JCOERE
Judicial Co-operation Supporting Economic Recovery in Europe

Report 2

Report on Judicial Co-operation in Preventive Restructuring and Insolvency in the EU

Substantive and procedural harmonisation, judicial practice and guidelines.

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Published September 2020

https://www.ucc.ie/en/jcoere/

Project no 800807 is funded by the European Union's Justice Programme (2014-2020)

V. Chapter 5: Judicial Co-Operation in Restructuring Processes

5.1 Judicial Co-Operation in Cross-Border Restructuring

This Chapter follows on from the discussion in Chapter 3 summarising differences in approach to preventive restructuring in European Member States and on procedural obstacles to co-operation, in addition to the discussion in Chapter 4 on different legal and judicial cultures in Europe. It will focus specifically on case law arising, either domestically in an EU Member State or in the CJEU, on co-operation in the context of insolvency, and on the emerging context of European corporate restructuring, in particular. The starting point, therefore, will be the EIR Recast Regulation,[1] which imposes specific obligations on insolvency practitioners and courts to co-operate as described in section 2 of this Chapter, building on the detailed discussion conducted in Chapter 2. The Chapter will then move on to a consideration of recognition and co-operation in the context of restructuring in section 3. Section 4 considers what co-operation might look like as application of these obligations increases together following the implementation of the PRD.[2] Examples are derived from cross-border cases in other contexts, where instances of judicial co-operation and communication occurred, or where such an approach was proposed and where it did not occur. Case law will demonstrate different approaches by practitioners and courts, which will influence developments in the European Union over time. Finally, section 5 will consider some exceptional cases, which may cause difficulties for co-operation.

[1] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19. [Hereinafter EIR Recast].
[2] Council Directive (EU) 2019/1023 of 26 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18. [Hereinafter "PRD"].

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

5.2 Foundation of the European Approach: Recognition of Proceedings under the European Insolvency Regulation 2000 and the EIR Recast 2015

The EIR Recast Regulation on Insolvency and its predecessor, the Insolvency Regulation,[3] set out important rules regarding recognition of insolvency proceedings across the EU Member States and the enforcement of consequent judgements.

For many years following the enactment of the original Insolvency Regulation, the case law focussed on the important question of centre of main interest or COMI. COMI is determinative of the jurisdiction in which the main insolvency proceedings will begin and the litigation surrounding the issue has been well documented. The important point in the context of co-operation, however, is that once COMI and seizure of proceedings is established, the opening of secondary or territorial proceedings (as local proceedings are described under the Regulation) is constrained.[4] Despite somewhat rocky beginnings in cases such as *Eurofood*,[5] which will be discussed below, the principles on which COMI is determined are fairly well settled in subsequent decisions of the CJEU such as *Interedil*[6] and followed in other cases such as *Daisytek*.[7] For our purposes, the smooth operation of the recognition process is a cornerstone of further enhanced court and judicial co-operation as anticipated following the passing of the EIR Recast.[8] As described below, there is, however, more to co-operation than simple recognition and the extent of the new co-operation obligations has yet to be explored.

The *Eurofood*[9] *case,* which was discussed in a different context in Chapter 3 of this Report, is relevant once again, albeit for a different reason. A further question had been referred to the ECJ by the Supreme Court of Ireland, namely whether there could be recognition for the principle of Irish law that the liquidation commences from the date of presentation of a petition to wind up a company where that petition is successful, as provided for in section 220 of the Companies Act 1963.[10] This question was considered by Advocate General Jacobs in his opinion, where he expressed the view that under the Regulation it is national law, which determines when a 'judgment' becomes effective. This matter was not considered by the ECJ in this case. However, subsequent cases have considered the issue. The lodgement of a request for the opening of insolvency proceedings, such as the presentation of a petition in the Central Office of the High Court, should have some consequence, even if this does not constitute the 'opening of proceedings'. The ECJ has held that the lodging of a request for the opening of proceedings in a Member State has, at least, the effect of restricting the debtor's

[3] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 [Hereinafter the EIR 2000].
[4] Regulation 1346/2000, Recitals 12, 17 and articles 3 and 27. EIR Recast, Recitals 23, 33, 38 and articles 3 and 34 – 40.
[5] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813.
[6] Case C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECR I-09915.
[7] *Re Daisytek-ISA Ltd*. [2004] BPIR 30.
[8] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19. [Hereinafter EIR Recast]
[9] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813.
[10] Companies Act 1963, s 220 provides that once a winding-up order is made the liquidation shall be deemed to commence from the date the petition was presented. This concept of 'relation back' was later referred to as 'heresy' by the Italian authorities in the Supreme Court (*Re Eurofood IFSC Ltd (No 2)* [2006] IESC 41, [2006] 4 IR 307).

freedom to move its centre of main interests; thus, the Member State where the request is lodged retains jurisdiction to determine the issue of COMI and whether to open main insolvency proceedings.[11] Applying to a preventive restructuring process such as the Irish Examinership, this would mean that the commencement of the stay, which is linked to the presentation of the petition, would receive pan-European recognition under the terms of the Regulation and that co-operation obligations would apply.

In fact, the *Eurofood*[12] case is a classic example of non-co-operation. Similarly, in recent times Irish courts have been inclined to support the repatriation of individual insolvent debtors, rather than allow the administration of the bankruptcy to take place in a neighbouring jurisdiction. In an academic context, this is described as a desire on the part of creditors to maintain 'jurisdictional reach' with the debtor.[13] There is anecdotal evidence of informal co-operation between practitioners in the UK and Republic of Ireland and there are provisions in the Irish Companies Act 2014, which allow a government Minister to make an order allowing for particular co-operation between Ireland and another state. There are similar provisions in the UK Insolvency Act 1986. These provisions were activated between Ireland and the UK until both countries' accession to the EU. It is expected that post Brexit these provisions will be re-activated.[14]

5.2.1 Foundations of the European approach: The co-operation obligations

The co-operation obligations contained in the EIR Recast were dealt with in detail in Chapter 2, however, a brief restatement is useful for this Chapter. In short, the more recent iteration of the EU Insolvency Regulation in the EIR Recast introduces an enhanced co-operation regime.[15] Articles 41-44 address co-operation obligations imposed on insolvency practitioners and courts respectively regarding a single insolvency proceeding concerning one company and articles 56-59 address similar co-operation obligations in the context of groups of companies. It is worth pointing out that the emphasis in the JCOERE Project is on the role of courts and the co-operation obligations imposed on them, rather than the obligations imposed on insolvency practitioners. For clarity though, it must be emphasised that article 41 imposes the

[11] See also the decision of the Court of Justice in Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-00701, where it was held that under art 3(1) the court of the Member State in which the centre of the debtor's main interests was situated at the time when the debtor lodged the request to open insolvency proceedings retained jurisdiction to open those proceedings when the debtor moved the centre of his main interests to another Member State after lodging the request but before the proceedings were opened. See also, in the context of the presentation of a bankruptcy petition, *Stojevic v Komercni Banka AS* [2006] EWHC 3447 (Ch) [2007] BPIR 141 and *Official Receiver v Eichler* [2007] BPIR 1636. See also Case C-396/*09 Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECR I-09915, where the court stated that 'it is the location of the debtor's main centre of interests *at the date on which the request to open insolvency proceedings was lodged* that is relevant for the purpose of determining the court having jurisdiction' (para 55) (emphasis added). In that case, it was held that a debtor could change the place of its registered office *before* a request to open insolvency proceedings was lodged, and the presumption in art 3(1) would apply, but may not be determinative on the question of the location of the debtor's centre of main interests.

[12] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813.

[13] *ACC v McCann and Griffin* [2012] IEHC 236; *Irish Bank Resolution Corp Ltd v Quinn* [2012] NICh. 1, [2012] B.C.C. 608; *O'Donnell and Anor. v Bank of Ireland* [2012] EWHC 3749. See Irene Lynch Fannon, 'Bankruptcy Tourism in the UK: Why and How?' (2013) 26(6) *Insolvency Intelligence* 85 for a discussion of these cases.

[14] Chris Umfreville, Paul Omar, Heike Lücke, Irene Lynch Fannon, Michael Veder and Laura Carballo Piñeiro, 'Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario'', (2018) 27 *International Insolvency Review* 422.

[15] See generally, Moritz Brinkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019).

obligation on insolvency practitioners to co-operate with each other in a single company situation and article 57 imposes a similar obligation in the context of corporate group proceedings. [16]

The language of the relevant articles is important to note from the outset. The obligation to co-operate is addressed to the court and not to the judiciary, as such.[17] The JCOERE Project, which reflects the policy of the EU Commission Justice Directorate General,[18] focuses on the question of judicial co-operation. It remains to be seen whether the different language employed is significant. In other words, is the fact that the obligation is addressed to the court rather than to the judiciary potentially important? It would seem to be of considerable importance in relation to the legal consequences for non-compliance. As described in Chapter 3 of this Report, questions of liability, for example, will pivot on the precise nature of the obligation.

Article 42 makes it clear that the explicit co-operation provisions are linked to the question of recognition of proceedings as it states that the co-operation obligation is imposed '[i]n order to facilitate the co-ordination of main, territorial and secondary insolvency proceedings concerning the same debtor (…)'. The article goes on to provide that any court dealing with a request to open proceedings or that has opened such proceedings, 'shall co-operate with any other court', which is similarly dealing with a request to open proceedings or which has opened proceedings. The article envisages that the co-operation obligation is subject to the compatibility with the 'rules applicable to each of the proceedings.' [19]

As we have stated, we expect that in the new European era of restructuring, some rules may be problematic for different courts as discussed in Chapter 3 of this Report. In some commentary, a wider view is taken of what is meant by 'rules applicable to each of the proceedings'. The proposition is that 'applicable rules' will include a range of laws, including for example, the General Data Protection Regulation (EU) 2016/679 or the Data Protection Directive 95/46/EC.[20] It seems surprising that these two specific legal frameworks would be singled out, as naturally, there will be other relevant legal rules that are applicable. It is our view, of course, that the general legal framework will be applicable, but nevertheless our interpretation of the specific provision is that it is intended to apply to rules applicable to each of the insolvency proceedings covered by the EIR Recast. On the face of it, the obligation to

[16] For a general commentary on these obligations see Dominik Skauradszun and Andreas Spahlinger in Moritz Brinkmann((ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019), at Chapter III and Chapter V.

[17] PRD, art 42(1): 'In order to facilitate the co-ordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings'

[18] The JCOERE Project is funded under a call from DG Justice for projects concerning Judicial Co-Operation. It is not envisaged that the use of the term court as distinct from judge is significant but nevertheless the difference should be noted.

[19] See below for a discussion of what this might mean.

[20] Both of these provisions are specifically mentioned by Dominik Skauradszun and Andreas Spahlinger in Moritz Brinkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos 2019) 342.

co-operate is most likely to be interpreted with reference to specific rules applying to particular proceedings covered by the EIR Recast.[21]

Article 42 goes on to provide some guidance as to how such co-operation might take place, including a provision that 'an independent person or body' acting on the court's instructions may be appointed, who may 'communicate directly with, or request information or assistance directly' from their counterpart in the second Member State.[22] As outlined in Chapter 2 of this Report, article 42(3) instances particular examples of co-operation that might occur.[23] Article 43 then goes on to impose an obligation on insolvency practitioners to co-operate with courts. Interestingly, however, the language of article 43 focuses on the practitioners' obligation in this regard and does not impose a correlated obligation on the court.

Article 57 imposes a similarly worded obligation on courts to co-operate with each other in situations where 'insolvency proceedings relate to two or more members of a group of companies'. Article 58 imposes an obligation, which is similarly worded to that in article 43, on insolvency practitioners to co-operate with courts in the same group context. In both contexts, articles 44 and 59 address costs but interestingly, somewhat different statements are made. Article 44[24] states that costs will not be charged by courts against each other for such co-operation whereas in the group context, article 59[25] states that costs of co-operation will apply to the respective proceedings. In short, the co-operation obligations are imposed on courts and practitioners insofar as such obligations to co-operate are not incompatible with substantive or procedural rules. The key questions posed by the JCOERE Project are how such co-operation obligations will operate in practice, particularly in the context of restructuring, and to what extent the substantive rules considered in Report 1 and the procedural rules considered in Chapter 3 of this Report will prevent co-operation.

5.2.2 Foundations of the European approach: Some issues surrounding co-operation

Our enquiry does not end there, rather there are additional questions of interest. We already know that there is more to co-operation than simple recognition of judgements. As the JCOERE Project progressed, a question has been raised in relation to the *borderline* between simple recognition issues, which have been played out in many cases, and the broader obligation now imposed under the EIR Recast regarding co-operation, both in relation to single debtor cases and group cases. This question is returned to in Section 5.4 of this Chapter.

[21] These specific proceedings are listed for each jurisdiction in Annex A of the EIR Recast.
[22] EIR Recast, Article 42(2). This communication must respect the procedural rights of the parties to the proceedings and the confidentiality of information. The reference to 'an independent body or person' reflects the UNCITRAL Model Law provisions described in Chapter 6.
[23] These are: (a) co-ordination in the appointment of the insolvency practitioners; (b) communication of information by any means considered appropriate by the court; (c) co-ordination of the administration and supervision of the debtor's assets and affairs; (d) co-ordination of the conduct of hearings; (e) co-ordination in the approval of protocols.
[24] EIR Recast, Article 44: 'The requirements laid down in Articles 42 and 43 shall not result in courts charging costs to each other for cooperation and communication.'
[25] EIR Recast, Article 59: 'The costs of the cooperation and communication provided for in Articles 56 to 60 incurred by an insolvency practitioner or a court shall be regarded as costs and expenses incurred in the respective proceedings.'

As the co-operation obligations are actually addressed to courts in the Member States, the question arises as to whether judges are personally obliged under the terms of the articles. According to Skauradszun, Spahinger and other commentators, under German law 'a prompt rejection or non-response to a request of another court for cooperation…is now a breach of duty.'[26] These authors conclude that the imposition of liability for breach of this obligation will rely on the terms of national law. However, the idea that an obligation imposed on a court could result in personal liability for a judge or other officer of the court would certainly raise some complex issues in some domestic legal frameworks. It is clear that one cannot presume that the reference to a court explicitly refers to a particular judge, or other officer of the court. Furthermore, it cannot be presumed that an obligation imposed on a body, such as a court, imposes a specific obligation, which gives rise to liability on a judge or officer.

A second interesting question in terms of legal consequences, as identified in Chapter 3 of this Report, is whether an alleged failure to co-operate can affect the validity of any claim, proceeding or other outcome in relation to insolvency proceedings generally. In other words what are the consequences if a party to an insolvency proceeding claims that either a court or an insolvency practitioner failed to comply with the co-operation obligations imposed in the EIR Recast? Is it even possible for a party to allege a failure to co-operate?

Finally, as described, it is contemplated in the EIR Recast that a court may decide that particular rules, substantive or procedural, render the co-operation required or requested 'incompatible with the rules applicable to them'. In addition, the court may find that co-operation may lead to a 'conflict of interest.' The question here is whether this decision by a court can be contested by a party to the proceedings. In other words, are the co-operation articles justiciable and if so, what is the proposed outcome?

5.3 The European Approach: Developing an Obligation to Co-operate in Restructuring

As described here and in Chapter 2 of this Report, the specific obligations imposed on courts to co-operate are newly introduced in articles 42 and article 57 (in a group context) and only applicable since 2017. Therefore, the fact that there are few cases arising in relation to these obligations may not be as significant as was thought at the outset. Instead, it may be simply a matter of time before issues come to the fore. Furthermore, restructuring is an even more recent concept in many European Member States following the passing of the PRD in June 2019. That said, we have some examples of a broader duty to co-operate being considered by courts in a European context *prior* to the enactment of the EIR Recast. The idea of an obligation imposed on *courts* to co-operate, as being inherent in the obligations already

[26] Dominik Skauradszun and Andreas Spahlinger in Moritz Brinkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos 2019) 353. Reference is also made to Zipperer in *Festscrhift fur Vallendar* to support this view. However, it is not entirely clear to whom this duty is owed and by whom. It is clear that one cannot presume that the reference to a court explicitly implies reference to a particular judge, or other officer of the court. Even more so one cannot presume that an obligation imposed on a body such as a court imposes a specific obligation giving rise to liability on a judge or officer.

imposed on *practitioners* to co-operate in the original EIR 2000, was mooted by some commentators and certainly raised in case law.[27]

In *Nortel Networks SA*,[28] for example, the court had been asked to send letters to courts in other EU jurisdictions seeking assistance for the Joint Administrators of various companies in the Nortel group. Patten J observed that even though the obligation in the EIR 2000 was addressed to practitioners only, 'the duty has been treated by the courts of Member States as incorporating or reflecting a wider obligation *which extends to the courts* which exercise control of insolvency procedures in their respective jurisdictions'.[29] In so finding, he referred to *Re Stojevic*[30] and cited the following passage from that decision, which states:

> Although the wording of Art 31 of the EU Insolvency Regulation only obliges the trustees in bankruptcy to cooperate, this also applies to the court according to the prevailing opinion and under the UNCITRAL model law.[31]

Nevertheless, the obligation to co-operate was not as clearly described as it is now.

5.3.1 Combining the EIR Recast and the new focus on restructuring

In June 2019, the Preventive Restructuring Directive was passed. The terms of the PRD, insofar as it describes rules that are potentially problematic to co-operation, are described in detail in the first JCOERE Report. Chapters 6-8 of JCOERE Report 1 also describe plans for its implementation by a number of Member States. The responses by various Member States to the issues we have raised in relation to the PRD and restructuring generally is summarised in Chapter 3 of this Report. Zorzi and Stanghellini have made some observations regarding the interface, or indeed lack of complementarity, between the PRD and the EIR Recast.[32] A key question that arises is whether the new restructuring processes adopted by Member States will be included in Annex A of the EIR Recast. The PRD provides Member States with the option of registering the processes under Annex A or not. This possibility is mentioned in Recital 13[33] and in Article 6 of the PRD, which concerns the imposition of a stay of enforcement proceedings.[34] For example, statements in the final paragraph of article 6 are designed to limit

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[27] Gabriel Moss, Ian Fletcher and Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016), para 8.402.
[28] *Re Nortel Networks SA & Ors* [2009] EWHC 206 (Ch).
[29] *ibid* para 11.
[30] *Stojevic v Komercni Banka AS* [2006] EWHC 3447 (Ch) [2007] BPIR 141, quoting a decision of the Vienna Higher Regional Court (9 November 2004, 28 R 225/04w).
[31] Patten J. also referred in Para 13 of his judgement to a similar observation made in the decision of the court in Graz in *Re Collins & Aikman,* Higher Regional Court of Graz, 20 October 2005, 3 R 149/05, reported in NZI 2006 vol 11 p.660.
[32] Lorenzo Stanghellini and Andrea Zorzi, 'Coordinating the Prevent Restructuring Directive and the Recast European Insolvency Regulation' (2019) Autumn Eurofenix 22.
[33] PRD, Recital 13: 'This Directive should be without prejudice to the scope of Regulation (EU) 2015/848. It aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. It does not change the approach taken in that Regulation of allowing Member States to maintain or introduce procedures **which do not fulfil the condition of publicity for notification under Annex A** to that Regulation. Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments.
[34] PRD, Article 6: 'Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.'

the available stay under the PRD to 4 months where the rescue process is not notifiable under Annex A and where there has been a COMI shift in the preceding 3 months. If a Member State chooses to implement the PRD by introducing a rescue or restructuring process that is not registered under Annex A of the EIR Recast, the obligations to co-operate quite simply do not arise. If, on the other hand the process is listed in Annex A, the obligations apply and then, and only then, do the questions around compatibility raised by the JCOERE Project arise.

The significance of the fact that the PRD gives the choice of Annex A inclusion to Member States can be illustrated by comparing two existing restructuring processes. The first process, which has been already implemented by Ireland as a Member State is the Examinership procedure and the second restructuring process, which was used effectively in the UK both before and after the financial crisis and which was particularly popular during the Great Recession, is the Scheme of Arrangement. The former is listed in Annex A[35] and therefore once an Examinership proceeding is opened in an Irish court, the recognition obligations, and the co-operation obligations under the EIR Recast will arise. In the gathering of the Judicial Wing at Copenhagen in September 2019, some members of the group regarded these facts as leading to an open and shut case of recognition.[36] This would unquestionably guide the court in the second Member State when considering a request from another party to open secondary proceedings in that Member State. Such a party could be a local creditor wishing to commence an enforcement proceeding in a local court, which would be contrary to the stay that accompanies the opening of an Examinership in all cases under Irish law. These rules effectively give the Irish stay a pan-European effect. In addition, requests for co-operation will be similarly governed by the EIR Recast.

A precursor to this situation is exemplified in the decision of the CJEU in *MG Probud Gydnia*[37] in which main insolvency proceedings had been opened in Poland. The company had a branch in Germany, carried on construction activities there and had assets situated there. On the application of the German customs office, a German court ordered the attachment of the company's assets. Even though the attachment had been ordered under German law, under Polish law it was not possible to order attachment of assets in this way. The CJEU confirmed that the main proceedings opened in Poland had universal effect and encompassed all of the company's assets including those situated in Germany. As a result, Polish law governed the treatment of assets, even though they were situated in another Member State. Thus, the German courts were precluded from ordering enforcement measures against the company's assets situated in Germany, subject to the exceptions to Article 4 provided for in the EIR Recast, which did not apply in this case. On the other hand, if secondary proceedings had been

[35] As is the French sauvegarde procedure, the Italian procedure and the Spanish procedure which feature in our Reports. See JCOERE Consortium, *Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations* (JCOERE Project, 2019) <https://www.ucc.ie/en/jcoere/research/report1/>.

[36] Discussion at the INSOL Judicial Wing, INSOL European Annual Congress, held in Copenhagen, September 26th, 2019.

[37] Case C-444/07 *MG Probud Gdynia sp. z o.o.* [2010] ECR I-00417.

opened in Germany, then German law would have applied and there would have been no difficulty in ordering attachment in respect of the assets situated in Germany.[38]

In contrast, if the same situation arose under a UK Scheme of Arrangement, the EIR Recast would not apply, so debtors in a second Member State could proceed to open a second set of proceedings to counteract or disrupt the rescue being proposed under the Scheme of Arrangement. It is also worth noting that rescue processes like the UK Scheme of Arrangement, which are based in company law, are specifically excluded from the application of the EIR Recast under Recital 16,[39] which states:

> This Regulation should apply to proceedings which are based on *laws relating to insolvency*. However, proceedings that are based on *general company law not designed exclusively for insolvency situations* should not be considered to be based on laws relating to insolvency. [emphasis added]

This statement raises an interesting question as to whether restructuring processes designed by Member States, which comply with the terms of the PRD, may in fact be excluded from being registered in Annex A, regardless of the views of the Member State. The lack of clarity or complementarity between the EIR Recast and the PRD presents difficulties of classification of restructuring processes with consequent advantages and disadvantages, which will take some time to work out once the PRD has been implemented. For our purposes, the most important consequence would be that the court (or judicial) co-operation obligations found in the EIR Recast would not apply to these restructuring processes at all.

Strangely, the EIR Recast itself addresses the question of restructuring in the provisions that are addressed to insolvency practitioners. Thus, Article 41(2)(b) states that in implementing the co-operation described in the first paragraph of the article insolvency practitioners should 'explore the possibility of restructuring of the debtor and, where such a probability exists, coordinate the elaboration and implementation of a restructuring plan'. A similar obligation is repeated in relation to the obligation imposed on insolvency practitioners in article 56 in the context of groups.[40]

In contrast, restructuring is not mentioned in relation to the obligation to co-operate imposed on courts in either Article 42 or 57.

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[38] Note that article 46 of the EIR Recast provides that the court which opens secondary proceedings may itself order a stay on the process of realisation of assets in whole or in part 'on receipt of a request from the insolvency practitioner in the main insolvency proceedings' but the Regulation goes on to provide that the court may require the insolvency practitioner in the main proceedings to take 'suitable measures to guarantee the interests of the creditors in the secondary insolvency proceedings'. This does not smoothly interface with existing domestic law implementing the Directive such as the Irish Examinership process which allows for a general stay of realisation of all claims, without any guarantee or other protective obligations. This contradiction is part of the Regulation because it recognises the Examinership as a procedure in Annex A.

[39] EIR Recast, recital 16: 'This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provision for payment to creditors.'

[40] EIR Recast, art 56(2)(c).

5.3.2 The classification of rescue as an insolvency proceeding

The EIR Recast applies specifically to *insolvency* proceedings. However, the PRD, which refers to preventive restructuring processes, implies that the procedures must be processes where there has been no adjudication of insolvency. Nevertheless, the PRD does envisage that a company may be technically insolvent, simply not adjudicated to be insolvent. As discussed in the previous section, we are aware of preventive restructuring mechanisms, such as the Irish Examinership process and the French *sauvegarde* processes, which are already covered by the EIR Recast.[41] We also know that certain kinds of restructuring proceedings, such as Schemes of Arrangement, are not included in Annex A of the EIR Recast. As discussed, such proceedings cannot, in fact, be included under the EIR Recast because they are derived from company law and therefore excluded per Recital 16.[42] It is also possible that that some Member States may decide not to include restructuring processes implementing the PRD in Annex A. This means that the recognition and co-operation obligations included in the EIR Recast may or may not apply to restructuring processes introduced by Member States to implement the PRD. What is interesting and somewhat surprising is that this issue is left to the discretion of the Member States.[43]

5.3.3 Rescue proceedings that are not included in the EIR Recast

In the same vein, similar considerations apply to particular kinds of actions that may be utilised in domestic insolvency practise, but that do not fit neatly into the categorisation provided by the EIR Recast or the PRD. As described above, schemes of arrangement, which are found in English and Irish law, are examples of rescue processes based in company law, that cannot be included under the EIR Recast. Common law receiverships and similar enforcement actions arising from the enforcement of rights *in rem* are another. In some jurisdictions – but not in all – that possess receivership-type arrangements, whether these are limited to rights derived from securities on real property or otherwise,[44] are viewed by practitioners as being part of the insolvency turnaround tool kit. This is the case in Ireland.[45] However, a common law receivership occurs without a *formal adjudication* of bankruptcy. All that happens is that the debtor decides a security or loan is in jeopardy and the receiver is appointed to protect the security or loan. The question as to the nature of a receivership arose in *Re Stanford International Bank Ltd* [46] in the context of the UNCITRAL Model Law in a similar set of circumstances that may occur under the EIR Recast.

[41] EIR Recast, Annex A, France.
[42] EIR Recast, Recital 1 states: 'This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency.'
[43] At some point during the last financial crisis the issue of whether UK Schemes of Arrangement ought to be included in the EIR Recast was considered as a debatable point by some academics in the UK See ILA Conference, London, 2015. However, the provisions of the EIR Recast 2015 renders this debate a moot point as Schemes of Arrangement are considered to be derived from Company Law provisions.
[44] English Insolvency Act 1986 Part III (though the use of this procedure has been significantly limited since the passage of the Enterprise Act 2002). See also, Irish Companies Act 2014, Part 8.
[45] See Irene Lynch Fannon, Jane Marshall and Rory O'Ferrall, *Corporate Insolvency and Rescue* (Butterworths, 1996).
[46] [2010] EWCA Civ 137.

In *Stanford International* it was held that 'the powers and duties conferred or imposed on the Receiver' did not amount to a 'foreign proceeding' for the purposes of the Cross-Border Insolvency Regulations (implementing the UNCITRAL Model Law).[47] Receiverships are not covered in these Regulation and will not be. In that sense there will be types of turnaround mechanisms that will not come within the remit of the EIR Recast or indeed be mechanisms implementing the PRD as such and will thus, be outside the European framework entirely.

Again, these provisions underline the lack of complementarity between the PRD and the EIR Recast and indeed some inherent lack of coherence in the provisions of the Recast itself.

5.4 Beyond Recognition to a Broader Understanding of Co-operation [48]

As described in the introduction to this Chapter, one of the distinctions at which the JCOERE Project has already arrived, is between recognition *simpliciter* of a decision to open proceedings or recognition of a judgement at the close of proceedings, on the one hand, and co-operation, which is ongoing throughout a process, in our case a restructuring process. Bearing in mind the difficult caveat generated by the lack of complementarity between the PRD and the EIR Recast, we will assume for these purposes that a number of restructuring processes will be included in the scope of the EIR Recast so that questions not only of recognition, but of ongoing further co-operation will arise. Omar have referred to examples of cases involving non-EU cross-border matters as exemplars of court-to-court co-operation relevant to the new provisions in the EIR Recast. However, on closer consideration of these cases, not all deal with questions of co-operation as distinct from questions regarding recognition. Our focus on co-operation in the EIR Recast goes further than mere recognition in reflection of the intended goals of the EIR Recast.

To illustrate this distinction, the Irish Supreme Court decision in *Re Flightlease*[49] concerns the question of whether a proceeding in a Swiss court will be *recognised in the sense of enforcement of the decision* in an Irish court. In answering this question, the court focussed on the nature of the proceedings and the question of whether this concerned the enforcement of a right *in rem* or a right *in personam*. This followed arguments made based on a decision of the Privy Council in in *Cambridge Gas*,[50] which raised similar facts and where the court held that the particular enforcement action was an action *in personam.*

In addition, the common law conflict of law principles recognising such judgements were also considered, as were the statements of the Privy Council in *Cambridge Gas*, which concerned further and additional observations regarding co-operation. In *Flightlease,* a resolution of this

[47] The Cross-Border Insolvency Regulations 2006 no 1030 (UK) [hereinafter the 'CBIR'].
[48] Bob Wessels, 'A Glimpse into the Future: Cross-Border Judicial Co-Operation in Insolvency Cases in the European Union' (2015) 24(1) IIR 97; Ian Fletcher, 'Spreading the Gospel: The Mission of Insolvency Law and Insolvency Practitioners in the Early 21st Century' in Stefania Barriati and Paul J Omar (eds), *The Grand Project: Reform of the European Insolvency Regulation* (INSOL Europe 2014) 193; Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016).
[49] *Re Flightlease (Ireland) Ltd* (in Voluntary Liquidation) [2012] IESC 12. [Hereinafter *Flightlease*].
[50] *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 [Hereinafter 'Cambridge Gas'].

final discussion regarding the development of common law principles was not necessary for the court to decide, rather it confined itself to the more limited question of recognition, which it was decided was not required in relation to the Swiss decision.[51]

The *Cambridge Gas* covered similar but broader territory with the decision addressing questions *of recognition*, but also questions *of assistance*, which for our purposes can be equated to the new European obligations to co-operate. As Lord Hoffman observed in his judgement, the entire circumstances in which Cambridge Gas sought to dispute the implementation of certain aspects of the Chapter 11 restructuring plan of the principle company Navigator Holdings plc ('Navigator') were peculiar in that no particular financial consequences arose for Cambridge Gas. Nevertheless, the Privy Council took the opportunity to deliver an important judgement regarding the common law and the principles that might be relevant to the courts of England and Wales in deciding whether to provide assistance to foreign bankruptcy proceedings. The focus is, therefore, on the provision of assistance to the ongoing conduct of an overseas insolvency proceeding (again similar to an obligation to co-operate in the European framework). Lord Hoffman, citing Professor Fletcher, agreed that the common law on cross-border insolvency has for some time been 'in a state of arrested development',[52] referring to both Regulation 1346/2000 and the fact that the UK gave effect to the UNCITRAL Model Law through a statutory instrument.[53] Consequently, the principles at common law could be further developed.

The court recognised that there was and is a distinction between questions of recognition by courts and the decisions of those courts, on the one hand, and on the other hand, the exercise by the Court of its 'discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property'. The latter question of assistance seems to be a more fluid concept.

In describing these distinctions, the Privy Council then went on to discuss the effect of existing common law principles in the following terms:

> the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of *Re African Farms* 1906 TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, **'recognition carries with it the active assistance of the court'.** [54]

Following further consideration of the current principles at common law, the Privy Council concluded in *Cambridge Gas* that the relevant court in the Isle of Man, which had originally

[51] *Re Flightlease (Ireland) Ltd* (in Voluntary Liquidation) [2012] IESC 12.
[52] Ian Fletcher, *Insolvency in Private International Law* (Oxford, Clarendon Press, 1999) 93. See also the observation of Jay Westbrook in 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum (1991) 65 Am Bankr L J 457, at p 457, that US courts and academic theorists have 'failed utterly' in addressing the needs of cross-border corporations facing insolvency and cross-border defaults.
[53] Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030).
[54] *Cambridge Gas* [20] (Hoffman LJ).

been asked for assistance in implementing some aspects of a previously agreed restructuring plan under a Chapter 11 proceedings, had the discretion to assist the trustee in the Chapter 11 proceedings in New York. This obligation was separate from the issue of recognition *per se*.

In the decision of the Privy Council in the *Singularis*[55] litigation, the common law powers to *assist* the operation of a foreign court were further considered in the context of a liquidation, which occurred in the Cayman Islands. The appointed liquidators had made a request to the court in the Cayman Islands ordering the auditors of the company (PwC) to disclose information and in the course of this litigation sought similar orders from the court in Bermuda, again with a view to assisting the liquidators in tracing assets that they felt at the time existed. The order was eventually denied by the Bermuda Supreme Court and this was appealed to the Privy Council, which summarised the questions to be considered as follows:

> The first is whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form), in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.[56]

The Privy Council had this to say in relation to the earlier decision in *Cambridge Gas*:

> It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply **by virtue of its power to assist**, [emphasis added] it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in *Rubin v Eurofinance* SA [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, a case cited in argument in *Cambridge Gas* but not in the advice of the Board.[57]

In making these distinctions, which lead to the conclusion that the **question of assistance** in a particular proceeding is separate from the question of recognition and enforcement of an actual judgement, the question then becomes one of whether recognition is a precondition to assistance. In European terms, can the co-operation obligations (analogous to assistance)

[55] *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2015] AC 1675, [2014] UKPC 36 [Hereinafter *Singularis*].
[56] *idem,* para [8].
[57] *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2015] AC 1675, [2014] UKPC 36 [18-20]; *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, and by Lord Collins (with whom Lord Walker and Lord Sumption agreed) in *Rubin v Eurofinance SA and others* [2012] UKSC 46.

be treated separately from recognition issues? Is it possible that assistance may be given to a particular process without involving the question of recognition of a final judgement?

If this is the case, it might lead us to suppose that in relation to restructuring in particular, assistance in the ongoing process of preventive restructuring might allow for a court to assist in the imposition of a stay imposed at the outset of a process, without the question of recognition of the process in the fullest sense of the word being assumed, particularly if the second Member State has implemented the PRD in an entirely different manner from that in the first Member State. If this second Member State implements the PRD through the adoption of a process that varies considerably from the process in the first Member State, would the enforcement of a pan-European stay simply amount to co-operation (assistance at common law), without obliging the second Member State to enforce a court order or judgement arising from the restructuring, which may include a cram-down on the interests of creditors in the second Member State?

5.4.1 The nature of the action: Enforcing rights or a collective bankruptcy proceeding?

In *Cambridge Gas*, as with *Flightlease*, the significance of whether the creditors' claim was a right *in rem* or a right *in personam* were also at issue. In the former decision, the distinction was considered important in terms of recognition of the creditors' claim against the insolvent estate. Key points regarding this development are that both corporate and personal insolvency proceedings involve a set of legal principles, which are not encompassed by the question of whether a particular action involves the enforcement of rights *in rem* or rights *in personam*. The distinction rests on the fact that:

> Judgments *in rem* and *in personam* are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment *in rem* or *in personam* is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. That mechanism may vary in its details.[58]

This distinction is important; recognition of a court order in a bankruptcy proceeding relates to the proceeding itself. In contrast, recognition of other claims, whether these are claims *in rem* or *in personam*, involves a recognition of a right. The court in *Cambridge Gas* emphasises that there is a difference in the effect of recognition from the second court. This distinction is

[58] *Cambridge Gas* [13-14] (Hoffman LJ).

expressed further in case law such as *Feniks* and *BNP Paribas* referred to below, which also distinguishes particular causes of action arising in national laws from an insolvency proceeding, even where these causes of action were pursued in the context of insolvency proceedings.

Finally, the Privy Council refers constantly to the provision of information as a form of assistance, which can be correlated to the statements in Article 42(3) described above. Noting that the obligation to assist may be more fluid in some ways, but stops short of recognition of a court order, the question remains as to whether this power of assistance is actually limited to the provision of information? It is also noteworthy that the Privy Council did not think the court was under a common law duty to assist in this particular case.

In this vein of distinguishing a particular cause of action from the recognition of and assistance with an insolvency proceeding as such, in another decision made at around the same time, the court in *Re Phoenix*[59] considered issues surrounding the enforcement of applications in the UK by office holders in a second jurisdiction. In this case a German administrator was recognised in the UK as having the capacity to act with the powers of an insolvency office holder under the Insolvency Act 1986[60] in the UK. The German administrator then applied under the Insolvency Act 1986 to have certain transactions set aside as being fraudulent against creditors and to claw back sums invested and fictitious profits under what had been deemed a Ponzi scheme. The facts rested upon the common law principles used to determine whether the court had an inherent jurisdiction to permit the statutory power under section 423 of the Insolvency Act 1986 to allow a foreign administrator to use those powers.[61] This decision rests upon the issue of assistance rather than the recognition of a particular process.

The elements of what might be involved are nicely summarised in the judgement of the Privy Council in *Singularis* by Lord Collins with reference to previous case law in this area. The elements are as follows: [62]

> First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings.
>
> Second, that power is primarily exercised through the existing powers of the court.
>
> Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law.

[59] *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann* [2012] EWHC 62 (Ch), [2013] Ch 61. [Hereinafter 'Re Phoenix'].
[60] Insolvency Act 1986, s 423.
[61] *Re Phoenix.*
[62] *Singularis Holdings Limited (Appellant) v PricewaterhouseCoopers* [2014] UKPC 36 para 38 per Collins LJ.

Fourth, the very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. [63]

Fifth, in consequence, those powers do not extend to the application, by analogy 'as if' the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case.[64]

5.4.2 Specific actions, rules and exceptions to co-operation in an insolvency and restructuring context

In the case law of the European Union and decisions of the CJEU, the issue of what amounts to a proceeding for the purposes of recognition and the purposes of the co-operation obligations has been litigated recently. In the following two cases, the CJEU held that the relevant proceedings, although connected to the main insolvency proceedings in terms of settlement of certain issues, were separate from the insolvency as such and therefore could proceed without incurring the recognition obligations under the regulation. *A fortiori* these sorts of proceedings would also not therefore attract the obligations to co-operate under the Regulation.

In *NK (liquidator) v BNP Paribas Fortis NV*,[65] money had been transferred to Fortis bank prior to insolvency proceedings concerning Gerechtsdeurwaarderskantoor BV. This was a company governed by Dutch law, of which PI ('PI.BV') was the sole shareholder who had subsequently been declared bankrupt. It was found that this particular transfer amounted to an act of embezzlement, which had resulted in the imprisonment of the individual involved. During the insolvency proceedings conducted in the Netherlands, proceedings were brought against the bank. Under Dutch law, the liquidator can bring an action in tort against a bank to repay money where the money has been paid at a disadvantage to other creditors: - 'Peeters-Gatzen-vordering (PGV).[66] In Dutch law, this is an action in tort, which can be brought by an individual creditor, liquidator, and/or anyone affected. The defendant bank, Paribas Fortis, said it was a tort claim and therefore should be brought in Belgium against the defendant. In contrast, the Dutch liquidator argued that this was a claim normally brought by a liquidator and therefore the Dutch court had jurisdiction over all of the insolvency related matters. CJEU found to the contrary. It decided that just because the liquidator brings the particular claim, it does not mean it is an insolvency procedure. It is still a tort and because individual creditors can bring the claim, the Belgian court could have jurisdiction. The PGV is covered by the

[63] This is a particularly important observation for common law countries in terms of how the EIR Recast is applied. Similar principles may apply in civil law systems. It is important to note that in France and Italy as examples, the implementation of the EIR Recast also includes rules regarding the conduct of recognition and co-operation obligations.

[64] This would mean that where there are differences in domestic legislation between the common law jurisdiction in which the application for assistance is made and the primary jurisdiction, the existence of an ongoing process in the primary jurisdiction would not in and of itself allow for the application of principles existing in that legal framework in the secondary common law court. In this case the transactional avoidance provisions are a case in point.

[65] Case C-535/17 *NK v BNP Paribas Fortis NV* [2019] ECLI:EU:C:2019:96.

[66] This is similar to a claim arising out of mistaken payments.

concept of 'civil and commercial matters' within the meaning of article 1(1) Judgement Regulation:[67]

> The Court has held that only actions which derive directly from insolvency proceedings or which are closely connected with them are excluded from the scope of the Brussels Convention and, subsequently, Regulation No 44/2001…[68]

The court went on to state that:

> the same criterion, as stated in the Court's case-law on the interpretation of the Brussels Convention, was set out in recital 6 of Regulation No 1346/2000 in order to delimit the subject matter of that regulation, and was confirmed by Regulation (EU) 2015/848 on insolvency proceedings…[69]

An important statement in the judgement is that:

> [the decisive criterion adopted by the Court to identify the area within which an action falls is not the *procedural context* [author's emphasis] of which that action is part, but *the legal basis* of the action. According to that approach, it must be determined whether the right or obligation which forms…the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings.[70]

More significantly, the decision in *Feniks sp. z o.o. v Azteca Products & Services SL*[71] also addresses this issue in relation to an important transactional avoidance action. In this case, Feniks was a creditor of Coliseum, which was a general contractor with whom Feniks had an investment agreement regarding a construction project in Poland. Coliseum was technically insolvent, in that it was unable to pay subcontractors, but proceedings had not yet been opened. Coliseum sold property in Poland to Azteca (Spain) in partial fulfilment of prior claims by Azteca. This transaction would normally be subject to some sort of clawback action. Under Polish law any creditor – not just an insolvency practitioner or appointed liquidator – can bring a claw back action. Feniks, as a creditor of Coliseum, brought a claw back action against Azteca

[67] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351/1.

[68] The court referred to the following judgments at paragraph 26: Case C-133/78 *Henri Gourdain v Franz Nadler* [1979] ECLI:EU:C:1979:49, paragraph 4, and Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'* [2012] ECLI:EU:C:2012:215, paragraphs 22 and 24, and Case C-641/16 *Tünkers France and Tünkers Maschinenbau GmbH v Expert France* [2017] ECLI:EU:C:2017:847, paragraph 19 and the case-law cited therein.

[69] *NK v BNP Paribas Fortis NV* [2019] ECLI:EU:C:2019:96, para 27.

[70] Case C-157/13 *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB* [2014] ECLI:EU:C:2014:2145, Paragraph 27 and 28; Case C-641/16 *Tünkers France and Tünkers Maschinenbau GmbH v Expert France* [2017] ECLI:EU:C:2017:847, paragraph 22; Case C-649/16 *Peter Valach and Others v Waldviertler Sparkasse Bank AG and Others* [2017] ECLI:EU:C:2017:986, paragraph 29.

[71] Case C-337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805. I wish to acknowledge the lecture provided by Lucas Kortmann RESOR at the EIRC Conference, hosted by hosted by German *Arbeitsgemeinschaft Insolvenzrecht und Sanierung* with INSOL Europe and the Law Society, Brussels 29 June 2017 which provided references and explanations for these cases amongst others. Kortmann L, 'Update on ECJ and other landmark decisions on European Insolvency Law' (EIRC Conference, hosted by German Arbeitsgemeinschaft Insolvenzrecht und Sanierung with INSOL Europe and the Law Society, Brussels 29 June 2017.)

before the Polish court to clawback the value of the transaction on the basis of article 7(1)(a) of the Judgments Regulation. Azteca argued that the correct forum was the Spanish court.

The question for the CJEU was whether an *actio pauliana* is covered by the rule of international jurisdiction provided for in article 7(1)(a) Judgments Regulation.[72] The response from the CJEU was that an *actio pauliana*, which is based on the creditor's rights created upon the conclusion of a contract, falls within 'matters relating to a contract' of article 7(1)(a) Judgments Regulation. Therefore, the action is separate from the insolvency *per se* and is not subject to the recognition or co-operation obligations in the EIR Recast. In terms of the interface between the EIR Recast and these provisions of the Judgements Regulation, there is a lack of certainty and clarity as to the borderline between insolvency matters and other causes of actions.[73] It is also important to recognise that these cases were argued under the original European Insolvency Regulation 1346/2000 and so the addition of the provisions of Article 6 to the EIR Recast may have an effect on possible outcomes of similar arguments made in cases after 2015. This provision states in Article 6(1) that " The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions." and goes on to amplify this issue in further sub sections. There has been no case law to date on this issue under the EIR Recast. However, commentary on a later decision of the CJEU in *Wiemer & Trachte GmBH vZhan Oved Tadzher* asserts a liquidator's right to choose between different jurisdictions 'when it comes to bringing actions to protect the interests of the creditors' and it is further argued that this situation should be maintained despite the provisions of Article 6 of the EIR Recast. The argument is made the view that Article 6 of the EIR Recast leads to a 'conclusion of exclusive jurisdiction' shoulde be rejected as limiting the 'options of the insolvency practitioner unduly'.[74]

[72] Such an action is where a person entitled to a debt repayment (ie a creditor) requests that an act, whereby his debtor has transferred an asset to a third party, which is detrimental to his rights, be declared ineffective, also described as an avoidance action.
[73] Case C-337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805 [44].
[74] See *Case C-296/17 Wiemer &Trachte GmbH v Zhan Oved Tadzher* and the commentary on this case from Ganeve *et al* in Eurofenix Spring 2020 p. 24

5.4.3 The invocation of exceptional rules

Some interesting cases have illustrated that it might be possible for particular rules to be invoked to prevent full co-operation. The rule in *Gibbs* seems to be one such example; this states that a debt governed by English law cannot be discharged or compromised by a 'foreign' insolvency proceeding.[75] The rule has been heavily criticised, with commentators[76] arguing that it is not relevant in modern day cross-border insolvency proceedings following the continuing trend towards recognition of foreign insolvency proceedings (and their effects). However, in a recent English decision[77] the court considered an application by a foreign representative to the English court on behalf of a debtor, International Bank of Azerbaijan, for a permanent stay on a creditors' enforcement of claims in England under a contract governed by English law, contrary to the terms of the foreign insolvency proceeding. The foreign proceedings were conducted in Azerbaijan and had been recognised in England under the CBIR. The English High Court found that the rule in *Gibbs* did apply to prevent the court granting a permanent (or indefinite) stay on the enforcement of creditors' English law governed contractual claims. Any stay granted by the court would be more than simply procedural and would go to the substance of creditors' claims. The court would, in effect, be ordering the discharge of the creditor's claim and was prohibited from doing this, following the rule in *Gibbs*.

In a European context, by analogy, leaving aside the issue of the UK specifically, the question would quite simply be whether the rule in *Gibbs*, or a rule of this kind, would be a rule incompatible with the recognition of, and co-operation with, a restructuring process introduced in another Member State, where this process is registered in Annex A. Following the decision in *BakishiyevaI*, there was a view that the recognition and co-operation obligations under the EIR Recast would supersede the invocation of a rule such as the rule in *Gibbs*. In fact, in *Bank of Baroda v Maniar*[78] it has been held by the English courts (in a case concerning an Irish Examinership) that the EIR effectively bypasses the Gibbs rule in cases where there is recognition of insolvency proceedings under the EIR. However, it is not entirely clear how different treatment of different proceedings in different jurisdictions could justifiably lead to different outcomes. The relatively recently created Model Law on Insolvency Related Judgments (2018), not as yet implemented in the UK, would similarly supersede the Gibbs rule.

[75] *Antony Gibbs and sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399. [Hereinafter Gibbs].
[76] K Ramesh, 'The *Gibbs* Principle: A Tether on the Feet of Good Forum Shopping' (2017) 29 SAcLJ 42, 54, Judge Martin Glenn of the United States Bankruptcy Court: Southern District of New York in the *Agrokar* Decision was also critical. See in contrast Madaus S: 'The Rule in Gibbs or How to Protect a Local Debt from Foreign Discharge Oxford Law Blog 18 December 2018.
[77] Bakhshiyeva v Sberbank of Russia [2018] EWHC 59 (Ch) [Hereinafter Bakishiyeva].
[78] *Bank of Baroda v Maniar* [2019] EWHC 2463.

5.4.4 The public policy exception in the EIR Recast

The EIR Recast does provide for the court to decide that an insolvency process in another jurisdiction may not be recognised for public policy reasons, specifically if recognition of such proceedings are contrary to public policy. In the European context, a decision of this kind was made by the Irish High Court in *ACC Bank plc v McCann* in which a set of proceedings were brought by the ACC Bank against Sean McCann. Mr McCann had also been involved in property development in Ireland. The case in hand concerned his application for a personal bankruptcy order in Northern Ireland and the efforts of his main creditor to have that order annulled. In a decision in the Irish High Court, Dunne J upheld the creditor's argument based on article 26 of the EIR Recast, which provides for the annulment of proceedings on public policy grounds. In upholding the creditor's challenge, which focussed on the fact that the nature and timing of the application to Northern Ireland had negated the creditor's right to be heard and could potentially prejudice the particular creditor's rights in significant ways regarding priority of payment, the proposed recognition of the bankruptcy adjudication in Northern Ireland was declined as being contrary to public policy within the terms of article 26. In the circumstances of the case and in granting the order not to recognise the personal bankruptcy proceedings in Northern Ireland, Dunne J stated:

> Suffice it to say I think that this is one of the exceptional and rare cases in which the court should, for the reason I have already outlined, namely the fact that ACC did not have an opportunity to be heard in Northern Ireland on the question of COMI bearing in mind that they will be significantly prejudiced by that fact it is my view appropriate in this case to make an adjudication. [79]

This case was on appeal to the Supreme Court, but the appeal has been withdrawn.[80]

5.5 Conclusion and Transition

The foregoing Chapter has focused on cases that have centred on an issue of cross-border *cooperation* within the EU in the area of cross-border restructuring and insolvency. Although the EIR Recast has only been applicable for the last three years at the time of writing, the cases discussed in this Chapter have shown what could occur in the EU when restructuring procedures falling under the EIR Recast begin to come before Member State courts and the CJEU and how these issues may develop in the EU over time, including where difficulties may arise. The discussion in this Chapter also provides an insight into the eventuality that there may be competing procedures under the PRD and what this could mean for court-to-court co-operation generally or under the EIR Recast.

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[79] Please note these statements are from the transcript of the proceedings in the High Court. There is no approved judgement to date. See further reports at RTE Business, 'Judge puts stay on Sean McCann bankruptcy case' *RTE News* (Dublin, 21 August 2012) < https://www.rte.ie/news/business/2012/0821/334442-judge-puts-stay-on-sean-mccann-bankruptcy-case/> [Accessed July 11, 2013].

[80] See also *Re Zetta Jet Pte Ltd* [2018] SGHC 16. Under article 6 of the Singapore Model Law, to which article 17 is subject, a Singapore court may refuse recognition if such recognition would be 'contrary' to the public policy of Singapore. Article 6 of the Model Law on the other hand requires recognition to be 'manifestly contrary' to public policy for it to be refused.

The next Chapter will present a thematic discussion of the various guidelines and recommendations that provide direction in relation to co-operation and co-ordination of cross-border insolvency and restructuring cases. Chapter 6 will discuss a number of different sets of guidelines and recommendations, focusing on their approaches to the sharing or obtaining of information and disclosure requirements; asset co-ordination; the mechanism of co-operation and communication methodology; and the notification and service of official documents. Chapter 6 will therefore extract issues that are relevant to court-to-court co-operation, focusing on how these issues may arise in the context of restructuring (preventive or otherwise), and explain what tools are already available to assist judges in the fulfilment of their co-operation obligations.