



Cross-Border Insolvency Update

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Introduction

1. We have prepared these notes as a support for the talks that we are giving in Leeds and Birmingham as part of the Guildhall Insolvency mini-seminars in those cities on Thursday 30 January 2014 and Thursday 6 February 2014. Our talks take the form of an update on cross-border insolvency law. We intend to cover the following specific areas:
 - The latest on the reform of Council Regulation (EC) No 1346/2000 on insolvency proceedings (“**the Regulation**”);
 - “Modified universalism” after the decision of the Supreme Court in *Rubin and another v Eurofinance SA and others* [2012] UKSC 46;
 - A general case update of recent cross-border insolvency cases, specifically, the decision of the Court of Appeal in *The matter of Tambrook Jersey Ltd; HSBC Bank Plc v Tambrook Jersey Ltd* [2013] EWCA Civ 576 [2013] BPIR 484 and the decision of the CJEU in *Christian Van Buggenhout and Ilse Van de Mierop, acting as liquidators in the insolvency of Grontimmo SA, v Banque Internationale à Luxembourg SA*.

The reform of the Regulation

Introduction

2. The Regulation came into force in 2002. As is by now well known, it contains rules relating to the allocation of jurisdiction in insolvency matters between Member States, the law which governs insolvency procedures as well the coordination of multiple sets of insolvency proceedings in respect of the same debtor. It applies in all Member States with the exception of Denmark.
3. Article 46 of the Regulation imposes a requirement on the European Commission to prepare and submit a report to the European Parliament by no later than June 2012. That date refers to the 10-year anniversary of the Regulation. The report is to be accompanied by a proposed amended regulation.

Timeline

4. We have set out below a list of the key dates and events which have already taken place in the context of the Regulation’s reform:
 - March 2012 – June 2012: consultation with stakeholders. The consultation attracted 134 replies, 21% of which were from the UK.
 - Throughout 2012, the European Commission sought and obtained impact assessments and comparative legal studies.
 - The European Commission presented it’s report to the European Parliament on 12 December 2012.
 - The text of the proposed revisions to the Regulation was published at around the same time, in December 2012. The Commission’s Vice President (Viviane Reding) described the proposed changes in the following terms:

“The new rules will help viable businesses to survive and promote a culture of the “second chance”. The revised rules will increase efficiency, fairness and transparency of cross-border insolvency proceedings”. (Speech on 16 May 2013)

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- On 15 January 2013, the European Parliament referred the proposed revised Regulation to its Legal Affairs Committee.
- The deadline for the UK to decide whether to opt in / opt out of the proposed revised Regulation was 10 April 2013.
- As a result, on 4 March 2013, the House of Commons European Committee (C) debated the proposed revisions. In the light of and that debate, the UK has decided to opt in.
- In speaking to the European Commission's proposal, Jo Swinson, the relevant government minister, made the following statements:

“... The decision to opt-in was unanimously supported by stakeholders who responded to a call for evidence during February 2013...” (15 April 2013 ministerial statement)

- On 11 September 2013, the European Parliament's Legal Affairs Committee published a draft Report on the Commission's proposed revisions to the Regulation. The Report contains 62 (!) proposed amendments (i.e. 1 to 62) to the Commission's proposed revisions.
- A further swathe of proposed amendments was published by the European Parliament on 16 October 2013 (amendments 63 to 90).
- The Committee's proposed amendments were due to be discussed at meetings on 4 November 2013 and 17 December 2013. The Committee was due to table a report on 20 December 2013; as at the date of preparing these notes (mid January 2014), that report had not yet been published.
- There is a proposed vote on the Legal Affairs Committee's amendments to the Commission's proposal programmed for 4 February 2014 in a plenary session of the European Parliament.
- The reform to the Regulation is being undertaken under the Ordinary Legislative Procedure. After it has been read in the European Parliament, it will need to be read in the European Council.
- At that stage, the Council can either adopt it or amend it. If the Council does the former, the proposed reform will become law; if it does the latter, the proposal returns to the European Parliament for a 2nd reading and the whole process starts over.

The reform in numbers

5. The breadth and scope of the changes to the Regulation can be neatly illustrated with a couple of key numbers:
 - The Regulation is 18 pages long.
 - The Commission's proposed amendments to the Regulation run to 23 pages.
 - The European Parliament's proposed amendments to the Commission's proposed amendments occupy 46 pages (amendments 1 to 62) and 20 pages (amendments 63 to 90).
6. In short, the proposed changes are both extensive and numerous.

Key proposed changes

7. It is difficult to cherry pick the most significant prospective changes. It seems to us that the following are key areas of reform:

- Bankruptcy tourism: several proposed amendments are directed at ensuring that it will be harder to engage in bankruptcy tourism. For example, one proposed change would require a

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court faced with a suspicious insolvency petition to order the applicant to file additional evidence and give notice to their creditors (this is already the practice of the English Courts following the decision of the Chief Registrar in *Eichler No 2*). Moreover, a Court would be required to examine its jurisdiction *ex officio*.

- COMI: the draft amendments do little more than codifying what the CJEU has already determined in: *Eurofood IFSC [2006] ECR I-3813* and *Interedil Srl, (in liquidation) v Fallimento Interedil Srl, Banca Intesa Gestione Crediti Spa, Case C-396/09*.
- Jurisdiction: the proposed amendments to the Regulation include provisions aimed at ensuring that the Court / Member State which opens insolvency proceedings also has jurisdiction to hear actions derived directly from the insolvency proceedings and which are closely connected with them.
- Secondary proceedings: the intention behind the proposals appears to be to ensure that it will be harder to open secondary proceedings (e.g they can only be opened when they are necessary to protect the interests of local creditors), secondary proceedings need no longer only be winding-up proceedings, and moreover there will be better provisions on co-operation between proceedings.
- Groups of companies: the Regulation's existing entity-by-entity approach is retained, with an added obligation to coordinate the proceedings, for example by liquidators exchanging information, discussing reorganisation plans, etc... Liquidators will have rights of appearance in other proceedings relating to group companies.
- Online insolvency portal: it is envisaged that there will be a pan-European company / insolvency portal enabling users to check online whether a company or a debtor find themselves in an insolvency process.

Modified Universalism- alive and kicking

Introduction

8. In *Rubin and another v Eurofinance SA and others* [2012] UKSC 46 the Supreme Court decided (by a majority of 4:1) that foreign judgment relating to insolvency proceedings are no different to other common law judgments. Due process trumped the universalist upspring unique to insolvency proceedings. However this paper considers what is happening beyond these shores and observes that modified universalism is alive and kicking.

High tide?

9. The tide of universalism was perhaps at its height after the delivery of the advice provided by Lord Hoffman in the Privy Council case of *Cambridge Gas Transport Corp v Navigator Holdings Plc Creditors Committee* [2006] UKPC 26. He first distinguished between the creation of rights by court process and purpose of bankruptcy proceedings:

“13 ... 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.

14 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



15 . . . [B]ankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings.”

10. Lord Hoffman then explained that “The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated”
11. The process of collection of assets will include transaction avoidance provisions. Such provisions are peculiar to insolvency proceedings and can differ considerably depending upon the jurisdiction. This thinking led to Lord Hoffman’s critical statement of law in *HH Casualty and General Insurance Limited* [2008] UKHL 21:

“The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.”

12. This principle persisted in the Court of Appeal in *Rubin*. Lord Clarke in the Supreme Court summarised the Court of Appeal’s position in the following terms:

“(a) the judgment was final and conclusive, and for definite sums of money, and on the face of the orders was a judgment in personam

(b) it was common ground that the judgment debtors were not present when the proceedings were instituted, and did not submit to the jurisdiction, and so at first blush had an impregnable defence;

(c) *Cambridge Gas* decided that the bankruptcy order with which it was concerned was neither in personam nor in rem, and its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established: *Pattni v Ali* [2006] UKPC 51, [2007] 2 AC 85, para 23, [2007] 2 All ER (Comm) 427;

(d) bankruptcy was a collective proceeding to enforce rights and not to establish them: *Cambridge Gas* [2006] UKPC 26, [2007] 1 AC 508, para 15, [2006] 3 All ER 829;

(e) the issue was whether avoidance proceedings which could only be brought by the representative of the bankrupt were to be characterised as part of the bankruptcy proceedings, ie part of the collective proceeding to enforce rights and not to establish them;

(f) the adversary proceedings were part and parcel of the Ch 11 proceedings;

(g) the ordinary rules for enforcing foreign judgments in personam did not apply to bankruptcy proceedings;



(h) avoidance mechanisms were integral to and central to the collective nature of bankruptcy and were not merely incidental procedural matters;

(i) the process of collection of assets will include the use of powers to set aside avoidable dispositions, which may differ very considerably from those in the English statutory scheme: *HIH* [2008] UKHL 21, [2008] 3 All ER 869, [2008] 1 WLR 852, para 19;

(j) the judgment of the US Bankruptcy Court was a judgment in, and for the purposes of, the collective enforcement regime of the insolvency proceedings, and was governed by the sui generis private international law rules relating to insolvency;

(k) that was a desirable development of the common law founded on the principles of modified universalism, and did not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context;

(l) there was a principle of private international law that bankruptcy should be unitary and universal, and there should be a unitary insolvency proceeding in the court of the bankrupt's domicile which receives worldwide recognition and should apply universally to all the bankrupt's assets;

(m) there was a further principle that recognition carried with it the active assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic insolvency;

(n) there was no unfairness to the Appellants in upholding the judgment because they were fully aware of the proceedings, and after taking advice chose not to participate: see [2011] Ch 133, paras 38, 41, 43, 45, 48, 50, 61-62 and 64⁷

13. The molecular structure of modified universalism comprises points (l) and (m) above so that private international insolvency law should be universal and recognised throughout the world. Further recognition carries with it active assistance by doing whatever the recognising court is able to do.
14. The tide swept out again with the Supreme Court majority finding that the common law 'Dicey Rule' applied to enforcement of foreign judgments whether they related to insolvency proceedings or not¹. The golden thread running through English cross-border insolvency law since the 18th century (as described by Lord Hoffmann) has run out. The judgment in *Rubin* was *in personam* and could only be enforced within the Dicey Rule. The English common law rule is set out in *Dicey, Morris and Collins on the Conflict of Laws* and is reflected in the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK). The Dicey Rule is based on due process and protection. It is (as one commentator² has explained) a fundamental tenet of due process that defendants have the right to contest default judgments against them for lack of personal jurisdiction. The Dicey Rule provides that where a party is not present in the foreign jurisdiction at the time that the proceedings began and never volunteered to submit to the proceedings then the English courts will not enforce the judgment.
15. In addition to deciding the contest between modified universalism and the Dicey Rule the Supreme Court rejected arguments that the Cross Border Insolvency Regulations 2006 applied on grounds that recognition and enforcement are not mentioned in the articles and rejected the application of section 426 of the Insolvency Act 1986 on the basis that it was restricted to enforcement of orders made in one part of the UK in another part of the UK.

Alive and kicking

¹ See Judgment of Lord Collins and in particular paragraphs 7 & 8 on the Dicey Rule.

² Jodie Kirshner Cambridge Law Journal [2013] 72.

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16. The outcome of the *Rubin* case is now being played out. It can be said straight away that the decision of the Supreme Court does not affect the recognition and enforcement of judgments under the EC Insolvency Regulations or judgments under Directive 2001/24/EC relating to the winding up and reorganisation of credit institutions and insurance undertakings. Secondly it could be said that the focus of *Rubin* was on avoidance transactions. The golden thread of Modified Universalism may still be weaving away in respect of other matters. Lastly some offshore cases have either sought to shun the Supreme Court's decision (depending on your view point) or distinguish it. There maybe very good political and economic reasons why countries such as the Cayman Islands would seek to promote Modified Universalism. Their economy is largely based on income from offshore investments funds. It is important to their survival that they are seen to be open, honest and accountable in order to obtain the confidence of the financial markets. Modified Universalism assists their aims as it permits international cooperation.
17. In *Picard v Primeo Fund*³ (decision of Jones J) 14 January 2013 the defendant, Primeo Fund LLC (the "Fund"), was a Cayman incorporated fund which had managed an account Bernard L. Madoff Investment Securities LLC ("Securities"), a company incorporated and operating in New York. Securities was owned and controlled by Bernard L. Madoff. Securities entered liquidation in the United States and on 15 December 2008, Irving H. Picard was appointed as trustee (the Trustee). His appointment was recognised in the Cayman Islands by way of an order made under Cayman company law (the Recognition Order). The Trustee subsequently commenced proceedings in the Cayman Islands. The question for the court was whether, having made the Recognition Order, the Trustee could make use of the Cayman Island domestic laws enabling him to claw back money from the Fund for the benefit of creditors.
18. The Judge found that the CBIR were not intended to abolish the common law principles relating to co-operation. Jones J considered *Cambridge Gas* and *Rubin* and found that it had a power to assist the Trustee by permitting him to use the Cayman Island transaction avoidance provisions. The Judge found that recognition carried with it active assistance and that the Supreme Court had only made a decision regarding the enforceability of *in personam* judgments. There was no issue regarding submission to jurisdiction and it was noted that Modified Universalism remained good law. At paragraph 39 of his judgment Jones J said:

"[R]ecognition is sufficient for granting assistance, even when it involves treating the foreign representative as having rights and remedies otherwise available only to official liquidators appointed by the court".
19. *Rubin* has been considered more recently in Bermuda. In *Saad Investments Company Limited* [2013] SC (Bda) 28 Com the Bermuda Supreme Court was asked to make an order in favour of a foreign representative for the production of documents and examination of a former auditors of the company (sections 235/236 Insolvency Act 1986 equivalent), even though the Bermudan court would not have grounds to appoint a liquidator. During the judgment the Supreme Court noted:

"This is an area of the law that in recent times has often been dominated by commercial pragmatism combined with an almost deification of the goal of promoting cross-border co-operation in insolvency cases with an international element, unwittingly no doubt, at the expense of the development of a set of coherent principles. One reason for this trend may be the fact that statutory cross-border cooperation frameworks are now the norm rather than the exception in most large common law jurisdictions. The opportunity to consider common law cooperation thus only occurs in fits and starts and then often in offshore jurisdictions with no local legal academy to stoke the fires of the theoretical debate. Moreover, in Bermuda at least, these questions have almost exclusively been considered at the first instance level."
20. The court expressly agreed with the judgment of Lord Hoffman in *Cambridge Gas* reaching the conclusion that:

³ FSD 275 of 2010 and see report of decision in ILA Technical Bulletin 489.

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“Lord Hoffman’s exposition on the breadth and flexibility of the common law judicial assistance jurisdiction in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26;[2007] 1 AC 508, as applied to the specific context of the recognition of winding-up orders made in and liquidators appointed in insolvent companies’ place of incorporation, has not been diminished in any way by the United Kingdom Supreme Court majority’s recent holding in *Rubin v. Eurofinance; and New Cap Re v. AE Grant* [2012] UKSC 46;[2013]1 AC 236 that *Cambridge Gas* was wrongly decided”

21. As regards the extent of assistance the court found that:

“what could be done in a local liquidation will generally delineate the course of the common law assistance journey....alternatively, and at first blush far more radically, the scope of assistance which can be provided at common law is delineated by both the general law (including the Court’s inherent powers) and the statutory insolvency regime which would apply in a local primary or ancillary liquidation. This is, ultimately, my preferred jurisdictional basis for the assistance granted. Although this conclusion seems less straightforward to justify, it appears to be supported by Lord Hoffman’s landmark *dictum* in the *Cambridge Gas* case which broadly approved the Transvaal Supreme Court decision in *Re African Farms Ltd.* [1906] Transvaal Law Reports 373. This proposition has been positively and most explicitly affirmed in the two most recent cases to consider this topic, *Frank Schmitt v. Hennin Deichman* [2012] EWCH 62 (Ch); [2013] Ch 61 (Proudman J) and *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al-v- Primeo Fund (In Official Liquidation)*, Cayman Grand Court FSD 275 of 2010, Judgment dated January 14, 2013 (Andrew Jones J)”.

22. The Saad case has seen activity in the Australian, Bermudan and Cayman Island courts. It perhaps provides a good example of why modified universalism is important and relevant to trade working in a global economic climate.

Case update

23. This part of the notes contains a digest of two cases.

Tambrook Jersey Ltd; HSBC Bank Plc v Tambrook Jersey Ltd [2013] EWCA Civ 576 [2013] BPIR 484 (22 May 2013)

24. *Tambrook* is a case on s.426 of the Insolvency Act 1986. The Court of Appeal was required to consider the circumstances in which the English Courts will give assistance to the Courts of other s.426 countries.

25. Tambrook Jersey Limited was incorporated in Jersey on 29 November 2006; its registered office was on the Island of Jersey. Its business was residential property development in England. The company sought and obtained substantial borrowing facilities from HSBC Bank Plc in order to fund a residential property development in Margate, Kent.

26. The bank obtained security for its borrowing in the form of legal charges over various properties. Come early 2013, the Margate development had proved to be disastrous. On 29 and 30 January 2013, the bank demanded payment of the outstanding loan liabilities: circa £8.2 million. Its demands were not met. The Company was, it seems, hopelessly insolvent.

27. Whilst it was obvious that the Company needed to be placed in an insolvency process, it was clear to the Bank that liquidation in England and Wales, or a *désastre* procedure in Jersey (there is no equivalent to an administration procedure) would not produce a favourable return for creditors; the Bank wanted an administration. Tambrook’s COMI was in Jersey; by operation of the Regulation, the Courts of England and Wales did not have jurisdiction over Tambrook.

28. On 28 February 2013, the Royal Court of Jersey issued a Letter of Request addressed to the High Court of Justice, Chancery Division, inviting the High Court to make an administration order

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over Tambrook Jersey Limited. On the strength of that letter of request, HSBC made an application to the High Court of Justice on 25 March 2013 seeking an administration order under Schedule B1.

29. On that application, Mann J raised with the applicants the question of whether the Court had jurisdiction under s.426 to make the administration order. Mann J's decision turned on the word "assist" as it appears in s.426(4):

"(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory."

30. His conclusion was that, given that there were no ongoing insolvency proceedings in Jersey (such as a *désastre*), he could not see how the English Court could be said to be assisting the Jersey Court. He was fortified in that view by a passage from the decision of the Supreme Court in *Rubin*:

"Thus its natural habitat is one in which assistance is to be provided in the context of some form of insolvency procedure in the requesting state.... That makes sense. The foreign insolvency court is doing something within its jurisdiction and, in that context, seeks the assistance of the English courts."

31. Mann J's conclusion is summarised in this paragraph of his judgment:

"18. I consider that on the wording of the section, and against the insolvency context in which I consider the section was intended to operate, this court cannot "assist" another court which is not actually doing anything, or apparently intending to do anything, in its insolvency jurisdiction. The jurisdictional threshold is not crossed. Without some form of existing or future intended activity by the foreign insolvency court, I do not see how that court is "assisted". Creditors might be; a foreign commercial community might be helped by an English court doing what its own courts cannot do. But that is not enough. It is the foreign insolvency court, in its insolvency jurisdiction, which has to be assisted. The section does not exist to fill in gaps in another jurisdiction's insolvency processes without more.

It exists to improve co-operation between actual processes. In the present case, for the reasons given, the Jersey court is not assisted in a relevant way."

32. Having referred to several authorities on s.426, including *re Dallhold Estates (UK) Pty Limited* [1992] BCLC 621, *Hughes v Hannover Rückversicherungs Aktiengesellschaft* [1997] 1 BCLC 497 and *Television Trade Rentals Ltd* [2002] EWHC 211 (Ch), Davis LJ concluded that Mann J's conclusion was incorrect. He gave the following reasons for reaching that conclusion:

- s.426(4) applies to Courts which have insolvency jurisdiction, not courts exercising insolvency jurisdiction. It would be wrong
- the relevant subsections of s.426 are to be given a broad and purposive interpretation.
- that construction of s.426 was consistent with Lord Hoffmann's principle of "modified universalism".
- Given that the *désastre* procedure in Jersey was deemed unsuitable, it would be counter-productive and unnecessarily costly to require a set of proceedings in Jersey.
- Mann J was wrong to think that the Jersey Court was not involved in an endeavour. It was involved in an endeavour, which was to seek the best outcome for the creditors of the Company. The Company had resolved that it needed to go into an insolvency process.



- As Davis LJ put it, “all of this is the very stuff of insolvency”!

Christian Van Buggenhout and Ilse Van de Mierop, acting as liquidators in the insolvency of Grontimmo SA, v Banque Internationale à Luxembourg SA (19 September 2013)

33. This is a decision of the Court of Justice of the European Union which concerns Article 24 of the Regulation. That article provides that “(1) where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceeding opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of the proceedings.” Article 24(2) contains presumptions dependent on whether the decision opening the proceedings has been published in the Public Registers of the first-mentioned state pursuant to Article 21.
34. Messrs Van Buggenout and Van de Mierop are the liquidators of Grontimmo SA, which was a property development company with its registered office in Antwerp, Belgium. On 4 July 2006, the Belgian Tribunal de Commerce declared Grontimmo to be insolvent. The application had been made on 11 May 2006. According to Belgian law, the insolvency took effect at 24.00 on the 4th. The decision was published in the “Moniteur Belge” (an equivalent of the London Gazette) on 14 July 2006.
35. Banque Internationale à Luxembourg opened two bank accounts for Grontimmo on 31 May 2006 and 22 June 2006. Cheques in favour of Grontimmo in the sum of €1.4 million dated 22 and 24 May 2006 drawn by a debtor were paid into the accounts. On 2 June 2006 Grontimmo’s directors requested the bank to issue a cheque drawn on one of the account in favour of a third party Panamean company (Kostner). That order was executed on 5 July 2006. The liquidators thereafter sued the bank seeking recovery of €1.4 million.
36. The question for decision by the CJEU was whether “an obligation... honoured... for the benefit of the debtor...” in Article 24(1) covers payments to a debtor, or payments by a debtor. After reviewing the different language versions of the relevant recital of the Regulation (recital 30) and of Article 24(1), the CJEU concluded that Article 24(1) applies to payments to the debtor. It was irrelevant that the payment had been made on behalf of Grontimo by the Bank in this case since Grontimmo was not the recipient of the payment. Whether the Bank was liable to return the payment of €1.4 million was a matter governed by the applicable local law, and not by Article 24(1).

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