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# Recognition of Schemes and Restructuring Plans in Switzerland and under the Lugano Convention

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## 1. Introduction

1. The purpose of this paper is to analyse the nature of both the United Kingdom (UK) Scheme of Arrangement under Part 26 of the Companies Act ('Scheme') and the (new) UK Restructuring Plan ('Restructuring Plan') under Part 26A of the same in the light of a continental European instrument and of Swiss law on recognition of judgments. Based on the paper's findings, the reader should be able to assess the chances of recognition of restructurings using such tools in continental Europe, especially in Switzerland. Given that Switzerland is a member of the 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Lugano Convention'),[1] the parallel instrument to the Brussels Regulation, the legal conclusions may not only be relevant in the strict Switzerland-UK context but might also be representative (*mutatis mutandis*) for the recognition of UK restructuring tools in other continental European jurisdictions, particularly post-Brexit.[2]

## 2. The sources of recognition in continental Europe – the example of Switzerland

### *2.1. The 2007 Lugano Convention*

#### *2.1.1 General scope*

2. The Lugano Convention has been fully applicable in Switzerland since 2011 (and still is), while in the UK, it continued to apply for a limited time under the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community[3] ('Withdrawal Agreement'). Article 129.1 of the Withdrawal Agreement provided for a continued application of the Lugano Convention until the end of the transition period, *i.e.,*

[1] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339.

[2] A shorter version of this article has been published in: Eugenio Vaccari/Emilie Ghio (Ed.), Insolvency Law: Back to the future, Papers from the INSOL Europe Academic Forum Annual Conference Dublin, Ireland 2-3 March 2022, Nottingham 2022, p. 96-110.

[3] 2019/C 384 I/01, OJ C 3841.

31 December 2020.[4] Since then, the UK has formally requested to re-accede to the Lugano Convention as an independent party and the European Free Trade Association States have agreed.[5] However, the EU has refused to give its (necessary) consent to that accession.[6] The re-accession of the UK will likely be part of broader political discussions over the next few years. In any event, the UK has ceased to be subject to the Lugano Convention as of 1 January 2021.

3. The Lugano Convention is conceived as a parallel instrument to the Brussels Convention originally[7], and later to the Brussels I Regulation.[8] The last recast of the Brussels I Regulation (also referred to as the Brussels Ia Regulation,[9] hereinafter 'Brussels Regulation') introduced some minor changes in the text, and no subsequent 'update' of the Lugano Convention has taken place. Therefore, the vast majority of key provisions have remained identical in both instruments, despite a new numbering of the Brussels Regulation. In particular, Protocol Nr. 2 on the uniform interpretation of the Lugano Convention and on the Standing Committee provides that:

> *Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities.*

4. 'The instruments referred to in Article 64(1)' cited in that provision essentially mean the Brussels Regulation and the European Court of Justice (ECJ) jurisprudence relating to it. In practice, the obligation to pay 'due account' is applied by the Swiss Federal Court as a de facto obligation to follow the ECJ jurisprudence where no important reasons suggest otherwise.[10]

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4 By Article 129 of the Withdrawal Agreement, the UK remains subject to the international agreements concluded by the EU (including the Lugano Convention) until the end of the transition period, as 'Union law', which is defined in Article 2(a)(iv) of the Withdrawal Agreement as including 'the international agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union'.

5 Upon leaving the EU on 31 January 2020, the UK has stated its interest in re-joining the 2007 Lugano Convention as a separate contracting party in the course of the transition period. See <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007> accessed 13 June 2022.

6 See the EU Commission's Communication of 4 May 2021 under <https://ec.europa.eu/info/files/communication-assessment-application-united-kingdom-great-britain-and-northern-ireland-accede-2007-lugano-convention_nl> accessed 13 June 2022.

7 Consolidated Version of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ L 299.

8 Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L 12.

9 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351.

10 For an example, see the decision BGE 135 III 185 [2008] Swiss Federal Court where the Swiss Federal Court implemented the 'Owusu' jurisprudence in Switzerland. For instance, an 'important reason' (to diverge from ECJ

*2.1.2 Situation after 31 December 2020*

5. In a recent decision, the Swiss Supreme Court has confirmed that the Lugano Convention remains applicable in Switzerland for the recognition of UK decisions issued before the end of the transition period.[11]

6. In the situation where a decision is made in the UK *after* 31 December 2020, but initiated before that date, a statement of the Federal Office of Justice argues that '[t]he same [i.e. the recognition under the Lugano Convention] must also apply to judgments pronounced after the date of withdrawal if the underlying proceedings began before the date of withdrawal'.[12] This is supported by the wording of Article 63(1) of the Lugano Convention which states that it is applicable to proceedings 'instituted' at the relevant time. This interpretation also aligns with the position under the Withdrawal Agreement regarding the recognition of proceedings under the recast Jurisdiction and Judgments Regulation.[13] However, the Swiss Supreme Court has had no opportunity to decide a case with these characteristics yet.

7. In the unlikely, but possible situation where a Swiss court would consider the Lugano Convention not to be directly applicable to a recognition proceeding by reason of the UK no longer being a party to it, Article 199 of the Swiss Private International Law Act (SPILA, which applies where no international treaty is applicable, see its art. 1 para 2) would apply in cases where the decision was at least initiated while the Convention was applicable. Article 199 SPILA refers to the conditions for recognition and enforcement that apply in an intertemporal context, *i.e.,* when the law changes between the time the decision is issued and the time recognition is sought. This provision enshrines the *favor recognitionis* principle, according to which a decision that was recognisable and enforceable under a prior law shall also be recognised and enforced under the new applicable provisions. This would (again) lead to the application of the Lugano Convention as part of the application of said principle.

jurisprudence) is given where the ECJ's considerations were based in EU law (for instance, a coordinated interpretation with another EU instrument) that are not relevant for Switzerland.

11 5A_697/2020 [2021] Swiss Federal Court.

12 See on the consequences of "Brexit" on the Lugano Convention the general official information provided under <https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html> accessed 13 June 2022.

13 Article 67(2)(a).

8. To sum up, the continued applicability of the Lugano Convention in Switzerland, a court decision, the open wording of Article 63(1) of the Convention (covering the situation at hand), and the general principles of international procedural law (*favor recognitionis*, legal certainty, non-retroactivity, *droits acquis*) speak in favour of a recognition of UK decisions issued *after* 31 December 2020 under the provisions of the Lugano Convention *if* the proceedings were *initiated* prior to that date.

*2.1.3 Application of the 1998 Lugano Convention?*

9. The UK's 'Lugexit' raises the question of the 're-emergence' of agreements concluded directly between Switzerland and the UK. This includes the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, the predecessor of the 2007 Lugano Convention.

10. The 1988 Lugano Convention was 'superseded' by the 2007 Lugano Convention by virtue of Article 65 of that Convention. However, there has not been any specific declaration or any other explicit act of termination of the 1988 Lugano Convention. If we were to assume that the 1999 Lugano Convention has not been rescinded and the (merely 'superseding') 2007 Convention would cease to be applicable (and with this, the 'supersession'), it could be argued that the 1988 Lugano Convention is now applicable again.

11. The 1988 Lugano Convention is not cited in Annex VII of the 2007 Lugano Convention, which lists the agreements superseded pursuant to the entry into force of the Convention. In Switzerland, which follows a monist approach[14] to treaties, courts should then apply the 1988 Lugano Convention again. However, since the UK follows a dualist approach,[15] one must also consider its national law. Article 3A of the Civil Jurisdiction and Judgments Act 1982, giving force to the 1988 Lugano Convention, has been repealed. The courts of the UK might therefore refuse to apply the provisions of the treaty, despite the UK still (or again) being bound by the international treaty.

[14] The Swiss monist approach to international treatises assumes that they become part of the Swiss legal system and directly applicable with their ratification and entry into force without a specific act of implementation.

[15] Meaning a system where international treatises need to be incorporated through specific legislation into national law to become directly applicable.

Consequently, courts seem so far to have ignored the 1988 Lugano Convention and a majority of doctrinal views refuse its applicability as well.[16]

12. Even though it represents a minority view, the argument can still be made that the 1988 Lugano Convention should be applied by Swiss (or Norwegian or Icelandic) courts after 31 December 2020 in relation to the UK.[17] If so, the application of the 1988 Lugano Convention would basically lead to the same result as the application of the 2007 Lugano Convention, which would favour recognition of UK Schemes beyond 31 December 2020, but would most likely not be relevant for Restructuring Plans, which would not be covered *ratione materiae* by the Lugano instruments anyway (see sec. 3).

### *2.2 The Swiss Private International Law Act (SPILA)*

#### *2.2.1 General scope*

13. In cases where no multilateral or bilateral agreements apply, recognition and enforcement of foreign decisions in Switzerland are subject to the provisions of the Swiss Private International Law Act ('SPILA').[18] The SPILA contains provisions on jurisdiction, applicable law and recognition and enforcement in all fields of private law as well as in insolvency law.

14. It is worth noting that, unlike in the field of commercial matters, there is no such thing as a parallel convention to EU Regulation 2015/848 ('Recast Insolvency Regulation')[19] applicable for Switzerland (or any other non-EU country). There also is no bilateral agreement to which Switzerland and the UK are party which covers the field of insolvency.

#### *2.2.2 Commercial matters outside the Lugano Convention*

15. Articles 25 *et seq.* and Article 149 SPILA concern the recognition of foreign decisions in matters of 'obligations' (under contract and tort law), while Articles 166 *et seq.* concern the recognition of foreign 'insolvency

[16] Nino Sievi, 'Auswirkungen des Brexit auf die Vollstreckung von ausländischen Urteilen' [2018] AJP/PJA 1096 <> accessed 13 June 2022.

[17] These considerations regarding the 1988 Lugano Convention and the states bound exclusively by this convention do not necessarily apply to the Brussels Convention. Despite being parallel instruments, the latter is an EC Convention. The argument can validly be made that by leaving the EU (and the EC), an EC Convention may not be applicable anymore. On the recognition of schemes in the EU, see Lucas Kortmann/Michael Veder 'The Uneasy Case for Schemes of Arrangements under English Law in relation to non-UK Companies in Financial Distress. Pushing the Envelope?' [2015] Nottingham Insolvency and Business Law E-Journal, p. 239-261.

[18] Swiss Federal Act on Private International Law (SPILA) [1987] RS 291.

[19] Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings [2015] OJ L 141.

decrees', 'composition agreements' and 'insolvency related decisions'. While Articles 25-27 SPILA contain the general conditions applicable to the recognition of all foreign decisions (grounds for refusal for improper service of the summons, violation of procedural and substantive *ordre public* (public policy), *res iudicata* and *lis alibi pendens exceptions*, see sec. 4.2.3), the qualification of the decision as either a contractual one or as an insolvency decree within the meaning of SPILA determines which provisions on indirect competence (accepted grounds for a personal jurisdiction) are applicable.[20]

16. The provisions of Art. 25-27 and 149 SPILA may be applicable where the Swiss recognising court considers the decision to be recognised as a 'civil and commercial matter' (and, as said earlier, the Lugano Conventions were not applicable *rationae temporis*). It is noteworthy that, unlike the Lugano Convention, Article 149 SPILA provides grounds for refusal on the basis of a lack of indirect competence. Where the Lugano Convention would not apply *ratione temporis* (see sec. 2.1.2 above – for instance, for proceedings initiated after 31 December 2020), the foreign decision would fall under Article 149 SPILA and would *not* be recognised if the Swiss court considers that the foreign court based its jurisdiction on a ground inconsistent with Articles 26 or 149 SPILA. Articles 26 and 149 SPILA will generally refuse the recognition of any foreign decision issued against a party domiciled in Switzerland, except where there has been an explicit (choice of court agreement) or tacit (submission to the proceedings) agreement to a foreign court.[21]

Instead, if the court were to qualify a decision, for example the sanctioning of an English Restructuring Plan, as an 'insolvency decree' or a 'composition agreement' (see below, sec. 2.2.3), it would consequently apply different provisions of SPILA, namely Articles 166-175, and, *rationae materiae,* certainly not the Lugano Convention.[22]

### *2.2.3 Recognition as an insolvency decree or 'composition or analogous agreement'*

17. Where a foreign decision is considered an 'insolvency decree' or a 'composition or analogous agreement', Articles 166-

[20] Articles 149 and 166(1) SPILA.
[21] Articles 149 contains some exceptions to that rule (for instance in consumer contracts) which will generally not be relevant in the present context.
[22] Articles 175 and 166 *et seq.* SPILA.

175 of SPILA apply, which are the provisions containing Switzerland's international insolvency law, notably regarding the conditions for and consequences of the recognition of foreign proceedings. Articles 166-175 of SPILA follow the principle of passive territoriality, which means that in the absence of a formal recognition by the competent Swiss court, foreign insolvency proceedings generally have no effect in Switzerland. Arguably, where a composition agreement is limited to changing contractual terms and does not affect the rights over assets located in Switzerland, a recognition order will not be required.[23] The same applies where all parties voluntarily apply the terms of the composition agreement. In all other cases, Swiss law will require the formal recognition of the foreign insolvency order by the competent Swiss court prior to any enforcement measure, and it will subject such recognition to conditions. A recent revision of the relevant provisions, which entered into force on 1 January 2019, has retained the fundamental recognition requirement, yet loosened its conditions.[24] First, by abolishing the controversial proof of reciprocity, and second, by extending the indirect competence to the debtor's centre of main interest (COMI), which is now considered – together with the place of incorporation, formerly the sole criterion – a proper ground for indirect competence. Other recognition requirements have remained unaltered. In summary, under the current provisions of SPILA, recognition is granted to a foreign 'insolvency decree' if:

> (i) the decree is enforceable in the state in which it was rendered;[25]
> (ii) there is no ground to deny recognition for reasons of violation of the Swiss ordre public;[26]
> (iii) the foreign insolvency order was rendered in the state of the debtor's domicile (under Swiss law, only the registered office), or in the state of the debtor's COMI under the condition that the debtor was not domiciled in Switzerland at the time of the opening of the foreign insolvency proceedings.[27]

18. The last condition excludes recognition in Switzerland of a foreign proceeding opened in respect of any company formally incorporated in Switzerland, even if its COMI is located in a foreign

[23] See the case law on article 175: BGE 137 III 138 [2011] Swiss Federal Court; on Article 166: BGE 140 III 379 [2014] Swiss Federal Court, cited in Stephen Berti and Ramon Mabillard, Commentary on Article 166 PILA in the Basel Commentary on Private International Law (4th edition Helbing Lichtenhahn 2021) N 15. See also article 167 SPILA on the venue of the recognition proceedings.

[24] See further Rodrigo Rodriguez, 'Das revidierte internationale Konkursrecht des IPRG' [2019] Jusletter <https://jusletter.weblaw.ch/fr/dam/publicationsystem/articles/jusletter/2019/963/das-revidierte-inter_6e9bfd0267/Jusletter_das-revidierte-inter_6e9bfd0267_fr.pdf> accessed 13 June 2022; Rodrigo Rodriguez, 'Is Swiss international insolvency law finally embracing the Model Law?' in Jean-Luc Albert (ed) *Mélanges en l'honneur de Jean-Luc Vallens* (Joly éditions 2017) 449.

[25] Article 166(1)(a) SPILA.

[26] Article 166(1)(b) and Article 27(1) SPILA.

[27] Article 166(1)(c) SPILA.

country. However, it allows for the recognition of a proceeding opened in the jurisdiction where the COMI (*e.g.,* the UK) is distinct from its place of registration as long as the latter is also in a third country.

19. Article 166 is primarily applicable to foreign bankruptcy/liquidation proceedings. The provision dealing with foreign restructuring proceedings is Article 175 SPILA, which reads as follows: 'A composition or a similar proceeding in a foreign jurisdiction shall be recognized in Switzerland. Articles 166 to 170 shall be applicable by analogy. […].' As a consequence, the recognition of any foreign proceedings falling under the (wide) definition of a 'composition or a similar proceeding' is subject to the conditions applicable to bankruptcy proceedings under Article 166 SPILA (see sec. 4).

## 3. The characterization game

### *3.1 The questions to be answered*

20. The characterization[28] of both the English Scheme of Arrangement and the Restructuring Plan under Swiss law has to determine whether the court order sanctioning the Scheme or Plan would fall into the scope of 'civil and commercial matters' or would qualify as an "insolvency, composition or a similar proceeding" (Article 1(2)(b) of the Lugano Convention and, similar, Art. 166 SPILA). In the first case, either the Lugano Convention or Art. 26 and 149 SPILA will apply (depending on the time the proceedings were initiated and the interpretation of the intertemporal provisions). In the second alternative, Art. 166-175 SPILA (on recognition of insolvency proceedings) will apply.

21. It is worth noting that, while the qualification of the proceedings by the originating court can be an important element, it is formally not binding upon the recognising court.[29]

22. The focus of this work is on qualification and recognition. Accordingly, the following description of the main features of both Scheme and Restructuring Plan is a succinct and simplified one.

[28] In Swiss and German international private law the legal doctrine of 'characterization' ("Qualifikation") means the act of subjecting or classifying a legal concept of a foreign law under the classifications of the applicable (national) private international law rules and concepts for the purpose of determining what set of those rules shall apply and thus answer the questions of jurisdiction, applicable law and recognition and enforcement in respect of that foreign concept.

[29] As last evidenced in the 'Sabena' decisions of the Swiss Federal Court, where that court refused the Belgian court's qualification of the claim under the Lugano Convention, leading to the refusal of the recognition of the Belgian decisions: see BGE 133 III 386 [2001] Swiss Federal Court, BGE 135 III 127 [2008] Swiss Federal Court, BGE 140 III 320 [2014] Swiss Federal Court and BGE 141 III 382 [2015] Swiss Federal Court.

### *3.2 Main features of a Part 26 Scheme of Arrangement*

23. For the purposes of this paper, the English Scheme of Arrangement is assumed (in a simplified way) to follow the following definition:[30] It is a compromise or arrangement between a company and its members or creditors (or any class of them) under Part 26 (sections 895 to 901) of the Companies Act 2006. A scheme of arrangement can be used to effect a solvent reorganisation of a company or group structure, as well as to effect insolvent restructurings such as by a debt for equity swap or by a wide variety of other debt-reduction strategies. A scheme requires approval by at least 75% in value of each class of the members or creditors who vote on the scheme, being also at least a majority in number of each class. If the scheme includes a reduction in the company's share capital, a separate special resolution of the company's members (requiring a 75% majority of those voting) is also necessary. A UK court's permission is needed to convene the meetings of members and creditors to vote on the scheme. The court will, at this point, review whether any division of the members and creditors into classes for voting purposes is appropriate. If the relevant members and creditors approve the scheme, the court will decide at a further hearing whether to sanction the scheme and will look at whether the approved scheme is fair. If the court sanctions the scheme, the scheme is binding on all affected members, creditors and the company.[31]

24. The English court will accept jurisdiction to sanction a Scheme of Arrangement in respect of a foreign-incorporated company if it is satisfied that there is a 'sufficient connection' with England. Factors which have frequently led the court to determine that a company has a 'sufficient connection' include:

> (i) it has substantial assets in England;
> (ii) its COMI is in England; or
> (iii) the liabilities subject to the scheme are governed by English law (whether or not coupled with an English jurisdiction clause).[32]

[30] From the Glossary of Thomson Reuters Practical Law website <https://uk.practicallaw.thomsonreuters.com/0-107-7201?contextData=(sc.Default)&transitionType=Default&firstPage=true> accessed 13 June 2022. For a more elaborated definition and further references, see Eugenio Vaccari and Emilie Ghio, *English Corporate Insolvency Law, A Primer* (Edwar Elgar Publishing 2022) pp. 185–190.

[31] See Elina Moustaira, 'English schemes of arrangement - [how] will they be recognized by the EU Member States?' [2021] Lex&Forum 195–203, Available at SSRN: <https://ssrn.com/abstract=4158782> accessed 13 June 2022.

[32] James Watson, 'Forging the connection: Foreign companies & English schemes of arrangement' [2015] Eurofenix 23; Eugenio Vaccari and Emilie Ghio, *English Corporate Insolvency Law, A Primer* (Edwar Elgar Publishing 2022) pp. 185–187.

### *3.3 Main features of a Part 26A Restructuring Plan*

25. A Restructuring Plan is an arrangement which may be proposed under Part 26A of the Companies Act in relation to a company which 'has 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'.[33] Part 26A was introduced into the Companies Act 2006 by the Corporate Insolvency and Governance Act of 2020, i.e. clearly by a law 'relating to insolvency'.[34]

26. In addition to this specific scope, the following particularity differentiates it from the pre-existing Scheme of Arrangement. A Scheme of Arrangement requires approval of more than 50% in number constituting at least 75% in value of each relevant class of creditors or members, present and voting either in person or by proxy in favour of the Scheme for it to proceed to sanction by the Court. The Restructuring Plan, in turn, allows the court discretion to sanction it where a number representing 75% in value of the creditors or members of at least one class are present and voting either in person or by proxy in favour of the Plan. This applies even where there is a dissenting class (or classes) (which therefore binds that dissenting class (or classes) to the Plan (*i.e.,* a 'cram down')), provided that:

> (i) no members of the dissenting class are any worse off under the 'relevant alternative' to the Plan; and
> (ii) at least one of the classes that has voted in favour of the Plan would receive a payment, or have a genuine economic interest in the company if the relevant alternative were implemented[35].[36]

27. There is not yet much case law referring to a Restructuring Plan. The first Restructuring Plan was sanctioned on 4 August 2020 by the High Court of Justice of England and Wales in the matter of Virgin Atlantic Airways Ltd.[37] That decision was recognised by the bankruptcy court of the Southern district of New York on 12 November 2020 under Chapter 15 of the United States

[33] Section 901A(2) Companies Act 2006.

[34] According to the research briefing of the UK Parliament (<https://commonslibrary.parliament.uk/research-briefings/cbp-8971/#:~:text=The%20Corporate%20Insolvency%20and%20Governance%20Act%202020%20(CIGA%202020)%20received,assist%20businesses%20during%20the%20pandemic>) the Part 26A Restructuring Plan was introduced as part of the "permanent [set of] insolvency measures in the Act (previously announced by the Government, and in development before Covid-19)", intended to "mark a major change in UK insolvency law towards a business rescue culture more in line with U.S. insolvency (chapter 11)",

[35] The relevant alternative will be whatever the court considers most likely to occur if the Plan is not sanctioned by the court (for example, this might be an administration or liquidation or, potentially, could be an alternative Plan).

[36] Eugenio Vaccari and Emilie Ghio, *English Corporate Insolvency Law, A Primer* (Edwar Elgar Publishing 2022) pp. 191–193.

[37] *Re Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch). The case has subsequently been followed in other Part 26A cases, but the principles in the Virgin Atlantic case remain the guiding principles.

Bankruptcy Code, the United States (US) implementation of the UNCITRAL Model Law on Cross-Border Insolvency 1997.

### *3.4. The scope of the relevant instruments*

#### *3.4.1 The scope of the Lugano Convention and the Brussels Regulation*

28. A question to examine for the purposes of qualification is whether the Scheme of Arrangement or the Restructuring Plan fall under the exception of Article 1(2)(b) of the Lugano Convention referring to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. However, as a consequence of the 'Lugexit' and intertemporal rules (non-applicability of the Lugano Convention already *rationae temporis* for proceedings initiated after 31.12.2020, see sec. 2.1), one can expect a decrease in cases where this question is directly relevant (see however, on the relevance of essentially the same issues of characterization for the determination of the applicable provisions of the SPILA, sec. 4).

29. Due to the parallelism between the Brussels Regulation and the Lugano Convention and the mechanisms for a unified interpretation, jurisprudence concerning the Brussels Regulation and its relationship with the Recast Insolvency Regulation is also relevant for the interpretation of the Lugano Convention (see below).

30. Doctrine and jurisprudence are scarce in Switzerland on this matter.[38] The author is not aware of jurisprudence of Swiss courts on a Restructuring Plan or on a Scheme of Arrangement.

31. Particularly when interpreting the Lugano Convention, Swiss law draws some inspiration from German legal

[38] Some doctrinal views have been expressed in respect of the Scheme of Arrangement. According to Richard Gassmann, the scheme of arrangement as provided by English and South African law is not subject to Article 175 (and thus neither to the provisions of bankruptcy nor on composition agreements under insolvency law): see 'Kommentar zu Art. 149a-175 IPRG' in Andreas Furrer et al. (eds.), *Handkommentar zum Schweizer Privatrecht, Internationales Privatrecht* (2016). By reference to English case law (*Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); *Re Zlomrex International Finance SA* [2013] EWCH 4605 (Ch); and *Re APCOA Parking Holdings GmbH* [2014] EWHC 3849) and recalling the main elements of the English Part 26 Scheme, Richard Gassman and Florian Bommer reach the conclusion that a Part 26 Scheme of Arrangement is to be recognised under the Lugano Convention: Richard Gassmann and Florian Bommer, 'Das international organisierte Unternehmen in der Krise' in Peter Münch et al. (eds.), *Handbuch Internationales Handels- und Wirtschaftsrecht* (Helbing Lichtenhahn 2015) 710 ft 128. See also Rodrigo Rodriguez and Paul Volken arguing that article 175 also excludes the scheme of arrangement from the scope of the insolvency law provision of the SPILA, stating that any proceeding falling under those provisions should "have its basis in a law relating to insolvency or at least share with such provisions the purpose of avoiding a potentially existential financial distress of the debtor": Rodrigo Rodriguez and Paul Volken, 'Konkurs und Nachlassvertrag Artikel 166 bis 175 (inkl. Vorbemerkungen)' in Markus Müller-Chen and Christoph Widmer Lüchinger (eds.), *(Zürcher) Kommentar zum IPRG* (2018) 1257.

practice and literature, which is more abundant. In Germany, while a majority of scholars[39] favour the qualification of the Scheme of Arrangement as a court decision falling under the Brussels Regulation (corresponding to the Lugano Convention), some views advocate for those proceedings to be subject to the Recast Insolvency Regulation.[40] Further doctrinal views are uncertain about how to apply the provisions of Lugano/Brussels, conceived for adversarial proceedings, to a proceeding where the roles of 'claimant' and 'defendant' are not easy to assign,[41] or advocate a 'case to case' approach to both schemes and plans.[42]

Ultimately, a CERIL[43] Statement of 6 July 2022 on Cross-Border Effects in European Preventive Restructurings[44] highlights the difficulties of cross-border recognition not only of [the implementations of] the EU Restructuring Directive, but also "with regard to preventive restructuring procedures opened in third countries (e.g. the United Kingdom, Switzerland or Norway)" and advocates for a harmonized or unified recognition regime for preventive restructure proceedings.[45]

[39] Christoph Thole, 'Sanierung mittels Scheme of Arrangement im Blickwinkel des Internationalen Privat- und Verfahrensrechts' [2013] 42 ZGR 109; Peter Mankowski, 'Anerkennung englischer Solvent Schemes of Arrangement in Deutschland' [2011] 26 WM 1201; Horst Eidenmüller/Tilman Frobenius, 'Die internationale Reichweite eines englischen Scheme of Arrangement' [2011] 26 WM 1210; Lars Westphal/Marvin Knapp, 'Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangement' [2011] 43 ZIP 2033; Dietmar Schulz, 'Apcoa – Grenzen der Anerkennung des Scheme of Arrangement nach Änderung der Rechtswahlklausel' [2015] 40 ZIP 2015 1912; Stefan Sax/Artur M. Swierczok, 'Die Anerkennung des englischen Scheme of Arrangement in Deutschland post Brexit' [2017] 13 ZIP 601; Vivien Tyrell/Philip Heitlinger/Nick Stern, 'Solvent Schemes auch in Deutschland vollstreckbar: über die Anwendbarkeit von Solvent Schemes of Arrangement auf deutsche Vertragsbestände' [2007] 62 VW 1695; Gerald Mäsch, 'The Opera Ain't Over Till the Fat Lady Sings – ein englisches „scheme of arrangement" vor dem BGH' [2013] 3 IPrax 234; Friedrich L. Cranshaw, '„Solvent Scheme of Arrangement", ein Sanierungsinstrument des englischen Rechts in der inländischen Rechtspraxis' [2012] DZWIR 223, 226 et seqq.; for a court decision, see BGH v. 15. 2. 2012 − IV ZR 194/09.

[40] See Jan Kropholler/Jan von Hein, *Europäisches Zivilprozessrecht, Kommentar zur EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO* (Deutscher Fachverlag GmbH 2011). On the recognition of schemes in the EU, see Kortmann/Veder, The Uneasy Case for Schemes of Arrangements under English Law in relation to non-UK Companies in Financial Distress. Pushing the Envelope?, Nottingham Insolvency and Business Law E-Journal, 3, 13, (2015), p. 239-261.

[41] Elina Moustaira doubts the appropriateness of those instruments, but does not discard their applicability: Elina Moustaira, 'English schemes of arrangement - [how] will they be recognized by the EU Member States?' [2021] Lex&Forum 195, 197 and 203. Susan Block-Lieb considers that a direct competence under the Brussels Regulation might be given where one creditor-defendant has its domicile in the UK: Susan Block-Lieb, 'Reaching to restructure across borders (without over reaching), even after Brexit' [2018] 92 American Bankruptcy Law Journal 12. See also Article 6.1 of the Lugano Convention (corresponding to 8.1 of the Brussels I Regulation).

[42] Riz Mokal, 'What is an Insolvency Proceeding? Gategroup Lands in a Gated Community' [2022] Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4128352> accessed 27 June 2022.

[43] Conference on European Restructuring and Insolvency Law, see <https://www.ceril.eu/home> accessed 23 June 2022.

[44] See <https://www.ceril.eu/news/ceril-statement-2022-2-on-cross-border-effects-in-european-preventive-restructuring> accessed 23 June 2022 with references to the Statement and the full Report.

[45] Outside the EU context the characterization as a 'preventive restructuring proceeding' is of limited relevance, the main question remaining – in view of the applicable sources – whether a proceeding is an insolvency proceeding or a civil and commercial decision, see sec 3.1. Mokal (Fn 42), p 22, also considers this term vague and unhelpful for purposes of characterization.

### *3.4.2 The scope of the EU Insolvency Regulation*

#### *3.4.2.1.1 Relevance*

32. Article 1(2)(b) of the Lugano Convention and its parallel provision in the Brussels Regulation cannot be read in isolation without regard to the wider features of the EU legislative landscape. The Recast Insolvency Regulation and the Brussels Regulation should dovetail without leaving any gaps.[46] The dovetailing principle has been confirmed by the Court of Justice of the European Union ("CJEU").[47]

#### *3.4.2.2 Definitions*

33. The instrument devoted to fill the gap created by the exception to the Scope of the Brussels Regulations of Article 1(2)(b) was Regulation 1346/2000 on insolvency proceedings.[48]

34. According to its Article 1, said Regulation was applicable to '*collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*'. The Regulation was later replaced by the recast Regulation (EU) 2015/848 ('EIR')[49].

35. Article 1 of the (recast) EIR has widened the definition. The EIR shall now apply to

> *… public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:*
>
> *(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;*
> *(b) the assets and affairs of a debtor are subject to control or supervision by a court; or*
> *(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its*

[46] Article 1(2)(b) of both the Lugano Convention and the Brussels Regulation is ultimately derived from the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. A draft Convention on insolvency proceedings was under discussion at the time when the Brussels Convention was being drafted, and it was always intended that Article 1(2)(b) would dovetail with the Draft Insolvency Convention so as to avoid leaving any gaps between them. The situation was explained in the report of Dr Peter Schlosser on the Brussels Convention dated 9 October 1978 (paragraph 53). Although the Draft Insolvency Convention was not brought into force, it remained under discussion for many years. It was revised in the 1990s through the efforts of, inter alia, Professor Miguel Virgos and Prosecutor Etienne Schmit, who produced a report on the Draft Insolvency Convention dated 3 May 1996. Their report explained again that the Brussels Convention and the Draft Insolvency Convention were designed to dovetail with each other (see para. 197). As *Mokal* (Fn 42), p. 64 f. accurately points out, the dovetailing principle applies (only) to the substantial scope under article 1(2)(b) of the Lugano/Brussels instruments, but cannot depend alone upon whether an instrument has been listed in Annex A of the EuInReg, even more so for the purposes of the Lugano Convention.

[47] See e.g. decision of the ECJ in *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* [2015] QB 96 at [21]:

> In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (OJ 1978 L304, p 36) ("the Jurisdiction Convention"), which was replaced by Regulation No 44/2001, the court has held that that Regulation and Regulation No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under article 1(2)(b) of Regulation No 44/2001, from the application of that Regulation in so far as they come under "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" fall within the scope of Regulation No 1346/2000.

[48] Council Regulation (EC) 1346/2000 on insolvency proceedings [2000] OJ L 160.

[49] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2005] OJ L 141, p. 19–72.

> *creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).*
> *Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.*

#### *3.4.2.3 What is a 'collective proceeding'?*

36. A question arises as to whether both the Scheme and the Part 26A Restructuring Plan qualify as 'collective proceedings', as only a selected set of creditors and borrowers, whose composition is determined by pre-existing contracts, are bound by the Scheme or Plan.[50] There is no reason in principle why a debtor could not bring a wider range of creditors within the scheme. However, even 'traditional' insolvency and restructuring proceedings often exclude certain classes, such as privileged creditors under Swiss law.[51]

37. The Recast Insolvency Regulation has expanded the definition of 'collective proceedings' to include proceedings covering 'all or a significant part of a debtor's creditors'[52] (article 2 (1)). Although modifications introduced in the Recast Insolvency Regulation are of only limited relevance for the interpretation of the 2007 Lugano Convention (an EU/EFTA instrument negotiated in 2007, and formally not covered by the parallelism mechanisms of Protocol 2 to the 2007 Lugano Convention), they may have an influence on the interpretation of both the Lugano Convention and SPILA insofar as they reflect general legislative developments.

38. Whether a collective proceeding is published or not (or only a later point in time) is not deemed to be a defining element of an insolvency proceeding.[53]

#### *3.4.2.4 In a law 'related to insolvency'?*

39. One of the key elements of an insolvency proceeding is that it is contained in 'a law relating to insolvency,' as evidenced in Article 1(1) of the Recast Insolvency Regulation, but also under the 1997 UNCITRAL Model Law on Cross-Border Insolvency, whose Article 2(a) requires the proceedings to

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50 See on German law also Christoph G. Paulus, 'Das englische Scheme of Arrangement – ein neues Angebot auf dem europäischen Markt für außergerichtliche Restrukturierungen' [2011] 23 ZIP 1077, 1080.

51 Article 305(2) and Article 306(1.2) of the Swiss Debt Enforcement and Bankruptcy Act ('DEBA').

52 See Article 2(1).

53 See, e.g. Art. 2 (u) of the UNCITRAL Legislative Guide on Insolvency Law or Art. 2 of the UNCITRAL Model Law on Cross Border Insolvency. Under Swiss Law, for instance, the publication of the opening of the composition proceedings (under 293 ss DEBA) may be postponed – of course with this having no influence on the characterization of the proceeding itself. In that context (of the prior EIR and UNCITRAL instruments) the term "public" must be read a referring to proceedings of public law and/or such open to a general participation of creditors under the assistance of public authorities.

be 'pursuant to a law relating to insolvency.'

40. Unlike the Scheme of Arrangement under Part 26, the new Part 26A Restructuring Plan fulfils this requirement since an actual or imminent financial distress (see above, sec. 3.3) is defined in the law as a requisite for its applicability.[54]

*3.4.2.5 Irrelevance of Annex A (of the EIR)*

41. The question as to the inclusion of the Restructuring Plan in Annex A of the EIR has not arisen, as at the time of the enactment of those provisions the UK had already ceased to be a member of the EU. Accordingly, no inferences can be drawn from the fact that the Part 26A Restructuring Plan is not included in Annex A.

*3.4.2.6 Further elements of an insolvency proceeding*

42. As shown above, the definition of 'insolvency proceeding' contains further elements (stay, debtor divestment, court control or supervision, purpose of rescue, adjustment of debt, reorganisation or liquidation) that deserve consideration as well. However, it is important to note the conjunctive 'or', meaning that an insolvency proceeding need not satisfy the requirements of each of these limbs.

*3.5 Conclusions as to the qualification*

*3.5.1 Schemes and Restructuring Plans in the light of the definitions*

43. While the Scheme shares with the definition of insolvency proceedings cited above a series of elements (the purpose of restructuring of debts, court supervision, overvoting of dissenting creditors), it also fails to fulfil a series of key elements, such as encompassing all of the debtor's creditors; providing for an automatic stay of individual enforcement against the debtor;[55] and being in a law relating to insolvency as well as requiring the financial distress of the debtor.

44. The Restructuring Plan, in contrast, differs from the Scheme in a few – yet essential – elements. Its purpose is 'rescue, adjustment of debt,

[54] See the dissenting view of *Mokal* (Fn 42), p. 23 ss. In his view, the courts should characterize a Scheme as an insolvency proceeding "in relation to sufficiently insolvent companies" (p. 39). This approach may lead to results that adapt better to the economic reality of the transaction in question. However, civil law jurisdiction generally expects from a characterization that it characterizes the legal instrument as such (and in view of any further cases), and not every individual application of it, also in the interest of legal certainty. Opening the door to a "look at the financial facts behind the instrument"-approach would lead to a system of 'ad hoc characterizations' (necessarily in respect of all instruments, not only the Scheme) that does not correspond to the civil law concept of characterization and would foster unpredictability in the cross border context.

[55] It is also a defining element under Swiss law, see above as to the 'typical elements', 3.5.2.

reorganisation' and it is only applicable where 'the company has 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'. The possibility of a 'cross-class cram down' in the new Restructuring Plan adds a heavily non-consensual element that is characteristic of insolvency proceedings.[56]

45. While some of these elements have evolved over time, some have remained constant. These include (i) the requirement of a context of financial distress and; (ii) the purpose of the restructuring of debts. Unlike the Scheme, the Restructuring Plan proceeding cumulatively fulfils those requirements.

### *3.5.2 The Restructuring Plans as a 'composition or a similar proceeding' in terms of SPILA?*

46. As stated under sec. 2.1.2, the Lugano Convention of 2007 is not applicable to the UK since 2021. Therefore, any UK Scheme or Plan initiated after 31 December 2020 falls outside the scope of that Convention (on the 1988 Convention see sec 2.1.3). The consequence is that the national SPILA applies in Switzerland, and in other countries, their respective rules on recognition of foreign decisions. The key determination to be made in the context of the SPILA is whether provisions on the recognition of 'insolvency decrees' (Article 166 SPILA) as well as on 'composition and similar proceeding' (Article 175 SPILA) apply – or the general provisions on commercial matters. In its leading case on the scope of Article 166 SPILA,[57] the Swiss Federal Court set the standard that 'a foreign insolvency decree has to deploy a set of minimal insolvency-typical effects' to be subject to the provisions of Article 166 ff. SPILA.

47. The conclusions in respect of the Lugano Convention and the Recast Insolvency Regulation are also relevant for the qualification under SPILA. The Swiss Federal court has consistently sought to interpret Article 1(2)(b) of the Lugano Convention and Article 166/175 of SPILA in a coordinated manner and in accordance with ECJ jurisprudence on Article 1(2)(b) of the Brussels

[56] See Article 11 of Directive (EU) 2019/1023 of the European Parliament and of the Council OJ L 172 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 OJ L 169.

[57] 2C_303/2010 [2011] Swiss Federal Court („Bashkirian"), E. 2.3.1.

Regulation.[58] Consequently, there is a strong argument that a proceeding that is considered to be excluded from the scope of the Lugano Convention by virtue of Article 1(2)(b) is subject to either Article 166 or to article 175 SPILA.

48. The author is not aware of jurisprudence or doctrine in Switzerland as to the qualification of a Restructuring Plan. However, as stated above, some scholarly views can be found on the qualification of the Scheme of Arrangement (sec. 3.5.1). These views heavily rely on the criterion of the legal instrument having its basis 'in a law relating to insolvency', an element lacking in the Scheme. Accordingly, they conclude that a Scheme of Arrangement is to be excluded from the scope of the insolvency law provisions of SPILA, arguing that any proceeding falling under those provisions should 'have its basis in a law relating to insolvency or at least share with such provisions the purpose of avoiding a potentially existential financial distress of the debtor'.[59]

49. Following that line of argument, a Restructuring Plan must, in turn, be subject to Articles 175 and 166 *et seq.* SPILA as it has its basis in a law relating to insolvency (see sec. 3.3 on the background of the introduction of the Restructuring Plan in Part 26A of the Companies Act and sec. 3.4.2.4).[60] Does this follow if the Plan is actually implemented in the Companies Act? This is consistent with scholarly views, according to which the decision to be recognised can be either one opening a proceeding or one sanctioning an agreement.[61] The same authors[62] state that the scope of Article 175 has "grown with the practical relevance of (insolvency-based) restructuring proceedings". According to one of these views, "[t]he decisive characterization element should be the circumstance, that solving an insolvency situation, under which the existing assets would

[58] See BGE 133 III 386 [2007] Swiss Federal Court, 135 III 127 [2008] Swiss Federal Court, 140 III 320 [2014] Swiss Federal Court and 141 III 382 [2015] Swiss Federal Court. In particular, its latest decision established a tight link between ECJ jurisprudence and the relevant interpretation of an insolvency proceeding for Swiss courts both under the Lugano Convention and SPILA.

[59] See Fn 54 on the dissenting view on this by Mokal (Fn 42).

[60] In the context of UNCITRAL documents, the term "in a law relating to insolvency" has been chosen as an open formulation to include laws that may not solely regulate insolvency but regulate (also) the situation of financial distress (see N 73 of the Guide to Enactment and Interpretation (2013) of the Model Law on Cross Border Insolvency, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf, accessed 7 November 2022. This is also relevant for the interpretation of national legislations (like the UK's) heavily influenced by the UNCITRAL instruments.

[61] Lukas Bopp, Commentary on Article 175 PILA in the Basel Commentary on Private International Law (4th edition Helbing Lichtenhahn 2021) N 3; Paul Volken/Rodrigo Rodriguez, Commentary on Article 175 PILA in the Zurich Commentary on Private International Law (3rd edition Schulthess 2018) N 21.

[62] Ibid. N 2.

not suffice to satisfy the creditors, is addressed in a procedure regulated by a law and supervised by a state authority in a binding manner and with the purpose of satisfying the creditors". Under that assumption, the same author excludes so-called 'workouts' from the scope of Article 175 because they lack court supervision and are merely voluntary for all parties involved.

*3.5.3 Conclusions*

50. Based on these sources the author has identified a series of elements required for a proceeding to qualify as an 'insolvency proceeding' or an 'insolvency decree' including 'compositions or similar proceedings'. These elements include:

> (i) having their basis in a law relating to insolvency (*i.e.,* in a law addressing financial distress and the rights of creditors);
> (ii) requiring, explicitly or implicitly, a state of financial distress which is an existential threat to the debtor, or would become one if not addressed;
> (iii) having, as their purpose, the liquidation or restructuring of the debts of the debtor;
> (iv) the agreement sanctioned by the court/authority having a binding effect on dissenting creditors.

51. Since all these elements can in some way be found in a Restructuring Plan (see, in particular, sec. 3.3 on the question of whether (i) is present if the legal basis is in the Companies Act 2006), this instrument is more likely to be qualified as a 'composition or similar proceeding' under article 175 SPILA than any other option (such as a contractual or a corporate law matter).

52. As stated above, the Scheme of Arrangement differs in a few, but essential points from the Restructuring Plan. First, and most essential, the Scheme does not require financial distress as a necessary requirement for its applicability. The Scheme also lacks the Plans 'cross-class cram down' possibilities (see sec. 3.3) and was – unlike the Restructuring Plan[63] – already originally part of the Companies Act, i.e. of a commercial law-related legislation. These differences, though modest, are just relevant enough to tip the balance and justify a different characterization of the Scheme, namely as a 'commercial matter' under the Lugano/Brussels instruments or – in the Swiss context – as a decision relating to 'obligations' (of contractual or non-contractual nature) under Article 149 SPILA.

[63] See above N. 0 and Fn 34.

## 4. Recognition of a Scheme and a Restructuring Plan in Switzerland

### *4.1 Common conditions and grounds for refusal*

#### *4.1.1 Lugano and SPILA, Schemes and Plans*

53. Irrespective of the characterization of a judgment (either as a civil or commercial matter or as an insolvency proceeding) a set of conditions common to all sections of the SPILA and also to the Lugano Convention (as the case may be) applies. This common set of conditions, contained in articles 25 to 27 and 149 SPILA and 34 to 35 of the Lugano Convention are commented in the following.[64]

54. Sec. 4.2 will then deal with the specific grounds for refusal of lack of indirect competence. It is regarding this ground for refusal where we will find a fundamental difference between the Lugano Convention and the SPILA but also, and most importantly, between the recognition of Scheme (characterized as a civil and commercial matter under the SPILA Art. 25-27 and 149 and the Lugano Convention) and that of a Restructuring Plan (characterized as an insolvency decree or a composition agreement under Art. 166 and 175 SPILA).

#### *4.1.2 The decision is enforceable in the state of origin (Article 25 lit. b and 166 (1)(a) SPILA, 37 Lugano Convention);*

55. This ground for refusal will rarely trigger any difficult issues if we generally assume that the order sanctioning the Scheme or the Restructuring Plan to be recognized in Switzerland would be enforceable under English law and could – at the time recognition is sought – not be appealed against by means of an appeal having an automatic suspensive effect. Under the Lugano Convention, even a decision that could still be appealed against could be recognized (however, the recognition decision could be suspended upon proof that an appeal has been filed, Art. 37 Lugano Convention).

#### *4.1.3 No lis pendens or res iudicata objections exist (Article 27 lit. c SPILA, 34.3 and 34.4 of the Lugano Convention)*

56. Also this ground for refusal rarely causes difficulties in practice. For the purposes of this general overview, it will be generally assumed that there would be

[64] Unlike the Lugano Conventions, the SPILA requires that most of the grounds for refusal exposed in the following sections be examined ex officio (i.e., it does not have to be established and proven by a party – which would be the case under the Lugano Convention).

no existing decisions or cases pending before Swiss courts that would trigger this ground for refusal of recognition, including prior third state decisions that could be recognized in Switzerland.

*4.1.4 That the decision is not manifestly contrary to Switzerland's substantial and procedural ordre public*

57. Both the Lugano Convention and the SPILA provide for grounds for refusal of recognition where the decision 'manifestly' violates either procedural (Articles 166(1)(b) and 27(1) SPILA, 34.1 Lugano Convention) or substantial (Art. 166(1)(b) and 27(b) SPILA, 34.1 Lugano Convention) '*ordre public*' (public policy). In respect of procedural rights, it requires specifically that the decision does, in particular, not violate the right to be heard (Article 27 lit. b SPILA, 34.1 Lugano Convention).

58. It can generally be assumed that UK proceedings to confirm the Schemes will raise no procedural issues amounting to a procedural 'ordre public' violation, and the procedural rights of the parties affected to be heard will be respected. Accordingly, the violation of procedural 'ordre public' is not likely to be an issue to be successfully raised in recognition proceedings (see, however, on the specific procedural question of proper notification sec. 4.2.5).

59. However, a party opposing the enforcement of a Scheme in Switzerland (once it is characterized as a civil and commercial decision, see sec. 3.5.1) could argue that Schemes violate substantial 'ordre public' on the basis that the Schemes disregard the principle of party autonomy by providing for a mechanism to disregard the necessary agreement of a party to change the contract it is a party to. This is particularly the case outside the context of insolvency (which is also the reason why this argument would make little sense against a Restructuring Plan given its characterization as an insolvency – see above) where the 'overvoting' mechanism of the Scheme can be seen as contradicting basic principles of party autonomy and contract law theory.

60. Even from a continental perspective such an argument seems, however, unconvincing on several grounds: *First*, a Scheme is a well-known feature of UK law, familiar to the law firms advising debtors and creditors with respect to major financial contracts. Parties participating in contracts subject to

Schemes or Plans generally reasonably had to be, and most certainly were, aware of the possibility of a Scheme being applied to the relevant agreements.[65] Respecting the principle of party autonomy precisely calls for this choice and its consequences to be respected. This applies also to the specific provisions in the relevant documents providing for a majority decision to amend specific parts of the agreement. *Second*, the possibility of modifying a contract or its effects against the will of a party is atypical, but not fully unknown, under Swiss law. In fact, legal theory does not always consider a contract to be 'unchangeable'. The *clausula rebus sic stantibus* is a general principle of law, which has notably been raised recently in the context of the COVID-19 pandemic. Swiss law also provides for unilateral changes of contractual terms with the agreement of the court in several situations, for example with respect to the extension of housing rentals, reduction of agreed rental fees and reduction of punitive clauses. And *third*, majority decisions of creditors that override dissenting creditors are a common feature of insolvency law. The fact that English company law permits variations to contractual rights through a Scheme of Arrangement as distinct from its insolvency proceedings is exceptional but would most likely not be considered as 'manifestly' violating 'ordre public', particularly in view of newer legal developments towards the promotion of 'hybrid' insolvency instruments, located between commercial and insolvency law.

61. Swiss courts – like most courts of the European continent – apply a strict standard to the application of the 'ordre public' clause. They require not only the law applied but the result or consequence of the decision to be a manifest violation of 'ordre public': generally, the most likely alternative to a restructuring is a liquidation, which would normally result in worse recoveries for creditors compared to the implementation of a rescue plan. Consequently, the result or consequence of the recognition would generally not create an 'ordre public'-relevant disadvantage, if any.

[65] One could raise the question whether the situation changes in respect of 'unsophisticated' creditors, i.e., consumers. However, contracts generally subject to amendments through a Scheme or a Plan are certainly not of a nature to place them in the vicinity of 'consumer contracts'. A creditor that would enter a complex contract with no legal advice would generally not deserve the 'ordre public' clauses' protection alleging unfair treatment or completely unexpected consequences.

62. It would therefore be generally unlikely that a creditor affected by a Scheme could successfully oppose the recognition of a Scheme in Switzerland based on an alleged violation of substantial 'ordre public'. For a Restructuring Plan, given its characterization as an insolvency proceeding (sec 3.5.3), it appears even more unlikely that typical consequences of an insolvency proceeding (like overvoting creditors) would be considered in any way a violation of 'ordre public'.

*4.1.5 That the parties have participated in the proceedings or have at least been duly summoned to participate*

63. As to the ground for refusal of improper service of 'the document which instituted the proceedings or with an equivalent document' (as per Articles 34.2 of the Lugano Conventions), it shall be noted that

(1) this ground can only be raised by a party that did not participate in the proceedings leading to the decision to be enforced, and
(2) unlike the stricter conditions set by Article 27 lit. a SPILA (see below), the Lugano Convention requires that the service was not only improper (i.e. in violation of applicable rules on service) but also effectively led to the document not being served to the defendant in 'sufficient time and in such a way as to enable him to arrange for his defence'. Accordingly, strictly formal mistakes in the notification process that did not adversely affect the summoned parties' rights would not constitute a ground for refusal.

64. However, while it is likely that Schemes are considered to fall within the substantial scope (*rationae materiae*) of the Lugano Convention, given that that has ceased to be applicable to the UK and that it is unlikely that a Swiss court would consider the 1988 Lugano Convention to be applicable (sec. 2.1.2), the following section examines the ground for refusal under the SPILA, which would both apply where no multi- or bilateral agreement is applicable, and in any event – *rationae materiae* – to Restructuring Plans.

65. The requirements for 'due summoning' under Article 27 SPILA are stricter than under Article 34. 2 of the Lugano Convention (or the Brussels Ia Regulation, Article 45 para. 1 lit. a). Under the SPILA, full compliance with the applicable provisions on cross-border service of the summons is required, at least for the document instituting the proceedings. It is essential that parties within the UK (or having agreed to be served there) subject to the Scheme are served or informed in accordance with the law of the forum and, in the case of cross-border notifications, in accordance with applicable treatises, so far as applicable.

66. Where a Scheme or a Plan creditor is abroad, the notification would have to fulfil the requirements of applicable treatises, so far as applicable as a matter of English and Swiss law (in the case of Switzerland and many other states, the Hague Service Convention of 15 November 1965)[66]. Proper service under the applicable Hague Convention would require the UK court to submit, through its central authority, a request for service of documents to the competent Swiss authority. However, the ground for refusal of non-compliance with such provision would only be available to a Scheme Creditor (abroad) that would not have participated voluntarily in the proceedings (for example in the meetings). [67]

*4.2 Indirect Competence in particular*

*4.2.1 Indirect competence and Schemes*
*4.2.1.1 Under the* SPILA (Article *25 lit. a, 26 lit. a-d and 149)*

67. The characterization of the Scheme as a 'civil and commercial matter' (or a matter relating to obligations under the SPILA) leads to the applicability of either the Lugano Convention or articles 24-27 and 149 SPILA. The acceptable grounds for jurisdiction under these provisions differ considerably from those applicable to insolvency proceedings (see below sec.), which is the reason why this section treats them under separate sections.

68. Under the SPILA, the ground for refusal of lack of 'indirect competence', i.e., of a proper ground for jurisdiction of the foreign courts in the eyes of the recognising jurisdiction is contained in Article 25 lit. a, Article 26 lit. a-d and Article 149 SPILA. Unlike under the Lugano Convention (Article 35.3, see the following sec.), the recognising court may and will, under the SPILA, examine the proper assertion of jurisdiction by the originating court.

69. As a result, whenever the parties bound by a Scheme have validly submitted to the jurisdiction of the courts of England and Wales (through valid choices of court or through valid tacit submission) in respect of all the agreements subject to the Scheme, Articles 5 and 26(c) SPILA will provide for the indirect

[66] <https://www.hcch.net/en/instruments/conventions/full-text/?cid=17> accessed 27 June 2022. It is worth noting that Swiss courts will – contrary to the UK position and that of many common law jurisdictions – consider the Hague Convention to be *mandatorily* applicable to the cross-border service of process.

[67] Stephen Berti and Ramon Mabillard, Commentary on Article 166 PILA in the Basel Commentary on Private International Law (4th edition Helbing Lichtenhahn 2021) N 48 with further references.

jurisdiction of those courts and therefore for recognition of the UK Schemes.

70. On the opposite, in situations where an agreement (or several agreements) subject to the Scheme (and affected by the Scheme in respect of an opposing creditor)[68] would contain an exclusive[69] choice of court in favour of a non-UK jurisdiction (e.g. the courts of the state of New York, or an exclusive arbitration clause), the assertion of jurisdiction by the UK court would be considered contrary to the SPILA[70], and recognition would be refused. In the (unlikely) situation where no valid choice of court provisions in the relevant agreements exist, there is virtually no possibility under the SPILA to recognize a UK decision against a Swiss-based party (that would not submit to the UK courts), and only in limited situations against a third-state-domiciled party.[71]

*4.2.1.2 Under the Lugano Convention*

71. Under the – unlikely – applicability of the Lugano Convention, the conditions for recognition in respect of indirect competence are completely different. Schemes are not subject to any of the grounds for exclusive jurisdiction under Articles 22.2 of the Lugano Conventions.[72] Neither are the provisions of section 3 and 4 of chapter II of the Lugano Conventions (relating to consumer or insurance contracts) applicable. As a consequence, by virtue of Articles 27 to 28 of the 1988 Lugano Convention and Articles 34 to 35 of the 2007 Convention, recognition would be granted in Switzerland without the possibility to question the grounds for jurisdiction. This is a major advantage in comparison to the SPILA regime (see sec. 2.2), which is more restrictive, but which is now the source most likely applicable as a consequence of UK's "Lugexit" (see sec. 2.1).

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68 A creditor that did not voluntarily agree to that modification and which subsequently opposes recognition of the modified agreement in Switzerland. The recognition issue will most likely arise where that creditor requires the enforcement of the agreement unmodified by the Scheme or Plan. The defendant (debtor) will then raise the recognition of the Scheme or Plan as a defense.

69 Swiss law presumes that a choice of courts is an exclusive one if the clause does not explicitly stipulate the contrary.

70 Specifically contrary to Article 5 SPILA, which requires a valid choice of court to be respected by Swiss courts, as it is presumed to be exclusive (para 1 in finem).

71 See in particular article 149 SPILA for the limited situation, most not relevant for the Scheme context.

72 There are no reasonable grounds to question that the court sanctioning the schemes is a 'court' in the sense of the Lugano Convention (neither under Article 25 of the 1988 nor Article 32 of the 2007 Lugano Convention), i.e. a court of law acting in full independence and acting within proceedings that grant the parties bound by the decision the possibility to be heard, i.e. a proceeding that is 'offering guarantees of independence and impartiality and in compliance with the principle of audi alteram partem', *Pula Parking v Sven Klaus Tederahn* Case C-551/15 [2017] para 54. Even if the decision were to be considered a court-approved settlement, Article 51 of the 1988 Lugano Convention (Article 58 of the 2007 Lugano Convention) provides for court-approved settlements to be treated – for the purposes of recognition and enforcement – in the same manner as judgements.

*4.2.2 Indirect competence and Restructuring Plans*

72. In respect of the indirect competence for the recognition of Restructuring Plans, Articles 166 and 175 SPILA[73] apply (as to the non-applicability already *rationae materiae* of the Lugano Convention, see 3.5.2).

73. Since the reform of the SPILA's provisions on the recognition of foreign insolvency decisions of 2019[74], Article 166 allows for recognition of a decision (sanctioning the Plan) issued either in the state of the registered seat, or of the centre of main interest ("COMI") of the debtor. No recognition is possible in respect of a debtor company that had its registered seat in Switzerland at the time of the issuing of the decisions.

74. As to the interpretation of the COMI-criterion, which was only introduced in SPILA in 2019, the official materials refer to the COMI under Article 3 of the EU Insolvency Regulation as the point of reference for its interpretation. Under these principles, it may be assumed that a shift of COMI is legitimate if, although motivated by the restructuring, it is ultimately intended to be effective and permanent.[75]

75. In the case of a Restructuring Plan initiated at a COMI that would differ from the forum according to the choice of court in the relevant agreements (affected by the Plan), an argument could be made that the initiation of Plan proceedings at the COMI violated and 'circumvented' the choice of forum agreement in a way that would amount to an abuse of law and to an 'ordre public' violation. However, there is settled jurisprudence, at least in respect of the Lugano Convention, under which the violation of jurisdictional rules does not amount to a breach of the ordre public, but will only be examined with the test for indirect competence.[76] As seen above, insolvency proceedings are to be opened in accordance with Article 166(1), and in the case at hand the indirect competence was given

[73] Art. 175 SPILA refers to restructuring proceedings (as opposed to bankruptcy/liquidation proceedings) but submits their recognition to Art. 166 ss, i.e., to the same provisions (and conditions) applicable to the recognition of foreign bankruptcy/liquidation proceedings.

[74] See Rodrigo Rodriguez, 'Das revidierte internationale Konkursrecht des IPRG' [2019] Jusletter <https://jusletter.weblaw.ch/fr/dam/publicationsystem/articles/jusletter/2019/963/das-revidierte-inter_6e9bfd0267/Jusletter_das-revidierte-inter_6e9bfd0267_fr.pdf> accessed 13 June 2022; Rodrigo Rodriguez, 'Is Swiss international insolvency law finally embracing the Model Law?' in Jean-Luc Albert (ed) *Mélanges en l'honneur de Jean-Luc Vallens* (Joly éditions 2017) 449.

[75] The determination of a valid COMI shift by the English court is not formally binding upon the Swiss recognizing court. However, as stated above, the criteria for determining the COMI are essentially the same under Swiss law and under English law. It is therefore unlikely that the Swiss court would 'second-guess' the validity of the COMI and even reach a different conclusion.

[76] 5A_387/2016 [2016] Swiss Federal Court.

irrespective of the existence of any jurisdiction agreements which are not relevant in the case of insolvency matters.

*4.3 Necessity and extent of the recognition*

76. The recognition of a Scheme or Restructuring Plan in Switzerland is not mandatory if parties voluntarily respect the terms of the modified agreements.[77] However, recognition becomes necessary if a party decides to (or it can be advanced that such party will) enforce a claim against another party subject to the Scheme or the Restructuring Plan and argues that the Scheme or Restructuring Plan should not affect its claim, where this claim is 'located'[78] or affects assets in Switzerland. In such a situation, the recognition decision will have to be raised as a defence (in the case of a Restructuring Plan in a separate proceeding).[79] While in the case of a Restructuring Plan, the effects of recognition are strictly *inter partes*, the effects of the Restructuring Plan are, in principle, *erga omes*, and (in the case of a recognition of a foreign main proceeding) apply to all assets of the Plan debtor located in Switzerland.

**5. Conclusions**

77. According to the findings of this paper, a *Restructuring Plan* is likely to be considered (by a Swiss court, or, in this view, by most continental European courts) to be a 'composition or similar proceeding', falling under Article 1 para 2 (b) of the Lugano/Brussels instruments (and consequently, also under Articles 166 to 175 of the SPILA). It is thus not a commercial matter falling under the substantial scope of the Lugano Convention (or Articles 25-26 and 149 of the SPILA).

78. In respect of the Restructuring Plan, the consequential applicability of national law provisions on the recognition of insolvency proceedings (Art. 166 ss. SPILA) would lead to a Part 26A Plan being recognised and enforced in Switzerland (upon application to the Swiss court) under the conditions of Article 166(1)(c) SPILA, namely that the Plan company (provided it be the

[77] 140 III 379 [2014], 382 [2015] Swiss Federal Court, and 5A_267/2007 [2008] Swiss Federal Court E. 5.3.

[78] Claims that are not embodied in a security are deemed located at the residence of the creditor (enforcement debtor). If the enforcement debtor lives abroad, but the third-party debtor lives in Switzerland, the claim is considered to be located at the third debtor's residence in Switzerland (BGE 31 I 198 [1905] Swiss Federal Court E. 3 200; last BGE 137 III 625 [2011] Swiss Federal Court E. 3.1 627; BGE 140 III 512 [2014] Swiss Federal Court 515.

[79] Lukas Bopp, Commentary on Article 175 PILA in the Basel Commentary on Private International Law (4th edition Helbing Lichtenhahn 2021) N 25.

material debtor) had its registered seat or COMI in the UK.

79. In turn, a *Scheme of arrangement* is more likely to be characterized as a 'commercial matter'. Where proceedings had been initiated in the UK before 31 December 2020, but decided afterwards, recognition proceedings would still benefit from the Lugano Convention when recognition is sought in Switzerland. For Scheme proceedings initiated after that date, recognition proceedings are subject to the conditions in Article 25-27 and 149 of the SPILA. These provisions would namely require that parties bound by the Scheme have validly submitted to the jurisdiction of the UK courts.

80. The following overview shows the jurisdictional sources of law applicable in respect to the different instruments (in view of their qualification) and the consequence for the relevant jurisdictional attachment criterion, both in the period before and after 2021 (Lugano ceases to be applicable) and 2019 (reform of the SPILA, new grounds for jurisdiction accepted):

| | **Scheme** | **Restructuring Plan** |
|---|---|---|
| **Characterization** | Civil & commercial | Insolvency |
| **Legal source** | | |
| **-until 2021** | Lugano (=BXL I) | SPILA on insolvency (Art. 166 et seqq.) |
| **-since 2021/2019** | SPILA (civil & commercial obligations, Art. 149) | (New) SPILA on insolvency (Art. 166 et seqq.) |
| **Jurisdictional criterion** | | |
| **-until 2021/2019** | Irrelevant | Registered seat[80] |
| **-since 2021/2019** | Choice of forum[81] | Registered seat or COMI |

81. As a result, UK law provides for two restructuring tools that are similar, but different in aspects that are key to their characterization for the purposes of recognition. This opens the possibility for UK counsels to choose the restructuring tool also, or even mainly, on the basis of the chances of recognition abroad. Where the parties subject to a (potential) Scheme would validly submit (or have submitted) to the jurisdiction of UK courts, a Scheme stands good chances of recognition. However, where this condition is not met (for instance, one or several of the relevant instruments to be modified by a Scheme or Plan contain an exclusive choice of forum in favour of courts other than UK courts), a Restructuring Plan may be the better option, provided that the Plan company (it being the material debtor) has its COMI in the UK (or can validly shift it there).

[80] The main difference between the SPILA and recognition provisions of other – namely EU – jurisdictions is the fact that Swiss law relies mainly on the registered seat of a company (also in the context of insolvency law), while most EU countries – even in their national provisions applicable to non-EU cases – rely on COMI. Since 2019, Swiss law relies alternatively on COMI or the registered seat for the purposes of recognition.

[81] See 4.2.1.1.