed by the *Celle Higer Regional Court* in his judgment.

⁵⁸ BGH, IV ZR 194/09, para 24.

⁵⁹ *ibid.*

Adversarial proceeding

According to several decisions of the European Court of Justice (ECJ), the actual presence of a contradictory proceeding is not a prerequisite for a judgment.⁶⁰ Rather, as the *Potsdam Regional Court* correctly pointed out, it is sufficient that a contradictory proceeding could potentially proceed.⁶¹ This must be correct. Otherwise one would absurdly exclude all kind of default decrees from the scope of the provision.⁶² The first argument of the *Celle Higher Regional Court* is thus incorrect.

Role of the court

In respect to the role of the court, as we have seen, the *Celle Court* argued that the scheme proceeding or concept is primarily driven and elaborated by the parties involved and not by the court.⁶³ The court only sanctions a settlement package, which the parties to the SoA have already agreed upon.⁶⁴ The court has therefore no material decision-making function, which is essential for a judgment though. This outcome is also not changed by the fact that the court has some considerable control functions, such as reviewing the fairness of the SoA.⁶⁵ In the end, it is decisive that the court has no capability to influence the design of the SoA itself.⁶⁶

However, in its reasoning the *Celle Court* seems to miss an important point. The sanctioning court does not only exercise significant control functions, but also has a wide discretion to sanction a SoA. In light of these significant material competences in my view, it appears hard to argue, that the court has only a ‘rubber-stamping’ position, as suggested by the *Celle Court*. Further, while the court has no right to directly influence the design of the SoA, it has an even stronger right: it can deny the sanctioning of the SoA as a whole.⁶⁷ Altogether, it is thus justified, in my view, to say that the court does not only have a pure control, but also a considerable decision-making function. The second argument of the *Celle Higher Regional Court* is also false.

Registration

The third and final argument raised by the *Celle Court* was that the SoA registration requirement is incompatible with the form of judgment designed to be caught by the EJR.⁶⁸ In the court’s view, such a requirement is rather typical for an agreement within the company, for example a shareholder decision, but

⁶⁰ Case C-125/75 *Denilauler v SNC Couchet Freres* [1980] ECJ 1553, para 13; Case C-39/02 *Maersk Olie & Gas A/S v Firma M de Haanen W de Boer* [2004] ECJ I-1553, para 50.

⁶¹ LG Potsdam, 2 O 501/07.

⁶² Peter Mankowski, ‘Anerkennung Englischer Solvent Schemes of Arrangement in Deutschland’ [2011] WM 1201, 1204.

⁶³ OLG Celle, 8 U 46/09, para 84

⁶⁴ *ibid* para 87.

⁶⁵ *ibid*.

⁶⁶ Kirsten Schümann-Kleber, ‘Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement’ [2011] IILR 447, 451.

⁶⁷ Artur Swierczok, *Das englische Scheme of Arrangement und seine Rezeption in Deutschland* (1. edition, Nomos 2014) 174.

⁶⁸ OLG Celle, 8 U 46/09, para 8.

not a court judgment.⁶⁹ However, a closer look at this argument shows that there is no legal basis for it. The function of the registration requirement is to inform the public about the changes caused by the SoA. It is a kind of 'service by public notice'.⁷⁰ Although this method of publication is very unusual, it nevertheless seems to be an appropriate method of publication for legal acts which concern many different parties.⁷¹ In summary, the arguments raised by the *Celle Higher Regional Court* are invalid. The sanctioning order to a SoA can in fact be regarded as a judgment in the sense of Art. 33 (1) EJR. As a result, the order should be automatically recognised in all other Member States, irrespective of whether the court has falsely approved jurisdiction or wrongfully judged on the matter.⁷²

LIMITS OF RECOGNITION – PUBLIC POLICY OBJECTION ACCORDING TO ART. 34 N 1 EJR

Although the *Celle Higher Regional Court* came to the conclusion that the sanctioning order to a SoA could not be regarded as a judgment, the court in its decision nonetheless also embarked on the important question of whether, in the hypothetical case of the application of Art. 33 (1) EJR, a SoA would not eventually violate the German public policy (*ordre public*). If this was the case, the German courts would not be obliged to recognise the effects of a SoA, according to Art. 34 n 1 EJR. The court particularly noted that, concerning creditors, a violation of the German public policy could arise under Art. 14 of the German Basic Law.

This provision protects property rights and also the right to dispose of property rights.⁷³ Based on this, individuals are entitled to structure their legal relationships according to their will and on their own account (right of private autonomy).⁷⁴ However, since a SoA can be binding on dissenting parties, it *prima facie* appears to violate the above right of private autonomy.⁷⁵ While the *Celle Higher Regional Court* in the end did not have to decide finally upon this whole issue, the court nevertheless stated that, a SoA might be comparable with certain German law institutions, for instance § 5 of the German Bond Act or the German insolvency plan (regulated in §§ 217 ff InsO).⁷⁶ According to the *Celle Court*, it is hence not absolutely clear that a SoA is in contradiction to the German public policy.⁷⁷ To answer this question, we have to analyse whether the above comparisons are in fact persuasive.

⁶⁹ *ibid* para 87.

⁷⁰ Peter Mankowski, 'Anerkennung Englischer Solvent Schemes of Arrangement in Deutschland' [2011] WM 1201, 1205.

⁷¹ *ibid*.

⁷² Eidenmüller and Frobenius, 'Die internationale Reichweite eines englischen Scheme of Arrangement', 1210, 1217; Artur Swierczok, *Das englische Scheme of Arrangement und seine Rezeption in Deutschland* (1. edition, Nomos 2014) 186.

⁷³ Kirsten Schümann-Kleber, 'Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement' [2011] IILR 447, 458.

⁷⁴ *ibid*.

⁷⁵ OLG Celle, 8 U 46/09, para 92.

⁷⁶ *ibid*.

⁷⁷ *ibid*.

§ 5 of the German Bond Act

Simply said, § 5 of the German Bond Act regulates the possibility of amending bond terms by way of a majority decision of the bondholders. However, according to the provision, this is only possible, where the bond terms themselves provide that this can be done. Further, § 5 of the German Bond Act also contains a comprehensive list of adjustments which can be undertaken. Thus, in contrast to a SoA creditor, a bondholder is not exposed to an unforeseeable change of his rights or legal position.⁷⁸ This is a significant difference between § 5 of the German Bond Act and a SoA. The comparison, in my view, is therefore not convincing. It cannot justify a possible violation of the German public policy.

German insolvency plan (§§ 217 ff InsO)

The German insolvency plan procedure and a solvent SoA resemble another in the way that they both provide for minority- binding majority decisions. However, in contrast to a SoA, an insolvency plan can only be integrated part of a standard insolvency procedure and is therefore necessarily tied to insolvency.⁷⁹

Further, concerning the rights of creditors, they can only be modified by an insolvency plan to the extent that it can be shown that in the course of ‘normal’ insolvency proceedings, these minority creditors would not be entitled to expect any increased level of satisfaction.⁸⁰ This means, in an insolvency plan situation, the affected creditors are not deprived of anything that they have not already lost through the insolvency of the debtor.⁸¹ Against this background, it thus seems very difficult to draw any comparative conclusions from an insolvency plan to a SoA, and especially solvent SoA, which can be applied without any requirement that there be an impending insolvency.⁸²

However, irrespective of this finding, there remains a very strong argument against the proposition that a SoA, whether insolvent or solvent, does violate Art. 14 of the German Basic Law. Thus, according to Art 14. (3) of the German Basic Law an ‘expropriation’ is, in principal, possible if the ‘expropriated’ person receives an appropriate compensation.⁸³ This though is regularly the case in SoA situations, as the court will only sanction a SoA, if it is fair and reasonable to the parties involved.⁸⁴ In conclusion, the analysis has sought to show that a SoA does not violate German public policy. A procedural duty of recognition of solvent SoA pursuant to Art. 33 (1) EJR does exist.

⁷⁸ Kirsten Schümann-Kleber, ‘Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement’ [2011] IILR 447, 459.

⁷⁹ *ibid* 458.

⁸⁰ *ibid*.

⁸¹ OLG Celle, 8 U 46/09, para 92.

⁸² Vanessa Finch, *Corporate Insolvency Law* (2. edition CUP 2009) 482.

⁸³ Also see the EU Bilateral Investment Treaty that awards this type of protection.

⁸⁴ *Re Anglo-Continental Supply Co. Ltd* [1922] 2 Ch 723. see also *Re Equitable Life Assurance Society* [2002] EWHC 140; *Re Uniq Plc* [2011] EWHC 749.

§ 328 Zivilprozessordnung (ZPO)⁸⁵

§ 328 ZPO is a provision of the autonomous German international civil procedure law. It deals with the recognition of foreign judgments. The provision is only applicable where it is not superseded by European law.⁸⁶ However since, as we have seen, a solvent SoA is covered by the EJR (see section B. IV. 1.) § 328 ZPO is consequently inapplicable.

Recognition under substantive law

Even if it was assumed that a procedural duty of recognition of SoA does not exist, a SoA is still an act of English substantive law.⁸⁷ A German court could therefore be obliged to recognise the substantive law effects of a SoA upon the legal relationships affected by it.⁸⁸ Unfortunately, this point was not considered by any of the above mentioned courts (*Rottweil Regional Court, Potsdam Regional Court, Celle Higher Regional Court* and the *BGH*).

On a European level, the legal basis for a material recognition could be Rome I. According to Art.1 (1) Rome I, the regulation applies to situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

To be applicable solvent SoA would first have to fall within the scope of the regulation. However, SoA may be covered by the exclusion in Art 1 (2) (f) Rome I. The provision states:

Questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body shall be excluded from the ambit of the regulation.

While SoA *prima facie* seem to fall within the wording of the exclusion, given that they are regulated in the CA 2006,⁸⁹ it, however, appears necessary, in my view, to distinguish between two types of SoA. On the one side, SoA which solely affect shareholders, and on the other side, SoA which solely concern creditors. Thus, in cases of SoA, which solely affect shareholders, the application of Rome I, is, because of Art. 1 (2) (f) Rome I, indeed very questionable.⁹⁰

In contrast, in solvent SoA cases, which solely affect the existing contractual obligations between a company and its creditors, Art. 1 (2) (f) Rome I does not

⁸⁵ German Code of Civil Procedure: http://www.gesetze-im-internet.de/englisch_zpo/index.html.

⁸⁶ Kirsten Schümann-Kleber, 'Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement' [2011] IILR 447, 454.

⁸⁷ Jo Windsor and Paul Sidle, 'International recognition of Schemes of Arrangement' (2010) 25(9) JIBFL 525.

⁸⁸ Kirsten Schümann-Kleber, 'Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement' [2011] IILR 447, 448.

⁸⁹ Jo Windsor and Paul Sidle, 'International recognition of Schemes of Arrangement' (2010) 25(9) JIBFL 525.

⁹⁰ There are no court rulings concerning this issue so far. However, an in depth analysis of this matter can be found in Artur Swierczok, *Das englische Scheme of Arrangement und seine Rezeption in Deutschland* (1. edition, Nomos 2014) 211 ff.

constitute a legal barrier for the application of Rome I. Looking closer at these situations, though, it is unclear at the moment what the correct starting point for the required contractual qualification pursuant to Art. 1 (1) Rome I is. This could be either the sanctioned SoA itself, or the existing contractual obligations between the company and its creditors.

SOA AS THE STARTING POINT

The question of whether a solvent SoA is a ‘contractual obligation’ in the sense of Art 1 (1) Rome I must be determined by way of autonomous interpretation of the regulation.⁹¹ Thus, according to the ECJ the term ‘contract’ has to be interpreted very broadly and can also cover obligations, which are unilateral in nature.⁹² However, a necessary prerequisite for a contract is always the presence of voluntariness.⁹³ This means the parties must voluntarily have entered into it. Looking at SoA, as they can be binding even on dissenting parties, it appears impossible to subsume them under the term of contract in the sense of the Rome I.⁹⁴ The solvent SoA itself can consequently not serve as the starting point for the required contractual qualification.

Contractual obligations between the company and its creditors as the starting point

In light of the above finding, the existing contractual obligations between the company and its creditors remain the starting point for the qualification. In this situation, a solvent SoA may potentially be regarded as a new contract, providing for a subsequent choice of law. Alternatively., the SoA may also constitute one way of extinguishing the obligations in the sense of Art. 12 (1) (d) Rome I. If this was the case, the SoA would be subject to the *lex contractus* of the obligations in question.

SoA as a new contract providing for a subsequent choice of law

The idea that a SoA constitutes a new contract providing for a subsequent choice of law in the sense of Art. 3 (2) Rome I, is very questionable. To do so, one would first have to assume that the choice of law is an individual component of the SoA. This is highly unlikely.⁹⁵ Further, a subsequent choice of law would only be binding on parties which have agreed to it by voting for the SoA.⁹⁶ There is consequently no way to bind dissenting parties. The proposed SoA

⁹¹ Jo Windsor and Paul Sidle, ‘International recognition of Schemes of Arrangement’ (2010) 25(9) JIBFL 525.

⁹² Case C-27/02 *Engler* [2005] ECR I-481, para 51.

⁹³ Case C-27/02 *Engler* [2005] ECR I-481, para 51.

⁹⁴ Peter Mankowski, ‘Anerkennung Englischer Solvent Schemes of Arrangement in Deutschland’ [2011] WM 1201,1207; Kirsten Schümann-Kleber, ‘Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement’ [2011] IILR 447, 456.

⁹⁵ Kirsten Schümann-Kleber, ‘Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement’ [2011] IILR 447, 456.

⁹⁶ Eidenmüller and Frobenius, ‘Die internationale Reichweite eines englischen Scheme of Arrangement’, 1210, 1216.

would simply be useless in this situation. Its characterisation as a new contract providing for a subsequent choice of law, can therefore be rejected.⁹⁷

Lex contractus

Although, as seen, a solvent SoA is not a new contract, it may still constitute one way of extinguishing the obligations in the sense of Art. 12 (1) (d) Rome I. And in fact, this view is largely shared by the academic literature.⁹⁸ The consequence of this is that, where the contractual obligations affected by the SoA are governed by English law, the effects of the SoA are also determined by English law. In other words, the choice of English law as the *lex contractus* for the obligations in question, implies an *ex ante* subjection under a possible English SoA including its substantive law effects.⁹⁹ However, a German court is obliged to recognise these substantive law effects under Rome I.¹⁰⁰ In contrast, where the contractual obligations affected by the SoA are governed by German law, which itself does not know a similar legal mechanism, the result is that the binding effect of a SoA is ruled out.¹⁰¹

CONCLUSION

In the SoA the English law unquestionably offers an extraordinarily flexible tool for distressed companies to deal with financial difficulties. It is therefore not surprising that non-English, but distressed companies such as *Tele Columbus GmbH*, *Rodenstock GmbH*, *Primacom GmbH*, *Monier Group Services GmbH* and other similar companies have used the English SoA to facilitate a rescue and rehabilitation that would not have been possible under their domestic laws. However, the crucial legal question for all these companies was regularly whether the local courts would also be obliged to recognise the SoA and its effects in the case they were contested. At least for Germany this question can be affirmed. Thus the above analysis has clearly shown that a procedural duty of recognition of solvent SoA pursuant to Art. 33 (1) EJR does exist. Further, German courts are also obliged to recognise the substantive law effects of solvent SoA where they affect contractual obligations which are governed by English law.

⁹⁷ Artur Swierczok, *Das englische Scheme of Arrangement und seine Rezeption in Deutschland* (1. edition, Nomos 2014) 216 f.

⁹⁸ Eidenmüller and Frobenius, 'Die internationale Reichweite eines englischen Scheme of Arrangement', 1210, 1216; Peter Mankowski, 'Anerkennung Englischer Solvent Schemes of Arrangement in Deutschland' [2011] WM 1201,1207; Christoph G Paulus, 'Das englische Scheme of Arrangement – ein neues Angebot auf dem europäischen Markt für außergerichtliche Restrukturierungen' [2011] ZIP 1077, 1082; Artur Swierczok, *Das englische Scheme of Arrangement und seine Rezeption in Deutschland* (1. edition, Nomos 2014) 218 ff.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ Kirsten Schümann-Kleber, 'Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement' [2011] IILR 447, 456.