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Cross-border Insolvency Proceedings in the European Union: The Interface Between the Insolvency Regulation and the Brussels I Regulation

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Contents

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Acknowledgement

INSOL International is pleased to present the 16th technical paper titled "Cross-border Insolvency Proceedings in the European Union : The Interface Between the Insolvency Regulation and the Brussels I Regulation".

The paper was written by Adrian Walters, Geldards LLP Professor of Corporate and Insolvency Law, Nottingham Law School, Nottingham Trent University, UK. Prof. Walters was also the INSOL International Scholar for the Europe, Africa, Middle East Region 2009-2010.

Council Regulation 1346 / 2000 establishes common rules to harmonise the insolvency proceedings between member states in the EU. Where a debtor is insolvent the Regulation has provisions to determine the competent court to commence insolvency proceedings, the applicable law and the recognition of the decisions of the courts. Decisions by the courts with jurisdiction for the main proceedings are recognised immediately in other EU countries without further scrutiny, except in limited situations.

On the other hand Council Regulation 44 / 2001 governs ordinary civil and commercial litigation with a cross-border element, and provides the rules that govern the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in European Union (EU) countries. The Regulation does not apply to bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.

Despite the clear rules stated in these two regulations, sometimes insolvency practitioners who are involved in cross-border insolvency cases have to determine whether a particular proceeding initiated by an office-holder for the benefit of the insolvent estate falls within the scope of the Insolvency Regulation or the Judgments Regulation. The answers have varying implications for office-holders. This paper, deals with the interface between the two regulations in common situations, and identifies the remaining areas of uncertainty and the relevant practical implications.

INSOL International sincerely thanks Professor Adrian Walters for writing this very interesting and informative paper.

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Cross-border Insolvency Proceedings in the European Union: The Interface Between the Insolvency Regulation and the Brussels I Regulation

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I. Introduction

Council Regulation (EC) 1346/2000 on insolvency proceedings (the 'Insolvency Regulation') contains harmonised private international law rules, directly applicable in the Member States of the European Union (excluding Denmark), which, among other things:

- determine which Member State has jurisdiction to open insolvency proceedings in a cross-border case;
- determine the law applicable to cross-border insolvency proceedings and the effects of those proceedings;
- make provision for the recognition throughout the European Union of cross-border insolvency proceedings and the powers of insolvency office-holders appointed by a court which has jurisdiction under the Insolvency Regulation.

Council Regulation (EC) 44/2001 on the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I Regulation') contains harmonised private international law rules dealing with jurisdiction and cross-border recognition and enforcement of judgments in civil and commercial matters. Essentially, this Regulation governs ordinary civil litigation with a cross-border element. It expressly does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.' According to the jurisprudence of the European Court of Justice ('ECJ'), the scope of this exclusion extends to proceedings which derive directly from insolvency proceedings and are closely connected to them.

The coverage of the Insolvency Regulation and the Brussels I Regulation is intended to be seamless. In other words, once insolvency proceedings have been opened (a matter that is clearly governed by the Insolvency Regulation), any further cross-border proceedings taken by the insolvency office-holder for the purposes of discharging his functions (such as actions to preserve or enhance the estate, collect and realise assets, set aside antecedent transactions and so on) should, in theory, be governed either by the Insolvency Regulation or by the Brussels I Regulation. This intended seamlessness is reinforced by Article 25(1) of the Insolvency Regulation which provides for automatic recognition and enforceability throughout the EU of:

- judgments handed down by the court which opened insolvency proceedings concerning the course and closure of those proceedings, and compositions approved by that court;
- judgments deriving directly from the insolvency proceedings and which are closely linked with them;
- judgments relating to preservation measures taken after the request for the opening of the insolvency proceedings.

According to Article 25(2), the recognition and enforcement of other judgments that do not fall within the Article 25(1) categories is generally governed by the Brussels I Regulation provided that the Brussels I Regulation is applicable.[1] The implication of the Article 25(2) proviso is that court orders may be made in the context of an insolvency or restructuring that fall neither within the Insolvency Regulation nor the Brussels I Regulation. In the case of these orders, questions of

[*] The views expressed in this article are the views of the author, Adrian Walters Geldards LLP Professor of Corporate and Insolvency Law, Nottingham Law School, Nottingham Trent University INSOL International Scholar for the Europe, Middle East and Africa Region 2009-2010.
[1] See further II.B.

international jurisdiction, recognition and enforcement would have to be determined by reference to the domestic private international and / or procedural rules of the relevant countries.

Although the Insolvency Regulation is silent on the point, the decision of the ECJ in *Seagon v Deko Marty Belgium NV Ltd*[2] confirmed that jurisdiction as regards civil actions brought by insolvency office-holders which derive directly from, and are closely linked to, insolvency proceedings (e.g. actions to avoid antecedent transactions) is to be determined by reference to Article 3 of the Insolvency Regulation.

Notwithstanding this useful clarification, questions arise concerning whether certain forms of legal action commenced, or court orders rendered, in the context of formal insolvency proceedings fall within the scope of the Insolvency Regulation or the Brussels I Regulation or wholly outside the scope of both Regulations. For example, there are considerable difficulties surrounding provisions of Member State law that impose liability on directors in insolvency situations and in relation to some causes of action based on the *actio pauliana* that may be triggered whether or not insolvency proceedings have been opened. These matters have practical implications because the rules on allocation of jurisdiction and those concerning the precise basis for cross-border recognition and enforcement in the Insolvency Regulation and the Brussels I Regulation are not the same. So, for example, in an action deriving directly from insolvency proceedings (such as an action for avoidance of antecedent transactions vesting exclusively in an insolvency office-holder), the relevant court in the country where the insolvency proceedings were opened will have jurisdiction. However, if the office-holder action does not fit squarely within the Article 25(1) categories, jurisdiction may then be governed by the Brussels I Regulation, in which case, the default rule is that the action should be brought in the Member State where the defendant is domiciled.[3] In cases involving cross-border administration of estates and asset recovery within Europe, an understanding of the relationship between the Insolvency Regulation and the Brussels I Regulation is therefore essential. From the perspective of an English lawyer, this paper explores the interaction between the two Regulations. The bulk of the paper is concerned with civil actions that will fall either within the Insolvency Regulation or the Brussels I Regulation. Section IV considers schemes of arrangement ─ an important restructuring mechanism available under English law ─ which raise peculiar difficulties of classification as it is at least arguable that they fall outside the scope of *both* European Community ('EC') law instruments.[4]

II. Background

This section provides a brief account of the background to and scheme of the two Regulations. It also explains why questions of classification matter for practical purposes and seeks to distil the relevant principles and guidance from the ECJ case law.

A. The Brussels I Regulation

The six founding Member States of what was then the European Economic Community ('EEC') committed themselves in the Treaty of Rome of 1957, which established the EEC, to 'enter into negotiations with each other with a view to securing for the benefit of their nationals… the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.'[5] The instrument for achieving this objective was the Brussels Convention, entered into by the six founders in September 1968, and subsequently acceded to by other countries as membership of the EEC, later the EC, expanded.[6] The Brussels Convention sought to remove barriers to the export and enforcement of judgments throughout the EC and, to underpin a 'free market in judgments' within the EC. It also promulgated uniform rules on the allocation of jurisdiction.[7] It was subsequently replaced by the Brussels I Regulation which was adopted under Article 65 of the EC Treaty[8] as one of a series of coordinating measures aimed at progressively establishing a European area of freedom, justice and security. The Brussels I Regulation is

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[2] Case C-339/07 [2009] ECR I-767.
[3] See further II.B.
[4] With the coming into force of the Treaty of Lisbon (which abolished the former 'pillar' structure including the old EC pillar) the EC Treaty has been superseded by the Treaty on the Functioning of the European Union. As, however, the Insolvency Regulation and the Brussels I Regulation were both enacted pursuant to the EC Treaty, they are referred to here as 'EC law instruments'.
[5] EEC Treaty Art 220.
[6] A Convention having similar effect was entered into by the EU states and the European Free Trade Area states at Lugano in April 1988. The Lugano Convention continues to govern matters falling within its scope arising between the EU states and Iceland, Norway and Switzerland which remain outside the EU.
[7] B Hess, T Pfeiffer and P Schlosser, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03 (September 2007) available at <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf> paras 60-61.
[8] Following the entry into force of the Treaty of Lisbon see now Art 81 of the Treaty on the Functioning of the European Union.

directly applicable in all the Member States with the exception of Denmark which has opted out of this and related measures.[9]

Article 1 of the Brussels I Regulation defines its basic scope. It applies in 'civil and commercial matters whatever the nature of the court or tribunal.' It does not extend to revenue, customs or administrative matters and, crucially for the purposes of this paper, Article 1(2)(b) expressly stipulates that it does not apply to 'bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.' The Article 1(2)(b) exception has been interpreted by the ECJ as extending to proceedings that are directly related or closely connected to the insolvency proceedings.[10]

For transnational civil and commercial disputes falling within its scope the scheme of the Brussels I Regulation is broadly as follows.

- The general rule is that persons domiciled in a Member State must be sued in the courts of that Member State regardless of their nationality (Article 2).[11]

- There are a series of special rules of jurisdiction by way of exception to the general rule as regards matters relating to contracts, maintenance or tort and as regards civil claims for restitution in defined circumstances, disputes arising out of the operation of a branch, agency or other establishment or disputes concerning the payment of remuneration claimed in the respect of the salvage of a cargo or freight in defined circumstances (Article 5).

- Special rules of jurisdiction by way of exception to the general rule also govern disputes where a party is sued in the capacity of settlor, trustee or beneficiary under a trust (Article 5).

- Special rules also apply to matters relating to insurance, consumer contracts and employment contracts (Articles 8-21).

- Article 22 confers exclusive jurisdiction on a particular court regardless of domicile in a series of defined circumstances. So, for example:

    - In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated have jurisdiction (Article 22(1)).

    - In proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept have jurisdiction (Article 22(3)).

- Where the parties have agreed that the courts of a specified Member State will have jurisdiction in respect of their disputes, this agreement will be respected insofar as it complies with the terms of Article 23 (for example, the agreement must be in writing or evidenced in writing).

- Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, the proceedings in the court first seised are accorded priority by Article 27.

- A judgment given in a Member State in a civil and commercial matter must be recognised automatically in the other Member States without any special procedure being required in accordance with the principle of mutual trust in the administration of justice within the EU (Article 33; recital (16)). In keeping with the purpose of the Regulation (the establishment of a European area of freedom, justice and security in which there is free movement of judgments), the jurisdiction of the court of the Member State that gave the judgment may

[9] Brussels I Regulation recital (21). The Brussels Convention continues to govern matters falling within its scope arising between Denmark and the other EU states: Brussels I Regulation recital (22).
[10] Section II.E below.
[11] For further sub-rules on how a party's domicile is to be determined, see Brussels I Regulation Art 59

not generally be reviewed unless it conflicts with the jurisdictional provisions in the Regulation governing insurance matters and consumer contracts and those which confer exclusive jurisdiction over subject matter falling within Article 22 (Article 35). Recognition can be refused in the following limited circumstances:

- Where recognition would be manifestly contrary to the public policy in the Member State in which recognition is sought (Article 34(1)).[12]
- Where the judgment was given in default of appearance if the defendant was not served with the proceedings (Article 34(2)).
- If the judgment conflicts with a judgment given in a dispute between the same parties in the Member State in which recognition is sought (Article 34(3)).
- If the judgment conflicts with an earlier judgment given in another Member State or in a third state involving the same cause of action and between the same parties provided that the earlier judgment is otherwise entitled to recognition (Article 34(4)).

The Regulation also streamlines the procedure by which judgments issued in one Member State can be enforced in the other Member States. Declarations of enforceability are required to be virtually automatic on compliance with minimal formalities (Article 41; recital (17)). This streamlining of enforcement is also premised on the principle of mutual trust. The Regulation therefore removes the necessity for parties to bring proceedings on the judgment (such as exequatur proceedings) in order to enforce it outside its state of origin.

B. The Insolvency Regulation

Alongside the Brussels Convention, the six founding EEC Member States also sought to develop an EEC Bankruptcy Convention designed to establish a common legal framework for coordinating cross-border insolvencies. As it was anticipated that insolvency proceedings would be dealt with separately, they were excluded from the scope of the Brussels Convention as we have seen. The draft Bankruptcy Convention had something of a chequered history and was never ratified.[13] However, it was revived in the form of an EC Regulation as another of the coordinating measures that underpin the establishment of the European area of freedom, justice and security.

The scheme of the Insolvency Regulation is broadly as follows. According to Article 1, the Regulation applies to 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator', though not to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings or collective investment undertakings. The forms of insolvency proceeding to which the Regulation applies are further particularised by reference to the national insolvency law regimes of the Member States in Annex A. The term 'liquidator' is used as shorthand. Its meaning is similarly fleshed out in Annex C and encompasses a wide range of office-holders including, but not confined to, office-holders whose functions are limited to winding up the affairs of an insolvent company. The principal corporate and personal insolvency regimes of the Member States are all covered. The various forms of receivership that exist in UK law are excluded as they are regimes for the enforcement of individual creditor claims rather than collective insolvency proceedings. Schemes of arrangement under UK company law[14] which are commonly used as a tool in large restructurings are also not insolvency proceedings for the purposes of the Regulation. As is the case with the Brussels I Regulation, the Insolvency Regulation does not apply to Denmark.

By virtue of Articles 3, 4, 16 and 17 of the Regulation, the courts of the Member State within which the debtor has its centre of main interests ('COMI') have jurisdiction to open a main insolvency proceeding governed by that Member State's insolvency law (*lex fori concursus*). Once opened, a main proceeding must be recognised and given full effect without further formality in the other Member States in accordance with the principle of mutual trust.[15] The

[12] Infringement of fundamental rights, such as the right of a party to be heard, would be likely to fall within this narrow exception: see Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935 and, in the context of the Insolvency Regulation, Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-3813.
[13] For background see IF Fletcher, *Insolvency in Private International Law* (2nd edn OUP, Oxford 2005) 340-358, M Balz, 'The European Union Convention on Insolvency Proceedings' (1996) 70 American Bankruptcy LJ 485.
[14] Companies Act 2006 ss 895-901.
[15] Insolvency Regulation recital (22) and see the preliminary ruling of the European Court of Justice in Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-3813 [38]-[44].

practical consequence is that the *lex fori concursus*, which governs such matters as the composition of the estate, claims that can be lodged in the insolvency proceedings, rules governing the distribution of assets and the powers of the office-holder, have universal effect throughout the other Member States and impact on the rights of creditors wherever situated.[16]

The universal effect of main proceedings is tempered by a series of schematic features:[17] provision for the opening of parallel territorial or secondary winding-up proceedings in countries where the debtor has an 'establishment' restricted to the debtor's assets within those countries;[18] carve-outs excluding or modifying the effects of the *lex fori concursus* on specified matters such as rights *in rem*, quasi-security rights, payment systems, financial markets contracts, employment contracts and rights in immoveable property subject to public registration;[19] and a limited ground in Article 26 for Member States to refuse to recognise foreign insolvency proceedings where the effects of such recognition would be manifestly contrary to their public policy.[20] In seeking to protect local interests, expectations and transactions, these aspects of the Insolvency Regulation amount to a political compromise that allows residual scope for Member States to resist wholesale importation of insolvency norms from other countries and systems.

As well as giving universal effect to a judgment opening main proceedings, the Insolvency Regulation also makes provision in Article 25 for the recognition and enforcement of other judgments and legal process arising in the context of insolvency proceedings. Under Article 25(1), judgments of the following type must be recognised in the other Member States without further formality:

- judgments handed down by the court which opened insolvency proceedings concerning the course and closure of those proceedings and compositions approved by that court;

- judgments deriving directly from the insolvency proceedings and which are closely linked with them (whether handed down by the court which opened insolvency proceedings or another court having territorial jurisdiction within the relevant Member State);

- judgments relating to preservation measures taken after the request for the opening of the insolvency proceedings.

Judgments falling within Article 25(1) must be enforced in accordance with what is now Articles 38 to 58 of the Brussels I Regulation though not including Article 45(1) which is expressly disapplied. The effect is that these judgments can be freely exported and other Member States can only refuse to enforce them where enforcement would be manifestly contrary to public policy in accordance with Article 26.

Under Article 25(2), the recognition and enforcement of other judgments handed down in the context of insolvency proceedings that do not fall within the Article 25(1) categories is governed by the Brussels I Regulation provided that the Brussels I Regulation is applicable. At first blush, this introduces a binary logic: judgments falling within Article 25(1) which are integral or closely linked to the insolvency proceedings are squarely *outside* the Brussels I Regulation for the purposes of recognition and enforcement by virtue of its Article 1(2)(b) exclusion but squarely *within* the Insolvency Regulation; judgments falling within Article 25(2) which are not directly related or closely linked to the insolvency proceedings are squarely *outside* the Insolvency Regulation for purposes of recognition and enforcement but *within* the Brussels I Regulation. Accordingly, Article 25(2) is designed to avoid gaps between the Insolvency Regulation and the Brussels I Regulation.[21] However, a third logical possibility is implied by the Article 25(2) proviso (that judgments not falling within Article 25(1) are governed by the Brussels I Regulation *provided that* the Brussels I Regulation applies). There may be judgments handed down in the context of insolvency proceedings that fall *outside* Article 25(1) of the Insolvency Regulation which are also *outside* the scope of the Brussels I Regulation. An example would be an arbitral award made in favour of a corporate debtor in relation to a

16 Insolvency Regulation Art 4(2). Note, in particular, Arts 4(2)(b), (c), (g), (h), (i), (j).
17 The model is one of 'modified universalism': see I Mevorach, *Insolvency Within Multinational Enterprise Groups* (OUP, Oxford 2009) 65-81, 89-93.
18 Insolvency Regulation Arts 3(2), (3), 27-29.
19 Insolvency Regulation Arts 5-15.
20 See further Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-3813; Case C-444/07 *Re MG Probud Gdynia sp. z o.o.* [2010] BCC 453.
21 See The Report on the Convention on Insolvency Proceedings, prepared by Professor M Virgos and ME Schmit (hereafter 'Virgos-Schmit'), EU Council Doc 6500/96, DRS 8 (CFC), 3 May 1996, para 197. On the status of Virgos-Schmit as an authoritative guide to the interpretation of the Insolvency Regulation see the opinion of Advocate General Jacobs in Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-3813 [2].

claim under a contract: a judgment on a claim arising prior to and independent of insolvency proceedings falls outside Article 25(1) of the Insolvency Regulation and the Brussels I Regulation does not apply to arbitration.[22] In such cases, issues of cross-border recognition and enforcement would be a matter for the domestic private international and/or procedural rules of the relevant countries.

C. Why the classification of proceedings matters

The classification of proceedings matters in relation to questions of international jurisdiction because the Member State whose courts have jurisdiction over a claim falling within the scope of Article 25(1) of the Insolvency Regulation will often be different from the Member State whose courts would have jurisdiction were the claim classified as one falling within the scope of Article 25(2) and the Brussels I Regulation. Although the Insolvency Regulation does not expressly allocate international jurisdiction over claims falling within the scope of Article 25(1),[23] it is now settled that courts within the territory of the Member State within which insolvency proceedings have been opened also have international jurisdiction, by implication, over such claims.[24] However, if the office-holder wishes to pursue claims that fall within Article 25(2) in circumstances where the assets and prospective defendants are situated in other Member States, different rules will apply to determine which Member State's courts have international jurisdiction. For example, if a liquidator in English main insolvency proceedings is seeking to recover land in France from a defendant who lives in Germany on grounds of fraud, then depending on the cause of action, the English courts may have jurisdiction as England and Wales is the place of the insolvency proceedings, the German courts may have jurisdiction as Germany is the place of the defendant's domicile or the French courts may have jurisdiction as France is the place where the land is situated. Which cause of action is pursued and how that cause of action is classified will be outcome determinative.

Classification is generally not so critical as regards recognition and enforcement. There are technical differences in the processes for recognition and enforcement depending on whether a judgment falls within Article 25(1) or Article 25(2) of the Insolvency Regulation. For example, a judgment within Article 25(1) must be automatically recognised whereas a judgment within Article 25(2) will be subject to the recognition procedure in the Brussels I Regulation. Moreover, the only ground for refusal of recognition and enforcement of judgments falling within Article 25(1) is public policy whereas the Brussels I Regulation affords wider grounds for Member States to refuse recognition and enforcement of judgments falling within Article 25(2).[25] These technical differences are relatively marginal. Nevertheless, problems will arise where the court asked to recognise a judgment takes the view that the underlying cause of action should have been classified differently and, as a result, challenges whether the court that handed down the judgment had jurisdiction.[26]

D. Interpreting the Regulations: ECJ guidance on classification

The cornerstone of ECJ jurisprudence on the scope of the Brussels I Regulation in relation to insolvency matters is *Gourdain v Nadler*.[27] The practical question in this case was whether an order made under a French statute requiring a manager of a French company in liquidation to contribute personally to the company's assets was enforceable against the manager in Germany. The underlying legal issue was whether the order ought to be recognised as a judgment falling within the scope of what was then the Brussels Convention. The resolution of this issue depended on whether or not the French proceedings amounted to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' excluded from the scope of the Brussels Convention. The ECJ ruled that decisions relating to bankruptcy and winding-up were excluded from the scope of the Convention where they derived directly from the

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[22] Brussels I Regulation Art 1(2)(d).

[23] Article 25 deals only with the related issues of recognition and enforcement.

[24] Case C-339/07 *Seagon v Deko Marty Belgium NV Ltd* [2009] ECR I-767. This is not a *vis attractiva concursus* principle whereby the court which opens the insolvency proceedings has within its jurisdiction the insolvency proceedings and all other actions arising from the insolvency. *Seagon* establishes that it is for Member States to determine the court with territorial and substantive jurisdiction over an action falling within Article 25(1) of the Insolvency Regulation which does not have to be the court which opened the insolvency proceedings.

[25] Brussels I Regulation Art 45(1) referring back to Arts 34-35. The Insolvency Regulation Art 25(1) excludes the application of Art 45(1) of the Brussels I Regulation to proceedings falling within its scope with the result that the only basis for refusing recognition of judgments arising from such proceedings is that contained in Insolvency Regulation Art 26 (public policy).

[26] A case in point is Case C-292/08 *German Graphics Graphische Maschinen GmBH v van der Schee* [2010] CEC 499 where the question arising was whether a German court order for preservation measures in relation to machines supplied under reservation of title to a Dutch company that had subsequently gone into insolvency proceedings should be recognised in the Netherlands as a judgment falling within Insolvency Regulation Article 25(2) and within the scope of the Brussels I Regulation.

[27] Case 133/78 [1979] ECR 733.

bankruptcy or winding-up and were closely connected with the insolvency proceedings. Rather than devising an autonomous EC law definition of actions, decisions or judgments that would meet this general criterion of direct derivation/close connection, the ECJ went on to identify and apply a number of further criteria which it used to determine the legal foundation of the French cause of action. These criteria were as follows:

- The relevant cause of action was one to make good a deficiency of assets for which special provision was made in the French law of bankruptcy and winding-up.
- Under French law:
    - the action could only be brought before the court which made the order opening the insolvency proceedings;
    - the action could only be brought by the liquidator or the court of its own motion;
    - the action was brought on behalf of and in the interest of the general body of creditors;
    - the action was subject to its own special period of limitation deriving from the law of bankruptcy and winding-up.

In the light of these various characteristics deriving from French law, the ECJ concluded that the legal foundation of the cause of action was exclusively the law of bankruptcy and winding-up and that the order therefore fell within the 'bankruptcy' exclusion and outside the scope of the Brussels Convention.

The ruling and methodology used by the ECJ in *Gourdain v Nadler* remain fundamental to the resolution of questions of classification even though the case predated both the replacement of the Brussels Convention by the Brussels I Regulation and the adoption of the Insolvency Regulation. Recital (6) and Article 25(1) of the Insolvency Regulation expressly adopt the *Gourdain* criterion of direct derivation/close connection as a criterion of *inclusion* thus mirroring the Brussels I Regulation 'bankruptcy' exclusion and making clear that the recognition and enforcement of judgments arising in the context of insolvency proceedings which derive directly from the insolvency proceedings and are closely linked with them is governed by the Insolvency Regulation.[28] Moreover, the ECJ has continued to follow *Gourdain* in cases that have been referred to it for preliminary rulings since the advent of the Brussels I and Insolvency Regulations.[29] The prevailing approach is to apply an EU law criterion of direct derivation/close connection by reference to the nature of the relevant cause of action as it is defined in national law in order to determine whether it is within the Insolvency Regulation and so excluded from the scope of the Brussels I Regulation.[30]

More generally, the ECJ applies well established EU law methods of interpretation in construing the Regulations. The foremost considerations are the need to maintain the coherence of EU law and to ensure its practical effectiveness. Thus, in *Seagon v Deko Marty* the ECJ ruled that the courts of the Member State that had opened insolvency proceedings had international jurisdiction as regards a transaction avoidance action which satisfied the direct derivation/close connection criterion. The Court reached this conclusion despite the fact that the Insolvency Regulation does not expressly apply the jurisdictional rules in Article 3 to ancillary actions that generate judgments falling squarely within Article 25(1). If the ECJ had ruled otherwise, the allocation of jurisdiction would have turned on national rules of private international law. The pattern of EU law harmonisation of private international law rules, the policy underlying systematic EU legislative intervention in the area of private international law and the need for consistency and effectiveness all suggested that the solution had to lie in the Insolvency Regulation rather than in national law.[31]

[28] See further *Virgos-Schmit* (n 21) paras 194-197.
[29] See Case C-339/07 *Seagon v Deko Marty Belgium NV Ltd* [2009] ECR I-767; Case C-111/08 *SCT Industri AB (in Liquidation) v Alpenblume AB* [2010] CEC 47; Case C-292/08 *German Graphics Graphische Maschinen GmbH v van der Schee* [2010] CEC 499. It is clear from this line of authority that interpretations provided by the ECJ in respect of provisions of the Brussels Convention also apply to the Brussels I Regulation where the two sets of provisions are equivalent. The 'bankruptcy' exclusion in Article 1(2)(b) of the Brussels I Regulation is worded identically to its predecessor in the Brussels Convention.
[30] Case C-339/07 *Seagon v Deko Marty Belgium NV Ltd* [2009] ECR I-767 [39] (Advocate General Colomer).
[31] See, in particular, Case C-339/07 *Seagon v Deko Marty Belgium NV Ltd* [2009] ECR I-767 [51]-[74] (Advocate General Colomer), [15]-[28] (ECJ First Chamber).

III. The interaction of the regulations in common situations

This section considers the interaction of the Regulations in relation to forms of action that commonly arise in the context of insolvency proceedings. These forms of action are explored under three generic headings: establishing ownership of assets; the *actio pauliana*; and actions against third parties for breach of duty. We have seen that in the application of the pivotal *Gourdain* criterion much turns on the characteristics of the relevant cause of action in national law. While it is possible to identify some clear patterns, this deference to how causes of action are characterised in national law will inevitably lead to some uncertainty necessitating a case by case approach in areas where national laws provide different solutions to similar problems.

A. Establishing ownership of assets

It is common place for liquidators to become embroiled in disputes about ownership of assets. From a liquidator's perspective, the object of such disputes will be to establish the debtor's title as a precursor to realising the debtor's interest as part of the insolvent estate. At first blush, it might be thought that disputes of this nature are closely linked to the insolvency proceedings because they arise in connection with the administration of the estate which is one of the liquidator's fundamental tasks and rationales.

However, where ownership of an asset is disputed, the liquidator and the insolvent estate have no greater claim to the asset than had the debtor under applicable property law. The delineation of the estate is invariably a matter of ordinary private law unless, exceptionally, the applicable insolvency law expropriates the rights of third parties who would otherwise have an interest in the relevant asset.[32] The point holds good even where applicable insolvency law gives the liquidator power to deal with third party property, for example, property such as a matrimonial home that is jointly owned by an insolvent individual and a spouse who is not the subject of insolvency proceedings. In such a case, even assuming that applicable insolvency law empowers the liquidator to realise the asset, the liquidator would still be required to account to the third party for their interest as delineated by ordinary private law. Accordingly, we would not expect any power of disposal that the liquidator might have to affect underlying substantive property rights. This kind of logic has consistently been followed in English cases concerning the application of the *Gourdain* criterion to disputes between the liquidator and third parties about ownership of assets.[33] The upshot is that claims to ownership arising under the general law that accrue to the debtor before the opening of insolvency proceedings are not derived directly from or closely linked to insolvency law or the insolvency proceedings.[34] The exception in Article 1(2)(b) of the Brussels I Regulation does not apply and therefore such claims are not excluded from the scope of the Brussels I Regulation. The practical implications as regards allocation of jurisdiction are as follows:

- Ownership disputes relating to immovable property fall within the exclusive jurisdiction of the courts where the property is situated.[35]
- Ownership disputes relating to movable property must be brought in the courts of the Member State where the defendant is domiciled.[36]

Where, however, the purchaser or transferee's title was acquired after insolvency proceedings commenced in relation to the seller or transferor and depends on the exercise of office-holder powers of disposal the scope of which is determined by the applicable insolvency law, the answer may be different. In that case, there is a close link with the insolvency proceedings where such proceedings have displaced the debtor and conferred on the liquidator the power to deal with and dispose of the debtor's assets.[37]

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32 Insolvency laws that expropriate the holders of property rights are likely to be extremely rare because of their impact on credit extension. In many legal systems laws having such an effect would be unconstitutional.

33 See *Re Hayward* [1997] Ch 45; *Ashurst v Pollard* [2001] Ch 595; *Byers v Yacht Bull Corporation* [2010] EWHC 133 (Ch), [2010] BCC 368. Similar logic has been applied in cases where the issues raised turned on the respective entitlements of the debtor and other parties under pre-liquidation transactions: see *UBS AG v Omni Holding AG (in Liquidation)* [2000] 1 WLR 916.

34 *Byers v Yacht Bull Corporation* [2010] EWHC 133 (Ch), [2010] BCC 368 [26]. The same is true of contractual disputes about the performance and termination of pre-liquidation contracts: see *Gibraltar Residential Properties Ltd v Gibralcon* 2004 SA [2010] EWHC 2595 (TCC).

35 Brussels I Regulation Article 22(1); *Re Hayward* [1997] Ch 45, 56-57. In cases where the liquidator simply wishes to apply for an order for the sale of immovable property there being no dispute about ownership, the proceedings do not have as their object rights in *rem* and so fall outside Article 22(1). In such cases, courts of the Member State where the defendant is domiciled have jurisdiction: see *Ashurst v Pollard* [2001] Ch 595.

36 Brussels I Regulation Article 2; *Byers v Yacht Bull Corporation* [2010] EWHC 133 (Ch), [2010] BCC 368.

37 Case C-111/08 *SCT Industri AB (in Liquidation) v Alpenblume AB* [2010] CEC 47.

Disputes concerning ownership of property not only arise where a liquidator is seeking to establish the debtor's title to assets that are no longer in the debtor's or the liquidator's possession. They may also arise where the liquidator or debtor is in possession of assets in respect of which a creditor claims ownership. The classic example is retention of title claims. The question of how retention of title claims should be classified for the purposes of the Insolvency and Brussels I Regulations was the subject of a preliminary ruling by the ECJ in *German Graphics Graphische Maschinen GmBH v van der Schee*.[38] The practical issue in the case was whether the Dutch courts were obliged to enforce an order for preservation measures made by a German court in relation to equipment supplied on ROT terms to a Dutch company that had subsequently gone into liquidation. Although under Article 4 of the Insolvency Regulation, the law applicable to the insolvency proceedings and, in particular, to the determination of the assets forming part of the estate, was clearly Dutch law, the ECJ ruled that the question of ownership of the equipment constituted 'an independent claim, as it is not based on the law of the insolvency proceedings and requires neither the opening of such proceedings nor the involvement of a liquidator.'[39] Retention of title claims are therefore susceptible to the analysis set out above. They arise under ordinary private law (property and sales law) and are not sufficiently dependent on insolvency proceedings to fall within Article 1(2)(b) of the Brussels I Regulation.

B. The *actio pauliana*

It is clear from *Seagon v Deko Marty* that transaction avoidance actions which, seen through the lens of *Gourdain v Nadler*, only arise under applicable insolvency law after the commencement of the insolvency proceedings and can only be pursued by the liquidator, fall within the scope of the Insolvency Regulation for the purposes of questions of jurisdiction and cross-border recognition and enforcement. The *Seagon* ruling clearly encompasses actions under English law by liquidators and administrators to set aside transactions at undervalue, preferences or late floating charges[40] and their analogues or equivalents in other legal systems.[41]

In many systems, avoiding powers in insolvency or bankruptcy law have evolved from provisions of the general law for the remedying of fraudulent conveyances such as those derived from the *actio pauliana* of Roman Law or the Statute of Elizabeth of 1571. It remains a common pattern across many jurisdictions for there to be a general power exercisable by creditors independently of insolvency law to strike down transactions designed to hinder, delay or defraud creditors and / or to dispose fraudulently of property for less than fair consideration.[42] In English law, this general law power can arise both within and outside insolvency proceedings.[43]

It appears that an action that is capable of being pursued either within or outside insolvency proceedings would not satisfy the *Gourdain* criterion as it depends neither on the existence of insolvency proceedings nor exclusively on applicable insolvency law. This implies that such actions will be governed by the Brussels I Regulation and not the Insolvency Regulation.[44]

C. Actions against third parties for breach of duties

As is the case with actions to strike down fraudulent conveyances, actions against third parties, notably the directors of an insolvent company, for breach of duties that may have resulted in harm to creditors, may arise under the general law or under insolvency law. Thus, for English lawyers, there is a familiar distinction between a misfeasance action ─ which is simply an action brought by a liquidator but on the basis of a pre-existing breach of duty that would have been enforceable by the company in the absence of insolvency proceedings ─

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[38] Case C-292/08 [2010] CEC 499.
[39] Case C-292/08 *German Graphics Graphische Maschinen GmBH v van der Schee* [2010] CEC 499 [32].
[40] Insolvency Act 1986 ss 238-241, 245, 339-342; *Oakley v Ultra Vehicle Design Ltd (in Liquidation)* [2005] EWHC 872 (Ch), [2006] BCC 57 [42]; *Byers v Yacht Bull Corporation* [2010] EWHC 133 (Ch), [2010] BCC 368 [23].
[41] For discussion of the Dutch and German equivalents see A Boraine, *Avoidance Provisions in a Local and Cross-border Context: A Comparative Overview* (INSOL International, Technical Series Issue No 7, December 2008).
[42] *Ibid*.
[43] Insolvency Act 1986 s 423. In Scots law the same is true of actions to set aside gratuitous alienations and preferences which can be pursued either at common law or, after the commencement of insolvency proceedings, under Insolvency Act 1986 ss 242-243: see *Bank of Scotland v Pacific Shelf (Sixty Two) Ltd* 1988 SC 245, 1988 SLT 690, (1988) 4 BCC 457.
[44] See Case C-115/88 *Reichert v Dresdner Bank AG* [1990] ECR I-27; Case C-339/07 *Seagon v Deko Marty Belgium NV Ltd* [2009] ECR I-767 [22]-[40] (Advocate General Colomer). For continuing uncertainty as regards classification of the English law action under Insolvency Act 1986 s 423, see *Byers v Yacht Bull Corporation* [2010] EWHC 133 (Ch), [2010] BCC 368 [23], [38].

and a fraudulent or wrongful trading action under the Insolvency Act 1986 ss 213-214 that can only be pursued by a liquidator after winding-up proceedings have commenced.

Again, if *Gourdain v Nadler* is applied, it is clear that an action arising under general corporate law that just happens to be pursued by a liquidator as the lawful decision-making organ of the company once it is in insolvency proceedings is nothing more than an ordinary civil action that will be governed by the Brussels I Regulation. Conversely, however, actions, such as fraudulent or wrongful trading actions in English law, that arise exclusively under applicable insolvency law fails to be treated in the same way as transaction avoidance actions of the *Seagon* type.[45]

IV. Schemes of arrangment and analogous restructuring devices

Schemes of arrangement entered into in England and Wales under Part 26 of the Companies Act 2006 (formerly Companies Act 1985 s 425) have become a prominent and sometimes controversial restructuring tool.[46] However, an English scheme will only be binding on foreign creditors in relation to foreign assets of the debtor without the need for parallel schemes or preservation measures under relevant foreign laws to the extent that it is recognised as a 'judgment' elsewhere. Where a scheme is used as a means of exit from an insolvency proceeding such as an administration, then to the extent that the scheme amounts to a 'composition' it would appear to fall within Article 25(1) of the Insolvency Regulation. It will be recalled that Article 25(1) requires recognition without further formalities of compositions approved by the court that opened the insolvency proceedings.[47]

Free standing schemes of arrangement ─ that is, schemes that are entered into *without* the company having gone into formal insolvency proceedings ─ raise greater difficulty. It is clear that such schemes are not insolvency proceedings in themselves: they do not 'entail the partial or total divestment of a debtor and the appointment of a liquidator' within the meaning of Article 1(1) of the Insolvency Regulation nor are they listed in Annex A. It can be argued on two alternative grounds that schemes of arrangement relating to insolvent companies also fall outside the scope of the Brussels I Regulation for purposes of recognition and enforcement. These two grounds are as follows:

- A scheme of arrangement does not give rise to a 'judgment' within the meaning of Article 32 of the Brussels I Regulation.
- Even if a scheme of arrangement does give rise to a 'judgment', it falls within the 'bankruptcy' exclusion in Article 1(2)(b) of the Brussels I Regulation.

For a scheme to become binding it has to be sanctioned by the court. While, the court's sanction is not a formality, the court cannot alter the substance of the scheme and impose on creditors an alternative arrangement to which they did not agree.[48] The first argument therefore revolves around the legal function of the court order sanctioning the scheme. In one sense the order is necessary to give effect to the scheme and can properly be regarded as a 'judgment' in that the role of the court involves evaluating the merits and fairness of the scheme.[49] However, a Higher Regional Court in Germany has decided that a German policyholder of the UK insurer Equitable Life was not bound by a scheme of arrangement as the scheme was better characterised as a settlement agreement rather than a court ruling.[50] This decision suggests that acceptance of English schemes in European jurisdictions which have no equivalent restructuring mechanism is far from guaranteed.

Even if the first argument does not succeed, the second seems decisive. In relation to an insolvent company, a free standing scheme appears to be a 'judicial arrangement' and / or 'composition' falling within Article 1(2)(b) of the Brussels I Regulation. The English High Court has expressed support for this view.[51] The upshot is that it is not safe to rely on either the Insolvency Regulation or the Brussels I Regulation for recognition and enforcement of an English scheme. It appears

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45 A view that has been expressed in the English High Court: see *Oakley v Ultra Vehicle Design Ltd (in Liquidation)* [2005] EWHC 872 (Ch), [2006] BCC 57 [42].
46 The practice of senior secured creditors and equity joining forces to 'burn off the mezz' is a feature of recent schemes. For a well known example see *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch), [2010] BCC 209 (the IMO car wash restructuring).
47 G Moss, IF Fletcher and S Isaacs, *The EC Regulation on Insolvency Proceedings* (2^{nd} edn OUP, Oxford 2009) 320.
48 *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271.
49 See Look Chan Ho, 'A New Byword for Cross-Border Restructuring: Scheme of Arrangement as Judgment' [2005] Lloyd's Maritime and Commercial LQ 295.
50 OLG Celle 8 U 46/09, 8 September 2009.
51 *Re DAP Holding NV* [2005] EWHC 2092 (Ch), [2006] BCC 48.

instead that recognition and enforcement will turn on the vagaries of domestic private international law rules in the relevant Member States.

The problem of international recognition and enforcement of schemes of arrangement is commonly overcome in the common law world through the implementation of parallel schemes in several jurisdictions. However, this solution is not as readily available in the EU because not all Member States have an equivalent restructuring procedure. To ensure EU-wide recognition, the scheme will need to be sheltered behind an insolvency proceeding so as to give rise to a court sanctioned 'composition' falling within Article 25(1) of the Insolvency Regulation. Alternatively, and where otherwise appropriate, the restructuring could be conducted through a corporate voluntary arrangement which qualifies as an insolvency proceeding for the purposes of the Insolvency Regulation and is therefore subject to automatic recognition.[52]

V. Conclusion

Most actions brought by or against the debtor in the context of insolvency proceedings will fall either within the Insolvency Regulation or the Brussels I Regulation for the purposes of allocation of jurisdiction and cross-border recognition and enforcement. The touchstone for whether such an action falls within the Insolvency Regulation or the Brussels I regulation is the *Gourdain* criterion: is the action derived directly from and closely connected to insolvency proceedings? While the application of the *Gourdain* criterion should be straightforward in most cases, the interaction between the Regulations can be expected to generate some uncertainty because the connection with insolvency proceedings has to be determined by reference to the nature of the action as it is defined in the relevant national legal system.[53]

Where the 'action' falls outside the scope of both Regulations, questions of jurisdiction, recognition and enforcement in relation to such action are left to the vagaries of domestic private international law rules. In this context, it is probably safest to treat English schemes of arrangement, where free standing, as falling outside the scope of both Regulations with the consequence that their EU-wide effects can only be determined by reference to the national law of the other Member States.

[52] A company voluntary arrangement was used in the Schefenacker restructuring: see S Moore, 'COMI Migration: The Future' (2009) 22(2) Insolvency Intelligence 25.
[53] Case C-339/07 *Seagon v Deko Marty Belgium NV Ltd* [2009] ECR I-767 [39] (Advocate General Colomer).