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Reconciling European Conflicts and Insolvency Law

Gerard McCormack*

Abstract

This paper focuses critically on European conflicts and insolvency law – examining and evaluating the relationship between the Jurisdiction and Judgments Regulation and the Insolvency Regulation. The Regulations are founded on the notion of judicial cooperation in civil matters linked to maintaining and developing an area of freedom, security and justice. The paper asks whether these high-minded ideals have been achieved in practice. It also asks whether the recent recasting of the Jurisdiction and Judgments Regulation, and the proposals for revision of the Insolvency Regulation will improve the situation. The paper concludes that the ideals have not quite been achieved and the reform proposals provide only a partial solution.

Keywords: conflicts of law, international insolvency, European Union, corporations, law reform.

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1. INTRODUCTION

This paper focuses critically on European conflicts and insolvency law. In particular, it examines and evaluates the relationship between the Jurisdiction and Judgments Regulation on the one hand, and the Insolvency Regulation on the other. The two Regulations are founded on the notion of judicial cooperation in civil matters linked to the objective of maintaining and developing an area of freedom, security and justice. Article 81 of the EU Treaty provides for judicial cooperation in civil matters based on the principle of mutual recognition of judgments and Article 67 states that the 'Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'. Freedom, security and justice cannot be achieved, however, if the Regulations interact in an unsatisfactory way, whether through undesirable overlaps or incompleteness or by creating legal uncertainties.

This paper asks the question whether the high-minded ideals of the European Union in this sphere have been achieved in practice. The paper also asks whether the recent recasting of the Jurisdiction and Judgments Regulation, and the European Commission's proposals for revision of the Insolvency Regulation[1] will improve the situation. To anticipate the conclusion, the respective answers are 'not quite' and 'partially'. This is an area of some complexity where answers are normally nuanced and seldom simple. The noble ideals of the European Union have not quite been achieved and the reform proposals will only partially alleviate the situation.

The paper consists of six sections. Section two sets the matter in greater context by examining the background to these EU legal instruments. The third section examines the point of interaction between these two instruments in the field of insolvency-related judgments. In section four, uncertainties in the interface between the Regulations are highlighted. The fifth section considers the effect of 'stay' orders – orders from the bankruptcy court precluding legal proceedings against the insolvent debtor. Section six addresses reform proposals, and section seven concludes by putting forward concrete proposals for making the EU's cherished objectives in this area of freedom, justice and security much more of a practical reality rather than just an ideal.

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[1] See Report from the Commission on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, COM(2012) 743 final, and the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM(2012) 744 final. For a critical overview of the proposals, see H. Eidenmüller, 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond', 20 *Maastricht Journal* (2013) p. 133.

2. BACKGROUND

Regulation 44/2001 on civil jurisdiction and the enforcement of judgments (the Brussels 1 Regulation) replaces the earlier Brussels Convention on the same subject.[2] Its objective is to achieve the simplification of formalities that govern the reciprocal recognition and enforcement of judgments and to strengthen the legal protection of persons. The preamble, in its 15th recital, makes clear the need, in the interests of the harmonious administration of justice, to ensure that two EU states will not give irreconcilable judgments. The Regulation is stated to apply generally in 'civil and commercial matters', though there is an exception in Article 1(2)(b) for 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. This exception mirrors a similar provision in the earlier Brussels Convention.[3]

It took longer to reach agreement at European level on the insolvency rules than on the general rules. Insolvency was considered to be a particularly fraught and politically contentious area.[4] The Insolvency Regulation was finally promulgated in 2000 and came into force in 2002.[5] Its preamble asserts that the activities of undertakings have more and more cross-border effects and are increasingly the subject of regulation by Community law. The insolvency of such undertakings was said to affect the proper functioning of the internal market with a corresponding need for European coordination measures. The preamble also speaks of preventing forum shopping, i.e., the movement of assets or legal proceedings from one jurisdiction to another to take advantage of a more favourable legal position.[6]

The rules on jurisdiction are somewhat different in the two Regulations. Under Article 2 of the Brussels 1 Regulation, persons domiciled in an EU state must be sued in the courts of that state, though there are rules of special jurisdiction allowing proceedings to be brought in other states in certain circumstances such as where

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[2] See W. Kennett, 'Private International Law: The Brussels 1 Regulation', 50 *International and Comparative Law Quarterly (ICLQ)* (2001) p. 725: 'The basic framework of the Regulation remains similar to that of the Convention, although there are numerous changes on points of detail and some on matters of substance.' It is also clear from the 19th recital in the preamble to Regulation 44/2001 that continuity of interpretation should be ensured between the Brussels Convention and the Regulation – Case C-167/08 *Draka NK Cables Ltd* v. *Omnipol Ltd* [2009] *ECR* I-3477.

[3] In the scheme established by Regulation 44/2001, Art. 1(2)(b) has the same position and performs the same role as point 2 of the second subparagraph of Art. 1 of the Brussels Convention. Moreover, the wording of those two provisions is identical – Case C-111/08 *SCT Industri AB (In Liquidation)* v. *Alpenblume AB* [2009] I.L.Pr. 43, at para. 23.

[4] See generally, G. Moss, I. Fletcher and S. Isaacs, *The EC Regulation on Insolvency Proceedings*, 2nd edn. (OUP 2009) ch. 1.

[5] Regulation No 1346/2000.

[6] Recital 4.

contracting parties have included a forum selection clause in their contract.[7] The court of the defendant's domicile may not decline jurisdiction on the basis of *forum non conveniens*, i.e., that it is not a suitable forum for the resolution of the dispute.[8] Moreover, a state that is the chosen forum under a contractual provision may not issue an anti-suit injunction to restrain proceedings brought in breach of the clause in other EU states.[9]

Under the Insolvency Regulation, jurisdiction to open main insolvency proceedings with universal effects is given to the EU state in whose territory the centre of the debtor's main interests (COMI) is situated.[10] The law of the state where the proceedings are opened applies to the insolvency proceedings.[11] Secondary insolvency proceedings, with strictly territorial effects, may be opened in a state where the debtor has an establishment.[12] An English court, however, might decline to open insolvency proceedings on a *forum non conveniens* basis, e.g., insolvency proceedings are already ongoing in another state and there would be no benefit to creditors in proliferating proceedings by making an English winding-up order.[13] There is nothing in the Insolvency Regulation abrogating the jurisdiction of an English court to stay the domestic proceedings.[14] It seems, however, that it may not grant an injunction restraining the institution of insolvency proceedings in other EU states.[15]

In the Brussels 1 Regulation, Article 27 provides that if proceedings involving the same cause of action between the same parties are brought in the courts of different EU states, then any court other than the court first seised must stay its proceedings until the jurisdiction of the court first seised is established and, when it is, decline its jurisdiction in favour of that court. The regime has the advantage of simplicity: 'Subject to possible problems as to exactly when a court is "seised", it

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[7] Art. 23. See generally, L. Merrett, 'Article 23 of the Brussels 1 Regulation: A Comprehensive Code for Jurisdiction Agreements?', 58 *ICLQ* (2009) p. 545.

[8] Case C-281/02 *Owusu* v. *Jackson* [2005] *ECR* I-1383.

[9] Case C-185/07 *Allianz SpA* v. *West Tankers Inc* [2009] *ECR* I-663; Case C-159/02 *Turner* v. *Grovit* [2004] *ECR* I-3565; [2005] 1 AC 101.

[10] Art. 3. For guidance from the European Court on 'COMI', see Case C-341/04 *Re Eurofood IFSC Ltd* [2006] *ECR* 1-03813 and the more recent *Interedil* Case C-396/09; [2011] BPIR 1639, and *Mediasucre* Case C-191/10; *OJ* 2012 cases.

[11] Art. 4. This general principle is subject to a range of exceptions set out in Arts. 5-15.

[12] Art. 3(2). On the definition of an 'establishment', see the decisions of the European Court in *Interedil* – Case C-396/09; [2011] BPIR 1639, and the Court of Appeal in *Re Olympic Airlines SA* [2013] EWCA Civ 643.

[13] See the comments of Mann J in *Trillium (Nelson) Properties Ltd* v. *Office Metro Ltd* [2012] BCC 829, at paras. 34-36, and see generally, K. Dawson, 'The Doctrine of Forum Conveniens and the Winding up of Insolvent Foreign Companies', *Journal of Business Law* (2005) p. 28.

[14] On *forum non conveniens* under the Insolvency Regulation, see the judgment of Beatson J in *Polymer Vision* v. *Van Dooren* [2011] EWHC 2951, at para. 88.

[15] See Case C-341/04 *Re Eurofood IFSC Ltd* [2006] *ECR* 1-03813, but cf. *Telia AB* v. *Hilcourt (Docklands) Ltd* [2003] BCC 856.

eliminates the possibility of the two courts reaching different conclusions as to which of them ought to hear the case…'.[16]

The position under the Insolvency Regulation is subtly different. While applications to open insolvency proceedings may be filed in different EU states, the court that is second 'seized' is not required to bide its time until the court first 'seised' reaches a decision on jurisdiction. The second court may open insolvency proceedings and a party dissatisfied with the decision must pursue its appellate remedies in the state of the opening of proceedings rather than seeking a different or inconsistent decision in another EU state.[17] The Insolvency Regulation avoids one of the most criticised features of the Brussels 1 Regulation, namely the so-called 'Italian torpedo'.[18] This involves a party to a dispute trying to wear down the other party to that dispute by instituting proceedings, perhaps proceedings seeking a declaration of non-liability, in an EU state where there is a slow-moving court system. The hope is that the long-drawn nature of the proceedings will force the other party to the dispute into a disadvantageous settlement.[19] In a sense, the Brussels 1 Regulation makes one wait until a slow-moving court system reaches its decision, whereas the Insolvency Regulation lets a fast-moving system take centre stage and open insolvency proceedings even though it is not first seised.

The rules on jurisdiction will remain different in the two Regulations even when the recast form of the Brussels 1 Regulation comes into force in January 2015.[20] The 'recast' Regulation will extinguish some of the fire from the 'Italian torpedo' in that if the parties have given a particular court exclusive jurisdiction, that court may go on to hear the case even if it was not first 'seised'.[21]

More generally, from a UK perspective, the Brussels 1 Regulation has been attacked for running against traditional common law jurisdiction rules, and its interpretation by the European Court has been criticised for what has been seen as a stubborn refusal to understand the rationale and good sense of the common law rules.[22] The

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16 See T. Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws', 54 ICLQ (2005) p. 813, at p. 816.

17 See Case C-341/04 *Re Eurofood IFSC Ltd* [2006] *ECR* 1-03813.

18 An expression that was apparently first aired in this context in M. Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo', 7 *European Intellectual Property Review (EIPRev)* (1997) p. 382.

19 For criticism by Lord Mance, 'Exclusive Jurisdiction Agreements and European Ideals', 120 Law Quarterly Review (LQR) p. 357, at p. 360: 'It may comfort theoreticians that the Community has rules of ideological purity and logical certainty. But the result can only be practical uncertainty, with large scope for tactical manoeuvring.'

20 Regulation (EU) 1215/2012. See generally, A. Dickinson, 'The Revision of the Brussels 1 Regulation', 12 *Yearbook of Private International Law* (2010) p. 248.

21 Art. 31(2) of the 'recast' Regulation.

22 The critics include UK Judges – see Sir Anthony Clarke MR, 'The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales', 18 *European Business Law Review (EBLR)* (2007) p. 101; Lord Mance, *supra* n. 19.

European Court has cut down such English favourites as anti-suit injunctions and the *forum non conveniens* doctrine.[23] The criticism ties in with a wider concern that sees European harmonisation endeavours, in part at least, as attempts to undermine national 'legal cultures'.[24] Professor Hartley speaks of giving up our traditional rules in favour of inferior continental-style rules and a 'crass insistence that common law rules must be abolished even where no Community interest is at stake'. He even suggests that the 'continental judges on the European Court want to dismantle the common law as an objective in its own right'.[25] His concerns have been echoed in even more graphic terms by other English-based conflicts lawyers. Professor Adrian Briggs, for instance, has referred to 'a pitiless Stalinist monoculture' and argues that the proscription of anti-suit injunctions and *forum non conveniens* will make for a 'diminished and degraded level of efficiency in the provision of legal services'.[26]

These comments seem somewhat inflammatory. The grant of anti-suit injunctions would seem to undermine the principle of mutual respect for each Member State's legal systems and judicial authorities and the related principle that each court seised of an action should determine for itself whether it has jurisdiction.[27] These principles are at the heart of the EU initiatives in this area. As the European Court remarked in *Owusu* v. *Jackson*:[28]

> Application of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down … and consequently to undermine the principle of legal certainty, which is the basis of the [Regulation].[29]

In the context of the Insolvency Regulation the criticism from English-based commentators has been more muted. There has been some concern, however, that while the preamble to the Regulation speaks of preventing forum shopping, the specific

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[23] See Case C-185/07 *Allianz SpA* v. *West Tankers Inc* [2009] *ECR* I-663; Case C-159/02 *Turner* v. *Grovit* [2004] *ECR* I-3565; [2005] 1 AC 101; Case C-281/02 *Owusu* v. *Jackson* [2005] *ECR* I-1383.

[24] See generally, S. Weatherill, 'Why Object to the Harmonisation of Private Law by the EC?', 12 *European Review of Private Law* (2004) p. 633; J. Bell, 'Judicial Cultures and Judicial Independence', 4 *Cambridge Yearbook of European Legal Studies* (2002) p. 47; G. Teubner, 'Legal Irritants: Good Faith in British Law', 61 *Modern Law Review (MLR)* (1998) p. 11.

[25] See T. Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws', 54 ICLQ (2005) p. 813, at p. 828.

[26] A. Briggs, 'The Impact of Recent Judgments of the European Court on English Procedural Law and Practice', 124 *Zeitschrift fur Schweizerisches Recht* (2005) p. 231.

[27] See Case C-185/07 *Allianz SpA* v. *West Tankers Inc* [2009] *ECR* I-663, at paras. 26 and 34, and Case C-281/02 *Owusu* v. *Jackson* (2005) *ECR* I-1383.

[28] Case C-281/02 [2005] *ECR* I-1383, at para. 41.

[29] For a general analysis, see P. de Vareilles-Sommières, *Forum Shopping in the European Judicial Area* (Oxford, Hart Publishing 2007), in particular the introduction by Edwin Peel.

provisions in the Regulation may have the effect of promoting rather than preventing it. This is not least through the ambiguity of the COMI concept that governs the jurisdiction to open main insolvency proceedings.[30] There are also concerns that the points of demarcation between the Insolvency Regulation and the Brussels 1 Regulation have not been clearly marked in the context of 'insolvency-related actions'.[31] It is to this issue that we now turn.

3. INTERACTION BETWEEN THE TWO REGULATIONS

It has been judicially affirmed that the Brussels 1 Regulation and the Insolvency Regulation were intended to provide mutually exclusive codes in relation to jurisdiction: the latter was confined to insolvency and analogous proceedings, and the former applied to other civil and commercial proceedings.[32] This view is supported by the *travaux preparatoire*. It reflects a view widely held in European jurisprudence. For instance, the Schlosser Report[33] on UK accession to the Brussels 1 regime suggests that the two instruments were 'intended to dovetail almost completely with each other'[34] while the Virgós-Schmit Report on the instrument which later became the Insolvency Regulation refers to the need to 'avoid unjustifiable loopholes' between it and the Brussels 1 regime.[35] The actual wording of the two Regulations suggests, however, a greater potential for friction.

Article 1(2)(b) of the Brussels 1 Regulation excludes from its scope 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. The reference to 'analogous proceedings' seems to cover what in broad terms might be referred to as insolvency-related actions, but the Insolvency Regulation does not in express terms cover insolvency-related proceedings. Article 3 confers jurisdiction

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[30] See generally, M. Szydło, 'Prevention of Forum Shopping in European Insolvency Law', 11 *European Business Organization Law Review (EBOR)* (2010) p. 253; G. McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings', 68 *Cambridge Law Journal (CLJ)* (2009) p. 213; W.-G. Ringe, 'Forum Shopping Under the EU Insolvency Regulation', 9 *EBOR* (2008) p. 579.

[31] See A. Dutta, 'Jurisdiction for Insolvency-related Proceedings Caught Between European Legislation', *Lloyd's Maritime and Commercial Law Quarterly (LMCLQ)* (2008) p. 88.

[32] See Case C-339/07 *Seagon* v. *Deko Marty Belgium NV* [2009] *ECR* 1-767.

[33] *Schlosser Report 1979*, No C 59/72, at para. 53.

[34] See *Gibraltar Residential Properties* v. *Gibralcon* [2010] EWHC 2595; [2011] BLR 126. See also Beatson J in *Polymer Vision* v. *Van Dooren* [2011] EWHC 2951, at paras. 46 and 62, though, intentionally or inadvertently, he omitted the word 'almost' which qualifies the word 'completely'.

[35] Virgós-Schmit Report (EC Council Document 6500/96, DRS 8 CFC), para. 77. While the Virgós-Schmit Report has no official status, it nevertheless is of persuasive authority. The report is available at: <http://aei.pitt.edu/952>.

on open insolvency proceedings and Article 16 provides for the recognition of judgments opening insolvency proceedings throughout the EU, but neither Article says anything about matters that are insolvency-related. The Virgós Schmit Report points out that certain states recognise what it terms a *vis attractiva concursus* under which the court opening the insolvency proceedings also has jurisdiction in respect of all the actions that arise from the insolvency. The Insolvency Regulation does not confer such jurisdiction expressly but there are certain implied indications that the courts of the state that open insolvency proceedings should also have jurisdiction in respect of insolvency-related actions. Recital 6 of the preamble suggests that the Regulation should govern jurisdiction for opening insolvency proceedings as well as judgments that were closely connected and handed down on the basis of such proceedings. Article 25 also extends the principle of recognition to judgments that derive 'directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court'.

In *Seagon* v. *Deko Marty Belgium NV*[36] the European Court relied on recital 6 and Article 25 in support of its conclusion that Article 3 impliedly conferred jurisdiction on the state within whose territory insolvency proceedings were opened to 'determine actions which derive directly from those proceedings and which are closely connected to them'. It pointed to the efficiency advantages in centralising all the legal actions directly related to a debtor's insolvency before the courts of the EU state with jurisdiction to open the insolvency proceedings.[37] It was not necessary, however, that the actual court which opened the insolvency proceedings should determine the insolvency-related action. The European Court's decision resolves one legal uncertainty but has not eliminated all legal uncertainty in this field. It is to these 'uncertainties' that we now turn.

4. LEGAL UNCERTAINTIES

4.1 **Overlaps**

If one follows the logic of *Seagon* v. *Deko*,[38] then the Brussels I Regulation and the Insolvency Regulation are mutually exclusive instruments operating harmoniously together. The Insolvency Regulation operates with respect to insolvency and related proceedings, whereas the Brussels 1 Regulation applies to other civil and commercial matters. Certainly the case law has stressed the need for a harmonious interpre-

[36] Case C-339/07 [2009] *ECR* 1-767. See generally, on the decision, L. Carballo Pineiro, 'Vis Attractiva Concursus in the European Union: Its Development by the European Court of Justice', *InDret* (3/2010) pp. 1-23.

[37] Para. 22.

[38] Case C-339/07 [2009] *ECR* 1-767.

tation of the two instruments. It has also suggested that the Brussels I Regulation should be given as wide a reading as possible and that the Insolvency Regulation governing one of the exceptions to that framework should be interpreted in a restrictive fashion. This was the view of the European Court in the *German Graphics* case.[39] A similar view commended itself to Beatson J in *Polymer Vision* v. *Van Dooren*,[40] who suggested that the reference to 'civil and commercial' matters in the Judgments Regulation was 'broad in its scope' but that the jurisdictional scope of the Insolvency Regulation 'should not be broadly interpreted'.

In practice, however, the reality is somewhat different. For a start, in *Gourdain* v. *Nadler*[41] the European Court saw the notion of insolvency-related actions in a fairly broad light. Secondly, there are some judicial indications of overlaps and gaps between the two Regulations. While *Seagon* v. *Deko* does not seem to leave much room for insolvency-related actions other than in the state that opens the insolvency proceedings,[42] in one UK case[43] it was common ground between the parties that cases might be brought which fell legitimately within the jurisdictional rules in either Regulation. In *F-Tex SIA*[44] the European Court was asked this question directly but declined to answer, stating that this was not necessary for a decision in the case.[45] The refusal to provide clarification causes legal uncertainty. A prospective plaintiff does not know whether legal proceedings may legitimately be brought in one forum rather than another and a likely defendant does not know where he may be sued. This situation is likely to make the planning of transactions more difficult.

4.2 Gaps

Legal uncertainty also arises if there are 'gaps' with cases falling into the cracks between the two Regulations and into the realm of national jurisdictional rules. The European Court in *German Graphics*[46] considered that there may be commercial cases that fall outside both Regulations.[47] While it did not offer any concrete exam-

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[39] Case C-292/08 [2009] *ECR* I-8421, at paras. 23-25.

[40] [2011] EWHC 2951, at paras. 46 and 62.

[41] Case 133/78 [1979] 3 CMLR 180.

[42] Advocate General Ruiz-Jarabo Colomer, at para. 69 of his Opinion, talked about the jurisdiction being 'relatively exclusive'. In Re Jurisdiction to Set Aside a Transaction on Grounds of Insolvency (IX ZR 39/06) [2010] I.L.Pr. 6, according to the German Federal Supreme Court, the European Court evidently assumed that the jurisdiction was exclusive in character.

[43] *Polymer Vision* v. *Van Dooren* [2011] EWHC 2951, at paras. 46 and 62.

[44] Case C-213/10 *F-Tex SIA* v. *Lietuvos-Anglijos UAB* [2013] Bus LR 232.

[45] Paras. 50 and 51 of the judgment. It could be argued, however, that the statement at para. 48 that the two Regulations existed symmetrically suggests that there should be no overlaps.

[46] Case C-292/08 [2009] *ECR* I-8421, at paras. 17 and 18.

[47] See generally, P. Omar, 'The Insolvency Exception in the Brussels Convention and the Definition of "Analogous Proceedings"', 22 *International Company and Commercial Law Review (ICCLR)* (2001) p. 172, at p. 176.

ples, one example might be of certain insolvency or restructuring proceedings that could be classed as judicial arrangement or composition proceedings and therefore falling outside the Brussels 1 Regulation. Nevertheless, these proceedings, on a strict interpretation, seem to fall outside the Insolvency Regulation since they can hardly be considered collective insolvency proceedings entailing the partial or total divestment of a debtor and the appointment of a liquidator. This is the definition of 'insolvency proceedings' in Article 1(1) of the Insolvency Regulation.

The potential application of the Brussels 1 Regulation and the Insolvency Regulation to schemes of arrangement under the UK Companies Act has been considered on a number of occasions, but there has not yet been an appellate court decision that reviews all the relevant case law.[48] Instead there has been a number of first instance decisions, some uncontested, in which the matter has been addressed at varying length. Under the scheme procedure, a company may enter into a compromise or arrangement with any class of creditors or members.[49] A majority in number representing 75% in value of the class of creditors or members affected is required to accept the scheme, and the court must also sanction a scheme as being fair to members of the relevant class as a whole.[50] Once these statutory conditions are fulfilled, the scheme becomes binding, even in respect of those creditors who did not give their consent.[51] In this way, 'holdouts' can be overcome. Solvent companies are free to seek court approval of schemes of arrangement; for instance, in takeover situations they may be used as a means for the compulsory acquisition of shares. In the case of insolvent companies, the procedure may be used for the restructuring of corporate debt.

If the jurisdiction of the court to sanction schemes of arrangement falls within either Brussels I or the Insolvency Regulation, then, in principle, a UK court-sanctioned scheme is entitled to automatic EU-wide recognition under these Regulations. In principle, however, schemes do not appear to be a neat fit under either Regulation. The Brussels 1 Regulation seems ill-equipped to deal with proceedings for the sanctioning of schemes of arrangement since, in a sense, nobody is being sued. Briggs J remarked in *Re Rodenstock GmbH* that they 'are not, at least in form, proceedings aimed at specific defendants at all. They may nonetheless be adversarial proceedings, in the sense that affected members and creditors of the scheme

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[48] For general discussion, see J. Payne, 'Cross-border Schemes of Arrangement and Forum Shopping', 14 *EBOR* (2013) p. 563; L.C. Ho, 'Making and Enforcing International Schemes of Arrangement', 26 *Journal of International Banking Law and Regulation (JIBLR)* (2011) p. 434, and see also J.-J. Kuipers, 'Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels 1 Regulation', 8 *Journal of Private International Law* (2012) p. 225.

[49] See generally, on schemes, G. O'Dea, J. Long and A. Smyth, *Schemes of Arrangement Law and Practice* (OUP 2012).

[50] On fairness, see *Re Telewest Communications* [2004] BCC 342.

[51] For details, see Part 26 of the UK Companies Act 2006.

company may appear and oppose the grant of sanction and, for that purpose, serve evidence and make submissions just like any ordinary defendant.'[52]

In *Re DAP Holdings NV*[53] it was suggested that applications to sanction schemes of arrangement fell outside the Brussels 1 Regulation. In *Re Rodenstock GMbH*[54] Briggs J suggested however that they were within Brussels 1. He also said that schemes in respect of insolvent companies that were made as part of insolvency proceedings, i.e., liquidation or administration proceedings, fell within the Insolvency Regulation, while reserving his view on 'standalone' schemes, i.e., schemes that were not made as part of liquidation or administration proceedings.[55] The better view is that 'standalone' schemes of arrangement in respect of insolvent companies are outside the Insolvency Regulation. According to Article 1(1), the Regulation applies to collective insolvency proceedings involving the partial or total disinvestment of the debtor and the appointment of a liquidator. Article 2 goes on to state that 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1), which proceedings are listed in Annex A. In *Ulf Kazimierz Radziejewski*[56] the European Court suggested that the Regulation applied only to the proceedings listed in the Annex.[57]

While the fact that schemes of arrangement are not listed in the Insolvency Regulation means that they do not have EU-wide recognition under Articles 16, 17 and 25 of the Regulation, it also means that the UK courts have a wider jurisdictional base in that they may sanction schemes where the relevant foreign company has a 'sufficient connection' with the UK even though its COMI may not be in the UK. Part 26 of the Companies Act 2006, dealing with schemes, gives the court jurisdiction to sanction a scheme if the company is liable to be wound up under the Insolvency Act. Section 221 of the Insolvency Act provides that a winding-up order may be made in respect of a foreign registered company, but established case law suggests that the winding-up jurisdiction should only be exercised if the company is deemed to have a sufficient connection with the UK, and the 'sufficient connection'

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52 [2011] EWHC 1104, at para. 60.

53 In *Re DAP Holdings NV* [2006] BCC 48, at para. 14. For a more cautious approach, see Warren J in *Re Sovereign Marine and General Insurance Co Ltd* [2007] 1 BCLC 228, at para. 62.

54 [2011] EWHC 1104; [2012] BCC 459. See generally, paras. 43-62.

55 [2011] EWHC 1104, at para. 51. See also *Primacom Holdings GmbH* v. *Credit Agricole* [2011] EWHC 3746; [2013] BCC 201; *Re Seat Pagine Gialle SpA* [*2012*] *EWHC 3686; Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) and *Re Tele Columbus GmbH* [2014] EWHC 249 (Ch).

56 Case C-461/11; *OJ* 2013 C9/20. The Court, however, also pointed out that the procedure considered in that case did not entail the divestment of the debtor and therefore could not be classified as an insolvency procedure within the meaning of Article 1.

57 Para. 24. See also the decision of the European Court in Case C-116/11 *Bank Handlowy and Adamiak* [2013] BPIR 174, holding that once proceedings are listed in Annex A, they must be regarded as coming within the Regulation.

test has been applied to schemes in cases like *Re Drax Holdings Ltd*.[58] While the absence of automatic EU-wide recognition is potentially problematic, the greater flexibility of the 'sufficient connection' compared with the 'COMI' test, may in fact enhance the attractiveness of the UK as a restructuring venue of choice for large corporate debt. Not all countries may have the same advantageous laws as the UK that enable 'hold-outs' among minority creditors to be overcome.[59]

4.3 Insolvency-related actions

The message from the European Court is that insolvency-related actions are outside the Brussels 1 Regulation but within the Insolvency Regulation. Therefore, in general, a defendant should be sued in the state that opens the insolvency proceedings rather than in his country of domicile.[60] Even if a defendant in an insolvency-related action has no assets in the state that opens the insolvency proceedings, he cannot afford to ignore an action commenced there because any judgment given on foot of that action can be enforced in other EU states under Article 25 of the Insolvency Regulation.[61] If the action is not considered to be insolvency-related, it should be brought where the defendant has his domicile and the defendant is safe in ignoring actions that have been instituted in the state where insolvency proceedings have been opened. Given these different rules governing jurisdiction and enforcement of judgments, it is imperative to decide what is, or is not, an insolvency-related action. The case law does not provide a decisive demarcation point but rather broad examples of cases that fall into one realm rather than another. It is a question of balancing the advantages of channelling all legal actions involving the insolvent debtor into the courts of the state that opened the insolvency proceedings versus the impor-

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[58] [2004] 1 WLR 1049. See also *Re Rodenstock GmbH* [2011] EWHC 1104; [2012] BCC 459, where a sufficient connection with the UK was found to exist by virtue of the fact that the credit facilities extended to the company contained English choice of law and jurisdiction clauses and also because of expert evidence to the effect that the relevant foreign courts would recognise the English scheme.

[59] See generally on these issues, J. Armour, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition', 58 *Current Legal Problems* (2005) p. 369; H. Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe', 6 *EBOR* (2005) p. 423.

[60] In Case C-328/12 *Schmid* v. *Hertel* [2014] 1 WLR 633, the European Court held that the Insolvency Regulation also applies where the defendant in an insolvency-related action is resident outside the EU, but the Court did not refer to the Virgós-Schmit report, which, at paras. 11 and 44, suggests that the Regulation does not give jurisdiction in these cases.

[61] For the rules governing enforcement of insolvency-related judgments handed down in non-EU states, see *Rubin* v. *Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236. In this case, the UK Supreme Court reaffirmed the traditional rule that a foreign judgment was only enforceable in the UK if the defendant was either present in the relevant foreign jurisdiction or else submitted to the jurisdiction of the foreign court. For criticism of *Rubin*, see, e.g., J. Kirshner, 'The (False) Conflict Between Due Process Rights and Universalism in Cross-border Insolvency', 72 *CLJ* (2013) p. 27.

tance attached to the defendant's due process rights in being sued in his country of domicile. It is ultimately a question of how big the 'insolvency exception' to standard rules of private international law should be.

The following have been held to fall within that category of insolvency-related actions:

(a) Actions based on insolvency law that seek to fix liability on company officers

In the leading case *Gourdain* v. *Nadler* the European Court held that an action is related to bankruptcy if it derives directly from the bankruptcy and is closely linked to proceedings for realising the assets or judicial supervision.[62] In this case, a French court had made an order requiring a German-based director of a French company that was the subject of French insolvency proceedings to contribute to the assets of the company. The order was made under provisions of French insolvency law that appeared to impose personal liability on company directors if they failed to take sufficient care to ensure that company creditors had been paid in full. The European Court held that it was therefore appropriate that the defendant should be sued in the state that opened the insolvency proceedings, i.e., France and not in his state of domicile, Germany.

(b) Actions based on provisions particular to insolvency law or to insolvency-related adjustments of general legal provisions

Gourdain v. *Nadler*, while concerned specifically with the liability of company directors, seems to stand more generally as authority for the proposition that proceedings are insolvency-related if they stem from provisions peculiar to insolvency law or from insolvency law adjustments of general legal norms. This reasoning was applied by David Richards J in *Fondazione Enasarco* v. *Lehman Brothers Finance SA*[63] to proceedings before the Swiss Bankruptcy Court challenging the liquidator's rejection of the proof of a debt. The proceedings were therefore held to fall within the 'bankruptcy' exception to the Lugano Convention,[64] which was similar to the Brussels 1 Regulation. He pointed out that the proceedings could only arise under Swiss insolvency law and formed an integral part of the liquidation proceedings designed to achieve the primary purpose of such proceedings, namely the distribution of available assets among creditors whose claims were admitted or established. The purpose of the proceedings was to establish whether a party had not simply a

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[62] The English version of the Court judgment, at para. 4, actually uses the French terms '*liquidation des biens*' and '*règlement judiciaire*'.

[63] [2014] EWHC 34 (Ch).

[64] The 2007 Lugano Convention governs recognition issues between EU Member States and European Free Trade Association countries.

good contractual or other claim but also the amount and ranking of the claim for liquidation purposes. The ranking of claims was a matter that arose exclusively under the relevant insolvency law.

(c) Actions based on insolvency law that seek to set aside pre-insolvency transactions entered into by the debtor

Insolvency laws in many countries allow a liquidator to reopen and set aside certain transactions entered into by an insolvent company within a certain period prior to the commencement of a formal insolvency process, though the procedure and detailed rules will differ from country to country. In *Seagon* v. *Deko*[65] the European Court was asked whether the state of the opening of insolvency proceedings had jurisdiction in respect of an action to set aside a pre-insolvency transaction that was brought against a company with a registered office in another EU state. Effectively, the European Court answered affirmatively, noting that the avoidance action was intended to increase the assets of the insolvent company. In this case, a German company that was the subject of German insolvency proceedings had transferred funds before the insolvency proceedings were opened to a Belgian company that had its centre of main interests in Belgium. The German liquidator sought to have the transfer set aside and to have the amount transferred repaid. The Court noted that, under German insolvency law, only the liquidator could bring such an action in the event of the debtor's insolvency and the sole purpose of the avoidance action was to protect the interests of the general body of creditors.[66]

Avoidance law often covers transactions at an undervalue entered into by an insolvent debtor within a certain period prior to the commencement of formal insolvency proceedings, and in *Byers* v. *Yacht Bull Corp*[67] similar reasoning was employed to conclude that the cause of action under s. 238 of the UK Insolvency Act 1986 to set aside an undervalue transaction fell within the insolvency exception. The action was not available to the company before winding-up and could only be pursued by a liquidator or other comparable office holder. Moreover, the cause of action was purely statutory in that the conditions for liability were laid down in the relevant provisions of the Insolvency Act and the products of success went for the benefit of the company's creditors, and not the company itself.

It seems, however, that not all avoidance-type proceedings are within the Insolvency Regulation rather than Brussels 1. Relevant factors include whether the proceedings are brought by the liquidator or a third party and whether all the recoveries

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[65] Case C-339/07 [2009] *ECR* 1-767. See also the comments of Lloyd LJ in *Oakley* v. *Ultra Vehicle Design Ltd* [2006] BCC 57, at para. 42, and Rimer J in *UBS AG* v. *Omni Holdings Ltd* [2000] 1 WLR 916, at 922.

[66] See para. 16.

[67] [2010] EWHC 133; [2010] BCC 368.

accrue for the benefit of the debtor's estate. In *Re Baillies Ltd*,[68] for instance, Judge Purle QC suggested that proceedings under s. 423 Insolvency Act 1986 seeking to set aside transactions that defraud creditors were not insolvency proceedings under the European Regulations. He pointed out that the provision was applicable, irrespective of whether there was a liquidation or some other form of insolvency process, and any victim could have brought the proceedings at any time.

A similar message comes from the European Court in *F-Tex SIA*,[69] but this is a decision very much confined to its own facts which does not provide much in the way of general guidance. The reasoning of the Court is also somewhat contorted: holding that an action was not closely connected with insolvency proceedings while avoiding any decision on the question whether the action was directly linked with the proceedings. In this case, a German-registered company had, while insolvent, transferred money to a Lithuanian-based recipient. The payer later became the subject of insolvency proceedings in Germany and it seems that under German law the transfer could be set aside by the liquidator. The liquidator, however, assigned to the company creditor all the company's claims against third parties, including the claim for reversal of the transfer. The Court held that the exercise by the assignee of the right acquired was not closely connected with the insolvency proceedings in that the assignee could freely decide whether to exercise the right. If he did so, he acted in his own interest and for his personal benefit; the proceeds of the action were owned by him personally and did not increase the assets of the insolvent debtor. The Court said that the fact that the assignee was obliged to pay the liquidator a percentage of the proceeds did 'not alter that analysis, since it is merely a method of payment'. Moreover, under German law, the closure of the insolvency proceedings did not affect the assignee's claim.[70]

(d) Actions challenging the exercise of a power or discretion by a liquidator

The case law suggests that actions involving a challenge to the exercise of a power or discretion given to a liquidator by insolvency law are outside the Brussels I Regulation. For instance, in *SCT Industri*[71] the European Court held that an action concerning the power of the liquidator to dispose of company assets fell outside the Brussels 1 regime. Under the relevant national law – Swedish law – the effect of insolvency was to give the liquidator exclusive power to transfer company assets, and he exercised this power on behalf of creditors. The Court emphasised that the liquidator intervened only after insolvency proceedings had been opened and the

[68] [2012] BCC 554, at para. 13.
[69] Case C-213/10 *F-Tex SIA* v. *Lietuvos-Anglijos UAB* [2012] WLR (D) 123.
[70] Paras. 42-46.
[71] Case C-111/08 *SCT Industri AB* v. *Alpenblume AB* [2009] *ECR* I-5655.

power to act on behalf of the company stemmed specifically from the national law governing insolvency.

The reasoning of Beatson J in *Polymer Vision* v. *Van Dooren*[72] was similar. In this case, proceedings were brought in the UK against a Dutch bankruptcy trustee relying on the Brussels 1 Regulation. The proceedings alleged fraudulent misrepresentation and breach of an agreement by the bankruptcy trustee as to how he would exercise his powers under Dutch bankruptcy law. It was held, however, that the case fell within the insolvency exception under the Brussels 1 Regulation since the statements made in negotiations and the resulting agreements derived directly from, and were closely connected with, the Dutch insolvency proceedings.[73]

The following types of proceedings have however been held not to be 'insolvency-related':

(e) Actions by an insolvency representative seeking to establish the debtor's ownership of property

Even though insolvency proceedings in the classic sense are all about the collection of assets and their distribution among creditors,[74] there is considerable support in the case law for the proposition that actions concerning the debtor's 'ownership' of assets are within the Brussels 1 Regulation and not the Insolvency Regulation. The leading case from the European Court is German Graphics,[75] where a German company had supplied machinery to a Dutch company subject to a reservation of title clause in its favour. The Dutch company went into liquidation in the Netherlands but the German supplier brought proceedings in Germany, relying on the reservation of title and asserting that the German court had jurisdiction to hear the claim under the Brussels 1 Regulation. The European Court agreed, holding that the claim of the German supplier founded on the reservation of title clause constituted an independent claim since it was not based on insolvency law and required neither the opening of insolvency proceedings nor the involvement of a liquidator. The link with insolvency was considered 'neither sufficiently direct nor sufficiently close' to warrant the insolvency provision coming into play.

There are also a number of English cases where claims have been brought successfully under the Brussels 1 Regulation, asserting either that an insolvent debtor

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[72] [2011] EWHC 2951, at para. 50.

[73] Paras. 68-71.

[74] See the comments of Lord Hoffmann in *Cambridge Gas Transport Corporation* v. *Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, [2007] 1 AC 508, at paras. 14-15, describing winding-up proceedings as a form of collective execution against the property of the debtor by creditors whose rights are admitted or established.

[75] Case C-292/08 [2009] *ECR* 1-8421, at para. 29.

does, or does not, own particular property. *Re Hayward*,[76] for instance, concerned a claim by a trustee in bankruptcy that real property in Spain formed part of the bankruptcy estate. Rattee J explained that the claim was essentially a claim by the trustee to recover from a third party assets said to belong to the bankrupt's estate and therefore vested in the trustee.[77] The issue between the parties did not involve any aspect of bankruptcy law and it was irrelevant that the bankruptcy trustee could only assert the claim by virtue of the bankruptcy.[78] In *Ashurst* v. *Pollard*[79] a bankruptcy trustee was seeking an order for the sale of foreign property formerly co-owned by the bankrupt and now vested in the trustee. It was held that in determining whether proceedings fell within the 'insolvency' provision, the mere fact that a claimant happened to be a trustee in bankruptcy was not enough.[80] In this case, the court relied on the fact that bankruptcy was not the principal subject matter of the proceedings.

Byers v. *Yacht Bull Corp* involved a claim by a UK liquidator that the insolvent debtor was the beneficial owner of an asset – a yacht – through having funded its acquisition. The legal owner, however, successfully contended that separate 'ownership' proceedings would need to be brought under the Brussels 1 Regulation in its country of domicile and that the case did not fall within the insolvency provision. In support of its conclusion, the court reasoned that the claim to ownership arose under the general law; it arose before the liquidation, and the link with the liquidation was neither direct nor close.[81]

(f) Trying to establish general principles

There is some support for the view that the Insolvency Regulation is only engaged if insolvency is the principal subject matter of the proceedings.[82] Viewed in isolation, however, the test of whether insolvency is the principal subject matter of the proceedings does not have much explanatory power. On one view, insolvency could only actually be said to be the proper subject matter of proceedings if the

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[76] [1997] Ch 45, at 54.

[77] Ibid. Reference was made to p. 10 of the Jenard Report (*OJ* 1979 C 59, 5 March 1979) on the Brussels Convention: 'However, matters falling outside the scope of the Convention do so only if they constitute the principal subject matter of the proceedings. They are thus not excluded when they come before the court as a subsidiary matter.' Section 3 of the Civil Jurisdiction and Judgments Act 1982 provides that the Jenard report on the 1968 Convention and the 1971 Protocol and the Schlosser report on the Accession Convention may be considered in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances.

[78] See also the comments of Rimer J in *UBS AG* v. *Omni Holdings Ltd* [2000] 1 WLR 916, at 922.

[79] [2001] Ch 595.

[80] Ibid, at 602.

[81] Ibid, at para. 26.

[82] See citation of the Jenard Report, p. 10, *supra* n. 77.

question is whether a debtor should be declared insolvent. But this would give the Insolvency Regulation a very narrow exception and deprive the reference to 'analogous proceedings' in the Brussels 1 Regulation of any force. The European Court judgment in *Gourdain* v. *Nadler* suggests a somewhat broader view that the insolvency provision would operate where the proceedings concerned the bankruptcy-specific powers of an insolvency administrator or involved a special remedy available only in insolvency cases. The mere fact, however, that the insolvency administrator was party to the proceedings was insufficient.

More recently, a 'close and direct links' test has found favour with the European Court.[83] In other words, a legal action has to be closely and directly linked with insolvency proceedings before it falls outside the Brussels 1 Regulation.[84] One might ask, however, how close and direct the link must be and one could use misfeasance proceedings under s. 212 of the UK Insolvency Act 2006 as an example. This section provides a summary remedy in the course of liquidation proceedings against officers of the company who are found to have misapplied, or retained, or become accountable for, any money or other property of the company, or to have been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. Persons found liable under the section may be ordered to restore money or property to the company or contribute a sum to the company's assets by way of compensation for the breach of duty. If a person who is domiciled in another EU state is found liable under the section, the questions arises whether the recovery order is enforceable in other EU states pursuant to Article 25 of the Insolvency Regulation as an insolvency-related action, or whether, instead, the defendant should have been sued in his state of domicile under the Brussels I Regulation. In favour of enforceability under the Insolvency Regulation, it can be pointed out that recoveries under s. 212 go to the company itself,[85] and this was considered an important factor by the European Court in *F-Tex SIA*.[86] On the other hand, it is clear that the section creates no new rights but merely provides a summary mode of enforcing rights which could have been enforced by the company before the liquidation.[87]

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[83] See Case C-292/08 *German Graphics* [2009] *ECR* 1-8421, at paras. 29 and 30. See also the decision of the Dutch Supreme Court in *Handelsveem BV* v. *Hill* [2011] BPIR 1024.

[84] In *Rubin* v. *Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236, the UK Supreme Court per Lord Collins also suggested, at para. 100, that there was a workable distinction 'between claims which derive directly from the bankruptcy or winding up, and which are closely connected with them, on the one hand, and those which do not, on the other hand'.

[85] It is clear from *Oldham* v. *Kyrris* [2004] BCC 111 that while a s. 212 application may be brought by a creditor or contributory, orders made can only be for the benefit of the company and not the applicant.

[86] Case C-213/10 *F-Tex SIA* v. *Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*.

[87] See *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634; *Cohen* v. *Selby* [2002] BCC 82.

5. INSOLVENCY STAY ORDERS AND PROCEEDINGS UNDER BRUSSELS 1

5.1 The reason behind insolvency stays

This section considers whether general legal rules, or court orders, made in the state that opens insolvency proceedings have the effect of staying legal proceedings against the debtor in other EU states. In other words, whether the jurisdictional rules under the Brussels 1 Regulation allow a debtor to be sued in other EU states notwithstanding the fact that the debtor is the subject of insolvency proceedings and a stay order in a different EU state.

Stay orders are a normal consequence of insolvency proceedings. In *Lornamead Acquisitions Ltd* v. *Kaupthing Bank HF*[88] Gloster J referred to the stay as a 'statutory gateway, designed to protect the interests of the insolvent estate and the general body of creditors and preventing a free-for-all of proceedings'.[89] The formal insolvency process replaces a potential series of individual executions against a debtor's assets with a mechanism for collective execution. It provides a way for the orderly winding-up of person's affairs – a process for the more efficient collection of the debtor's assets and their distribution to creditors.[90] Individual executions against assets, or seizure of assets by creditors, may deplete general asset values whereas collective execution should reduce collection costs and maximise the general pool of assets.[91] Under UK law, the opening of insolvency proceedings brings about a stay on legal proceedings against the debtor.[92] The stay applies in respect of both liquidation proceedings and administration proceedings which may be of a rescue or reorganisation nature.[93] In the latter context, the stay affords a debtor the

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[88] [2011] EWHC 2611.

[89] Para. 95.

[90] See Lord Hoffmann in *Cambridge Gas Transport Corporation* v. *Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, [2007] 1 AC 508, at paras. 14-15.

[91] For 'creditors' bargain' and 'procedural' approaches towards bankruptcy law, see T.H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Mass., Harvard University Press 1986), and C.W. Mooney, 'A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure', 61 *Washington and Lee Law Review* (2004) p. 931.

[92] Section 130(2) Insolvency Act (liquidation) and paras. 43 and 44 Schedule B1 Insolvency Act (administration).

[93] Liquidation of a company involves the cessation of its business; realisation of its assets; payment of debts and liabilities; distribution of any remaining assets to company shareholders; and at the end of the process the company is wound up and dissolved – see David Richards J in *Re MF Global UK Ltd (No 1)* [2012] EWHC 3068 (Ch); [2012] WLR (D) 304, at para. 32. Administration, by contrast, is designed primarily as a rescue procedure aimed at facilitating the survival of the company's business either in whole or in part. An administrator is obliged to perform his functions with the objective of (a) rescuing the company as a going concern, or (b) achieving a better result for company creditors as a whole than is likely in liquidation – see schedule B1 Insolvency Act 1986, para. 3(1).

opportunity of getting back on its feet by having a business rescue plan agreed and put into operation.[94]

As a matter of general principle, it makes sense that litigation stays emanating from the state that opens insolvency proceedings should have EU-wide effect. It seems more efficient to have legal proceedings relating to an insolvent debtor centralised in a single state. Savings should be achieved by reducing the time spent on multi-jurisdictional squabbling over assets. This interpretation seems more than plausible from a reading of the Insolvency Regulation, but it does not emerge very clearly from the European case law which suggests a much murkier picture.

5.2 The conflicting case law

In the Regulation, Article 3 gives the EU state where an insolvent debtor has its COMI the power to open main insolvency proceedings in respect of the debtor, though secondary insolvency proceedings may be opened where the debtor has an 'establishment'. Article 4(1) provides that 'the law applicable to insolvency proceedings and their effects' shall be that of the EU state where the proceedings are opened. Article 4(2)(f) is one of the detailed examples in Article 4(2) highlighting the general principle. It provides that the law of the state where insolvency proceedings are opened shall determine the effects of the insolvency proceedings on proceedings brought by individual creditors, with an exception for lawsuits pending. Article 15 adds that the effects of insolvency proceedings on a pending lawsuit shall be governed solely by the law of the EU state in which that lawsuit is pending. These provisions were considered in *Syska* v. *Vivendi Universal*,[95] where it was held that the 'lawsuits pending' exception included arbitration proceedings. The court said that Article 15 reflected the natural expectation of businesses that, if litigation or arbitration had begun before insolvency proceedings were commenced, it should be the law of the seat of those proceedings that determined whether the proceedings should continue.[96] But the court also said that if no claim had been initiated before insolvency proceedings were opened, it was entirely appropriate that the insolvency forum should determine how any subsequent litigation or arbitration should proceed. This would help to ensure the effective and efficient administration of the insolvency proceedings and preclude one creditor from gaining an advantage over others.[97]

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[94] On different conceptions of rescue, see V. Finch, 'Corporate Rescue: A Game of Three Halves', 32 *Legal Studies* (2012) p. 302; *idem*, 'Corporate Rescue in a World of Debt', *Journal of Business Law* (2008) p. 756.

[95] [2008] 2 Lloyd's Rep 636.

[96] Ibid., at para. 16.

[97] See also on Article 15, *Mazur Media Ltd* v. *Mazur Media GmbH* [2004] 1 WLR 2966; *Fortress Value Recovery Fund* v. *Blue Skye Special Opportunities Fund* [2013] EWHC 14 (Comm), and *Isis Investments Ltd* v. *Oscatello Investments Ltd* [2013] EWHC 7 (Ch).

The proper interpretation of Article 4(2)(f) has not been considered squarely and directly by the European Court. Article 4(2)(f) issues, however, have arisen indirectly in a number of cases, most notably in the German Graphics case,[98] but it is submitted that the decision is problematic. As we have seen in section 4.3, the case concerned the sale of machines by a Germany supplier to a Dutch buyer subject to a reservation of title clause under which the German supplier retained ownership of the goods until the goods were paid for. The Dutch buyer went into liquidation without having paid for the machines. The machines were located in the Netherlands when the insolvency proceedings were opened, but, nevertheless, a German court made an order granting relief to the supplier and the European Court suggests that this result was perfectly compatible with European law. Given the location of the machines and also the fact that the insolvency proceedings had been opened in the Netherlands, one might think that Dutch law should govern the effectiveness of the reservation of title clause and preclude actions in the German courts. This is by virtue of the general Article 4 principle, and more specifically Article 4(2)(f) as well as Article 4(2)(b), which provides that the law of the state of opening of the insolvency proceedings determines 'the assets which form part of the estate'. The European Court said, however, somewhat elliptically, that Article 4(2)(b) 'only constitutes a rule intended to prevent conflicts of law'.[99] The judgment makes no reference to Article 4(2)(f).

The result in the *German Graphics* case is also difficult to square with two other decisions by the European Court, and at some stage, the Court will be tasked with providing a much-needed measure of clarity. The first – predating *German Graphics* – is *European Commission* v. *AMI Semiconductor Belgium BVBA*.[100] In this case, the Court said that it was clear from Article 4(2)(f) that the law of the state which opens insolvency proceedings governs the effects of those proceedings on actions brought by individual creditors. The Court also held that, by virtue of Articles 16 and 17, the opening of insolvency proceedings in an EU state should be recognised in all the other EU states. It should also produce the same effects in the other EU states as it has according to the law of the state in which the proceedings are opened. Reference was made to the Opinion of Advocate General Kokott that the purpose of insolvency proceedings is to distribute the debtor's available assets on the basis of equality among creditors in a single procedure in which all creditors participate.[101] The Court also referred to the stay, stating that, for this reason, national laws generally precluded the initiation of separate legal proceedings once

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98 Case C-292/08 [2009] *ECR* I-8421.

99 At para. 37 of the judgment.

100 Case-294/02 [2005] *ECR* I-2175.

101 See Opinion of Advocate General Kokott, at para. 84. For arguments that the equality of creditors or *pari passu* principle is rather less important than it is sometimes made out to be, see generally R. Mokal, 'Priority As Pathology: The *Pari Passu* Myth', *CLJ* (2001) p. 581.

insolvency proceedings have been opened. It said that Article 4(2)(f) prevented this principle being circumvented by the bringing of actions in other EU states.[102]

The second European Court decision – subsequent to that in *German Graphics* – is in the *Probud Gdynia* case.[103] Here, the Court held that only the opening of secondary proceedings was capable of restricting the universal effect of the main insolvency proceedings. The court reaffirmed the general principle that the insolvency proceedings had the same effects throughout the EU as in the state where such proceedings were opened.

Despite its dubious doctrinal and policy base, *German Graphics* was the principal authority relied upon by the UK court in *Gibraltar Residential Properties Ltd* v. *Gibralcon*,[104] where UK proceedings against a Spanish company were allowed to continue despite the fact that the UK proceedings had only been commenced after the Spanish company had entered insolvency proceedings in Spain. There was an argument that the UK court should apply Article 4(2)(f), and therefore Spanish law as the law of the state that opened the insolvency proceedings should determine the effects of the proceedings on actions brought by 'individual creditors'. The judge, however, took the view that the fact that a defendant in commercial proceedings was subject to insolvency proceedings in another EU state did not detract from the application of the Brussels 1 Regulation. He added though that the English court would not take 'any step to prejudice or interfere with the Spanish insolvency proceedings. This court will do no more than determine the rights of the parties under this contract … and, in particular, determine so far as it can which party is owed money by the other and how much'.[105]

It is submitted that the *Gibralcon* decision wrongly deprives the Insolvency Regulation of much of its force. Under the Regulation, the EU state that opens main insolvency proceedings has the primary role of determining the effect of those proceedings on the debtor's legal relationships, and the decision compromises the unity and universality of insolvency proceedings that the Regulation is ostensibly designed to achieve. In Gibralcon, the Court considered, but clearly rejected, the argument that 'the Insolvency Regulation clearly permits the local law (in this case, Spanish) to determine the effects of an insolvency in any particular jurisdiction, subject to some exceptions'.

The *Gibralcon* decision appears inconsistent with that of Gloster J in *Lornamead Acquisitions Ltd* v. *Kaupthing Bank HF*,[106] though the latter is, strictly speaking, a decision not on the Insolvency Regulation but on the Reorganisation

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[102] See paras. 69-71 of the Court judgment.
[103] Case C-444/07; [2010] BCC 453.
[104] [2010] EWHC 2595, at para. 15.
[105] Ibid.
[106] [2011] EWHC 2611.

and Winding-up of Credit Institutions Directive[107] and its implementation in the UK,[108] rather than on the Insolvency Regulation.[109] Gloster J gave the moratorium created by Icelandic law on legal proceedings against the insolvent bank an equivalent effect in the UK to that in Iceland. In Iceland, such legal proceedings were barred – any claims had to be adjudicated in the course of the insolvency – and by virtue of the Directive, the Icelandic bar extended to the UK. Gloster J suggested that a narrow definition, which gave the Icelandic insolvency measure only limited effect in the UK, would undermine the purpose of the 2001 Directive by allowing differential treatment of claimants dependent on whether they sought to proceed in the home Member State or another state.[110] Moreover, a bank subject to a European insolvency measure that was denied full effect in the UK would be exposed to the risk of uncontrolled litigation. She also spoke of the risk of dissipation of an insolvent bank's necessarily limited resources in litigation expenditure. An orderly insolvency process could be disrupted, and the estate dissipated, by proceedings brought in different jurisdictions by persons claiming that they were not debtors of the estate. The insolvency court would want to ensure that actions against the insolvent entity were properly coordinated and disciplined.

In defence of the *Gibralcon*[111] decision, one might draw a distinction between individual enforcement actions by creditors and lawsuits more generally.[112] Measures for the realisation of assets would be examples of enforcement actions, whereas actions to determine the existence, validity, content or amount of a claim would exemplify the latter. One might argue that Article 4(2)(f) only precludes enforcement actions and not lawsuits more generally.

A recent decision of the European Court on the Credit Institutions Directive – *LBI hf* v. *Kepler Capital Markets SA*[113] – does draw a distinction between individual enforcement actions and lawsuits but does so in a context where it gives greater effect to the principle of universalism and the primacy of insolvency proceedings. A French order had served attachment orders on an Icelandic credit institution before it had entered insolvency proceedings in Iceland. It was held that the 'lawsuit spending' exception to the primacy of the insolvency proceedings should be given a narrow

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[107] Directive 2001/24/EC, *OJ* 2001 L 125/15. Iceland was subject to this Directive through its membership of the European Economic Area (EEA).

[108] Credit Institutions (Reorganisation and Winding-up) Regulations 2004 (SI 2004/1045).

[109] There are certain differences between the Credit Institutions Directive and the Insolvency Regulation. Under the Directive and unlike the Regulation it is not possible to start secondary insolvency proceedings with purely territorial effects in states where the debtor has an 'establishment'. Only single main insolvency proceedings with near-universal effects are allowed.

[110] Para. 95.

[111] [2010] EWHC 2595.

[112] M. Virgós and F. Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer 2004), at p. 76.

[113] Case C-85/12 [2013] EUECJ C-85/12; [2013] All ER (D) 301.

interpretation.[114] The exception was held to cover only 'proceedings on the substance',[115] and individual enforcement actions such as the attachment orders in this case remained subject to the legislation of the insolvency forum. Icelandic law imposed a moratorium with retrospective effect on execution or enforcement actions and this moratorium had to be given effect in France in accordance with the Directive.

5.3 How the conflict is to be resolved

There is a clear conflict between the European Court decisions in this area – *German Graphics* on the one side and *AMI Semiconductor* and *Probud* on the other. It is submitted that the latter authorities are to be preferred. In other words, the opening of main insolvency proceedings in an EU state means that the law of that state should determine whether fresh legal proceedings against the debtor can be initiated and continued.[116] This result is based on the wording of Article 4 and also conforms with policy in that one of the fundamental goals of the Insolvency Regulation is to centralise the handling of disputes involving the insolvent debtor. The correctness of this result is also apparent if one compares the EU Insolvency Regulation with the UNCITRAL Model Law on Cross-border Insolvency Law. The Model Law has been implemented into UK law by the Cross-border Insolvency Regulations (CBIR) 2006 which track the Model Law fairly closely.[117]

The Insolvency Regulation is a much more far-reaching and integrationist measure than the Model Law. In the Regulation, recognition of insolvency proceedings opened in another EU Member State is automatic, whereas under the Model Law it is dependent upon an application to the court. Moreover, by virtue of the Insolvency Regulation, insolvency proceedings have the same effect in other EU states as they have under the law of the insolvency forum, whereas under the Model Law the consequences of recognition depend partly on the law of the recognising state. Nevertheless, there are certain prima facie consequences entailed by the recognition of foreign main proceedings under the Model Law and CBIR. Firstly, there is a general stay on proceedings against the debtor, though proceedings may still be instituted to prevent an action from becoming statute-barred and the stay is subject

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[114] Para. 52.

[115] Para. 54.

[116] For discussion of a possible exception to this general principle relating in particular to the enforcement of security under Art. 5 of the Regulation, see Moss, Fletcher and Isaacs, *supra* n. 4, at para. 8.183: 'Where one of the exceptions to Article 4 applies, presumably this covers proceedings required to enforce rights which fall under such exception.'

[117] SI 2006/1030. See UK Insolvency Service, 'Implementation of UNCITRAL Model Law on Cross-border Insolvency in Great Britain' (2005), at para. 7: 'When drafting the articles, we have tried to stay as close to the drafting in the Model Law as possible to try and ensure consistency, certainty and harmonization with other States enacting the Model Law and to provide a guide for other States who are considered enacting the law.'

to the exceptions in UK domestic insolvency law. Secondly, there is a stay on executions against the debtor's assets, and thirdly, the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended subject to the exceptions under domestic insolvency law.[118]

While there is a judicial discretion to modify or lift the stay, the basic position remains that recognition of foreign main insolvency proceedings under the Model Law and the CBIR prima facie involves the imposition of a stay on proceedings against the debtor. The Insolvency Regulation is a much more extensive and interventionist legal instrument and expressly takes precedence over the Model law.[119] Therefore, the position on the insolvency stay under the Regulation should be a fortiori. Any stay under national law that arises from the opening of insolvency proceedings should produce the same automatic effects throughout the EU in accordance with Article 17, thereby barring actions against the debtor except in line with the terms of the stay.

6. Reform proposals from the European Commission

In its recent proposals for reform of the Insolvency Regulation, the European Commission has acknowledged that the 'delimitation between the Brussels I Regulation and the [Insolvency] Regulation is one of the most controversial issues relating to cross-border insolvencies'.[120] The Commission proposes a codification of the decision in *Seagon* v. *Deko*.[121] In other words, in the revised Regulation, there would be a clear statement that courts opening insolvency proceedings also have jurisdiction in respect of actions that derive directly from the insolvency proceedings and are closely linked with them. This is a welcome measure of clarification but there is no guidance proposed as to what is a 'directly and closely linked action'. Following the example of Article 4(2), which sets out conflict of law rules for determining which matters are subject to the law of the state that opens the insolvency proceedings, it would be more helpful if the revised Regulation provided examples of what are considered to be insolvency-linked actions. Such examples need not prejudice or exhaust the generality of the term.

The European Commission has also proposed that a liquidator should be allowed to bring insolvency-related actions against a defendant in the defendant's country of domicile as well as in the insolvency forum.[122] The intention is that a

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[118] See Art. 20(1) of the Model Law.

[119] Cross-border Insolvency Regulations 2006, SI 2006/1030, Sch 1 Art. 3.

[120] See Report from the Commission on the application of Council Regulation (EC) No 1346/2000, *supra* n. 1, at p. 10.

[121] Case C-339/07 [2009] *ECR* 1-767.

[122] See Proposal for a Regulation amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, *supra* n. 1, at p. 7.

liquidator would be entitled to couple an action asserting director liability that is grounded on insolvency law with an action against the director in the same court founded on tort or company law. The proposal adds that insolvency-related actions may only be brought in a court of the defendant's domicile if that court has jurisdiction under the Brussels 1 Regulation. But it could be argued that that court is bereft of jurisdiction by virtue of the bankruptcy and analogous proceedings exception under the Brussels 1 Regulation, in which case the proposal means little in practice. The Hess/Oberhammer/Pfeiffer external evaluation of the Regulation is much clearer on this point. It states that the liquidator should be entitled to file the insolvency-related action optionally before the courts of the EU state in which the defendant is domiciled, if and to the extent that the latter courts have jurisdiction over the connected claim under the Brussels 1 Regulation.[123] There is much merit in this proposal. At the moment, a liquidator is faced with the prospect and the costs of potentially having to bring proceedings against the same defendant in two different countries. Avoidance proceedings should be brought in the state where the insolvency proceedings are opened, whereas actions to recover company assets in a defendant's possession should be brought in the state where the defendant is domiciled. This seems to be both costly and inconvenient. It would minimise transaction costs if the actions could be combined and heard together in the same court.

7. Conclusion

The Brussels 1 Regulation and the Insolvency Regulation are intended to dovetail, bringing about a common and harmonious European space where freedom, security and justice reign supreme. The reality may be a little more grubby for a number of reasons. Firstly, the case law suggests the possibility of gaps between the two Regulations, with cases potentially falling into the cracks and therefore governed by national jurisdictional rules.[124] Secondly, while the language of the two instruments, the legislative history and the preponderance of the case law suggest that the instruments have mutually exclusive spheres of operation, the most recent pronouncement from the European Court does not preclude the possibility of overlaps. This does not do much for legal certainty, nor for a defendant's due process rights since he does not know where he may be sued. This state of affairs compromises transaction planning. Thirdly, while the case law establishes that insolvency-related actions should be brought in the state that opens the insolvency proceedings, it is not entirely clear what constitutes an insolvency-related action. The Regulations do not provide examples, and the guidance from the case law, due to the happenstance

[123] JUST/2011/JCIV/PR/0049/A4, at pp. 22 and 219-220.

[124] But see the comment in Case C-213/10 *F-Tex SIA* v. *Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*, at para. 48, about the symmetrical nature of the Regulations.

of litigation, is somewhat fragmentary and uncertain. The cases suggest that to be insolvency-related, an action must be 'directly and closely linked' with the insolvency proceedings. Case law has fleshed out some understanding of the concept of 'direct and close links'. For instance, the mere fact that a liquidator is party to the proceedings has been held not to mean direct and close links with the insolvency proceedings, but if the proceedings involve questioning, the judgment or decisions of the liquidator under insolvency law, then it seems that the concept comes into play. Nevertheless the concept of 'direct and close links' is inherently one that lends itself to differing interpretations.

Fourthly, there is considerable uncertainty about the application of the Brussels 1 Regulation when main insolvency proceedings have been opened in an EU state. Under the Insolvency Regulation, the opening of such proceedings is supposed to have the same effect throughout the EU as in the state where the insolvency proceedings are opened.[125] National law generally provides for a stay or moratorium on legal proceedings against a party once insolvency proceedings have been opened in respect of that party.[126] The purpose of the insolvency stay is to help in collectivising the administration of the debtor's affairs: to minimise or avoid competition among creditors for the debtor's assets and to provide an orderly mechanism for the resolution of claims against the debtor's estate. By virtue of Article 4 of the Insolvency Regulation, this stay should operate equally throughout the EU, and the European Court has given effect to the stay in *Probud*. The European Court decision in *German Graphics* and the English *Gibralcon* case suggest differently however. The resulting discordance and uncertainty does little for security of legal principle and the EU's noble-minded aspirations of freedom and justice.

The recent proposals from the European Commission for reform of the Insolvency Regulation will go some of the way towards alleviating the difficulties highlighted above. On the plus side, the proposals clarify that the state which opens insolvency proceedings has jurisdiction also in respect of insolvency-related actions. Moreover, the proposal also empowers an insolvency administrator to bring insolvency-related actions in the state where a defendant is domiciled if such an action can be combined with another claim against the defendant. At the technical level, the actual wording of the Commission proposal is deficient, but the underlying policy is sounder in that it should save on costs and enhance convenience if two actions stemming from essentially the same set of facts can be heard together in the same forum. The defendant can hardly complain of an infringement of due process rights since he is being sued in respect of the insolvency-related action in his country of domicile rather than in the possibly distant insolvent forum.

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[125] See Arts. 16 and 17 of the Regulation.

[126] See Moss, Fletcher and Isaacs, *supra* n. 4, at para. 8.173: 'All of the national laws of the Member States are believed to provide for an interruption or suspension of proceedings … by means of a stay of steps by individual creditors against the debtor or his assets upon insolvency … proceedings being opened in relation to that debtor…'.

On the negative side, however, apart from stating that the action must be closely and directly linked with the insolvency proceedings, the proposal does not really say what an 'insolvency-related action' is. The 'direct and close links' test has generated difficulties in practice, and to clarify the expression it would have been helpful if examples had been provided along the lines of the categories indicated in Article 4(2) of the Insolvency Regulation. This Article provides that the law of the state which opens insolvency proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It then highlights particular cases that exemplify the application of the general principle.

Another omission from the Commission proposal is any consideration of the potential application of the Brussels 1 Regulation by a would-be claimant once insolvency proceedings have been opened in relation to a debtor. It is submitted that any revision of the Insolvency Regulation should reaffirm the provision for centralised jurisdiction and administration of the debtor's estate in the state where main insolvency proceedings have been opened – the 'COMI' state. Any stay on legal proceedings against the debtor imposed by the COMI state should apply across the EU. This would avoid unnecessary enforcement costs in a number of different countries and the piecemeal disposition of assets precluding the equal treatment of similarly situated creditors. In the absence of such a centralising principle, significant resources of the debtors might be expended unnecessarily, and the available assets depleted, in defending enforcement and other lawsuits in many different countries. Reaffirmation of this principle might help to make the EU's cherished objectives in this area of freedom, justice and security much more of a practical reality rather than just an ideal.