A (Not so Simple Matter of) Jurisdiction: 
the Relationship between
Regulations (EU) No. 1346/2000 and No. 44/2001

Michele Angelo Lupoi

This paper deals with the relationship between two very important EU pieces of procedural legislation: on the one hand, regulation no. 44/2001, on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (the so called Brussels I regulation), and, on the other, regulation no. 1346/00, on insolvency proceedings.

Both regulations apply between the European Members States and have introduced very important uniform provisions within their objective scope of application.

Regulation no. 44/2001 is really the “heir” of the Brussels Convention of 27 September 1968: therefore, it has a much longer history than the insolvency regulation. As a matter of fact, the Convention of 1968 basically set down the foundations of the European judicial space, based on mutual trust and on the equivalence between the courts of the various Member States.

It is beyond the scope of this paper to enter into the details of the Brussels I regulation / Convention. Here, I am mostly concerned with the boundaries between regulation no. 44 and the insolvency regulation. In order to trace such boundaries, one first needs to examine Art. 1 of what used to be the convention of 1968.

According to this provision, the Convention applied to civil and commercial matters. Art. 1, however, did not define the notion of civil and commercial matters: as a matter of fact, it only clarified that the application of the Convention did not depend on the nature of the judicial body which rendered a decision. The Court of justice was therefore called upon to try and define such a notion, in a series of important decisions which is impossible for me now to examine in any detail. Suffice here to say, therefore, that the notion of civil and commercial matters, in the case law of the Court, must be given a common and autonomous meaning, irrespective of the meanings given to this expression by the national

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1 Regulation n. 1346, however, does not apply to Denmark.
laws of the Member States, in the light of the elements which characterize the relationships and the object of the dispute.  

Art. 1, however, did specify that some subject matters fell out of the scope of application of the 1968 Convention. As concerns us here, Art. 1, lett. g) excluded from the scope of Brussels 1: “bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings”. As it is well known, at the time Art. 1 was enacted, such exclusion was due to the fact that, in the light of the extremely different positions of the Member States, the European law maker decided to regulate transnational insolvencies in an ad hoc Convention.  

The meaning of the letter g) exclusion was made clear by the Court of justice, which stated that the Brussels I Convention, in the first place, did not apply to insolvency proceedings, i.e., those proceedings based on the debtor’s insolvency or lack of credit, implying the intervention of a judicial authority to forcibly and collectively dispose of the debtor’s assets or, anyway, putting those assets in the hands of such authority. Moreover, the exclusion extended also to proceedings deriving from bankruptcy or winding-up, i.e. those actions and claims which arise directly from bankruptcy or winding-up and are closely connected with the proceedings for the ‘liquidation des biens’ or the ‘règlement judiciaire’, in the sense that they may be filed only after the opening of insolvency proceedings.  

As an example of such related proceedings, the Court expressly pointed to an action to set a transaction aside by virtue of insolvency. As a matter of fact, such an action is clearly available on the condition that insolvency proceedings

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5 ECJ, c. 133/78, Gourdain, [1979] ECR 733.  

6 See case 133/78 Gourdain, [1979] ECR 733.  

have been opened against a debtor and it aims at increasing the assets used to pay off the creditors.

By contrast, all the civil law actions brought by the liquidator, in particular those actions which pre-date the opening of the insolvency procedure, fall within the scope of application of Brussels I.

The blank space left by the 1968 Convention was finally filled-up with the implementation of regulation n. 1346 of 2000, a welcome and long due piece of legislation in a very sensible area of the law. Such regulation is based on the text of the Brussels Convention of 23 November 1995 (which never entered into force) and aims at providing uniform rules for coordinating insolvency proceedings within the EU, granting an equal distribution among the creditors and contrasting forum shopping on the side of insolvent debtors.

As it was already pointed out by previous presentations in the course of this Symposium, Art. 3 of the regulation provides for a rule on jurisdiction in insolvency proceedings. Such provision, however, only hands out a connecting factor in relation to the opening of the so-called main and secondary insolvency proceedings (the place of main interests and the secondary seat of the debtor respectively).

No jurisdiction ground, on the other hand, is provided for in relation to actions derived from the insolvency proceedings and which, as it was pointed out earlier, were deemed not to be covered by Brussels I. In particular, no rules on jurisdiction are expressly given for actions to set a transaction aside because of insolvency.

This apparent lacuna cannot be considered fortuitous: as a matter of fact, the European lawmaker could not conciliate the various principles applied in the Member States, also taking into consideration the fact that not every national
legal order applies the principle of the “vis attactiva concursus”\textsuperscript{14}, according to which the court which opens insolvency proceedings has universal jurisdiction for every action or claim deriving from the insolvency.

In December 2000, regulation n. 44/2001 replaced the 1968 Convention in governing jurisdiction and the recognition and the enforcement of decisions within the Member States in civil and commercial matters. As concerns us here, no changes were brought in Art. 1 in regard to the “insolvency” exception to the application of the Brussels I system.

In time, the question was raised whether the exclusion from Brussels I of actions derived from insolvency proceedings was still valid under the new regulation no. 44 or if, on the other hand, regulation no. 1346 contained an (implicit) rule on jurisdiction on actions related to insolvency proceedings.

Most commentators came to the conclusions that the actions, not covered by Brussels I in the light of the Court of justice case law and not referred to by Art. 3 of regulation 1346 either, fell to be regulated by the provisions of the lex fori\textsuperscript{15}. As concerned Italy, this solution implied that the court which opens the main proceedings, in compliance with Artt. 3 of law n. 218 of 1995, 24 of the Insolvency Act and 20 c.p.c., also had jurisdiction on any related or deriving action, in particular those to set transactions aside.

According to some authors, however, after regulation no 1346 entered into force of, the “insolvency exclusion” set by Art. 1, para. 2, lett. b) of regulation 44 should now be interpreted in a more restrictive meaning, with the possibility to apply the rules on jurisdiction of Brussels I to all the actions derived from insolvency proceedings non covered by regulation no. 1346\textsuperscript{16}.

A third interpretative solution was also offered, in particular from German commentators, according to which the State where the main proceedings are opened also has jurisdiction, in compliance with the provisions of the regulation, as concerns related actions, in application of the vis attractiva concursus\textsuperscript{17}.

An author even proposed a compromise solution, stating that regulation no. 1346 does indeed provide for a connecting factor for claims to set a transaction aside in its Art. 4, lett. m), according to which the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure, as concerns, in particular the rules relating

\textsuperscript{14} See De Cesari, in La tutela transnazionale del credito, De Cesari, Frigessi di Rattalma eds., p. 105.

\textsuperscript{15} De Cesari, Giurisdizione, riconoscimento ed esecuzione delle decisioni nel regolamento comunitario relativo alle procedure di insolvenza, in Riv. dir. int. priv. e proc., 2003, p. 69; Corsini, Revocatoria fallimentare e giurisdizione nelle fonti comunitarie: la parola passa alla Corte di giustizia, ibid., 2008, p. 442 s.

\textsuperscript{16} See Dutta, Jurisdiction for insolvency-related proceedings caught between European legislation, in Lloyd’s mar. comm. law quar., 2008, p. 92 s.; contra De Cesari, in La tutela transnazionale del credito cit., p. 107; Corsini, op. cit., p. 437.

\textsuperscript{17} Contra Corsini, op. cit., p. 433 ff.; Dutta, op. cit., p. 90 ff.
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to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors\textsuperscript{18}.

In the light of these diverging opinions, the German \textit{BGH} in 2007\textsuperscript{19} filed a reference for a preliminary ruling to the European Court of Justice, in order to verify whether the lack of an express discipline of jurisdiction over actions related to insolvency proceedings was due to a mistake by the lawmaker or whether such omission was indeed caused by the impossibility for the Member States to agree upon the width of a Community \textit{vis attractiva concursus}. What the German Supreme Court asked to know, basically, was whether an action to set a transaction aside because of insolvency is subject to the provisions of regulation no. 1346 or those of regulation no. 44, for the purposes of determining the appropriate court to hear a cross-border dispute.

The case was filed as C-339/07 (\textit{Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium NV}) and has been recently decided by the European Court of justice.

The facts of the case are relatively straightforward: a German company (Frick Teppichboden Supermärkte GmbH) (‘the debtor’) had paid 50,000,00 euros to a Belgian company (Deko Marty Belgium NV) (‘the defendant’) on 14 March 2002. The following day, the debtor applied to commence insolvency proceedings before the Amtsgericht (Local Court), Marburg, and that application was granted on 1 June 2002. The liquidator then brought an action to have the transaction set aside before the Landgericht (Regional Court), Marburg and claimed repayment of the 50,000,00 euros paid to the defendant. The Landgericht dismissed the applicant’s claim for lack of jurisdiction, arguing that the defendant had its registered office in another State (Belgium) and regulation no. 1346 did not apply to actions in the context of an insolvency to set a transaction aside. The case was then brought before the Bundesgerichtshof, which proceeded to invest the European Court of Justice with its request for preliminary ruling.

Advocate general Ruiz-Jarabo Colomer, in his opinion delivered on 16 October 2008, pointed out that, in the \textit{Gourdain} decision, the Court had given, as the reason for the exclusion of the “\textit{actio pauliana}” from the scope of application of Brussels I, the direct relationship between the action and the insolvency proceedings. He also added that he did not believe any lacunae existed in the Community legislation in the regard at hand, considering the possibility of using the analogy principle. In the opinion of the Advocate General, the intention of the Council in laying down the procedural rules governing actions in the context of an insolvency to set a transaction aside was clear: as a matter of fact, for the A.G., the analysis of regulation no. 1346 demonstrated that there is a partial

\textsuperscript{18} See Consalvi, \textit{Brevi considerazioni in materia di giurisdizione e legge applicabile alla revocatoria fallimentare intracomunitaria}, in \texttt{www.judicium.it}, p. 5.

\textsuperscript{19} 21 June 2007, cit.
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rather than a total silence in this regard. Considering that Community action in the field of insolvency is based on the need for effectiveness and legal certainty and that regulation no. 1346 adopts a (partial) universal approach to insolvency, the Advocate General came to the conclusion that an action to set a transaction aside should be in the hands of the liquidator and that it is for the liquidator alone to bring the most appropriate actions in the course of the proceedings for the purposes of protecting the assets as a whole. Therefore, in accordance with Article 3(1) of regulation no. 1346, a national court which is seized of insolvency proceedings has jurisdiction to hear an action in the context of the insolvency to set a transaction aside brought against a defendant whose registered office is in another Member State: since that jurisdiction is relatively exclusive, it is for the liquidator to choose the forum which, having regard to the connections of the contested disposition, is most suitable for protecting the assets.

The Court of Justice rendered its judgment on 12 February 2009. The Court starts its reasoning by quoting several recitals in the preamble to regulation no. 1346: in particular, recital 2 (which states that: ‘The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the [EC] Treaty’), recital 4 (according to which ‘[i]t is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)’), recital 6 (which provides: ‘In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.’) and recital 8 (which states: ‘In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States’).

The Court then went on to examine whether the actions to set a transaction aside are included within the scope of Article 3(1) of regulation no. 1346. Interestingly, in this analysis, not a word is spent on the possibility to overrule the Gourdain decision and bring these claims within the Brussels I regulation: this must clearly be right, since the silence of regulation no. 1346 could not overcome the rationale behind the “insolvency” exception set forth in Art. I of regulation no. 44. Much to the contrary, the Court mentions its own decision in the
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Gourdain case in order to come to the conclusion that the very criterion behind that judgment can now be found in recital 6 in the preamble to regulation no. 1346, to delimit the purpose of the regulation: according to the European judges, therefore, in compliance with that recital, the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. With this background, it is easy for the Court to state that Art. 3(1) must be interpreted as meaning that it also contributes international jurisdiction on the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them.

According to the Luxembourg judges, concentrating all the actions directly related to the insolvency of an undertaking before the courts of the Member State with jurisdiction to open the insolvency proceedings also appears consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects, referred to in recitals 2 and 8 in the preamble to regulation 1346; recital 4, on the other hand, confirms the necessity for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (i.e., forum shopping). In the view of the Court, the objectives set forth by the regulation would be undermined should more than one court exercise jurisdiction as regards actions to set a transaction aside by virtue of insolvency brought in various Member States.

The Court also bases its interpretation of Article 3(1) on Art. 25(1) of regulation 1346. As a matter of fact, the Court notes that the first subparagraph of that provision imposes an obligation to recognise judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Art. 16 of the regulation and which concern the course and closure of insolvency proceedings, that is to say, a court with jurisdiction under Article 3(1) of that regulation. Pursuant to the second subparagraph of Article 25(1), the first subparagraph of Art. 25(1) is also to apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them. In the words of the Court, that provision basically allows the courts of a Member State within the territory of which insolvency proceedings have been opened, pursuant to Art. 3(1), also to hear and determine an action of the type at issue in the main proceedings.

This is a somehow forced interpretation of Art. 25, and the Court shows to be aware of that. As a matter of fact, that provision expressly extends the principle of automatic recognition to decisions deriving directly from the insolvency proceedings "even if they were handed down by another court": i.e., from a court
other than the one which opened the main proceedings. According to the European judges, however, this sentence does not mean that the Community legislature wished to exclude the jurisdiction of the courts of the State within the territory of which the insolvency proceedings for the type of actions concerned were opened: on the contrary, those words mean, in particular, that it is for the Member States to determine the court with territorial and substantive jurisdiction, which does not necessarily have to be the court which opened the insolvency proceedings. With respect, it is submitted that this is a rather unconvincing interpretation of the provisions of Art. 25.

In its decision, the Courts concludes that Art. 3(1) of regulation no. 1346 must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State. In other words, the Court finds that Art. 3(1), in connection with other provisions of the regulation and especially with several recitals in the latter's preamble, encompasses the _vis attractiva concursus_ principle.

This conclusion is somewhat surprising, for it was widely acknowledged that the formulation of Art. 3 mainly derived from the inability of the Member States to agree on the adoption of such a principle to the main insolvency proceedings opened in compliance with the regulation provisions.

It is true that the Court finds arguments in support of its decisions mostly in the preamble to the regulation. In retrospect, however, one is even led to believe that the European lawmaker conceived such preamble as a sort of “Trojan horse”, to enable the Court to fill in the blanks and holes left in Art. 3 by political compromise at the drafting stage of the regulation.

It is submitted that the Court goes even further than the Advocate General in recognizing such _vis attractiva concursus_ principle in Art. 3: as a matter of fact, while the A.G. expressed his favour for a quasi-exclusive jurisdiction of the main proceedings courts over actions deriving from that procedure, while at the same time leaving space for the concurrent jurisdiction of other Member States according to their own rules, the Court, with its interpretation of Art. 25, seems to believe that the State where the main insolvency proceedings are opened in compliance with Art. 3 also has exclusive jurisdiction over any deriving claims, even though those actions may fall to be decided by courts, within the State, other than the one which opened the main proceedings.

All in all, the Court’s decision is not so astonishing. As a matter of fact, the European judges have always been ready to play a rather creative role in interpreting European procedural provisions. From the European integration perspective, it is even desirable that the blank “no-man’s land” between regulations no. 44 and no. 1346 has now been mapped out and entirely brought within the European space of justice.
It is also true, however, that nothing in the wording of Art. 3 allowed for the interpretation given to it by the Court. Moreover, the systematic approach of the European judges seems a bit strained and forced, especially if one considers that regulation no. 1346 leaves more than several issues to be governed by the *lex fori* of the Member State. In the context of a regulation with such a low harmonizing factor, the Court’s decision is somehow rather perplexing.