Feature

KEY POINTS

- English schemes of arrangement were used successfully in 2014 to restructure the debts of two French companies.
- Schemes can, in appropriate circumstances, provide an alternative to French *sauvegarde* proceedings where there is a sufficient connection with England.
- There are various routes to obtaining recognition of schemes in the French courts.

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"*La scheme à la française*": a new restructuring tool for French debtors

This article explains that French debtors can now use English schemes of arrangement, discusses the recognition of schemes in France and outlines the issues to consider when choosing between an English scheme and a French safeguard proceeding.

Last year was a prolific year for the French restructuring legal landscape. On 1 July 2014, France saw a number of reforms, including the introduction of the *sauvegarde accélérée* (the new accelerated safeguard proceedings), an extension of the new money privilege for creditors providing new lending during pre-insolvency proceedings and a new right for bank creditors to propose a safeguard plan to a company. At the time of writing, a much-anticipated new law is also before the French parliament. This law, if implemented would allow debt for equity swaps without shareholder consent, in limited circumstances, thus preventing out of the money shareholders from blocking a restructuring.

2014 was also the year in which France opened its door for the first time to English schemes of arrangement. Two French companies successfully restructured their debts with a scheme of arrangement: Zlomrex International Finance SA ("Zlomrex"), a *société anonyme*, ([2013] EWHC 4605 (Ch)) which completed in February 2014 and Zodiac Pool Solutions, Zodiac European Pools SAS and Zodiac International SAS ("Zodiac"), all *société par actions simplifiées*, which completed in July 2014 ([2014] EWHC 2365 (Ch)).

French corporates now have a much broader spectrum of restructuring tools available to them. Going forward, French debtors should consider what restructuring tool is the most appropriate in the circumstances. Schemes will not always be available (see below the requirement for a "sufficient connection" with England) and both English schemes and French safeguard proceedings should be compared when deciding how to implement a restructuring.

SAFEGUARD PROCEEDINGS OR SCHEMES OF ARRANGEMENT?

Safeguards have a lower threshold of creditor approval (two-thirds of each class of creditors) than schemes, however the constitution of creditor committees/classes is not the same as in schemes. In a French safeguard, all bank debt holders will vote together (including senior and junior and unsecured and secured), and bondholders will also vote together in one assembly (separate to the bank debt committee), regardless of secured status or priorities. An English scheme will, by contrast, require creditors with different rights to vote in separate classes. Depending on the commercial solution required, the company may find that the constitution of creditor classes is an important factor in choosing the restructuring tool.

A scheme may be advantageous in circumstances where a safeguard would trigger defaults in finance documents. Schemes are a statutory process arising under the English Companies Act 2006, not the Insolvency Act 1986. Depending upon the drafting of the finance documents, schemes may not trigger an insolvency default.

Finally, while the new *sauvegarde accélérée* has been used at least once since its introduction (Alma Consulting), schemes of foreign companies are more commonly used and are a tried and tested tool over many years for complex and innovative restructurings.

WHAT IS A SCHEME?

A scheme of arrangement is a consensual cram down mechanism usually proposed by a company to its creditors. It is a very flexible tool to effect a commercial compromise or arrangement between the company and its creditors where unanimous consent of creditors cannot be obtained. A scheme can be used to amend, release or write-off debt and put in place new debt/equity instruments.

A scheme will bind all the scheme creditors if approved by 75% in value and a majority in number of each class of creditors who vote at the scheme creditor meetings and provided that the English court also sanctions the scheme.

It does not have the stigma attached to insolvency processes because it is an English company law process. Schemes are commonly used to implement restructurings of both English and foreign companies. It is a particularly useful tool where unanimous consent of creditors is difficult to obtain.

THE REQUIREMENT FOR SUFFICIENT CONNECTION WITH ENGLAND

In recent years, many companies incorporated outside of England have implemented English schemes of arrangement (for example companies incorporated in Austria, Denmark, Finland, France, Germany, Indonesia, Ireland, Italy, Jersey, Kuwait, the Netherlands, Norway, Russia, Singapore and Vietnam).

It is well established in England that foreign companies can avail themselves of the English scheme of arrangement process, where the English court is satisfied, among other conditions, that there is a "sufficient connection" with England.

The English courts have found a "sufficient connection" where the relevant debt (creating the debtor/creditor relationship which is the subject of the scheme) is governed by English law and subject to an English jurisdiction clause (exclusive and non-exclusive). This was the requisite link with England, for example, in

the scheme of the French companies, Zodiac.

In more recent cases, English courts have also found the requisite "sufficient connection" where the relevant debt was governed by foreign law but the centre of main interests (COMI) of the company had been shifted to England (for example, the New World Resources scheme in 2014 and the Magyar Telecom scheme in 2013). A French company, Zlomrex, also shifted its COMI to England to provide the sufficient connection for the scheme because its debt documents were governed by New York law, not English law. Shifting the COMI of a company to England should not be difficult where the debtor is a holding company of the group and has no or limited operations in France. There is no minimum time for corporates to shift their COMI prior to a scheme (although the court will consider carefully whether the centre of main interests is genuinely in England).

An alternative has been to contractually amend the governing law of the debt to English law (pursuant to the requisite contractual creditor approvals) prior to the scheme in order to create the sufficient connection with England (this was the case for the first schemes of the Belgium, Danish, German and Norwegian companies in the Apcoa Parking group in 2014). In the Apcoa scheme judgment handed down on 19 November 2014, Mr Justice Hildyard explained (paras 253 and 254) that the change of governing law was "*understood and intended to enable such a result…*" (ie to enable the scheme) and that he did not think that the change of law was "*alien or indiscriminate or such as could not reasonably have been contemplated by commercial parties aware of the Rome I-regulation…*"

The English courts have, therefore, on the whole, taken a pragmatic approach in finding a sufficient connection with England. The courts will consider whether the proposed schemes before them would be likely to have a beneficial impact for the business and creditors. This is also reflected in Mr Justice Mann's judgment convening the scheme meetings in the case of Zlomrex: "*An English scheme is preferred over alternatives. A French restructuring would be likely to trigger an event of default with further cross-defaults within the Group which would lead to worse recoveries for creditors than they currently hope to get out of the Scheme… Restructuring in New York is said to be more expensive to the extent of being prohibitive, or almost prohibitive…*"

RECOGNITION OUTSIDE ENGLAND: THE ENGLISH APPROACH

A sufficient connection with England is not the only pre-requisite for schemes of foreign companies. The court will only sanction the scheme if, among other conditions, the scheme will be likely to serve its purpose (ie if the scheme will be recognised in the jurisdiction of incorporation of the company and in any countries where the scheme might need to take effect).

The practice developed in England has been for independent expert foreign law evidence to be produced in court for the English court to satisfy itself that the scheme will be recognised abroad. The New York law expert evidence in Zlomrex was provided by the company's own legal counsel. This has been criticised by the court and the prudent approach would be to use independent experts.

In practice, schemes have, in the large majority of cases, been sanctioned and taken effect without the issue of recognition ever being challenged in the foreign jurisdictions. However, there is one well-known exception: Equitable Life. The Equitable Life scheme was challenged in the German courts. In that case, the German Federal Court did not recognise the scheme based on specific insurance points. However, the German Federal Court made several helpful comments regarding the recognition of schemes in Germany and further schemes of German companies have since been implemented in Germany without any challenges being raised by creditors in Germany. In the recent Apcoa scheme, the English court considered that injuncting creditors from bringing actions in Germany to challenge the scheme was a "step too far" (however, the German law point was settled without the need for an injunction).

RECOGNITION OF SCHEMES IN THE FRENCH COURTS

The two recent French schemes concerned different scenarios: (1) the Zlomrex scheme was a scheme amending US governed high yield notes issued by a French finance vehicle, following a COMI shift of the issuer to the UK; and (2) the Zodiac scheme was a scheme amending English governed bank debt of a French holding company of a group with real trading activity in France. Chapter 15 recognition was obtained in the US for both schemes, on the basis that the companies had a COMI (Zlomrex), or an establishment (Zodiac), in England.

Both schemes benefited from high levels of creditor support. However, the question remains how the French courts would respond should a creditor seek to challenge a scheme of arrangement in a French court.

There are various routes to obtaining recognition of a scheme in the French courts. Firstly, recognition of the sanction order could be obtained, in the limited circumstances described below, using the EC Regulation on Insolvency Proceedings (1346/2000). However, the more likely scenario is that recognition is obtained in the French courts pursuant to the Recast Brussels Regulation (1315/2012).

COUNCIL REGULATION (EC) 1346/2000 ON INSOLVENCY PROCEEDINGS ("INSOLVENCY REGULATION")

Unless a scheme is combined with an insolvency process, the Insolvency Regulation will not assist recognition in the French courts.

Article 1(1) of the Insolvency Regulation restricts the scope of application to "collective insolvency proceedings" and Art 2 defines insolvency proceedings as those listed in Annex A of the Insolvency Regulation. Schemes of arrangement do not figure in the list at Annex A of the Insolvency Regulation (nor any Annex B relating to winding up proceedings) and therefore do not, *per se*, fall within the scope of the Insolvency Regulation. This is because schemes of arrangement are a corporate procedure set out in the English Companies Act, not in the Insolvency Act. Recent proposals for reforms to the Insolvency Regulation have sought to introduce schemes into Annex A but the latest amendments did not make this change and schemes which are outside insolvency proceedings remain definitively outside the Insolvency Regulation.

However, it should be possible to achieve

recognition of a scheme in a French court pursuant to Art 25(1) of the Insolvency Regulation if the scheme relates to a company with its COMI in England and which is in an English administration (or another English insolvency process listed in Annex A). Article 25(1) provides that: "*Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Art 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities…*" This sub-paragraph also applies to judgments deriving directly from the insolvency proceedings and which are closely linked to them, even if they were handed down by another court.

Therefore, a scheme sanction order could be recognised as a judgment handed down, or composition approved, by a court whose judgment is recognised in accordance with Art 16 of the Insolvency Regulation (ie an administration in accordance with Art 16) provided that the scheme concerns the course of, derives directly from, or is closely linked to, the administration.

Article 16 requires a "judgment opening insolvency proceedings *handed down by a court*". Clearly, the appointment of an administrator in court would be a judgment opening insolvency proceedings handed down by a court. However, Annex A of the Insolvency Regulation also specifically lists administration appointments, which are made without a court order, simply by filing documents at court. Therefore, Art 16 should also include all insolvency proceedings listed in Annex A and one would argue that a scheme could be recognised via Art 25 even if the administrator had been validly appointed without a court order.

There are limited objections to recognition where Art 25 applies. One of the key exceptions is the "public policy exception": pursuant to Art 26, any member state may refuse to recognise insolvency proceedings opened in another member state or to enforce a judgment handed down in the context of such proceedings, where the effects of such recognition or enforcement would be manifestly contrary to that state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

Subject to any specific factual circumstances, provided the scheme statutory requirements have been duly followed (including due notice being given to creditors), it is difficult to find grounds for a scheme, *per se*, to be contrary to public policy in France. Leading French commentators (see "*L'accueil en France des schemes of arrangement de droit anglais*", *Etude par Hervé Synvet et Pierre-Nicolas Ferrand, Revue de droit bancaire et financier no. 1, Janvier 2014, étude 1*) have in fact concluded (in the context of Council Regulation (EC) 44/2001, not the Insolvency Regulation), that it seems very unlikely that an English scheme be considered contrary to French public policy, because a French judge himself has the ability to give a debtor certain grace periods for payments and also to revise penalty amounts (Code Civil, Art 1244-1 and 1152).

Given the limited objections available to the French courts and the broad interpretation of Art 25, a scheme of arrangement conducted within an administration should be recognised in France by the French courts pursuant to Art 25 of the Insolvency Regulation.

COUNCIL REGULATION (EC) 1215/2012 ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ("RECAST BRUSSELS REGULATION")

The Recast Brussels Regulation came into force on 9 January 2013 and applies to all proceedings on or after 10 January 2015. It replaces and largely follows its predecessor, Council Regulation (EC) 44/2001 ("the Brussels Regulation"), in matters of recognition of judgments and provides for automatic recognition of judgments in many instances.

Where a scheme of arrangement is not combined with an administration, scheme recognition could be obtained in France pursuant to Art 36 of the Recast Brussels Regulation if (i) the scheme falls within the scope of the Recast Brussels Regulation; (ii) the French courts consider that the scheme sanction order is a "judgment" capable of recognition within the meaning of Art 36; and (iii) the French courts do not find grounds to oppose recognition in Art 45.

Scope of Recast Brussels Regulation

The scope of application of the Brussels Regulation was the subject of debate in English, European and French legal commentary in respect of schemes. The scope of the Recast Brussels Regulation remains the same as its predecessor, therefore the judicial interpretation given in respect of the Brussels Regulation continues to remain relevant. Mr Justice Briggs in *Rodenstock* ([2011] EWHC 1104 (Ch)) and Mr Justice Richards in *Magyar Telecom* ([2013] EWHC 3800 (Ch)) both concluded that the sanction of a standalone scheme (outside of an insolvency) did fall within the scope of Art 1(1) ("civil and commercial matters") of the Brussels Regulation.

Mr Justice Richards concluded, in the *Magyar Telecom* scheme judgment, that it logically follows from the exclusion of schemes from Annex A of the Insolvency Regulation that the Brussels Regulation ought to apply and that the exclusion of insolvency proceedings from the scope of the Brussels Regulation does not extend to a scheme of arrangement involving an insolvent company unless that company is also subject to an insolvency proceeding. French commentators have also concluded, in the same vein as Richards J, that the Insolvency Regulation and the Brussels Regulation are intended to dovetail each other and therefore that the bankruptcy exclusion in Art 1(2)(b) should not exclude schemes of arrangements (see para 10, *L'accueil en France des schemes of arrangement de droit anglais, Etude par Hervé Synvet et Pierre-Nicolas Ferrand, Revue de droit bancaire et financier no. 1, Janvier 2014, étude 1*).

"Judgment" within the meaning of the Recast Brussels Regulation

Turning to the second condition for recognition under the Recast Brussels Regulation – is a scheme sanction order a "judgment" within the meaning of the Recast Brussels Regulation?

It could be argued that a sanction order is not a jurisdictional proceeding aimed at specific defendants. However, creditors have often been considered to be the defendants in a scheme as it is the obligations of the company to the creditors which are altered. Furthermore, the definition of judgment in the

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Recast Brussels Regulation (which is the same as in the Brussels Regulation) is very broad: *"any judgment given by a court or tribunal of a member state, whatever the judgment may be called, including a decree, order, decision or writ of execution…"* It would be challenging to argue that the order granted by the court to sanction the scheme was not a "judgment" within the meaning of the Recast Brussels Regulation.

The French courts have traditionally given a wide interpretation to jurisdictional acts, which do not necessarily require a dispute. The German Federal court also held, *obiter* (in the Equitable life scheme), that there were general arguments for recognising an English scheme as a "judgment" under the Brussels Regulation, that Art 32 (which contained the definition of judgment now found in Art 2 of the Recast Brussels Regulation) was to be given a wide interpretation and that the English scheme involved adversarial elements which are a pre-requisite for a "judgment". Therefore, any opposition on this ground would seem likely to fail before the French courts.

Grounds for opposition

Article 45 of the Recast Brussels Regulation also provides specific grounds of opposition to recognition of judgments, which is otherwise automatic under the Recast Brussels Regulation. One of the grounds of opposition which could be raised by creditors is a failure by the English court to comply with the jurisdictional rules regarding insurance, consumer contracts and exclusive jurisdiction when declaring itself competent to sanction the scheme (Art 45(1)(e)). There are also grounds to oppose recognition of a judgment if it is shown that there are prior and conflicting judgments (Arts 45(1)(c) and (d)). Compliance with such rules would need to be assessed on a case-by-case basis.

The French courts could also refuse to allow recognition of the scheme in France using the public policy exception (Art 45(1)(a)) or as a result of a failure to give the scheme creditors sufficient notice of the scheme to allow them to challenge the scheme (Art 45(1)(b)).

As mentioned above, a French court is unlikely to find a scheme, *per se*, manifestly contrary to public policy. A scheme is a consensual process requiring the consent of a super majority of each class of creditors (75% in value and a majority in number of those creditors voting).

It would also be difficult for the French courts to refuse to recognise a scheme on the basis that creditors were not given sufficient notice of the scheme or opportunity to defend themselves. The scheme process includes two court hearings at which creditors can and often do challenge the scheme or propose alternative restructurings. Indeed, the most recent Apcoa scheme hearings lasted a number of days because the scheme was contested by certain creditors. The court considered and heard in detail arguments of such opposing creditors before making its judgment.

Furthermore, it is the practice in schemes to send to all scheme creditors a practice statement letter explaining the details of the scheme and the class formation. This gives the creditors advance notice and time to challenge the scheme at the first court hearing at which the judge is asked to convene creditor meetings to vote on the scheme. In addition a detailed document describing the company and the terms of the scheme, the explanatory statement (akin to a prospectus), is sent out to all creditors ahead of the creditor meetings to vote on the scheme. Creditors are therefore given detailed information before voting on a scheme and have the opportunity to be heard.

Accordingly, the French courts should recognise a scheme pursuant to the Recast Brussels Regulation and it is difficult to find grounds upon which they could refuse to recognise a scheme if a minority creditor sought to challenge the scheme in the French courts.

OTHER GROUNDS FOR RECOGNITION

It should not be necessary to consider other grounds for recognition since ample grounds are provided in the Recast Brussels Regulation.

For completeness, there is no reason why a scheme could not also be recognised in France pursuant to the French rules of international private law. As mentioned earlier, it would be difficult to argue against recognition on grounds of public policy. The French rules of recognition would require a sufficient connection with England (*Simitch, Cour de Cassation* 6 February 1985), which is reminiscent of the concept of "sufficient connection" used by the English courts.

Finally, it is worth noting that Council Regulation (EC) 593/2008 (on the law applicable to contractual obligations) ("the Rome Regulation") has sometimes been considered in the context of recognition of schemes. In *Rodenstock*, the court received expert evidence that the scheme would be recognised in Germany because a German court would apply English law to decide whether the lenders' rights were effectively varied by the scheme. Where the Recast Brussels Regulation applies, it should not be necessary to consider the Rome Regulation because the scheme decision should be recognised without considering the substance of the decision and the law applicable to the decision. Once the English court has rendered its sanction order for the scheme, a French court should not examine the question of conflict of laws and should simply apply the Recast Brussels Regulation in recognising the decision.

CONCLUSION

At the time of writing, the question of recognition of schemes in France remains untested before the French courts. However, this is also the case for the majority of schemes of European companies, which have successfully been implemented in Europe without challenges before the local courts.

The two French schemes (Zodiac and Zlomrex) successfully implemented last year, demonstrate that stakeholders in French restructurings can now consider schemes of arrangement as part of their toolkit for restructurings, alongside the existing safeguard regime. ■

Further reading

- Wish you were here? English court becomes the restructuring destination for foreign companies [2011] 7 JIBFL 405
- English schemes of arrangement: another gateway opened to foreign companies [2014] 4 CRI 154
- LexisNexis RANDI blog: Schemes of arrangements – pushing the boundaries of jurisdiction