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Recognition of an English Restructuring Plan in Germany

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Abstract

In 2020, English restructuring law was expanded to include restructuring plan proceedings by the Corporate Insolvency and Governance Act 2020. Since then, there has been a heated debate in both Germany and England as to whether such a plan (or the court's decision to confirm the plan) is recognisable in Germany. This article takes a recent decision by the Frankfurt Regional Court as an opportunity to argue in favour of recognition as insolvency proceedings under sec. 343 of the German Insolvency Act (InsO),[1] or alternatively as a civil court decision under sec. 328 of the Code of Civil Procedure (ZPO).[2]

1 Introduction

1. In a provisional ruling dated 22 August 2025,[3] the Frankfurt Regional Court refused to recognise in Germany a restructuring plan confirmed by the High Court under the law of England and Wales (Part 26A Companies Act 2006[4]).

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1 English translation available at https://www.gesetze-im-internet.de/englisch_inso/index.html (last accessed on 8 December 2025).

2 English translation available at https://www.gesetze-im-internet.de/englisch_zpo/index.html (last accessed on 8 December 2025).

3 Ref. 2-12 O 239/24, ZRI 2025, 934. – Similarly, LG Stuttgart RdTW 2022, 494 (juris para. 14) for a Polish procedure for out-of-court coordination and determination of a settlement for companies in crisis.

4 Available at https://www.legislation.gov.uk/ukpga/2006/46/contents (last accessed on 8 December 2025). – Introductory remarks on this topic *by Bork* in: Vogenauer (ed.), Englisches Handels- und Wirtschaftsrecht, 4th ed. 2024, chap. 8 para. 80 et seq.; *Ruiz/Hertz* in: Payne/van Zwieten (eds.), Corporate Restructuring Law in Flux, 2025, p. 21, 29 et seq. – The restructuring plan under Part 26A Companies Act 2006 differs from the scheme of arrangement under Part 26 Companies Act 2006 mainly in that, on the one hand, it requires the debtor company to be in financial difficulties and, on the other hand, it allows for a cross-class cram-down.

It essentially stated as reasons that recognition under sec. 343 InsO failed because the plan did not cover all creditors, but only some of them, meaning that it did not constitute insolvency proceedings. Nor could the plan be recognised under sec. 328 ZPO, as the necessary guarantee of reciprocity in the documentary proceedings could not be proven by an expert opinion.

2. The judgment attracted considerable national and international attention just a few days after it was handed down. Initial comments already suggest that insolvency tourism to England has been stopped.[5] However, two aspects are not being given sufficient consideration. Firstly, it is not sufficiently appreciated that this is only a provisional judgment, which is expressly based on the (admittedly erroneously assumed by the court[6]) restriction of evidence under sec. 595 (2) ZPO.[7] Secondly, it is only a first-instance judgment, which can be expected with certainty to be reviewed on appeal. From both an academic and a practical point of view, it would be highly desirable for the Federal Court of Justice to have the opportunity to comment on recognition under sec. 343 InsO and thus on an issue which – largely unnoticed by the Regional Court of Frankfurt – has been the subject of heated debate not only in the literature,[8] but also,

5 See https://www.advant-beiten.com/aktuelles/insolvenztourismus-gestoppt-erste-deutsche-entscheidung-zur-anerkennung-eines-englischen-part-26a-verfahrens-in-deutschland (last accessed on 8 December 2025).

6 See below at D.III.1.

7 Under § 592 et seq. ZPO, so-called "document proceedings" are possible where evidence can only be brought by documents, not by witnesses or experts. The judgement handed down in such proceedings is only a provisional decision which can be reversed by the same court in subsequent main proceedings (in which all types of evidence are admissible) and it can also be challenged to the Court of Appeal.

8 For recognition under § 343 InsO (analogously, if applicable), see, for example, *Bork* in: Payne/van Zwieten (eds.), Corporate Restructuring Law in Flux, 2025, chapter 10; Braun-*Ehret*, InsO, 9th ed., 2022, § 343 para. 4; Graf-Schlicker-*Bornemann*, InsO, 6th ed. 2022, § 335 para. 27; *Keller*, ZInsO 2022, 733, 736; *Madaus*, International Corporate Rescue (ICR) 2025, 198, 200 et seq.; *Piekenbrock*, ZInsO 2022, 2512, 2516 = Festschrift für Markus Gehrlein, 2022, p. 455, 464; *Thole*, ZRI 2024, 790 et seq.; *Tresselt/Lochmann* in: Hamburger Kommentar zum Restrukturierungsrecht, 4th ed. 2025, Part II, Chapter 1, para. 32a; probably also *Tashiro*, NZI 2021, Supplement 1, p. 77, 79; undecided *Sax/Berkner/Saed*, NZI 2021, 517, 519 et seq.; *Schwarz*, ZRI 2023, 478, 480; *Zehlicke/Herding/Parzinger*, ZIP 2024, 164, 168. – Of a different opinion Fridgen/Geiwitz/Göpfert-*Weissinger*, Beck'scher Online-Kommentar Insolvenzrecht, 40th ed., 1 August 2025, § 343 para. 7.4; Heidelberger Kommentar zur InsO (= HK.InsO)-*Swierczok*, 11th ed. 2023, § 335 para. 15; *Hoos/Schwartz/Schlander*, ZIP 2021, 2214, 2221; Seibt/Westpfahl-*Mankowski*, StaRUG, 2023, Appendix to § 88 StaRUG para. 192; Skauradszun/Fridgen-*Skauradszun*, Beck'scher Online-Kommentar zum StaRUG (= BeckOK.StaRUG), 13th ed., as of 1 July 2024, § 84 para. 93b, c; *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665 et seq. (English version in ICR 2024, 349 et seq./2025, 7 et seq.); cautious also *Herding/Kranz*, ZRI 2021, 123, 128; KPB-*Paulus*, InsO, as of December 2025, § 343 para. 6; *K. Schmidt/Uhlenbruck-Vallender*, Die GmbH in Krise, Restrukturierung und Insolvenz, 6th ed. 2023, para. 43.37; unclear *Schack*, Internationales Zivilverfahrensrecht, 9th ed. 2025, para. 1302.

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and above all, in the proceedings before the High Court since the provisions on the restructuring plan were incorporated into the Companies Act 2006. It is therefore worth examining this topic, especially since the following considerations can be generalised: their findings apply not only to the English restructuring plan, but to all foreign (preventive) restructuring proceedings, including those from EU Member States, provided that they are not conducted publicly and therefore do not fall under the EIR.[9]

3. Following a historical overview (B.), the text below first discusses recognition as a decision in insolvency proceedings under sec. 343 InsO (C.), and then recognition as a civil court decision under sec. 328(1) ZPO (D.).

2 Background

4. The decision of the Frankfurt Regional Court concerns – in simplified terms[10] – a company under Luxembourg law which, as a project company, is operating a large-scale real estate project in Berlin. Among other things, it had taken out a loan under German law, the repayment of which the plaintiff demanded in the amount of EUR 5 million on the basis of assigned rights in the action provisionally decided by the Frankfurt Regional Court. The defendant project company ran into financial difficulties in 2023 and therefore initiated restructuring plan proceedings under Part 26A of the Companies Act 2006 in October 2023. The plan submitted by the company was discussed in two oral hearings before the High Court,[11] approved by the creditors with a majority of 97.3% (albeit against the plaintiff's vote) and finally confirmed by the High Court.[12]

5. Since, according to established case law of the High Court,[13] such confirmation is only possible for foreign companies if the decision is also recognised with

9 For more details, see fn. 65 below.

10 The debtor in the plan proceedings was not the borrowing company ("PropCo."), but its parent company ("HoldCo."), which had guaranteed the loan claims and thus assumed joint and several liability. HoldCo. had transferred its COMI to England and was therefore subject to the jurisdiction of the High Court. The plan primarily regulated the guarantee claims and then extended its effect to all parallel claims by way of *third party releases*. This is not considered in detail here.

11 *Convening hearing* on 1 November 2023 (Mr Justice Miles), [2023] EWHC 2849 (Ch); *sanctioning hearing* on 2, 5, 6 and 7 February 2024 (Mr Justice Richards), [2024] EWHC 468 (Ch).

12 *Re Project Lietzenburger Strasse HoldCo S.à.r.l.* [2024] EWHC 468 (Ch) and [2024] EWHC 563 (Ch).

13 For example, *Re DTEK Energy BV and another (No 2)* [2021] EWHC 1551 (Ch) para. 27; *Re gategroup Guarantee Ltd.* [2021] EWHC 304 (Ch) para. 211; *Re Project Lietzenburger Strasse HoldCo S.à.r.l.* [2024] EWHC 468 (Ch) para. 112; *Re Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch) para. 59.

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sufficient probability in the relevant foreign country, two – controversial – expert opinions by German professors *Skauradszun*[14] and *Thole*[15] were submitted to the High Court. In its examination of the expert opinions, the court dealt in detail with the legal situation in Germany and ultimately concluded "*that there is a reasonable prospect of the Plan being so recognised in accordance with s343 of the InsO*".[16]

6. The plan provided for a change in the due date of the plaintiff's claim (from 28 November 2023 to 28 November 2025) and a partial subordination. The plaintiff did not want to accept this and brought an action before the Frankfurt Regional Court in document proceedings. In its provisional judgment, the court held that the loan claim was due and payable as of 28 November 2023, as the change in the due date could not be recognised by the restructuring plan.

3 Recognition pursuant to sec. 343 InsO

7. Since the defendant was insolvent until the restructuring plan was confirmed[17] and this insolvency was to be permanently remedied by the plan, it makes sense to first discuss recognition under insolvency law, which – since the EIR no longer applies in relation to the United Kingdom – is governed by sec. 343 InsO.[18] According to paragraph 1 of this provision, the opening of foreign insolvency proceedings is recognised automatically, i.e. *ex lege* and without exequatur proceedings,[19] unless the courts of the state in which the proceedings were opened do not have jurisdiction under German law or recognition would violate German public policy. According to paragraph 2, protective measures and decisions made to implement or terminate the recognised insolvency proceedings must also be recognised. It is undisputed that termination

14 Published in German in ZIP 2024, 665 et seq. (authors: *Skauradszun/Kümpel/Schröder*).
15 Published in German in ZRI 2024, 790 et seq.
16 *Re Project Lietzenburger Strasse HoldCo S.à.r.l.* [2024] EWHC 468 (Ch) para. 123 et seq., 138.
17 See *Re Project Lietzenburger Strasse HoldCo S.à.r.l.* [2024] EWHC 468 (Ch) para. 8: "*The Group failed to pay and has nowhere near enough cash to do so.*"
18 Far-fetched, however, the view expressed by *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 667 et seq., 671 et seq., that § 343 InsO cannot be considered from the outset, since a basis for authorising the recognition of preventive restructuring proceedings can only be found in the StaRUG, but is not contained therein. Nor is this an unintended regulatory gap, so that analogy must also be ruled out. Clear and accurate, on the other hand, is *Thole*, ZRI 2024, 790, 791 f.
19 On behalf of all: KPB-*Paulus* (above fn 8), § 343 para. 2, 24.

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decisions also include court confirmations of insolvency plans,[20] in this case, the sanction order of the High Court pursuant to sec. 901F, 901G Companies Act 2006. In the present case, therefore, the main issue is whether the proceedings under Part 26A of the Companies Act 2006 constitute insolvency proceedings.[21]

3.1 International standards

8. Although the application of German law is to be discussed here, it is helpful to first briefly consider what is understood internationally as insolvency proceedings.[22] The following sections examine the UNCITRAL Model Law on Cross-Border Insolvency (1.) and the European Insolvency Regulation (2.).

3.1.1 UNCITRAL Model Law

9. The UNCITRAL Model Law on Cross-Border Insolvency,[23] which has now been transposed into national law in 60 countries,[24] applies, according to the definition in Article 2 (a), to "*collective judicial or administrative proceedings in a foreign State, including interim proceedings, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of re reorganisation or liquidation*".

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20 KPB-*Paulus* (Fn.8), § 343 para. 26; Münchener Kommentar zum BGB (= MünchKomm.BGB)-*Kindler*, Volume 13, 9th edition 2025, § 343 InsO para. 38; Münchener Kommentar zur InsO (= MünchKomm. InsO)-*Thole*, Volume 3, 4th edition 2020, § 343 para. 82.

21 With regard to international jurisdiction, which must be assessed in a mirror-image manner, Art. 3 EIR, which also regulates jurisdiction in relation to third countries (CJEU, Case C-328/12 *Schmid v. Hertel*, ECLI:EU:C:2014:6 para. 17 et seq.) and is therefore also applicable in relation to the United Kingdom (BGH NZI 2023, 183 para. 18 et seq.), it must be asked whether the debtor had its centre of main interests (COMI) in England. As can be seen from the High Court's decision, the debtor's COMI had been transferred to England in good time, so that the English courts had mirror-image international jurisdiction; see *Re Project Lietzenburger Strasse HoldCo S.à.r.l.* [2024] EWHC 468 (Ch) para. 69 et seq.

22 For more details, see also *Bork*, Corporate Insolvency Law, 2nd ed. 2023, para. 1.3 et seq.; *Eidenmüller*, 92 (2018) American Bankruptcy Law Journal (ABLJ) 53 et seq.; *Jackson*, The Logics and Limits of Bankruptcy Law, 1986, p. 11; *Madaus*, 19 (2018) European Business Organisation Law Review (EBOR) 615, 620, 623 et seq.; *Mokal*, 31 (2022) International Insolvency Review (IIR), 418 et seq.; *Wessels*, 2 (2011) International Insolvency Law Review (IILR) 491 et seq.

23 United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, United Nations Publications, New York 2014, available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last accessed on 8 December 2025).

24 The implementation status is available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last accessed on 8 December 2025).

It is generally accepted that these conditions are met in the case of a restructuring plan under Part 26A of the Companies Act 2006.[25] However, two questions are important: (1) what qualifies as "insolvency" and (2) what degree of "collectivity" is required?

10. The procedure regulated in Part 26A Companies Act 2006 is a court procedure because it ends with the confirmation of the plan and thus with a court decision (section 901F(1) Companies Act 2006). Although it is regulated under company law, it is nevertheless governed by insolvency law because this criterion does not depend on the location of the regulation,[26] but on the fact that the procedure relates to debtors who are insolvent or, in any case, in serious financial difficulties.[27] This is precisely what is found in sec. 901A(2) of the Companies Act 2006, which requires that the company be in financial difficulties that threaten its existence. Insolvency and restructuring plans also serve reorganisation purposes[28] and are concluded in collective proceedings.[29] In this respect, it is noteworthy that the model law expressed early on – it was adopted in 1997 – that liquidation and restructuring are not opposites, but two ways of solving the same problem, namely overcoming the debtor's financial crisis. The fact that a plan not only regulates the legal relationships with individual creditors, but also does not always regulate those with all creditors, but often only those with individual groups of creditors, does not preclude recognition either, since according to the materials it is sufficient that the proceedings cover these groups of creditors collectively.[30] Finally, the proceedings under sec. 901C and 901F(1) of the Companies Act 2006 take place under the supervision of the High Court and thus under judicial control.

25 For details, see *Bork* (fn.8), p. 289 et seq.

26 Inaccurate, however, *Re Hydrodec Group Plc* [2021] NSWSC 755 para. 47.

27 See explicitly the materials, Guide to Enactment (fn. 23), para. 65, 73; see also *Mevorach/Walters*, 21 EBOR (2020), 855, 871: "*function carries more weight than form*".

28 Cf. sec. 901A(3)(b) Companies Act 2006: "*the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties*". See also *Re gategroup Guarantee Limited* [2021] EWHC 304 (Ch) para. 115 on Art. 1 EIR.

29 *Re Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch) para. 60; *Mevorach/Walters*, 21 EBOR (2020), 855, 871. On Art. 1 EIR, *see* also *Re gategroup Guarantee Limited* [2021] EWHC 304 (Ch) para. 110. Of a different opinion *Eidenmüller*, 92 (2018) ABLJ 53, 65 et seq., 70.

30 Guide to Enactment (fn. 23), para. 70.

3.1.2 EIR

11. The EIR also defines the term 'insolvency proceedings' in Art. 1(1). For further consideration, it is helpful to take a look at the development of the law.

a) EIR 2000

12. According to the original version of the EIR 2000, this concerned " collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator." Insolvency proceedings were, according to Art. 2 (a) EIR 2000, those collective proceedings referred to in Art. 1 (1) EIR 2000. In the course of the evaluation required by Art. 46 EIR 2000, however, it was quickly agreed that this definition no longer met modern requirements and that restructuring proceedings in particular had to be included.

b) EIR 2015

13. Recital 10 of the EIR 2015 therefore now expressly states: "The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs."

14. Article 1 EIR has been amended accordingly. The provision now reads "This Regulation shall 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 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."

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15. This cleared the way for pre-insolvency restructuring proceedings to be included in the scope of the EIR, as is now the case with the inclusion of, for example, the German StaRUG procedure or the Dutch WHOA procedure[31] in Annex A to the Regulation. It is therefore logical that restructuring plans confirmed in these proceedings must be recognised in accordance with Art. 32(1) sentence 1 EIR, even if not all creditors are affected, but only individual significant creditor groups are necessary for the restructuring.[32]

3.1.3 Conclusion on international standards

16. As a result, there can be no doubt that restructuring proceedings aimed at averting the imminent insolvency of the debtor with the aid of a restructuring plan are recognised internationally as insolvency proceedings. This is not precluded by the objective of restructuring (understood as opposed to liquidation) or by the fact that typically not all creditors are included in the plan, but only individual groups of creditors.

3.2 Interpretation of sec. 343 InsO

17. Against this background, turning to the decisive question here of what constitutes insolvency proceedings within the meaning of sec. 343 (1) InsO, the following conclusion can be drawn.

3.2.1 State of opinion

18. Case law and literature do not provide a clear picture. Referring to the explanatory memorandum to the law,[33] the Federal Court of Justice asks whether the foreign proceedings "according to domestic legal principles"[34] essentially serve the same objectives as German proceedings. For example, in a decision of 20 December 2011, it states that "foreign proceedings are not recognised without restriction, but only if they pursue approximately the same

31 Art. 369 et seq. Faillissementswet (hereinafter referred to as Fw).

32 See, for example, Cuniberti/Leandro-*Cuniberti*, The European Insolvency Regulation, 2024, para. 32.012; Graf-Schlicker-*Bornemann* (fn. 8), Art. 1 EIR para. 23, Art. 32 EIR para. 6; KPB-*Skauradszun* (fn. 8), Art. 32 EIR para. 12; Uhlenbruck-*Deppenkemper*, InsO, Volume 2, 16th ed. 2023, Art. 32 EIR para. 17.

33 Reasoned draft § 343 InsO, BT-Drs. 15/16, p. 18, 21. – Similarly, among others, Jaeger-*Mankowski*, InsO, Volume 9, 2020, § 343 para 5.

34 BGHZ 134, 79, 80 (juris para. 12).

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objectives as the proceedings provided for in the Insolvency Code (...). In addition to proceedings primarily aimed at the prompt liquidation of the debtor's assets, the objectives of insolvency proceedings formulated in sec. 1 InsO are also served by proceedings which, as in the former German composition proceedings, are intended to preserve the existence of a company despite existing grounds for insolvency, provided that these proceedings also pursue the objective of satisfying creditors (...). In the Insolvency Code, this objective is achieved by recognising such proceedings as insolvency proceedings, in which the collective satisfaction of creditors is effected not only by realising the debtor's assets and distributing the proceeds, but also by agreeing on a different arrangement in an insolvency plan, in particular for the preservation of the company (section 1 (1) sentence 1 case 2 InsO [...])."[35] The Federal Court of Justice therefore also recognises restructuring proceedings as insolvency proceedings, but this is understood to mean that the satisfaction of creditors must also be involved.

19. In the much-discussed "*Equitable Life*" decision of 15 February 2012,[36] the IV. Senate of the Federal Court of Justice refused to recognise an English *scheme of arrangement* under Part 26 of the Companies Act 2006 as insolvency proceedings because the proceedings did not require the debtor to be insolvent[37] and did not necessarily involve all creditors, but could be limited to individual classes of creditors.[38] This is remarkable because a Norwegian compulsory settlement procedure[39] and, above all, an insolvency plan procedure under Chapter 11 of the US Bankruptcy Code had previously been recognised as insolvency proceedings,[40] although the latter also does not require the debtor

35 BGH NZI 2012, 572 para. 33 (recognition of Swiss insolvency proceedings pursuant to Art. 293 et seq. SchKG; confirmed in BGH NZI 2025, 708 para. 4, 2023, 478 para. 3, 2019, 423 para. 15, ZIP 2014, 1997 para. 52 et seq. and BGH, decision of 2 April 2025 – IV ZR 49/24 – unpublished, juris para. 4); likewise BGH NJW 2012, 2113 para. 22 (no recognition of an English scheme of arrangement); BGH NZI 2009, 859 para. 7 et seq. and judgment of 13 October 2009 – X ZR 160/05 – unpublished, juris para. 7 et seq. (recognition of US Chapter 11 proceedings).

36 BGH NJW 2012, 2113 para. 21 et seq.; for more details, see, inter alia, *Bork*, ZEuP 2013, 132 et seq.; Jaeger-*Mankowski* (fn. 33), § 343 para. 23 et seq.

37 BGH NJW 2012, 2113 para. 23.

38 BGH NJW 2012, 2113 para. 24.

39 BGHZ 134, 79 (juris para. 34 et seq.).

40 BGH NZI 2009, 859 para. 8 et seq.; likewise BGH, judgment of 13 October 2009 – X ZR 160/05 – unpublished, juris para. 7 et seq.; BAGE 121, 309 para. 19 et seq.; also Jaeger-*Mankowski* (fn. 33), § 343 para. 18 et seq.

to be insolvent[41] and allows the insolvency plan to cover not all creditors, but – as can be seen from sec. 1123(a)(2) Bankruptcy Code – only individual groups of creditors.[42]

20. Two things therefore appeared to be particularly important to the Federal Court of Justice in its previous case law, which admittedly dates from before the amendment of the EIR. On the one hand, it requires that the proceedings be based on grounds for insolvency comparable to those under German law, i.e. (imminent) insolvency or over-indebtedness, although it should suffice that the debtor's assets are "presumably" insufficient to satisfy creditors.[43] On the other hand, it also requires the involvement of all creditors, at least in some restructuring proceedings.[44]

21. Other courts have followed the basic approach of the Federal Court of Justice.[45] The literature predominantly takes a more functional approach and questions the comparability of foreign proceedings with German insolvency or restructuring proceedings,[46] without this resulting in any significant differences in substance.

3.2.2 Opinion

22. It is clear from the above that case law and literature tend to take an inductive approach. The standards are unclear, a clear list of criteria is rarely provided,[47] and there is little evidence of legal methodology. However, as will be shown

41 Restructuring proceedings under Chapter 11 of the Bankruptcy Code are almost always initiated at the request of the debtor. It is therefore a voluntary procedure which, according to § 301 Bankruptcy Code (in contrast to § 303(h)(1) Bankruptcy Code for involuntary proceedings), does not require material insolvency; cf. only *Bork* (fn. 22), para. 3.18, 8.16; *Epstein*, Bankruptcy and Related Law, 9th ed. 2017, p. 290; *Epstein/Nickles/White*, Bankruptcy, 1992, § 2-2; *Tabb*, Law of Bankruptcy, 4th ed. 2016, p. 92.

42 This corresponds to international standards, cf. only *Bork* (fn. 22), para. 8.35.

43 BGHZ 134, 79, 89 (juris para. 35).

44 See also LG Frankfurt ZRI 2022, 800, 802 (for a Thai proceeding).

45 Example: BAGE 121, 309 para. 19 et seq.

46 Fridgen/Geiwitz/Göpfert-*Weissinger* (Fn.8), § 343 para. 6; Gottwald/Haas-*Kolmann/Keller*, Insolvency Law Handbook, 6th ed. 2020, § 132 para. 22; KPB-*Paulus* (fn. 8), § 343 para. 5; MünchKomm. *BGB-Kindler* (fn. 20), § 343 InsO para. 6; MünchKomm.InsO-*Reinhart* (fn. 20), before §§ 335 et seq. para. 96 et seq., 101; K. Schmidt-*Brinkmann*, InsO, 20th ed. 2023, § 335 para. 5; Uhlenbruck-*Knof*, InsO, volume 1, 16th ed. 2025, § 343 para. 7.

47 A notable exception can be found in Jaeger-*Mankowski* (fn. 33), § 343 para. 8 et seq.; for a link to the normative requirements of Article 1(1) EIR, see Graf-Schlicker-*Bornemann* (fn. 8), § 335 para. 7.

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below on the basis of the four classic criteria for construction,[48] this can certainly lead to reasonable results.

a) Philological construction (wording)

23. As is well known, the interpretation of the law begins with the wording of the norm, in this case with the word "insolvency proceedings". In a very narrow – classic – sense, this word can be understood as liquidation proceedings linked to the material insolvency of the debtor. However, this is no longer the case today. There is agreement that not only liquidation proceedings but also restructuring proceedings are covered.[49] There is also agreement that recognition is not limited to proceedings that require grounds for commencement comparable to those under German law. It is therefore not necessary to require at least "imminent insolvency" within the meaning of sec. 18 of the Insolvency Act (InsO);[50] rather, it is sufficient that the proceedings are intended to avert a risk of insolvency resulting from a financial crisis.[51] Anything else would be hardly justifiable, considering the diversity of what is understood as insolvency in Europe alone[52] and what is sufficient for the initiation of restructuring proceedings. The term "insolvency proceedings" can therefore also be understood as "insolvency management proceedings",[53] which includes averting impending insolvency.

48 For more details, see, inter alia, *Bork*, Allgemeiner Teil des Bürgerlichen Gesetzbuchs, 4th ed. 2016, para. 123 et seq.

49 For case law, see the decisions cited in fn. 35; for literature, see Jaeger-*Mankowski* (fn. 33), § 343, para. 11.

50 In view of the long forecast period of two years, this standard defines likely rather than imminent insolvency, using internationally accepted terminology that distinguishes between likely and imminent inability to pay debts, see *Bork* in: Kern/Seagon/Haghani (eds.), Aus Theorie und Praxis der Unternehmenstransformation, 2024, p. 13, 19 f.; *Bork/Veder/Schuijling*, Definition of Insolvency, 2024, para. 6.3.

51 For example, the following should suffice: "insufficiency of assets" (MünchKomm.BGB-*Kindler* [fn. 20], § 343 InsO para. 7; *Rendels/Körner*, EWiR 2009, 781, 782); "credit shock" (Jaeger-*Mankowski* [fn. 33], § 343 para. 9); "serious financial crisis that gives rise to and justifies collective action" (Graf-Schlicker-*Bornemann* [fn. 8], § 335 para. 9).

52 For details, see *Bork/Veder/Schuijling* (fn. 50), passim.

53 Similarly, Graf-Schlicker-*Bornemann* (fn. 8), § 335 para. 11; for "insolvency avoidance proceedings" also MünchKomm.InsO-*Thole* (fn. 20), § 343 para. 14.

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b) Historical construction (history of origin)

24. The reference to the EIR points to another important aspect that should be considered in the context of historical interpretation. As is well known, autonomous German international insolvency law (now Part 12 of the InsO) was not included in the original version of the InsO, but was only added to the law in 2003 – at that time as Part 11[54].[55] The reason for this was that the German government wanted to wait for the regulation at a European level before aligning German international insolvency law with it. With regard to the concept of foreign insolvency proceedings, it states that the proceedings listed in Annex A of the EIR could serve as a guide for interpretation.[56] According to general opinion, this does not mean that Annex A of the EIR would tacitly become part of sec. 343 InsO.[57] However, it does mean that, according to the intention of the legislator, proceedings corresponding to those listed there are to be recognised as foreign insolvency proceedings in case of doubt.[58]

25. It should not be overlooked that when German international insolvency law was adopted, the EIR was still limited entirely to liquidation proceedings and that restructuring proceedings, including pre-insolvency restructuring, only gained particular significance in 2015.[59] However, it cannot be concluded from this that following this development step in German law is not in line with the will of the legislator.[60] Such a static approach, which ignores modern legal developments , would lead to a fossilisation of this norm that cannot be justified methodologically. The German legislature can be trusted to be sufficiently open to the future and willing to adopt a modernised understanding, at least at the European level, that it is reasonable to assume that the current catalogue in Annex A of the EIR may also serve as a guide for those applying the law. This is all the more true given that insolvency and restructuring law is an extremely dynamic area of law, in which even the legislators of 2003 had

54 Part 12 was amended by the insertion of group insolvency law (sections 269a – 269i InsO) as a new Part 7 by the Act to Facilitate the Management of Group Insolvencies of 13 April 2017, Federal Law Gazette I, 886.

55 By the Act on the Reform of International Insolvency Law of 14 March 2003, Federal Law Gazette I, p. 345.

56 Reasoned draft § 343 InsO, BT-Drs. 15/16, p. 21.

57 *Jaeger-Mankowski* (fn. 33), § 343 para. 6.

58 See also below at fn. 75.

59 See above I.2.

60 However, see *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 670.

to anticipate further developments. There are no indications in the legislative materials that they did not want to keep pace with these developments.

26. If one follows this line of reasoning, one must also assume, with regard to the intention of the German legislature, that the inclusion of pre-insolvency (i.e. insolvency-avoidance or insolvency-management) restructuring proceedings within the scope of the EIR is also to be understood in the interpretation of sec. 343 (1) InsO.[61]

c) Systematic construction (regulatory environment)

27. If we take a closer look at the regulatory environment of sec. 343 InsO in the course of a systematic interpretation, the following areas of law deserve special mention.

28. First, it is important to briefly recall the EIR. As directly applicable secondary European law, it is part of German law, and the legislature itself has pointed out that the interpretation of sec. 343 InsO should be based on Annex A of the EIR. The necessary comments on this have been made above.[62]

29. Secondly, we must take a look at the insolvency plan procedure. As is clear from sec. 1 sentence 1 InsO, it serves to restructure the company, requires imminent insolvency in accordance with sec. 18 InsO, can also be combined with self-administration (arg. sec. 270d (1) sentence 1 InsO), and does not require the involvement of all creditors, but may be satisfied with arrangements for individual groups of creditors (arg. sec. 237 (2) InsO).[63]

30. Thirdly, in the present context, it is important to remember the procedure under the StaRUG, which also serves the purpose of restructuring, requires imminent insolvency (section 29 (1) StaRUG), is always carried out under

61 Similarly *Madaus*, ICR 2025, 198, 201; *Thole*, ZRI 2024, 790, 792.

62 According to fn. 56.

63 According to the somewhat strange provision in sec. 222 (1) sentence 2 no. 2 InsO, a group must also be formed for insolvency creditors if their rights are not to be affected, meaning that they have no voting rights pursuant to sec. 237 (2) InsO (cf. only KPB-*Spahlinger* [fn. 8 , § 222 para. 19 with further references, also to the opposing view). The purpose of this requirement is not entirely clear. In any case, it does not alter the fact that the insolvency plan can indisputably be limited to "partial collectivity", i.e. to providing legal consequences for only some of the creditors.

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self-administration and without seizure of assets,[64] and in which the restructuring plan can be limited to individual creditor groups – those affected by the plan – (sections 8 (1) sentence 2 no. 1, 20 (1) sentence 1, 45 (3) sentence 1 StaRUG). If the Federal Government has now decided to register public[65] restructuring matters for inclusion in Annex A of the EIR, this reflects the fact that Germany considers such proceedings to be insolvency proceedings within the meaning of Art. 2 No. 4 EIR, which fulfil the requirements of Art. 1 EIR. In view of this, the system requires that foreign proceedings with comparable characteristics also be regarded as insolvency proceedings within the meaning of sec. 343 InsO.[66]

d) Teleological interpretation

31. If one asks about the meaning and purpose of the provision, one cannot come to any other conclusion, even if the teleology of sec. 343 InsO is not immediately apparent. The best way to approach it is from the perspective of the principles of international insolvency law. Of the many principles,[67] the principle of universality, the principle of mutual trust between states, and the principle of efficiency are particularly relevant in the present context.

32. The principle of universality means that national insolvency proceedings should have global effect as far as possible. This objective is particularly supported by sec. 343 InsO,[68] because this provision is precisely about attributing domestic effect to foreign proceedings. This objective must not be undermined by interpreting the concept of (recognisable) foreign insolvency proceedings narrowly and, as it were, "through German eyes".

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64 See also Article 5(1) of Directive (EU) of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on debt discharge and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive (EU) 2017/1132 (Restructuring and Insolvency Directive), OJ L 172/18 of 26 June 2019.

65 According to Art. 1(1) EIR, only public proceedings may be included in Annex A. However, it cannot be concluded from this that these proceedings would no longer be insolvency proceedings if they were conducted in private. A proceeding does not lose its character as an insolvency proceeding simply because it takes place "behind closed doors". Therefore, this characteristic is disregarded in the following.

66 Similarly, *Thole*, ZRI 2024, 790, 793.

67 For details, see *Bork*, Principles of Cross-Border Insolvency Law, 2017, Chapters 2-5; also *Bork*, Festschrift für Hanns Prütting, 2018, p. 613 et seq.; for general information on the principles of insolvency law, see further *Bork/Veder*, Harmonisation of Transactions Avoidance Laws, 2022, para. 2.1 et seq.

68 Jaeger-*Mankowski* (fn. 33), § 343 para. 3; KPB-*Paulus* (fn. 8), § 343 para. 2; MünchKomm.InsO-*Thole* (fn. 20), § 343 para. 1; *Paulus*, DStR 2005, 334, 339; Uhlenbruck-*Knof* (fn. 46), § 343 para. 4.

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33. This can only be said to a limited extent for the principle of mutual trust between states. This principle is a cornerstone of the EIR[69] for EU Member States, but following guidelines from the European Court of Justice,[70] the Federal Court of Justice has clearly stated that this principle does not apply here in relation to third countries in general and the United Kingdom in particular.[71] However, this does not mean that it no longer plays any role at all in the question of whether an English legal act is to be recognised as insolvency proceedings in Germany.[72] However, recognition cannot be refused "blindly" because mutual trust is not institutionalised through EU membership. Rather, taking into account the high standards of the rule of law that exist in the United Kingdom – unlike in some other countries – and which can certainly inspire confidence, it must be justified in each individual case why a particular procedure is not accepted as insolvency proceedings.

34. In any case, the principle of efficiency is particularly relevant. In the government draft on which the current Part 12 of the InsO is based, it has been made clear in various places that autonomous German international insolvency law also aims to enable the effective administration of foreign insolvency proceedings.[73] This does not obviate the need to determine whether the proceedings in question are insolvency proceedings at all. However, it does require that this determination is not made in a manner and by applying standards that call into question any efficiency. This is precisely why the German legislature opted for automatic recognition with only a few and, moreover, very high hurdles for refusal of recognition.[74]

35. Against this background, there is agreement that the principle of interpretation in favour of recognition can be inferred from sec. 343(1) InsO. This is because the fact that foreign insolvency proceedings are automatically recognised and recognition is only refused in the absence of international jurisdiction and in

69 See, for example, EIR, Recital 65; also CJEU, Case C-341/04 – *Eurofood*, ECLI:EU:C:2006:281, para. 39; Case C-723/20 – *Galapagos BidCo. Sàrl*, ECLI:EU:C:2022:209 para. 35; Case C.444/07 – *MG Probud Gdynia sp. z.o.o.*, ECLI:EU:C:2010:24 para. 27 f.

70 CJEU, Case C-723/20 – *Galapagos BidCo. Sàrl*, ECLI:EU:C:2022:209 para. 39.

71 BGH ZRI 2023, 101 para. 46 et seq. = NZI 2023, 183 with note by *Bork*.

72 However, see *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 670 f.

73 General justification RegE Part 11 InsO, justification RegE § 343 InsO, justification RegE § 347 InsO, BT-Drs. 15/16, p. 12, 21, 23.

74 See above C. before I.

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the event of a violation of public policy also means that, when interpreting the term "insolvency proceedings", it must be assumed in case of doubt that the proceedings are eligible for recognition.[75]

3.3 Recognition of a restructuring plan

36. If the above considerations are applied to the English restructuring plan procedure under Part 26A of the Companies Act 2006 (which is understood as insolvency proceedings in England itself,[76] although this is of course not binding on German courts), there can be no serious doubt that this is an insolvency proceeding within the meaning of sec. 343 (1) InsO.

3.3.1 Insolvency

37. According to sec. 901A(2) of the Companies Act, this procedure requires that "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". It therefore concerns financial difficulties that threaten the company's existence and thus a situation in which insolvency is likely[77] and is to be eliminated or prevented by the restructuring plan (section 901A(3)(b) Companies Act 2006). It can therefore be described without further ado as insolvency management or avoidance proceedings.[78]

38. In this respect, English law is similar to continental legal systems,[79] not least to French law, which in Art. 620-1 (1) sentence 1 Code de Commerce merely

75 Graf-Schlicker-*Bornemann* (fn. 8), § 335 para. 7; *Jaeger-Mankowski* (fn. 33), § 343 para. 5; MünchKomm. BGB-*Kindler* (fn. 20), § 343 para. 6; *Rendels/Körner*, EWiR 2009, 781, 782; *Thole*, ZRI 2024, 790, 791.

76 *Re gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) para. 100, 104 et seq.; subsequently also *Re Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch) para. 60; *Re Cineworld Cinemas Ltd* [2024] EWHC 2475 (Ch) para. 110. – This also follows from the fact that the English legislature has reserved certain legal consequences for insolvency proceedings, in which it has also included the restructuring plan procedure; see sec. A15 Insolvency Act 1986 for the moratorium; sec. 233B(2)(g) Insolvency Act 1986 for *ipso facto* clauses.

77 See also *Re AGPS Bondco Plc* [2024] EWCA Civ 24 para. 133: "financial difficulties" mean that the company "may not have sufficient assets to pay everyone in full "; similarly *Re gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) para. 16: "the Company and the Group are in serious financial difficulties, which means that, absent the restructuring, the Bondholders would receive only a fraction of their debts in the inevitable insolvency proceedings that would follow ".

78 See above at and in fn. 53.

79 See also *Ruiz/Hertz* (fn. 4), p. 54, who, however, consider the English requirements for entering into the procedure to be somewhat more flexible, partly because they can also be met (as in the present

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requires that the debtor be in difficulties that it is unable to overcome (*difficultés qu'il n'est pas en mesure de surmonter*) for the restructuring procedure of the *procédure de sauvegarde*. If this procedure is recognised as an insolvency procedure within the meaning of Article 2(4) of the EIR for Germany with effect from its inclusion in Annex A to the EIR, then there is no reason to decide differently for the restructuring plan.[80]

39. A look at the German StaRUG confirms this. Just like the StaRUG procedure,[81] the restructuring plan procedure is an instrument for eliminating likely (imminent) insolvency, which is intended to prevent insolvency and over-indebtedness.[82] As a pre-insolvency restructuring procedure in this sense, it can therefore be understood without further ado as insolvency proceedings within the meaning of sec. 343 InsO. After all, if German law regards the StaRUG procedure as insolvency proceedings, it cannot proceed differently in the case of the restructuring plan.

40. The fact that the restructuring plan presupposes "financial difficulties" and thus the likelihood of material insolvency distinguishes it fundamentally from the scheme of arrangement under Part 26 of the Companies Act 2006, which can also be used as a restructuring instrument in insolvency cases (insolvent scheme of arrangement), but which is also available outside of insolvency (solvent scheme of arrangement).[83] Therefore, nothing can be inferred from the decision of the Federal Court of Justice of 15 February 2012 in this regard, as it concerned a solvent scheme of arrangement.[84] On the other hand, the

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case, see above in fn. 17) when insolvency has already occurred.

80 It is undisputed that the Part 26A proceedings could be included in Annex A if the United Kingdom were still a member of the EU. This was not the case with *the scheme of arrangement*, which the English government never notified for inclusion in Annex A, presumably because it itself assumed that this was not (necessarily) an insolvency proceeding.

81 Sec. 29 (1) StaRUG. For more details, see II.2.c. above.

82 The main similarities between the two procedures can be summarised as follows: restructuring purpose (§ 29 (1) sentence 1 StaRUG/sec. 901A(3)(b) Companies Act 2006), initiation before material insolvency occurs (§ 29 (1) StaRUG/sec. 901A(2) Companies Act 2006), self-administration and no seizure of assets (for StaRUG, see above at fn. 64 /for England, see *Ruiz/Hertz* [fn. 4], p. 21), restriction of the restructuring plan to individual creditor groups possible (§§ 8 (1) sentence 2 no. 1, 20 (1) sentence 1, 45 (3) sentence 1 StaRUG/sec. 901A(3)(a) Companies Act 2006), *cross-class cram-down* possible (§ 26 StaRUG/sec. 901G Companies Act 2006), court confirmation required (§ 60 StaRUG/sec. 901F Companies Act 2006), creditor protection through creditors' best interest test (§§ 26 (1) No. 1, 64 (1) sentence 1 StaRUG/sec. 901G(3) Companies Act 2006) and absolute priority rule (§ 27 *StaRUG/Re AGPS Bondco Plc* [2024] EWCA Civ 24 para. 159 et seq.).

83 *Re AGPS Bondco Plc* [2024] EWCA Civ 24 para. 7.

84 BGH NJW 2012, 2113 para. 23 et seq.

recognition of the restructuring plan procedure in Germany would fit in well with the recognition of the Chapter 11 procedure,[85] as the latter does not require any form of insolvency at all.[86]

41. As a result, the restructuring plan procedure is sufficiently linked to the insolvency of the company, so that this aspect of sec. 343 InsO is satisfied.[87]

3.3.2 Collectivity

42. In the *Equitabe Life* decision, the Federal Court of Justice refused to recognise the solvent scheme of arrangement, among other things, because it did not include all of the company's creditors; the composition plan was not a comprehensive settlement with all creditors and therefore, in the absence of collective satisfaction, it was not a comprehensive and thus not an insolvency proceeding.[88] This argument could also be applied to the recognition of a restructuring plan,[89] as this too may be limited to the legal relationships with individual groups of creditors in accordance with sec. 901A(3)(a)(i) of the Companies Act 2006. However, this approach can now be considered outdated.

43. It was not correct even at that time, because the concept of collective proceedings essentially serves to distinguish them from individual enforcement proceedings,[90] which is certainly not the case in Part 26A of the Companies Act 2006, and because the insolvency plan proceedings under sec. 217 et seq. InsO do not involve all creditors either. Although all creditors must be divided into groups in the insolvency plan,[91] the insolvency plan does not have to provide for any interference with the rights of creditors for all creditor groups, and creditors who are not affected therefore have no voting rights at the creditors' meeting (sec. 237 (2) InsO). Even the German insolvency plan procedure therefore does not provide for a "comprehensive arrangement for all creditors", but is content with a "partial collectivity". It cannot be argued that a 100% quota is provided for creditors who are not affected, so that they too are included in the

85 References above in fn. 40.
86 For more details, see above in fn. 41.
87 There seems to be broad agreement on this; see, for example, *Hoos/Schwartz/Schlander*, ZIP 2021, 2214, 2221; *Keller*, ZInsO 2022, 733, 736; *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 669.
88 BGH NJW 2012, 2113 para. 24.
89 Indeed – but far too conceptual – *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 669 f.; also *Hoos/Schwartz/Schlander*, ZIP 2021, 2214, 2221.
90 Correct *Thole*, ZRI 2024, 790, 793.
91 See above fn. 63.

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overall arrangement, because this is also the case in proceedings such as the English restructuring plan, which only require groups for affected creditors.

44. Collective proceedings now also include the German restructuring plan proceedings under the StaRUG. This is because, pursuant to sec. 8 (1) sentence 2 no. 1, 20 (1) sentence 1 and 45 (3) sentence 1 StaRUG, only those "affected by the plan" participate in these proceedings from the outset; no group is formed for those whose rights remain unaffected and who thus receive a 100% quota in economic terms. The same applies pursuant to sec. 1123(a)(2) of the Bankruptcy Code, the Federal Court of Justice had no problems with "partial collectivity" in Chapter 11 proceedings[92] – quite rightly, since it is not important that the plan covers all creditors as a collective, but only that it subjects the creditors grouped together to a collective arrangement.

45. In its Chapter 11 ruling, however, the Federal Court of Justice suggested that the overall regulation results from the automatic stay affecting all creditors (sec. 362 Bankruptcy Code). However, such a respite to secure the negotiation process is also permitted under German (sec. 49 ff. StaRUG), Dutch (Art. 376 Fw) and English law (sec. A1 ff. Insolvency Act 1986), among others.[93] The fact that these moratoriums do not come into effect automatically (by operation of law) but only upon application, and that they do not necessarily apply to all creditors but only to those against whom it is necessary, is in line with the modern understanding of a reduced restructuring law limited to the necessary measures.[94] That restructuring law here provides for a reduction to the least intrusive measures possible in accordance with the principle of proportionality cannot mean that it therefore loses the character of insolvency proceedings.

46. Overall, recourse to "partial collectivity" must be regarded as an outdated view.[95] Since the amendment of the EIR in 2015 at the latest, restructuring plan proceedings in which only individual groups of creditors are involved must also be classified as insolvency proceedings within the meaning of sec. 343 InsO from the point of view of collectivity.[96]

92 BGH NZI 2009, 859 para. 11.
93 For more details, see *Bork*, Festschrift für Haimo Schack, 2022, p. 1048 et seq.
94 See also Art. 6(3) of the Restructuring and Insolvency Directive.
95 Similarly, *Piekenbrock*, ZInsO 2022, 2512, 2516.
96 *Keller*, ZInsO 2022, 733, 736; *Madaus*, ICR 2025, 198, 201 f.; *Piekenbrock*, ZInsO 2022, 2512, 2516; *Thole*, ZRI 2024, 790, 793.

3.4 Conclusion on recognition pursuant to sec. 343 InsO

47. Overall, it can therefore be concluded that the English restructuring plan procedure under Part 26A of the Companies Act 2006 is an insolvency procedure recognisable under sec. 343 InsO.

4 Recognition under sec. 328 ZPO

48. Now that it should be clear that the restructuring plan must be recognised under sec. 343 InsO, the considerations regarding recognition under sec. 328(1) ZPO can be shorter. It should be noted at the outset that the recognition provisions of civil procedure law are not really suitable for restructuring proceedings. There is neither a plaintiff nor a defendant here, nor is there any application for payment. Instead, there are a large number of parties involved, in particular the company to be restructured, its shareholders, and often a very heterogeneous group of creditors. The bilateral situation of civil proceedings (in which there are always only two sides, even with a large number of interveners and co-litigants) is not really suited to this constellation of diverse and conflicting interests.

49. Nevertheless, if the restructuring plan of the planning company is not regarded as insolvency proceedings, it will be possible to accept the plan as a request for the consent of the creditors to this plan. In any case, this somewhat unnatural classification does not mean that, if sec. 343 InsO is rejected, sec. 328 ZPO must also be declared inapplicable.[97] Rather, it must be recognised that the two standards complement each other.[98] The recognition of restructuring decisions must be carried out either in accordance with sec. 343 InsO or sec. 328 ZPO, because in any case the sanction order is a civil court decision. It was issued either in "insolvency proceedings" or in "civil proceedings"; *tertium non datur*. It is therefore consistent for the Federal Court of Justice to have assumed adversarial proceedings for the scheme of arrangement in the *Equitable Life* decision after refusing to classify it as insolvency proceedings.[99] Nothing else can apply to the restructuring plan.[100]

97 However, see *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 673.

98 The same must apply here as for the relationship between the EIR and the Brussels Ibis Regulation according to Art. 1(2)(b) Brussels Ibis Regulation.

99 BGH NJW 2012, 2113 para. 26 ("adversarial features").

100 See also *Hoos/Schwartz/Schlander*, ZIP 2021, 2214, 2221.

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50. In other words, if one advocates a narrow interpretation of sec. 343 InsO, one must, at the same time, opt for a broad interpretation of the rules of civil procedure. This is a recurring problem, because the grounds for recognition under international civil procedure law are all formulated for adversarial proceedings and regularly exclude insolvency proceedings from their scope because they do not fit in with them.[101] These rules – which are only discussed here as a fallback option – can therefore only be applied if, even when interpreting them autonomously, one takes the view that restructuring plan proceedings are not insolvency proceedings but civil proceedings within the meaning of these provisions.

51. Against this background, the following sections examine whether these are adversarial proceedings (I.), whether the confirmation of a restructuring plan constitutes a judgment within the meaning of sec. 328 ZPO (II.), and whether reciprocity is guaranteed (III.).

4.1 Adversarial proceedings

52. Sec. 328 (1) ZPO concerns the recognition of judgments rendered in civil proceedings. The provision therefore aims at adversarial proceedings. Although restructuring proceedings are not typical two-party proceedings, they can very well be adversarial, for example when there is a dispute about the correct valuation of company shares, the hypothetical quota in an alternative insolvency proceeding to be examined, or the correct formation of groups. The pros and cons are discussed just as intensively here as in a typical civil proceeding. Therefore, restructuring proceedings can also be regarded as adversarial proceedings.[102]

4.2 Judgment

53. If one agrees with this, the sanction order must also be classified as a "judgment" within the meaning of sec. 328 ZPO.[103] The term is to be interpreted

101 See, in addition to Art. 1(2)(b) Brussels Ibis Regulation, also Art. II(2) of the German-British Agreement (below III.3.) and Art. 2(2)(e) Hague Convention (below III.4.).

102 This is confirmed, incidentally, by the fact that the High Court considers general civil procedure law to be applicable in Part 26A proceedings; cf. *Re Chaptre Finance plc* [2024] EWHC 2908 (Ch) para. 76 et seq.

103 *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 673 et seq., but only because of the (alleged) lack of adversarial character; see D.I. above.

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broadly and covers all final civil law decisions on the merits.[104] The sanction order can easily be subsumed under this. If one therefore affirms the adversarial procedure, then a plan confirmation can also be regarded as a "judgment" within the meaning of sec. 328 ZPO.[105]

4.3 Guarantee of reciprocity

54. An essential prerequisite for recognition in the present case is the guarantee of reciprocity, sec. 328 (1) No. 5 ZPO.

4.3.1 Examination in documentary proceedings

55. In the decision discussed here, the Regional Court of Frankfurt held that sec. 595 (2) ZPO prevented it from determining English law by means of expert opinion in documentary proceedings. However, this is untenable in terms of procedural law. Sec. 595 (2) ZPO does not apply to the determination of foreign law, which is governed solely by sec. 293 ZPO.[106] However, the Regional Court of Frankfurt believes that this does not apply to the question of mutual guarantee and refers to a decision by the Federal Court of Justice,[107] which discusses the burden of proof and presentation for the guarantee of reciprocity. The Frankfurt Regional Court concludes from this that the guarantee of reciprocity is not a question of law but a question of fact, because the actual practice of foreign courts is decisive for determining the guarantee of reciprocity. In fact, the Federal Court of Justice has consistently ruled[108] that foreign law must be determined *ex officio* and that therefore the principles of the burden of presentation and proof do not apply to sec. 293 ZPO. However, this does not help in the present case. This is because not only in the case of sec. 328 (1) No. 5 ZPO, but also in the case of sec. 293 ZPO, the German judge must determine the foreign law as it actually applies abroad; he or she must examine the law

104 See only Münchener Kommentar zur ZPO (= MünchKomm.ZPO)-*Gottwald*, 7th ed. 2025, § 328 para. 61; Musielak/Voit-*Stadler*, ZPO, 22nd ed. 2025, § 328 para. 5; *Schack* (fn. 8), para. 960; Stein/Jonas-*Roth*, ZPO, vol. 5, 23rd ed. 2015, § 328 para. 54.

105 See also *Hoos/Schwartz/Schlander*, ZIP 2021, 2214, 2217; *Madaus*, ICR 2025, 198, 201 f.; *Thole*, ZRI 2024, 790, 794. – Similarly, the Federal Constitutional Court has regarded the confirmation of a German insolvency plan as an act of the judiciary, not the executive, BVerfG NZI 2020, 1112 para. 49.

106 See, for example, BGH NJW-RR 1997, 1154; MünchKomm.ZPO-*Heiß* (fn. 104), § 595 para. 4; MünchKomm.ZPO-*Prütting* (fn. 104), § 293 para. 15; Musielak/Voit-*Voit* (fn. 104), § 595 para. 7; Stein/Jonas-*Berger*, ZPO, Volume 6, 23rd edition 2018, § 595 para. 12.

107 BGHZ 141, 286, 301 f. (juris para. 42).

108 Most recently BGH NJW-RR 2022, 1441 para. 24; 2008, 586 para. 37.

as a whole, as it is expressed in case law and legal doctrine and applied in practice.[109] This applies all the more if foreign law – as in England – is strongly influenced by case law, and is not a special feature of sec. 328 (1) No. 5 ZPO. Rather, the circle is closed when one recognises that the determination of the – in this sense: factual – guarantee of reciprocity is also made in accordance with sec. 293 ZPO.[110]

4.3.2 Standard

56. Reciprocity is guaranteed if the foreign court would recognise a German decision of the same content on the same facts in comparable proceedings.[111] The examination of sec. 328 (1) No. 5 ZPO must therefore be based on the factual findings of the foreign judgment to be recognised.[112] In the present case, this means that it must be examined whether an English court would recognise a German restructuring plan that provides for interventions in loan claims subject to German law and has been confirmed by a German restructuring court. The test is not whether an English court would confirm a plan that regulates claims subject to *English* law. This is because in the case at hand, the facts of which must be taken as a basis for applying sec. 328(1)(5) ZPO, the claims were governed by German and not English law.

57. English courts are – subject to international jurisdiction and the rule in *Gibbs*, which is discussed in more detail below and is not relevant here – generally willing to recognise foreign restructuring plans, in particular those confirmed in Chapter 11 proceedings.[113] Even if this has not yet been decided, there can be no doubt against this background that a plan confirmed in German StaRUG proceedings would generally also be recognised in the United Kingdom.

109 BGH NZI 2016, 93 para. 15; NJW 2014, 1244 para. 15; 1992, 3106 f. (juris para. 9); Beck-online Commentary on the ZPO (= BeckOK.ZPO)-*Bacher*, 57th ed., as of 1 July 2025, § 293 para. 18; MünchKomm. ZPO-*Prütting* (fn. 104), § 293 para. 17.

110 BGHZ 22, 24, 26; *Mankowski*, IPRax 2015, 410, 412; MünchKomm.ZPO-*Gottwald* (Fn.104), § 328 para. 139; *Stein/Jonas-Roth* (Fn.104), § 328 para. 125.

111 *Martiny*, Handbook of International Civil Procedure Law, Vol. III/1, 1984, para. 1206.

112 BGH NJW 1980, 529, 531; Stein/Jonas-*Roth* (fn. 104), § 328 para. 106; Zöller-*Geimer*, ZPO, 35th ed. 2025, § 328 para. 269.

113 See, for example, UK *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; *Re Videology Ltd* [2018] EWHC 2186 (Ch); in principle also *Rubin v Eurofinance SA* [2012] UKSC 46.

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4.3.3 German-British Convention of 14 July 1960

58. Mutuality is always guaranteed if there is an agreement between Germany and the other participating state stipulating that civil court decisions must be recognised.[114] In the present context, the Convention between the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland for the mutual recognition and enforcement of judgments in civil and commercial matters of 14 July 1960[115] must be taken into account. Pursuant to Art. 70(1) of the Brussels I^{bis} Regulation, this Convention continued to apply even during the United Kingdom's membership of the EU and had its own – albeit small – scope of application.[116] Following Brexit, it is once again fully applicable.[117]

59. When applying the Convention, it should first be noted that, according to its Art. II (1), only higher court decisions can be recognised, which, according to the list in Art. I (2) (b), also includes those of the High Court.[118] It should then be taken into account that, according to Art. II (2) of the Convention, it does not apply to bankruptcy proceedings. From this perspective, it can therefore only be applied if the term "bankruptcy proceedings" is understood in the same way as "insolvency proceedings" in sec. 343 InsO and the proceedings under Part 26A of the Companies Act 2006 are thus assigned to civil proceedings rather than insolvency law.[119] Finally, recognition is not automatic but must be granted by the court in whose proceedings recognition is relevant.

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114 *Martiny* (fn. 111), para. 1270; MünchKomm.ZPO-*Gottwald* (fn. 104), § 328 para. 141; Stein/Jonas-*Roth* (fn. 104), § 328 para. 118. – One could also argue that these agreements are independent grounds for recognition, to which § 328 ZPO takes a back seat. This argument is not pursued here.

115 Federal Law Gazette 1961 II, 302 with implementing law of 28 March 1961 (Federal Law Gazette I, 301).

116 This mainly concerned disputes under inheritance law, which were excluded from the scope of application of the Brussels Ibis Regulation pursuant to its Art. 1(2)(f); see only *Schütze*, IPRax. 2022, 461, 462; Stein/Jonas-*Roth* (fn. 104), § 329 para. 42; *Steinbrück/Lieberknecht*, EuZW 2021, 517, 523.

117 For details, see *Dickinson*, IPRax. 2021, 213, 217 f.; Geimer/Schütze/Hau-*Vorpeil*, Internationaler Rechtsverkehr, as of March 2025, Vol. IV, B II, 701 p. 9 and Vol. VI, 1156, p. 25 f., 28 f.; *Hau*, MDR 2021, 521, 524 para. 12; *Herding/Kranz*, ZRI 2021, 123, 128 fn. 152; *Hess*, IPRax. 2016, 409, 413 f.; *Keller*, ZInsO 2022, 733, 737; *Madaus*, ICR 2025, 198, 203; *Mankowski*, EuZW 2020, special edition Brexit, p. 3, 11; MünchKomm.ZPO-*Gottwald* (fn. 104), § 328 para. 51; *Schack* (fn. 8), para. 149; *Schütze*, IPRax. 2022, 461, 462; *Steinbrück/Lieberknecht*, EuZW 2021, 517, 523; *Sturm/Schulz*, ZRP 2019, 71, 72. – Opposing *Lutzi/Ungerer* in: Vogenauer (fn. 4), chap. 10 para. 12; *Rühl*, JZ 2017, 72, 80 f.; *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 676 f.; *Sonnentag*, The consequences of Brexit for private international law and civil procedure law, 2017, p. 91 et seq.; *Ungerer*, NJW 2021, 1270, 1272.

118 The Supreme Court of Judicature referred to in the agreement, which was established by the Supreme Court of Judicature Act 1873 (36 & 37 Vict. Ch. 66), historically consisted of the High Court and the Court of Appeal, which are therefore both mentioned in the parenthetical addition to the definition.

119 See also fn. 101 above.

60. However, if this approach is taken, the obligation to recognise arises from Art. III (1) of the Convention, provided that none of the grounds for refusal specified therein apply. In particular, international jurisdiction as specified in Art. IV must be established (Art. III (1) (a) of the Convention).[120]

4.3.4 Hague Convention on Recognition and Enforcement

61. The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Hague Convention) should also be considered.[121] According to Article 16, it is applicable if it was in force between the State of origin and the requested State at the time the proceedings were instituted in the State of origin. It entered into force on 1 September 2023 in relation to the EU and its Member States (Article 216(2) TFEU) and on 1 July 2025 in relation to the United Kingdom.

62. This means that, although it cannot be used as a basis for recognition in the present case, it can be used to guarantee reciprocity. This is because sec. 328(1) (5) ZPO does not depend on the legal situation at the time the decision to be recognised was issued, but on the legal situation at the time of the last oral hearing in the German recognition proceedings.[122] If, as in this case, the legal situation becomes more favourable to recognition between these two points in time, this must be taken into account with regard to the guarantee of reciprocity.

63. The Hague Convention concerns the recognition of decisions in civil and commercial matters (Art. 1 para. 1). Exceptions are "insolvency, composition, resolution of financial institutions, and analogous matters" (Art. 2 (1) (e)), so that here too a decision must be made between classification as adversarial proceedings and classification as collective proceedings.[123] If collective proceedings are chosen, the Hague Convention cannot be applied.[124] Otherwise, it may provide the correct basis for recognition.

120 See fn. 21 above.
121 The text can be found, inter alia, in the Official Journal of the European Union L 187 of 14 July 2022, p. 4 et seq.
122 BGHZ 22, 24, 26 et seq.; MünchKomm.ZPO-*Gottwald* (fn. 104), § 328 para. 136; Stein/Jonas-*Roth* (fn. 104), § 328 para. 35, 126.
123 See above under fn. 101.
124 *Madaus*, ICR 2025, 198, 203.

64. However, on closer inspection, it becomes apparent that a set of rules formulated for adversarial proceedings is not really suitable for restructuring proceedings. According to Art. 5 (1) Hague Convention, recognition requires that one of the cases specified therein be present. Insofar as relevant here, either the person against whom recognition is to take place must have had their habitual residence or principal place of business in the state of origin (in this case, England), or they must have been the plaintiff (a term that does not apply to restructuring plans). Alternatively, the defendant (which, according to English understanding, is any creditor included in the plan[125]) must have had at least one establishment or branch in the state of origin, or must have submitted to the jurisdiction of the courts in the state of origin, or must have appeared before them without objection. Alternatively, it is sufficient if the place of performance was in the state of origin or if the claim was secured in the state of origin. In individual cases, one or more of these conditions may be met. However, given these limitations, the Hague Convention is clearly not suitable as a general basis for the recognition of restructuring plans. This shows once again that restructuring proceedings in international civil procedure law are to be classified as collective proceedings and are subject to the national recognition regime for insolvency proceedings.

4.3.5 Relevance of the rule in Gibbs

65. When it comes to the recognition of an English restructuring plan in Germany, the rule in *Gibbs* is repeatedly invoked under the aspect of "guaranteeing reciprocity".[126] This rule of English international recognition law dates back to the 1890 decision in *Gibbs v Société Industrielle de Métaux*,[127] in which a French discharge of debt was denied recognition in England because the underlying claim was subject to English law. The legal principle derived from this decision, which is still applied in England today, can be summarised as follows: English courts do not automatically recognise a discharge resulting from foreign insolvency proceedings which claim universal validity. Rather, the discharge is

125 *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 para. 37 f.; *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) para. 31; *Re Pizza Express Financing 2 plc* [2020] EWHC 2873 (Ch) para. 29; *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) para. 61 f.; *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch) para. 51; *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch) para. 58 et seq.

126 For example, *Hoos/Schwartz/Schlander*, ZIP 2021, 2214, 2221; *Keller*, ZInsO 2022, 733, 737; *Skauradszun/Kümpel/Schröder*, ZIP 2024, 665, 674 f.; *Thole*, ZRI 2024, 790, 794.

127 *Gibbs v Société Industrielle de Métaux* (1890) 25 Q.B.D. 399; generalised in: Collins/Harris (eds.), Dicey, Morris & Collins on the Conflict of Laws, 16th ed. 2023, Rule 211.

governed by the law applicable to the debt. If the debt is subject to the law of the country in which the insolvency proceedings took place, the discharge is recognised.[128] If, on the other hand, the liability is subject to another law, in particular English law, English courts will recognise the discharge only if the creditor has participated in the foreign insolvency proceedings (so-called submission to jurisdiction),[129] for which, under English law, participation in the vote is sufficient, for example.[130]

66. Even if this legal principle cannot be completely disregarded in the context of sec. 328(1)(5) ZPO,[131] the rule in *Gibbs* would not preclude the recognition of a (mirror image) decision in England in the present case. This is because, firstly, the underlying claims are subject to German law[132] and, secondly, the German creditor agreed to the English restructuring proceedings and actively voted against the restructuring plan there. If all this had taken place in German StaRUG proceedings, the rule in *Gibbs* would not prevent the recognition in England of the restructuring plan confirmed by the German restructuring court, even if, unlike in this case, the restructured claims were subject to English law, so that reciprocity is also guaranteed in this respect.[133]

128 *Ellis v M'Henry* (1871) L.R. 6 C.P. 228; *Potter v Brown* (1804) 102 E.R. 1016; *Wight v Eckardt Marine GmbH* [2003] UKPC 37.

129 Fundamental *Gibbs v Société Industrielle de Métaux* (1890) 25 Q.B.D. 399; confirmed, inter alia, in *Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94 and 95; *Joint Administrators of Heritable Bank plc v The Winding-Up Board of Landsbanki Islands hf* [2013] UKSC 13; *National Bank of Greece and Athens SA v Metliss* [1958] A.C. 509, 523; *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ. 2802 para. 57; *Wight v Eckardt Marine GmbH* [2003] UKPC 37.

130 *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ. 2802 para. 12.

131 However, *Thole*, ZRI 2024, 790, 794 argues that the only thing that matters is whether the foreign law is fundamentally recognisable and unobjectionable under the rule of law.

132 See above D.III.2.

133 Similarly BGHZ 59, 116, 122 f. for the French jurisdiction privilege under Art. 15 Code Civil which provides that a French national can only be brought before a court in France, unless they have waived this privilege, which is possible, for example, by acting in the foreign proceedings.

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67. It can therefore be concluded that restructuring proceedings under Part 26A of the Companies Act 2006 are insolvency proceedings within the meaning of sec. 343(1) sentence 1 InsO and that the sanction order of the High Court is a decision within the meaning of sec. 343(2) InsO. The objections raised against this, primarily from the perspective of (partial) collectivity, are based on an outdated view that has long been superseded internationally and are not convincing. In view of this, recourse to sec. 328 (1) ZPO is no longer necessary, but would in principle also lead to recognition.

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