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Département « Sorbonne - études des relations Privées Internationales » de l'Institut de recherches juridiques de la Sorbonne

ACTIONS DERIVING DIRECTLY FROM INSOLVENCY PROCEEDINGS AND CLOSELY LINKED WITH THEM UNDER REGULATION EU 2015/848 ON INSOLVENCY PROCEEDINGS

Tutor:

Chiar. ma Prof.ssa Stefania BARIATTI

M. le Professeur Etienne PATAUT

Coordinatore del corso di dottorato:

Chiar.ma Prof.ssa Diana Urania GALETTA

M. Le Professeur Etienne PATAUT

Chiara Teresa Maria LUNETTI

Matricola R11659 / n° étudiant 11240793

To my parents, to whom I owe the privilege of this PhD

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CHAPTER I

THE *VIS ATTRACTIVA* UNDER NATIONAL LAWS

CHAPTER IV

THE (UE) REGULATION 2015/848

PREFACE

For years, insolvency law has been defined as the field of law of 'practitioners', often considered likewise a 'servant law' of contingent evaluations of a purely economic nature, for some, and an 'ancillary' branch of civil and commercial law or civil procedural law, for others.

Yet, every legal system - despite the approaches adopted by countries vary in a number of aspects - has always been faced with the need to lay down specific rules organising a statutory reaction to the crisis of cooperation between the debtor and his creditors, triggered by the material insolvency of the former.

In view of this consideration, as a general starting point for the issues that are to be dealt with in this work, it is worth questioning whether there is a need for an independent branch of law (*i.e.* a set of principles and rules), specifically regulating the phenomenon of insolvency proceedings, or whether such a construction is superfluous.

The first approach which supports the idea that insolvency law should be at the service of the economy should be discarded at once. A part of legal scholarship generally considers (and therefore analyses) the law as a set of rules merely serving the regulation of (current) economic situations, as if there is a constant chase between law and economics. In this respect, the intersections between law and economics is generally referred to business ethics.

It is indeed true that legal systems and judicial organisations have become more and more important parameters for assessing the competitiveness of a country, especially from the point of view of the ability to attract foreign investors. Under this perspective, the law is measured with the instruments of the economy and it is obvious that certain profiles (even if sometimes resulting from a too simplistic analysis) can be decisive for a global evaluation of a legal system.

It is clear that the innate dynamism of the economy in relation to the irreducible static nature of the law can act as a catalyst for legal innovations. In many ways, it now seems almost inevitable the idea that (above all) company law - understood as the ethics of the rules pre-existing to the phenomena that they are intended to regulate - is destined to be decisively influenced by the economy, as a result of an innate need to adapt those rules to an increasingly changing factual reality, characterised by an evolutionary speed that (unfortunately) does not always allow pondered legislative choices and often leads to changes in commercial law in the wake of the emergency.

The field of insolvency law does not escape the myth of the prevalence of the economy over the law. Confirmation of this may be found, for instance, in the fact that many laws of recent seasons are aimed at making more efficient the instruments of credit protection once acknowledged the devastating impact on the economy of the s.c. 'non-performing loans'. The efficiency of the law, and in particular that of insolvency law, has repeatedly yielded to this economic evaluation, which entails

that the law is no longer evaluated through the lenses of the legal expert, but rather with the set of mind of the econometrist.

Albeit practical, this way of legislating, which puts extemporary economic concerns before a systematic evaluation of the law, is often a source of structural flaws, because it entails that regulations pile up on each other, and the interpreter is no longer able to offer unitary dogmatic constructions of a system that is now often largely fragmented.

In a domain of law that regulates the phenomenon of business' insolvency, the interest of the market - even in the broadest sense possible - can never coincide only with the interest of the creditors and in particular the 'strongest' creditors (which is the direction pushed by the rules of competition typical of a market economy). There are other subjects, not creditors - but bearers of interests of equal importance - that should not be neglected, and their presence should sound like an alarm bell whenever certain proposed solutions are pushed towards the sole needs of creditors and debtors.

In this sense, when the legislature encourages the recourse to private autonomy, understood as self-regulation of the relations between the distressed company and its creditors, one feels the danger that an excessive investment in the choices of private individuals may lead to worse solutions, due to an excess of individualism in an area characterised, instead, by a plurality of heterogeneous components and interests. In those cases, the (undesirable) prevalence of economics' logic is somewhat tempered, when the law comes back into play with recourse to the judicial authority, which witnesses that certain economic initiatives are not manageable by recurring exclusively to the rules of market competition.

Therefore, the approach that wants to anchor insolvency law to the economy is not shared, as it leads to an analysis of new set of rules, excessively focused on the contingent economic reasons underpinning the introduction of those rules, thus concealing the systematic evaluation which instead should be the point of reference of a correct doctrinal approach.

Similarly, it is submitted that the approach of that part of the doctrine which considers insolvency law as ancillary either to civil and commercial law or to civil procedural law is poorly persuasive, because it does not take into account the systematic role that insolvency law plays in every legal system.

The main reason behind this construction lies with the assumption that insolvency law lacks its own general principles.

The tenet underpinning the analysis carried out in this work demonstrates, instead, that insolvency law is an autonomous branch of law, characterised by principles and procedural rules of its own, which distinguish it from both civil law and civil procedural law.

The starting point leading to this conclusion is the fundamental acknowledgement that insolvency law proves to be primarily an instrument of the (compulsive) implementation of the fundamental principle (which is common to all legal systems) under which the debtor is liable towards its creditors with all his assets, actual and future.

The specific characteristics that the protection of (creditor's) rights assumes in the context of insolvency law presupposes a brief, and admittedly superficial, overview of the system of protection of rights in ordinary civil law, in order to determine whether (and if so to what extent) the general principles are different from the system provided by insolvency law.

The relationship between the debtor and his creditors rests on debt that creates enforceable claims. In the context of ordinary relationship between two or more parties, irrespective of whether the relationship is normally functioning, or whether a pathological situation where a crisis of cooperation between the parties occurs, each party knows that it has access, on the basis of the instruments offered by the common substantive and procedural law, to different remedies.

Needless to say, each legal system provides for (efficient) legal tools aimed at protecting the enforcement of claims.

Some credit protection remedies relate to substantive law. For example, secured rights (likewise a mortgage or a pledge) or contractual remedies such as the right of retention or the exception of non-performance, are self-help means of preserving the right of the creditor since the party could make use of them on its own initiative, without the need for external judicial authoritative intervention.

In most cases, however, in order to receive the protection of his right, the creditor will have to apply to the judicial authority seeking the prevention that his right is infringed or to restore the already occurred infringement. In those circumstances, civil law and civil procedural law remedies are available; the conflict can be solved or settled by taking into account only the subjective legal positions held (or assumed to be held) by the parties to the dispute.

Against this general backdrop, a distinction must be made.

Where the crisis of cooperation, for instance, pertains to an obligation to pay a sum of money, if the parties to the relationship are private individuals who do not carry out business activities, judicial protection is expressed exclusively through the forms of ordinary civil law remedies. There are no other forms of protection, save for to the (substantive) remedies already mentioned.

Where, on the other hand, the debtor is market participant (an individual merchant, a company, but nowadays also the consumer), in addition to the typical remedies of civil law the legislature juxtaposes the specific remedies of commercial, which, usually, take on specific contours since they consider also the positions of third parties (equally operating in the market), that are not directly involved in the specific relationship between the debtor and the concerned creditor. It is rather obvious that when an activity is performed in the market, a plurality of subjects and legal interests coagulate around that activity. In that context, when a crisis of cooperation occurs between the debtor and a creditor, the involvement of super-individual interests is presumed by each legal system. This distinction should be further completed by pointing out that when the debtor carries out a business activity in corporate forms, additional specific rules come into play, namely those of company law.

In that constellation, the protection of the rights of the individual creditors, when a crisis of cooperation occurs, must be calibrated in relation to the protection of other rights of which other subjects are the bearers, and commercial and corporate law perform this function.

Up to this point, the protection of rights has been considered in the event of a (isolated) crisis of cooperation between the commercial debtor and one creditor. Indeed, as long as the debtor is still solvent, the individual creditor is allowed to recur to the ordinary rules of civil procedure and enforce its claim, to get what the debtor owes him.

However, the cooperation crisis may also affect at the same time several creditors. In this respect, the concept of collectiveness (which, for the moment, can only be understood in a broad sense, in terms of plurality of parts, as will soon become clear) must be introduced.

When a debtor does not fulfil its obligations towards more creditors, but it is not (yet) materially insolvent, the ordinary remedies of civil, commercial and company law will be sufficient to solve the deadlock of cooperation. The protection of the creditor's claims will naturally be collective, *lato sensu*, as more subjects, once they have obtained an enforcement title, satisfy their rights against the assets of a single debtor. The involvement of multiple creditors notwithstanding, the application of the specific (and assumedly autonomous) rules of insolvency law are not yet necessary.

In the scenario of the debtor's insolvency (*i.e.* when the debtor is not able to *regularly* fulfil its obligations as they fall due) the protection of the creditor's claim still has a collective dimension *lato sensu*, because it involves more creditors of the business debtor, who are generally (but not necessarily) a multitude of different parties. However, the common rules of enforcement prove to be not sufficient.

The question then arises, then, is why national legal systems seem to consider it necessary to provide for specific rules governing the enforcement of claims when the debtor is materially insolvency, instead of recurring to the ordinary 'individual' enforcement procedure (that, as discussed, are instead suitable to govern multiparty enforcement proceedings against the debtor *in bonis*).

A first answer to that question may be found considering that the situation of insolvency involves not only a plurality but *all* the business' creditors and, therefore, the common rules of enforcement do not offer a suitable response to the collective dimension of the problem.

In this respect, however, it must be noticed that the plurality of creditors does not represent a *condicio sine qua non* of insolvency proceedings, as the opening of an insolvency procedure may well concern also one creditor, when the latter is the only debtor's creditor. Still, such a procedure would be governed by specific principles and rules of insolvency law, which are different from those of enforcement law.

It would be the result of a partial view to believe that insolvency proceedings exist only to safeguard a public or super-individual interest. Of course, insolvency law does involve super-individual interests, but it is at least dubious that whenever occurring, their mere presence imposes the opening of insolvency proceedings, as they are taken into account also by the (ordinary) rules of commercial

and company law. Those profiles (the plurality of creditors and the protection of public super-individual interest) concern only two facets of the reason underpinning the fact that each legal system provide for a specific filed of law governing the issue of the insolvency, but do not represent the true reason behind it.

When insolvency hits a business, *i.e.* a legal and economic entity that in principle operates in the market and enters multiple relationships with other subjects, every legislature (both ancient and modern) deems it appropriate that the legal system reacts to the situation where the debtor is not in the position to regularly fulfil its obligation with its market counterparts through a set of rules which, on the one side, are directed at achieving the same objective of ordinary enforcement rules (*i.e.* the satisfaction of creditors), but that, on the other side, go one step further, governing the pathological situation of the business through the involvement of other subjects that are not anymore creditors of the insolvent debtors, but that have acquired asymmetric advantages that are considered by the legislature not to be consolidated.

Scholars generally refer to the situation that occurs when insolvency proceedings are opened as the 'common pool' problem (or multi-party prisoners' dilemma).

When faced with the material insolvency of the debtor occurs, creditors have a strategic incentive to try and collect on their claims as soon as possible because the debtor's finances presumptively are not sufficient to meet all outstanding claims.

It is (only) such a situation therefore that triggers the opening of insolvency proceedings, *i.e.* a procedure that pursues a bundle of objectives, among which stands out prominently the satisfaction of the creditors' claim, whose enforcement is compulsorily centralised before one court, is governed by specific (procedural and substantive) principles and becomes 'collective' by the express provision of the law.

When the common pool situation occurs, insolvency law provides the only remedy available for creditors to enforce their claim, which is why insolvency proceedings are viewed as a *sui generis* collective debt collection procedure.

From an objective standpoint, the collective attachment of the debtor's assets is a profile that may equate insolvency proceedings and ordinary enforcement proceedings, where, in the context of the latter, a plurality of creditors enforces their claims on the same asset of the debtor.

However, the pivotal difference between those two areas of law lies with the fact that in ordinary enforcement proceedings the assets of the debtor are taken into consideration under a static perspective, so that creditors may attack only those assets that exist in the precise moment of the enforcement procedure. On the contrary, in the context of insolvency proceedings, the debtor's assets are not at the disposal of the (orderly) creditors' enforcement, only as they exists at the moment of the opening of insolvency proceedings, but judicial initiatives may be undertaken to increase (but also decrease) the debtor's assets.

It is then possible to refer to this phenomenon as a 'dynamic collectiveness', as the opening of insolvency proceedings involves other subjects than the creditors, such as those subjects whose claims have been already satisfied, or *in bonis* contractual counterparties of contracts which at the moment of the opening of insolvency proceedings are still pending.

It is now clear why it was specified above that reference to the 'collectiveness' was referred to only in its broad sense: a procedure can be defined 'collective' *lato sensu* when several creditors aspire to be satisfied with a single asset. This explains why, under a purely procedural point of view, it is not entirely incorrect to consider that the rules of individual enforcement represent a guideline for the rules of insolvency law and, *vice versa*, that insolvency law can govern the enforcement of a single creditor's claim (in which case it would be more correct to speak of only potential 'true collectiveness').

Nevertheless, in the context of insolvency law, the concept of 'collectiveness' assumes its own specific meaning, which will be referred to in the course of this work as 'true collectiveness'.

Also, a further element revealing the autonomy of insolvency law from the ordinary civil and commercial matters is the value of the business as going concern. Ordinary civil enforcement affects individual assets, or even a plurality of assets, also where considered as a whole, but still they are considered in a disaggregated manner.

On the other hand, in the context of insolvency proceedings, that by definition concern a debtor exercising a business activity, it is necessary to assess whether the business still has a residual value to reallocate on the market, whether it is possible in a period of transition to recover economic viability to that business activity, or whether the unitary management of assets is more profitable than atomistic liquidation management. In the absence of insolvency law, uncoordinated creditor enforcement actions, as well as voluntary asset transfers by the debtor, may destroy a business that is worth much more if sold as a going concern than in pieces.

Therefore, the widespread idea that the pathological situation of the crisis of cooperation between an insolvent debtor and (all) its creditors must be dealt with a set of autonomous principles and rules rests on the fact that such a debtor operates in a complex market.

The fundamental values underpinning insolvency proceedings lie with the need to ensure the orderly satisfaction of creditors, in the context of a dynamic collective procedure, involving the debtor's assets, which in turn is administered as a business organisation.

The centralised enforcement (what is often defined, also under national law, in terms of universality) is perhaps the most interesting expression of the autonomous nature of insolvency law. Indeed, *(i)* the opening of insolvency proceedings entails a general enforcement procedure on the debtor's assets, precluding any individual initiatives of creditors; *(ii)* the substantive effects of the enforcement are achieved with the sole judgment opening insolvency proceedings (with the advantage for the creditors that they do not have to necessarily obtain an enforceable title), so that a single act produces all the constraints of unavailability on the debtor's assets; *(iii)* the debtor's pool of assets may be potentially

increased, as a result of the application of the rules of the dynamic collectiveness, and thus its value could be greater compared to the (static) assets subject to ordinary enforcement procedures; *(iv)* the effects of the opening of insolvency proceedings extend also to legal relationship and rights and all the subjective legal positions (active and passive) ascribable to the debtor.

In the light of the above, it is fair to acknowledge that it would be reductive to look at insolvency law as a set of rules leaning towards either substantial civil and commercial law or civil procedural law, as it represents an autonomous field of law that traditionally governs and organises the legal situations arising out of the pathological managing of a business and, today, also of an over-indebted person.

Insolvency law represents an autonomous branch of law with principles of its own and rules under both a substantive and procedural aspects.

From a substantive point of view, the modification of the substantive right of the individual creditor, which must be (collectively) enforced according to different rules aiming to strike a balance between multiple interests.

From a procedural point of view, the insolvency of the debtor requires that the protection of rights can no longer be entrusted to the ordinary rules of civil procedural law protection, but they must be enforced within typical procedures that deviate from the traditional procedural system.

Incidentally, it may be noted that a peculiar feature of insolvency law is that it is at the same time substantive and procedural law. In principle, the very purpose of procedural law is to be an instrument for the implementation of substantive rights: in the field of insolvency, the inferences between substantive rights and the judicial instrument for its implementation are of such intensity that they give rise to a system in which it is often difficult to separate the right from its legal enforcement.

As a conclusion to this reasoning, it should be borne in mind that one of the cornerstones that has traditionally distinguished insolvency law is the principle of the *par condicio creditorum*, which requires that all insolvency creditors (or even creditors divided according to homogeneous interests) are treated on equal terms.

It must be clear that the principle of the *paritas creditorum* does not conceptually coincide with the 'true collectiveness' of the insolvency procedure, as illustrated above. The latter concept describes the phenomenon pursuant to which the *orderly* enforcement of all the creditors' claims is compulsorily centralised within one single procedure. The *paritas creditorum*, instead, is nothing more than one of the (ideally) possible orders to achieve the coordinated satisfaction of the creditors within the framework of that truly collective procedure.

Once this distinction has been clarified, it is apparent that all the systems have adopted the *par condicio creditorum* as the fundamental principle for the orderly satisfaction of the credits (although, given the proliferation of privileges and the generalised use of classes, it is clearly in recession).

It is only bearing that in mind the above outline that it is possible to fully understand the principle of the *vis attractiva concursus*.

Indeed, assuming that every legal system adopts the principle of the *par condicio creditorum*, it is necessary, then, that the procedural rules governing the collective satisfaction of the creditors are provided with an adequate tool to implement such a principle and achieve the uniform treatment of the creditors.

The primary purpose of the *vis attractiva concursus* serves precisely that function, because it may be only the implementation of the orderly satisfaction of the creditors according to the *par condicio coreditorum* that may explain the reasons underpinning the procedural rule, pursuant to which 'insolvency-related' actions – *i.e.* actions retaining a traditional claimant vs. respondent structure - must be attracted to the same forum of the insolvency proceedings. Those actions prove to be linked to be linked with the collective satisfaction of the creditors to such an inextricable extent that their adjudication cannot be performed outside of that context, as they require the involvement of all the interests that are reunited within the insolvency procedure.

I say 'primary' objective because often, as will be shown in the course of this work, other reasons of practical nature - but not of lesser importance - lie behind and extend the 'natural' scope of operation of the *vis attractiva concursus*, such as, for instance, the effectiveness and efficiency of the process itself. Where those reasons are taken into consideration by the legislature, they must expressly result in the insolvency law, through the provision of specific rules establishing the competence of the insolvency forum for actions which (albeit somewhat linked to the collective satisfaction of creditors) would not be attracted to the procedure because they are not essential to it, but still they are attracted for other reasons of legislative policy expediency. Otherwise, without such specific rules, it is not possible to affirm by way of interpretation the attraction of other quasi-insolvency-related actions to the insolvency forum, without undertaking the risk of systematic distortions, which inevitably clash with the irreducible defendant's rights of defence.

The above reasonings represent the steppingstone for the present study, whose focus is the topic of the European *vis attractiva concursus*, provided under Article 6 of the Regulation (EU) 2015/848 on insolvency proceedings, according to which any action with cross-border elements that proves to be 'directly deriving from insolvency proceedings and closely linked with them' (labelled hereinafter as 'Annex Actions') must be attracted to the jurisdiction of the Member State opening the insolvency procedure.

In the first chapter, a comparative analysis of the rules on the *vis attractiva concursus* is carried out with regard to the Italian, Spanish and French legal systems. It also takes into account the German insolvency law, which has traditionally refused to adopt the solution that actions arising from insolvency proceedings are attracted to the functional and exclusive jurisdiction of the insolvency court. The national perspective has proven to be necessary in order to grasp the differences and points of commonality between the four legal systems taken into consideration, with a view of constituting a useful yardstick for the analysis of the autonomous notion of European *vis attractiva concursus*. The first chapter is hence aimed at identifying, on the one hand, the actions which, according

to national law, fall within the scope of application of *the vis attractiva concursus* as a domestic rule for the allocation of competence between territorial courts. On the other hand, that analysis made it possible to investigate whether the opening of the procedure entails the effect of the 'insolvification' of the claims underlying such actions.

The second chapter is divided into four sections, all of which are functional to the systematic framing of the central topic of the thesis. The first section focuses on the historical evolution and phases of the 'Insolvency Project', which from 1960 to 2015 led to the current formulation of the Recast Regulation. The second section is dedicated to the analysis of the relevant rules of the EIR and the Brussels Ia Regulation. It was considered appropriate also to provide a few hints about the Lugano Convention. The third section outlines in general terms the problem arising from the *actio finium regundorum* between the two EU Regulations. The collective dimension of the problem is therefore illustrated (*i.e.* the relationship between Article 1 EIR and the insolvency exception provided for in Article 1(2)(b) of the Brussels Ia Regulation), also through the example of the difficult characterisation of the English schemes of arrangement and the procedures dealing with the over-indebtedness of natural persons. Some temporary conclusions are therefore drawn on the collective dimension as far as the boundaries between the EIR and the Brussels Ia Regulation are concerned. Finally, the fourth section serves as an outline of the 'individual dimension', *i.e.* the issue of *vis attractiva concursus* in the case of an action against a defendant domiciled in another Member State brought in the context of insolvency proceedings governed by the EIR. In particular, the section illustrates the ambiguities of the EIR, which did not have an express rule on the jurisdiction in respect of such actions.

The third chapter focuses entirely on the case-law of the ECJ on the issue of Annex Actions. For the sake of an orderly consideration of the EU jurisprudence, it was considered appropriate to divide the chapter into two sections. The first section provides a detailed, but objective, analysis of the relevant judgments, describing the facts of the case and the reasoning of the Court. The second section represents a cross-cutting and critical reorganisation of the arguments and principles adopted by the ECJ, and aims at identifying, first, the main characteristics of the European *vis attractiva concursus*, as progressively specified by the Court's decisions, and then to analyse in detail the so-called Gourdain Formula and its interpretative evolutions.

The fourth chapter analyses the new set of rules introduced by the Recast Regulation. In a more general perspective, the chapter analyses the changes brought to the scope of the new Regulation compared to the previous EIR and, in the light of the inclusion of the s.c. 'hybrid' and pre-insolvency proceedings within the scope of the Recast Regulation, the conclusions on the collective dimension drawn in the second chapter are reassessed. The new Article 6 of the Recast Regulation is then taken into account, assessing the extent to which the European legislature has codified the precepts of the ECJ case-law (illustrated in the third chapter) and the rules introduced *ex novo* by the Recast Regulation.

Finally, the fifth chapter represents a conclusive and critical analysis of the European *vis attractiva concursus*, which attempts to summarise all the principles that have emerged, and the assessments made in the previous chapters, highlighting the strengths and shortcomings of the new provision. The conclusions drawn can be summarised as follows: under a systematic perspective, the rule according to which Annex Actions must be attracted to the jurisdiction of the Member State where the insolvency proceedings are opened is useful for the pursuit of the objectives set out in the Recast Regulation. However, the greatest uncertainties stem from the ambiguity of the Gourdain Formula, which uses concepts that are too broad and still lack a precise application as criteria for the identification of Annex Actions. In the light of the above, as a solution *de lege ferenda*, it seemed in any case useful to try to draw up a catalogue of actions which, according to an autonomous qualification, could be considered as falling within the European notion of Annex Actions.

CHAPTER I -

THE *VIS ATTRACTIVA* UNDER NATIONAL LAWS

CONTENTS: I.1. The legal systems adopting the vis attractiva concursus - I.2. The Italian system and the *vis attractiva concursus*: statutory provision and legal background - I.2.1. The (only apparent) intermix between the competence set forth by Article 24 l.fall. and the rules on procedure applicable to the assessment of actions deriving from insolvency proceedings - I.2.2. Actions brought by insolvency creditors against the insolvent and the procedural rules on their centralysed determination - I.2.3. The actions brought by the trustee: actions deriving from insolvency proceedings and actions of the estate - I.2.3.1. Actions 'directly deriving from insolvency proceedings' within the scope of Article 24 l. fall. - I.2.3.1.1. Avoidance actions - I.2.4.2. Actions for the termination of contracts under Article 72 and ff l. fall. - I.2.3.1.3. Actions for the liability of the trustee and the body of the procedure - I.2.3.2. An action that does not fall within the scope of Article 24 l. fall. but that is attracted ex lege to the insolvency court: the ordinary actio pauliana exercised by the trustee - I.2.3.3. Actions that do not fall within the scope of Article 24 l. fall and the 'actions of the estate' - I.2.3.3.1. Actions brought by the trustee on behalf of the divested debtor -I.2.3.3.2. Liability actions against directors and corporate actions - I.2.3.3.3. Actions for the abusive credit financing - I.2.3.2.4. Actions concerning contracts legal relationships entered into by the trustee - I.3. The Spanish system and the vis attractiva concursus - I.3.1. Actions falling within the scope of Article 8 LC - I.3.2. Actions out of the scope of Article 8 LC - I.3.2.1 *Acciones de reintegración* and *acción rescisoria* - I.3.2.2. The 'external' director's liability regime and its affection by the opening of insolvency proceedings - I.3.2.3. Liability actions against the trustee - I.3.2.4. Actions brought on behalf of the divested debtor - I.3.2.5. Actions for the termination of contracts - I.4. the French system and the vis attractiva concursus - I.4.1. The limitations to the jurisdiction of the *Tribunal de Commerce* - I.4.1.1. The different role of *the juge commissaire* and of the *Tribunal de Grande Instance* - I.4.1.2. Actions for the trustee's liability - I.4.1.3. The exclusive jurisdiction of other courts - I.4.2. Actions stemming from the opening of insolvency proceedings or legally affected by them - 1.4.2.1. Avoidance actions - 1.4.2.2. *L'action en responsabilité pour l'insuffisance de l'actif* - 1.4.2.3. Actions concerning the termination or the continuation of contracts (and the residual category of actions implying the application of rules governing insolvency proceedings) - I.4.3. Actions excluded from the scope of Article R. 662-3 Cod. Com. - I.4.3.1. *Le soutien abusif du credit* - I.4.3.2. The *actio pauliana* exercised by the trustee - I.4.3.3. Other actions excluded from the scope of the vis attractiva concursus - I.5. An alternative to the vis attractiva concursus: the German system - I.5.1. Directors' corporate liability under the German system - I.5.2. *[segue]* Directors' liability towards creditors - I.5.3. *[segue]* Director's duties and liability in the vicinity of insolvency - I.5.4. The rules governing the lodging, verification and admission of insolvency claims under the German system

I.1. The legal systems adopting the *vis attractiva concursus*

This chapter aims at providing a general overview of some common difficulties that arise in the domestic context of four Member States concerning the characterisation of the nature of actions that may arise in the course of insolvency proceedings.

In particular, it was decided to examine three jurisdictions with a common (latin) legal matrix, i.e. Italy, France and Spain, in order to demonstrate that, despite the apparent commonalities dictated by the fact that they all adopt the vis attractiva concursus, the interpretation that is given to that principle and to the actions falling within its scope leads in each system to different solutions.

It seemed appropriate, then, to flank the analysis of those system to the different position bolstered by the German legislature, which has traditionally refused to embed in its insolvency law the *vis attractiva concursus*.

The analysis carried out, therefore, has not merely examined whether, for the purposes of the internal allocation of the competence, a certain action is attracted or not to the jurisdiction of the insolvency court.

Rather, an attempt has been made to analyse the controversial legal basis of some actions which are of particular relevance for the purpose of this work, highlighting that the doctrinal debates coagulating around the qualification of those actions (as matters relating to the domain of insolvency law or pertaining to the common rules of civil law) emerge irrespectively of the *vis attractiva concursus*, the latter being a mere procedural *posterius* of a necessarily preliminary issue of characterisation.

I.2. The Italian system and the *vis attractiva concursus*: statutory provision and legal background

The Italian system has embraced the principle of the *vis attractiva concursus* since the ancient Code of Commerce dated 1882 [(1)]. At present, the principle is codified in Article 36 of the newly introduced Code of Business Distress and Insolvency (*Codice della Crisi d'Impresa e dell'Insolvenza*, 'CCII') [(2)], which from August 2020 will replace the former Italian insolvency act (*legge fallimentare*, hereinafter 'l.fall.') [(3)].

The provision dealing with the *vis attractiva concursus* within the CCII retains the exact formulation of the previous Article 24 l. fall., merely adding a second paragraph concerning the *translatio iudicii* in favour of the insolvency court, in case the parties have erroneously seised the ordinary court for actions deriving from insolvency proceedings [(4)].

Because the new CCII does not bring any substantial change to the former provision and it has not yet come into force, in analysing the phenomenon of the *vis attractiva concursus* within the Italian system it is still necessary to refer to the previous Article 24 l. fall., which has been the legislative reference for over 77 years.

The last version of Article 24 l.fall. provides that

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1 Codice di Commercio del Regno d'Italia, Royal decree 31 October 1992, n. 1062. At that time, the principle was enshrined in article 685(2) thereof. For an overview on the historical background of the *vis attractiva concursus* in Italy, see G. CASELLI, 'organi del fallimento', in *Commentario fallimentare Scialoja-Branca*, *Legge fallimentare*, Bologna-Rome, 1977, p. 38, A. BONSIGNORI, 'Il fallimento', in F. GALGANO (ed.), *Trattato di diritto commerciale e di diritto pubblico dell'economia*, Padova, 1986, p. 202.

2 Following a two-year legislative process, on 10 January 2019, the Italian Government approved the Legislative Decree No. 14, published in *OJ* 14 February 2019, captioned 'Code of Business Distress and Insolvency' (*Codice della Crisi d'Impresa e dell'Insolvenza*). The CCII will enter into force after 18 months from the publication, except for some limited provisions that are already effective, as they came into force 30 days after the publication.

3 Royal Decree 16 March 1942, n. 267.

4 Before the reform, the rule concerning the *translatio iudicii* was provided under article 9*bis* l.fall.

« *Il tribunale che ha dichiarato il fallimento è competente a conoscere di tutte le azioni che ne derivano, qualunque ne sia il valore* [The court opening insolvency proceedings is competent to hear and determine all the actions deriving from the procedure, regardless of their value] » [5].

The rationale underpinning such a rule is unanimously traced back to a sort of *primauté* of the insolvency court, which should (purportedly) solve, through a simple rule of competence, the problematic relationship between actions deriving from the opening of insolvency proceedings and their 'natural' forum. It should prevent the interpreter from establishing each time by way of interpretation the boundaries between the actions that must be heard and determined by the insolvency court, and those that remain instead governed by the ordinary rules on competence set forth by Articles 7 and ff. of the Italian Civil Procedural Code (c.p.c.) [6].

The *vis attractiva concursus* was thus conceived as a principle vesting the insolvency forum with a functional and exclusive competence for the determination of certain actions, and, according to some, was dictated mainly by reasons of legislative expediency [7]. Indeed, from a historical perspective, it emerges that ultimately the restatement of such a rule in the Insolvency Act of 1942, was to be attributed to the choice of the Italian legislature not to establish an ad hoc tribunal for insolvency proceedings and actions deriving therefrom [8].

I.2.1. The (only apparent) intermix between Article 24 l.fall. and the procedural rules applicable to the assessment of actions deriving from insolvency proceedings

To have a proper understanding of the Italian approach towards the *vis attractiva concursus*, a fundamental concept must be understood henceforth.

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[5] Throughout the years, the provision dealing with the *vis attractiva concursus* has undergone several amendments. Although retaining the original principle established therein (*i.e.* the attraction to the insolvency forum of some actions), on the occasion of the reforms of 2006 and 2007 the Italian legislature modified the text of article 24 l. fall. Prior to those reforms, the text read « *the court opening the insolvency proceedings shall have competence to hear and determine all actions arising therefrom, whatever their value and even if they relate to employment contracts, with the exception of real estate actions, in relation to which the ordinary rules of jurisdiction remain unaffected* [il tribunale che ha dichiarato il fallimento è competente a conoscere di tutte le azioni che ne derivano, qualunque ne sia il valore e anche se relative a rapporti di lavoro, eccettuate le azioni reali immobiliari, per le quali restano ferme le norme ordinarie di competenza] ». The Legislative Decree 6/2006 has abrogated the sentence 'even if they relate to employment contracts, with the exception of real estate actions, in relation to which the ordinary rules of jurisdiction remain unaffected' and, instead, added a second paragraph concerning the procedural (summary) rules to be applied, which stated « *unless otherwise provided, the provisions of Articles 737 to 742 of the Civil Procedural Code shall apply to the disputes referred to in the first paragraph. Article 40, third paragraph, of the Italian Civil Procedural Code does not apply* [salvo che non sia diversamente previsto, alle controversie di cui al primo comma si applicano le norme previste dagli artt. Da 737 a 742 c.p.c. Non si applica l'art. 40, terzo comma, c.p.c.] ». Such an addition was however deleted the following year, with the Legislative Decree 169/2007.

[6] M. FABIANI, 'under art. 24', in A. JORIO and M. FABIANI (eds.), *Il nuovo diritto fallimentare*, Bologna, 2006, p. 424.

[7] F. FERRARA, *Il fallimento*, Milan, 1974, p. 244 and ff.

[8] F. DE SANTIS, 'Le azioni che derivano dal fallimento', in V. BUONOCORE and A. BASSI (eds.), *Trattato di diritto fallimentare*, Padua, 2010, p. 27.

The more attentive Italian legal literature dealing with the *vis attractiva concursus* is unanimous in making it clear that when addressing the phenomenon of the attraction before the insolvency court of judicial actions two different approaches must be kept severed.

One could address the issue of the *vis trahens* of the insolvency court with a broad and objective perspective and examine, under a sort of 'laical' standpoint, *what* is brought before the insolvency court, irrespective of the type of action concerned. This approach does not make any specific distinction between 'incoming' actions (namely the lodging, verification and admission of insolvency claims) and 'outgoing' actions (*i.e.* actions brought by the trustee acting either on behalf of the divested debtor or in the interest of the creditors). Instead, this view assumes that the *vis attractiva concursus* is understood *lato sensu* as legal phenomenon entailing that, factually, when insolvency proceedings are opened some actions are attracted to the competence of the insolvency forum. Article 24 l.fall., then, would be anything more than one expression of a more general principle, which pertains to insolvency proceedings in general (*i.e.* the domestic unity and universality of the procedure). Should one adhere to this method of analysis, one should also be aware that it implies analysing on a case-by-case basis if each action arising in the course of insolvency proceedings is subject to such a phenomenon [(9)].

Another approach, which is deemed more correct, stresses that the *vis attractiva concursus* provided by Article 24 l.fall. is conceived as a mere rule on competence *stricto sensu* [(10)], which must be kept conceptually separated from the other rules on the procedure ('regole di rito'), regulating other profiles and phases of the insolvency procedure (and, in particular, the specific rules on the lodging, verification and admission of insolvency claims under Article 52 and 92-103 l. fall.).

It follows that, for certain profiles and phases of the insolvency procedure, the *de facto* attraction to the insolvency forum should not be attributed to the principle of the *vis attractiva concursus* set forth by Article 24 l. fall. (regarded as a mere rule on the competence) but rather to those specific and predominant procedural rules. For present purposes, this means that the fact that insolvency claims are necessarily heard and assessed before the insolvency court is not a *direct* consequence of the *vis attractiva* itself, but it derives from the mandatory application of other specific procedural rules, typical of insolvency law.

In this constellation, the profile of the competence of the insolvency court is inevitably intermixed with the rules on the procedure, as it addresses, on the one side, the identification of the actions which derive from insolvency proceedings and, on the other side, the applicability of ordinary procedural rules and special insolvency procedural rules.

On the basis of the applicable procedural rules, the following classification can therefore be made:

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[9] See, among others, C. VELLANI, *Competenza per attrazione e fallimento*, Padua, 1996, p. 17. F. FERRARA JR., A. BORGIOLI, *Il fallimento*, Milano 1995, p. 273 ff.

[10] G. BETTAZZI, 'Azioni che derivano dal fallimento', in *Il Fallimentarista*, 14 February 2019, p. 3.

(i) actions that fall within the definition of 'actions deriving from insolvency proceedings' under Article 24 l.fall. (rule on the competence) are those whose merits are assessed by the insolvency court according to ordinary procedural rules. In the majority of the cases, in assessing those claims, the insolvency court applies the ordinary procedural rules provided under Articles 163 and ff. c.p.c. [11];

(ii) protective measures anticipating the decision on the merits relating to actions deriving from insolvency proceedings, are also decided by the insolvency court. However, such an attraction does not derive from the operation Article 24 l. fall., but from the specific rules governing the competence of protective measures brought in the context of insolvency proceedings (Article 669*ter* c.p.c.).

(iii) all claims brought by insolvency creditors against the insolvency estate (in particular monetary insolvency claims, but also segregation and separate satisfaction claims of secured creditors) are assessed by the insolvency court pursuant to the procedural rules specific of insolvency proceedings, under Article 93 and ff. l.fall. Here, the *de facto* attraction of those claims before the insolvency forum derives from the necessary application of those procedural rules and not from Article 24 l. fall.

Keeping that in mind, a systematic approach towards the issue of the *vis attractiva* leads, at the outset, to single out those claims which are decided by the insolvency court according to the insolvency-specific procedure of Articles 93-102 l. fall. (and which do not fall within the scope of the *vis attractiva concursus*), and then focus the attention on the actions that fall within the (thecnical) scope of Article 24 l.fall.

I.2.2. Actions brought by insolvency creditors against the insolvent and the procedural rules on their centralysed determination

As mentioned above, under the Italian insolvency law, some profiles and some phases of the insolvency procedure are subject to specific procedural rules.

The key provision in this respect is Article 52 l.fall., which states that

> « *Il fallimento apre il concorso dei creditori sul patrimonio del fallito. Ogni credito, anche se munito di diritto di prelazione o trattato ai sensi dell'articolo 111, primo comma, n. 1), nonché ogni diritto reale o personale, mobiliare o immobiliare, deve essere accertato secondo le norme stabilite dal Capo V [92-103], salvo diverse disposizioni della legge* ['The opening of insolvency proceedings opens the creditors' competition ['concorso'] on the assets of the bankrupt. All claims, even if they have a general priority right or are dealt with pursuant to Article 111(1)(1), as well as all rights in rem or in personam,

[11] It is not excluded, however, that for actions which are decided by the court in monocratic composition, the simplified procedure under article 702 *bis* c.p.c. is applicable, provided that the conditions for its applicability set forth by the law are fulfilled. Moreover, the specific procedural rules *ratione materiae* (such those applicable to actions regarding employment contracts, whose assessment is regulated by the procedure under articles 409 and ff. c.p.c.) may be applicable as well by the insolvency court. See F. DE SANTIS, *op. cit.*, p. 27.

whether on movables or immovables, must be determined in accordance with the procedural rules laid down in Chapter V [92-103], unless otherwise provided for by law] ».

It is necessary to recall the above provision because it proves to be important to understand that the concentration of the assessment of insolvency claims before the insolvency court does not derive at all from Article 24 l. fall, but rather it derives from the combined provisions of Articles 52 and 93 l.fall. (12).

Such a (procedural) rule provides that the assessment of all insolvency claims (both unsecured and priority claims(13)), as well as that of rights of secured creditors covered by a right *in rem* or an equivalent right *in personam*, must be assessed according to the specific procedure set forth by insolvency law (14).

The rationale underpinning the necessity to apply a different procedure to the determination of insolvency claims lies with the choice of the Italian legislature to involve the necessary participation and discussion of all creditors involved in the procedure order to ensure that the substantive collectiveness (*i.e.* the *par condicio creditorum*) is respected also at the level of the assessment of the claims, and not only for distributional purposes (15).

According to the majority of scholars, that procedural provision - establishing the rules to be followed by the judicial authority (*i.e.* the insolvency court) to assess the insolvency claims towards a debtor

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12 See Cass. 15 February 1999, n. 1240, Cass., 21 November 1998, n. 11787, Cass., 4 June 1998, n. 5477, in *Foro.it*, 1999, I, p. 1184.

13 With Legislative Decree 9 January 2006, n. 5, also the assessment of contested claims arisen after the opening of insolvency proceedings, where they are qualified as super-priority claims ('crediti prededucibili) either for express provision of law or because they prove to have arisen in function or on the occasion of the procedure - is subject to the procedural rules of articles 92-103 l.fall. For the sake of completeness it is worth mentioning that, according to the majority of the case-law, also the (monetary) claims of employees against the insolvent debtor are subject to the centralised assessment under Article 52 and 93 l.fall. Other actions brought by the employees (such as an action for the declaration of the continuation of the employment contract) are excluded from the scope of Article 24 l.fall., as they do not derive from the opening of insolvency proceedings (unless, they prove to do so on the basis of their cause of action, this may be, according to some authors, the case of the temporary exercise of the business while proceedings are ongoing). See *infra*, I.2.3.2.4.).

14 It bears noticing that the inclusion of the assessment on the rights of creditors holding rights *in rem* or equivalent rights *in personam* is a relatively recent novelty brought up by the reform of legislative decree 9 January 2006, n. 5. The previous regulation provided that actions concerning real property on immovable assets were expressly excluded from the *vis attractiva concursus* under Article 24 l. fall. The beforementioned legislative decree has abolished such an exclusion and has parallely modified Article 52 l. fall. That entails that (form a technically doctrinal point of view), those actions do not fall within the scope of the *vis attractiva*, but are subjected to the procedural rule on the assessment of insolvency claims pursuant to Articles 52 and 92-103 l. fall. However, Cass., 3 May 2005, n. 9170, in *Giust. civ.* 2006, 7-8, I, p. 1569 has found that the action for the mere declaratory relief on the existence of a right *in rem* may be brought before the ordinary venue, irrespective of the insolvency procedure, provided that the creditor does not seek the assessment on the « *peculiar feature of his credit to be satisfied in priority in respect to the other* creditors ». It follows that actions concerning rights *in rem* must be treated as insolvency-related claims *lato sensu* when they concern the enforcement of the secured right, whereas they are ordinary civil and commercial claims when the claimant acts for the mere declaratory relief concerning the secured right. F. DE SANTIS, *op. cit.*, p. 61.

15 G. BOZZA, 'Il procedimento di accertamento del passivo', in *Fallimento*, p. 1053.

subject to insolvency proceedings - would prevail over the mere rules on the competence (such as the *vis attractiva concursus*) [16].

In other words, the concentration before the insolvency court of actions seeking the assessment and the satisfaction of insolvency claims (secured and unsecured) and the restitution of assets [17] does not derive from Article 24 l.fall., but it must be traced back to the principle of substantial collectiveness under Article 52 l.fall. and the procedural rules implementing it (Article 92 ff. l. fall.)

It follows that the ordinary courts seised erroneously by the creditor pursuing his insolvency claim (even where only seeking a declaratory relief is sought [18]) should not declare its incompetence, but rather the inadmissibility of the claim on the ground that the claim would be assessed under the wrong procedural rules (*i.e.* the ordinary procedural rules of Articles 163 and ff. c.p.c., instead of the rules under Article 92 and ff. l.fall.). Indeed, procedural rules represent a fact *litis ingressus impediens*, which, from a doctrinal perspective, must be kept conceptually separated from the exception concerning the competence.

It would be out of the scope of the present research to further dwell on the rules concerning the determination of insolvency claims [19]. For present purposes, the key takeaway is that the *vis attractiva concursus* of Article 24 l.fall. (if understood *stricto sensu* under its technical meaning) does not concern the actions brought by the creditors against the divested debtor. Any 'income' claim against the debtor subject to insolvency proceedings must be brought before the insolvency court, not on the ground of the *vis attractiva concursus*, but rather according the joined provisions of Article 51, 52 and 92-103 l.fall.

Article 24 l. fall. concerns exclusively those actions that are brought by the trustee against creditors, or third parties and (and the related actions brought by creditors and third parties seeking negative relief) [20].

I.2.3. The actions brought by the trustee: actions deriving from insolvency proceedings and actions of the estate

Once framed the 'technical' scope of the principle of the *vis attractiva concursus* under Article 24 l.fall. and acknowledged that it concerns only those actions that are brought by the trustee, it is now possible to further investigate which actions fall in the definition of 'actions deriving from insolvency proceedings'.

16 See F. DE SANTIS, *op. cit.*, pp. 40-41, C. VELLANI, *op. cit.*, p. 16.

17 G.P. MACAGNO, 'La domanda di rivendica/restituzione', in *Fallimento*, 2011, p. 1050.

18 See L. BALESTRA, 'Le restituzioni nel fallimento', in *Rev. trim. dir. e proc. civ.*, 2012, p. 74.

19 For a recent contribution on the topic, see L. CAMPIONE, 'Concorso dei creditori', in *Il fallimentarista*, 26 August 2019.

20 See I. PAGNI, 'Le azioni di massa e la sostituzione del curatore ai creditori', in *Fallimento*, 2007, p. 1039.

Before doing so, however, it bears noticing that drawing the taxonomy of the actions brought in the context of insolvency proceedings is an operation which is nowadays further complicated, as it does not concern anymore the sole category of insolvency-deriving actions.

As noted by scholars, the legislative stratification regarding the Italian regime of insolvency law has progressively emphasised some differences between two kind of actions which may be brought in the context of insolvency proceedings.

In particular, after the reforms of 2006 - 2007, the category of 'actions deriving from insolvency proceedings', under Article 24 l.fall., does not represent anymore a 'monad' in the Italian insolvency regime, but only one of the possible categories of actions in the landscape of insolvency proceedings. Today, that doctrinal category of actions must be flanked to (*recte* encompassed in) another dogmatic notion, and namely that of the 'actions of the estate' ('*azioni di massa*') mentioned in Article 106 l. fall and defined by the case law as those actions aimed at obtaining reinstatement of the debtor's assets, which would benefit the single creditor, when brought outside of the procedure, whereas, once the insolvency procedure is opened, they would operate in the interest of all creditors [21].

In the light of this evolution, the two categories of actions should be treated differently.

I.2.3.1. Actions 'directly deriving from insolvency proceedings' within the scope of Article 24 l. fall.

In that constellation, the insolvency law does not provide for any objective criterion to define which actions should be attracted to the competence of the insolvency court.

Article 24 l.fall. merely establishes that the ordinary rules on the competence should be derogated only when the action 'derives from insolvency proceedings'. The construction of that concept is hence left to the interpreter.

For decades Italian scholars have attempted to provide for a more concrete definition of what the expression 'deriving from insolvency proceedings' actually means.

In this sense, the various doctrinal thesis, endeavouring to bring back to such a general definition all the category of actions which may be attracted to the competence of the insolvency court, have led to a variety of opinions that, although not involving macroscopic theoretical differences, when applied to individual concrete actions come to sometimes opposing solutions [22].

A more precise specification of what is an action 'directly deriving from insolvency proceedings' within the meaning of Article 24 l. fall., was provided in 1967, when the by Italian Supreme Court established the principle pursuant to which

> « *actions which fall within the exclusive competence of the insolvency court are only those actions which stem directly from insolvency proceedings, and not those actions which, being independent from the undertaking's*

21 Cass., 20 December 2002, n. 18147, in *Foro.it*, 2003, p. 770 ss.

22 For an articulated reconstruction of all the doctrinal definitions of the concept of actions 'directly deriving from insolvency proceedings' see C. VELLANI, *Competenza per attrazione e fallimento*, Padua, 1996, pp. 10-11.

material insolvency and from collective proceedings, could have been commenced autonomously outside of insolvency proceedings » [23].

In the light of the definition provided by the court, in principle the rule of the *vis attractiva concursus* should not go beyond this objective: implement the unitary assessment and the enforcement of insolvency claims provided by Articles 51 and 52 l.fall. and the *paritas creditorum* [24].

This means that only actions whose legal foundation stems directly form the insolvency procedure or those that are 'ontologically' transformed from insolvency proceedings to such an extent that they must be exercised in the context of insolvency proceedings fall within the scope of Article 24 l. fall.

On the contrary, those actions which are related with insolvency proceedings with a mere occasional link must be treated as if they were bought by the debtor and thus their competence should follow the ordinary rules of the code of civil procedure [25].

Nevertheless, the abovementioned principle enunciated by the Italian Supreme Court, still leaves room for wide margins of discretion on the part of local courts to decide on their competence to hear an action, as the idea of the 'direct derivation' of the action and its 'occasional link' with the procedure are extremely malleable concepts that can be used to support contradictory solutions in the same case. Indeed, potentially, any action could be deemed to be either somewhat affected from the opening of insolvency proceedings or, on the contrary, to have only a loosened connection to insolvency proceedings.

As pointed out by scholars, the interpreter should not focus solely on the procedural amendments that the action undergoes as an effect of the opening of insolvency proceedings. The fact that the exercise of the action is procedurally modified by the insolvency procedure should have no bearing on the operation of the *vis attractiva concursus*. Besides, the procedural modifications of the action should reflect also the transformation of the substantive right or obligation underlying the action. As a consequence, actions deriving from insolvency proceedings should be only those ones which, in the light of the *cause of action* of the claim, as determined by the claimant in the initial act introducing the action and the exceptions made by the defendants, appear to be necessarily decided on the basis of the principles and rules which are specific to insolvency law [26].

I.2.3.1.1. Avoidance actions

The typical example of actions deriving from insolvency proceedings within the meaning if Article 24 l. fall. are undoubtedly avoidance actions, which the Italian system are governed by Articles 67 et seq. fall. For present purposes, there is no need to dwell on the features of this kind of actions as they are unanimously considered by scholars and case-law as the archetype of actions deriving from

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23 Cass. SS. UU., 8 April 1976, n. 1224, in *Giust. Civ.*, 1976, I, p. 1066. See also Cass., 22 June 2004, n. 11647.

24 Italian Constitutional Court, 7 July 1988, n. 778, in *Giust civ.*, 1988, I, p. 2194.

25 F. DE SANTIS, *op. cit.*, p. 36.

26 G. CASELLI, 'Fallimento – Organi del fallimento', in *Enc. giur.*, XIII, Rome, 1989, p. 3.

insolvency proceedings [27]. As such they are necessarily brought before the insolvency court. It is more debated the admissibility of avoidance actions *vis-à-vis* the receiver of the transaction, where the latter is subject to an insolvency procedure as well. The case law on this particular situation seems to admit that the avoidance action may continue where insolvency proceedings are opened against the respondent in the course of the action. On the contrary, it seems that the trustee cannot bring an avoidance action against another insolvency procedure [28].

Apart from this, it may be worth adding that Article 44, 64 and 65, l. fall. represent the specular provision of Article 67 l.fall., providing that that any transaction that is undertaken by the debtor *after* the opening of the procedure are ineffective *vis-à-vis* the creditors as they violate the *par condicio creditorum*. Therefore, the case law and scholars are unanimous in considering that they are actions deriving from insolvency proceedings as well [29].

I.2.3.1.2. Actions for the termination of contracts under Article 72 and ff l. fall.

Actions arising out of the termination of a contract following the exercise by the trustee of the right bestowed upon him by the insolvency law to choose between the continuation or the termination of pending contracts (Articles 72 and ff. l. fall.) are unanimously considered as actions deriving from insolvency proceedings [30].

The Italian Supreme Court has stated that, after the opening of insolvency proceedings, pending contracts (synallagmatic ones not yet entirely performed [31]) are deviated *ex lege*, or upon the choice of the trustee, from their typical legal scheme. In this respect, albeit pre-existing within the legal sphere of the debtor, the right to terminate the contract between the parties is considered to be a right somewhat 'novated' by the insolvency proceedings, as it becomes a new, different right.

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27 S. SATTA, *Diritto fallimentare,* Padua, 1990, p. 103-104. G. PAJARDI*, Manuale di diritto fallimentare*, Milan, 1993, p. 386, F. FERRARA JR. and A. BORGIOLI, *Il fallimento*, Milano, 1995, p. 275, G. CASELLI, 'Gli organi del fallimento', in F. BRICOLA, F. GALGANO and G. SANTINI (eds.) *Commentario fallimentare Scialoja-Branca*, *Legge fallimentare*, Bologna-Rome, 1977, p. 47, U. AZOLINA, 'La revocatoria fallimentare', in *Dir. fallimentare*, 1951, I, p. 79.

28 See Cass. 4 October 2016, n. 19795; Cass. 8 March 2012, n. 3672.

29 See, *ex multis*, Cass. 17 September 2014, n. 1724; Cass., 13 September 2007, n. 19165.

30 Cass. 15 July 2015, n. 14844, in *Giust. Civ. Mass.*, 2015 (action of the trustee seeking the declaration of non-opposability of the property lease contract stipulated by debtor *in bonis* pursuant to art. 2923 c.c., or the termination of the same contract pursuant to art. 80 l.fall.), Cass., 22 November 2006, n. 24686, in *Giust. Civ. Mass*, 2006, p. 11 (an action brought by the creditor against the trustee for the restitution of the advanced sale price relating to a contract for the future sale of an estate property entered into with the debtor *in bonis* and terminated by the trustee). Cass., 20 July 2004, n. 13496, in *Giust. Civ. Mass.*, 2004, pp. 7-8. Cass. 6 June 2002, n. 8238 (action brought by the trustee who had exercised the right to terminate a sale contract seeking the recovery of the sums paid by the debtor *in bonis* to the promisor vendor). Cass., 21 December 2001, n. 16183 (action arising out of the *ex lege* termination of a lease contract of a hotel). Cass., 16 June 1998, n. 5477, in *Foro.it*, 1999, I, p. 1184 (action brought by the trustee seeking a declaratory relief on the existence of an employment contract with the insolvent employer). I. PAGNI, 'Le azioni di massa e la sostituzione del curatore ai creditori', in *Fallimento*, 2007, p. 1037. M. FABIANI, '*Sub* Art. 24', *cit.*, p. 429. G. CASTELLI, *op. cit.*, p. 39.

31 Contracts whose object is the transfer of a right *in rem* ('contratti ad effetti reali', e.g. a sale contract) and the right has already been transferred do not fall within such a category.

The application of the *vis attractiva concursus* is frequent with reference to preliminary contracts, with respect to which the case-law considers that the exercise by the trustee to terminate the contract represents a 'qualified' defence ('*eccezione in senso proprio*'). Therefore, the action of the contractual counterparty seeking the judicial order for the performance of the obligation arising out of the preliminary contract would be subtracted from the competence of the ordinary court [32].

Another part of the case-law rejects the above interpretation, pursuant to which the *vis attractiva concursus* operates with respect to those actions on the sole argument that the power of the trustee to terminate the contract would be a procedural 'qualified' defence. Instead, the power of the trustee to terminate the contract must be regarded as a « *choice affecting the course of the proceedings* » [33], which precludes the adjudication of the action brought by the contractual counterparty of the debtor. The ratio underpinning such an effect produced by the choice of the trustee on the action rests on the fact that it affects the substance of the contractual relationship [34].

I.2.3.1.3. Actions for the liability of the trustee and the body of the procedure

Actions for the liability of the trustee (Article 38 l. fall.) and the creditor's committee (Article 41 l. fall.) of the procedure are also considered actions deriving from insolvency proceedings.

In particular, the exclusive *locus standi* to bring an action seeking the compensation for the damages suffered by the body of creditors due to the conduct of the trustee exercising his tasks lies with the newly appointed trustee (under the authorisation of the insolvency judge and the creditor's committee). Similarly, the action *vis-à-vis* the creditor's is brought (only) by the trustee, duly authorised by the insolvency judge, who appoints a new committee.

The nature of the action against the trustee is controversial. A minority of the case-law maintained that the liability of the trustee is non-contractual in nature, because he does not assume any direct obligation towards creditors [35].

In the most recent jurisprudence prevails the interpretation pursuant to which the relationship between the trustee and the creditors may be equated to the contract of mandate. Accordingly, the

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32 See Cass. 26 January 2003, n. 582, in *Fallimento* 2003, p. 840 where the Italian Supreme Court however considered that the action brought by the claimant did not actually sought the order for the specific performance of the preliminary contract, but rather it concerned the underlying property of the real property.

33 Cass. 18 May 2005, n. 10436, in *Giust. civ. Mass.* 2005, 9.

34 Cass., 24 July 2009, n. 17405, in *Giust. civ. Mass.*, 2009, pp. 7-8, 1142 and Cass. 14 April 1999, n. 239, in *Dir. fall.* 1999, II, 678.

35 The tortious nature of the action was argued by a part of the scholars by way of analogy with director's liability under article 2394 c.c. (liability *vis-à-vis* corporate creditors). Other authors recurred to the general principle of the *neminem laedere*. However, such an interpretation lacks persuasiveness when one considers that under article 37-*bis* l. fall. the trustee may be appointed upon request of the majority of the members of the creditor's committee. Cass, 24 May 1991, n. 5882 in *Dir. fallimentare*. 1991, II, p. 674, which held that the liability of the trustee should be assessed pursuant to article 2236 c.c. (liability of the service provider), on the assumption that the nature of the public function of its activity did not prevent the applicability of the regime concerning the intellectual professions. Instead, Cass., 8 November 1979, n. 5761 excluded the applicability of article 2236 c.c.

liability under Article 38 l. fall. would have a contractual nature, with the consequent subjection of the relative action to the ordinary ten-year limitation period, starting from the replacement of the revoked trustee [36] : see, in this regard, it should also be noted that, in the event of inaction on the part of the bankruptcy bodies, the action may also be brought by the bankrupt, notwithstanding the pending insolvency proceedings, given the relative nature of his procedural incapacity, which can only be invoked against him in the interest of the creditors' assets, and his consequent legitimacy to act to protect property rights of which those bodies have lost interest.

Some scholars have argued that, as far as those actions are concerned, the connection with the damage provoked to the insolvency estate is particularly close, and, therefore, those actions must be heard by the insolvency court [37].

It bears observing that, in case of inertia of the other subjects entitled to commence the action *vis-à-vis* the trustee, it seems that also the debtor could bring the liability action against the trustee, not only after the closure, but also in the course of the insolvency procedure.

The limitation period is subject to the suspension provided under Article 2941(6) c.c., concerning the liability of fiduciary administrator of other people's assets.

Scholars generally differentiate the action under Article 38 l. fall. from that brought against the trustee where the conduct of the latter has provoked a harm in respect to the debtor's assets excluded from the insolvency estate. Those actions are not considered insolvency-related, because they would ultimately be referred to a 'regular' tortious action under Article 2024 c.c. (general rule of tort law). Such an action is subject to the ordinary limitation period [38].

I.2.3.2. An action that does not fall within the scope of Article 24 l. fall. but that is attracted *ex lege* to the insolvency court: the ordinary *actio pauliana* exercised by the trustee

The actions listed above are generally understood as falling in the scope of the definition of actions 'directly deriving from insolvency proceedings', set forth by Article 24 l.fall. Therefore, their legal foundation is recognised as stemming directly form the insolvency procedure and, as a consequence of such an 'ontological' characteristic, they must be brought before the insolvency court.

It is extremely debated whether the same conclusions may be applied to the *actio pauliana* exercised by the trustee in the context of insolvency proceedings.

It is extremely controversial between Italian scholars whether - irrespective of the attraction *ex lege* to the jurisdiction of the insolvency forum entailed by virtue of Article 66 l. fall. - such an action should

36 Cass., 5 April 2001, n. 5044 of in *Fallimento*, 2002, p. 57, Cass. 11 February 2000, n. 1507 Cass. 4 October 1996, n. 8716, in *Fallimento,* 1997, I, 1903, confirming the inapplicability of the time-limit suspension provided under Article 2941(6) c.c.

37 F. DE SANTIS, *op. cit.*, p. 50. M. Fabiani, *Il diritto della crisi e dell'insolvenza*, Bologna, 2017, p. 126.

38 Cass., 23 July 2007, n. 16214, A. BONSIGNORI, *Fallimento*, Turin, 1990, p. 398; G. CASELLI, 'Gli organi del fallimento', in F. BRICOLA, F. GALGANO and G. SANTINI (eds.) *Commentario fallimentare Scialoja-Branca*, *Legge fallimentare*, Bologna-Rome, 1977, p., 224 ss.

be characterised as underpinning a matter of insolvency law or whether it essentially may still be regarded as a matter relating to civil law, although admittedly the action undergoes a sort of 'metamorphosis' due to the opening of insolvency proceedings.

Article 66 l. fall. provides that

> « *Il curatore può domandare che siano dichiarati inefficaci gli atti compiuti dal debitore in pregiudizio dei creditori, secondo le norme del codice civile. L'azione si propone dinanzi al tribunale fallimentare* […]. [The trustee may request that transactions undertaken by the debtor to the detriment of creditors be declared ineffective, in accordance with the provisions of the Civil Code. The action shall be brought before the bankruptcy court ».

From the above wording, it emerges clearly that the intention of the legislature in introducing this provision was that of making available, in the context of insolvency proceedings, the remedy of the ordinary civil *actio pauliana* at the service of all the insolvency creditors.

Indeed, as well as the action under Article 2901 c.c., Article 66 l. fall. ultimately allows the insolvency creditors to restore the debtor's assets [39], through the invalidation of the transaction detrimental to their shared right of satisfying their claims. Such an effect is achieved by vesting the trustee with the *locus standi* to bring the action on behalf of all the creditors, acting as a body of the procedure.

Such a brief description of the action brought under Article 66 l.fall. immediately reveals the uncertainties that traditionally surround it.

As acknowledged by the scholars, the *actio pauliana* exercised by the trustee is a 'chamaleontic' instrument [40].

It may be defined as a (new) 'collective' action [41], if one considers the effects produced by the exercise of the *actio pauliana*. Indeed, under this perspective, it is undisputable that the opening of the insolvency procedure affects them: while the 'ordinary' *actio pauliana* produces a doubly relative effect (*i.e.* the non-enforceability of the transaction *vis-à-vis* the claimant, within the limits of the debit owed to him by the debtor); the effects of the action under Article 66 l. fall. lose the character of double relativity, as the action benefits all the debtor's creditors [42].

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39 It must be kept in mind, however, that the *actio pauliana* both under article 2091 c.c. and article 66 l.fall. does not restore the debtor's assets in the sense that the third party must return to the debtor the asset fraudulently transferred. The effect of the action is that of merely invalidating the transaction, which remains valid between the parties, but is ineffective *vis-à-vis* the creditor(a). It would, then, be more correct to say that the *actio pauliana* restore the assets of the debtor considered as the general collateral for the satisfaction of the creditor's shared right to satisfy their claim over those assets. I shall revert on this question in Chapter VI, at § V.4.5.2.3.

40 The Italian Supreme Court defined the action under article 66 l. fall. an 'eclectic' action Cass., 10 December 1987, n. 9122, in *Fallimento*, 1988, p. 322. .Some authors speak of 'metamorphosis' of the *actio pauliana* when exercised by the trustee in the context of insolvency proceedings, see S. AMBROSINI, G. CAVALLI, A. JORIO, Il fallimento, in A. COTTINO (directed by), Trattato di Diritto Commerciale, Padova, 2009, 405), see M. FABIANI, 'La concorsualità dell'azione revocatoria', in *Giur. Comm.*, 2013, 5, p. 958 and ff. G. MILANO, applicabilità del termine di decadenza ex art. 69 bis l.fall. alla revocatoria ordinaria, in *Fallimento*, 11, 2017, p. 1190.

41 F. CORSI, La revocatoria ordinaria nel fallimento, Napoli, Morano, 1965, 32 ss.

42 Cass., 17 June 2009, n. 14098, in *Foro it.*, Rep. 2009, 'Fallimento', n. 40. E. LUCCHINI GUASTALLA, 'Sub art. 66', in C. CAVALLINI (ed.) *Commentario alla legge fallimentare*, II, Milan, 2010, 107.

On the contrary, if one considers the legal foundation of the action, although some differences between the action exercised by the single creditor and the trustee may be detected [43], the action cannot be defined *sic et simpliciter* as underlying a new 'collective' legal foundation, since it ultimately follows the ordinary rules of the civil code (which, not by chance, are expressly referred to in Article 66 l.fall.). Therefore, the trustee would still have to demonstrate (likewise the individual creditor) that: *(i)* at the time when the act was performed the parties were aware of the damage (*scientia damni*) [44]; *(ii)* the act in concrete terms has caused a prejudice [45]; *(iii)* that at the time when the act deemed detrimental was carried out there were one or more previous claims (*i.e.* the *consilium fraudis*, which demonstrates the intentional intention to jeopardise the satisfaction of the claim [46]).

In the light of the above, one part of the scholars emphasising the 'collectivisation' of the effects of the actions argue that, although the *actio pauliana* cannot be considered as underpinning a different legal foundation (and therefore it does not 'derive' *stricto sensu* from the opening of insolvency proceedings), it would reveal a significantly different nature, which could characterise it as insolvency law [47].

Other authors, instead, (more correctly) explain the marked hybridism of the *actio pauliana* on the ground that the *locus standi* of the trustee would not express the mere substitution of the creditors that in that particular case would be in the position of exercising the *actio pauliana* outside of the procedure,

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43 From a procedural point of view, the *actio pauliana* exercised by the trustee differs from that under article 2901 c.c. for the fact that *(i)* the debtor is not a party to the proceedings (which puts the trustee in the 'odd' position of cumulating both the role of the substitute of the debtor and the representative of the creditors. See M. MAIENZA, Fallimento del debitore ed azione revocatoria ordinaria preesistente: le possibili scelte del curatore secondo le sezioni unite, in *Fallimento*, 2009, p. 543; *(ii)* the rule of article 292(2) c.c. under which the claim of the third party deriving from the exercise of the ordinary *actio pauliana* may be enforced against the debtor, but as a subordinated creditor. In the context of insolvency proceedings, the ranking of the third party's claim does not suffer such a 'penalisation'. Cass., 28 May 2009, n. 12513, in *Rep. Foro it.*, 2009; Cass., 17 December 2008, n. 29420, in *Foro it.*, 2009, I, 1063; *(iii)* it is also extremely debated whether the limitation period established by article 69*bis* l.fall. in relation to avoidance actions could be applicable also to the *actio pauliana* exercised by the trustee. See, *inter alia*, E. STAUNOVO POLACCO, 'Doppio limite per la scadenza dell'azione', in *Guida al diritto dossier*, 2007, p. 107 and for the case-law Cass. 4 April 2017, n. 8680, in *dejure.it*. *Contra*, M. MONTANARI, 'Riduzione del termine di decadenza per l'esercizio della revocatoria', in *Fallimento*, 2005, p. 1029.

44 It is not required that the state of the insolvency was known to the third party, as this would aggravate his position compared to the action exercised outside of insolvency proceedings (which confirms that the trustee exercises the same action that the creditor would bring independently of insolvency proceedings). It is sufficient to demonstrate that the debtor and the third party were aware that, by means of the transaction, the debtor was reducing his assets in such a way as to prejudice the interests of his creditors (Cass., 18 May 2005, n. 10430, in *Giur. it.*, 2005, 2291). In the event of gratuitous transactions, the *bona fide* of the third party has no relevance, by virtue of the latin expression *qui certat de damno vitando in luogo di qui certat de lucro captando*.

45 The damage must be different from the mere alteration of the *par condicio* among the creditors, which is the profile that most significantly differentiate the *actio pauliana* from avoidance actions. It is sufficient that the transaction has caused greater difficulty or uncertainty for the creditor in the possibility of enforcing his claims, according to an evaluation made *ex ante*. Cass., 1 August 2007, n. 16986, in *Foro it.,* 2007, 'Fallimento', n. 478; Cass., 27 January 2006, n. 1759, in *Foro it.*, 2006, 'Fallimento', n. 446.

46 Cass., 31 October, 748; Cass., 12 September 1998, n. 9092, in *Giust. civ.*, 1998, I, 2735.

47 M. MAIENZA, 'Presupposti e prospettive dell'azione revocatoria ordinaria in ambito fallimentare', in *Fallimento*., 2001, p. 86 and C. CONSOLO, Il fallimento e le altre procedure concorsuali, L'azione revocatoria ordinaria, Milano, 2008, p. 699. *Contra* A. BONSIGNORI, in F. GALGANO (ed.) Trattato di diritto commerciale e di diritto pubblico dell'economia, IX, Padua, 1986, p. 476.

but it would act as the representative of the body of creditors, thus representing also those who could not theoretically exercise that action. However, such a significant difference could not lead in any case to neglect that the right exercised by the trustee would substantially equate that one underlying the action of the single creditor under Article 2901 c.c. (48).

In the light of the above, the *actio pauliana* does not belong to the category of the actions 'directly deriving' from insolvency proceedings under Article 24 l. fall. (because their legal foundation does not seem to deviate from the typical scheme to the point of becoming new rights, deriving from insolvency proceedings), but it is not even an action with a merely occasional relationship with the procedure (because the effects of the action are 'collectivised') (49).

Rather, it is encompassed within the abovementioned notion of 'action of the estate', which are actions that *in thesi* pre-existed in the legal sphere of the creditor *uti singulo*, and that in the context of the insolvency procedure are exercised by the trustee on behalf and in the interest of all the creditors.

This conclusion does not seem to be contradicted by the fact that the action is decided by the insolvency court. Indeed, the *vis attractiva* provided for the *actio pauliana* exercised by trustee under Article 66 l.fall. should not be read as an expression of the general principle of Article 24 l. fall., but as the exception, which must be traced back to a specific choice of legislative policy.

As a conclusive remark on the *actio pauliana* brought in the context of insolvency proceedings, it must be highlighted that the contrasting view illustrated above entail also that there is no shared opinion also on the alternative *locus standi* of the single creditors to bring the action autonomously for its own interest, in the course of the insolvency procedure (50).

I.2.3.3. Actions that do not fall within the scope of Article 24 l. fall and the 'actions of the estate'

It is submitted that, apart from the actions listed above, all the other actions which may arise in the course of the procedure do not fall within the notion of 'actions deriving from insolvency proceedings' and, therefore they should be excluded from the scope of the *vis attractiva concursus*.

The first group of actions which may be excluded relatively easily from insolvency-derived actions, are those actions brought by the trustee on behalf of the divested debtor.

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48 The *petitum*, according to some authors, would be the same. The sole difference would be that in the *actio pauliana* exercised by the trustee it would be wider, since it would 'absorb' the minor *petitum* of the individual action of the creditors actually prejudiced by the transaction. Therefore, it would only occur a mutation as to the 'subjective latitude' of the action, but not of its nature.

49 A similar debate concerns the action brought by the trustee challenging a simulated contract. See specifically on those actions Cass., 20 July 2004, n. 13496, Cass. 25 January 2003, n. 508, Cass. 11 April 1991

50 Supporting the possibility for the single creditor to exercise the action E.F. RICCI, 'Le "azioni di recupero" dei creditori in pendenza di fallimento', in *Quadrimestre*, 1998, p. 9 and ff. and C. CONSOLO, *'La revo catoria ordinaria nel fallimento fra ragioni creditorie individuali e ragioni di massa', in Riv. dir. proc.*, *1998,* p. 391. *Contra* (but providing for an alternative solution) L. GUGLIELMINUCCI, 'L'azione revocatoria ordinaria nel fallimento', *in Fall.*, 1991*,* p. 893 and A. CECCHERINI, Questioni processuali nel subingresso del fallimento in revocatoria ordinaria anteriormente proposta dai creditori, in *Fall.*, 1999, p. 1033.

Article 43 l.fall. establishes the general entitlement *ex lege* of the trustee to substitute the debtor (acting as both the claimant and respondent) in all actions concerning rights and obligations which already existed in the debtor's legal sphere prior to the opening of insolvency proceedings [51].

On the contrary, it is more difficult to determine whether the actions where the trustee acts on behalf of the body of creditors (the 'actions of the estate') must be encompassed within the rule under Article 24 l.fall. or, lacking a provision similar to that under Article 66 l.fall. they should be excluded from the *vis attractiva*. The Italian insolvency law, in fact, does not provide for a statutory provision vesting the trustee with a *general locus standi* to act on behalf of all the creditors, with a view to protect their shared and common interest. Instead, the trustee may only bring on behalf of the general body of creditors only the s.c. 'actions of the estate'.

Eventually, another group of actions pertain to the claims that arise after the opening of insolvency proceedings, provided that they are credits of the estate and not claims against it (as in this case the abovementioned procedural rules under Articles 51-52 and 93 and ff. l. fall would surely impose that their satisfaction should be done before the insolvency court, but without calling in the *vis attractiva concursus* of Article 24 l.fall.).

I.2.3.3.1. Actions brought by the trustee on behalf of the divested debtor

It is the shared opinion that actions brought by the trustee seeking a declaratory relief or an order of payment concerning a credit of the divested debtor *vis-à-vis* a third party does not fall within the scope of Article 24 l.fall. Indeed, those actions have a merely occasional link with the opening of insolvency proceedings, as they could have been brought autonomously by the debtor himself outside of the insolvency proceedings. The sole effect of the insolvency procedure lies in the fact that the trustee is vested with the *locus standi* to bring the action, but this merely reflects the position of the latter as a processual substitute of the divested debtor. Also, it bears no relevance on the characterisation of the action the fact that the proceeds of the action revert to the insolvency estate, thus increasing it and indirectly affecting the interests of the creditors [52].

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51 I. PAGNI, 'Le azioni di massa e la sostituzione del curator ai creditori', in *Fallimento*, 2007, p. 1037.

52 See *ex plurimis* Cass., 9 November 2005, n. 21708, Cass. 15 February 1999, n. 1240. Those actions are particularly frequent in relation to tender contracts to which the insolvent debtor is a party as the contractor. The action brought by the trustee seeking the payment of the services or the performance rendered by the insolvent debtor prior to the opening of the procedure is therefore not considered an action deriving from insolvency proceedings within the meaning of Article 24 l.fall. as it already existed in the legal sphere of the debtor before the opening of the procedure. See, for instance Cass. 14 September 2007, n. 19290. It bears noticing that an ancient (minority) approach of the Italian Supreme Court considered that actions concerning the recovery of the debtor's credits had to be attracted to the competence of the insolvency court, under Article 24 l.fall., because ultimately they affect the insolvency procedure since their proceeds benefit the whole body of creditors (see, among others, Cass. 1 August 1997, n. 7136, in *Fallimento*, 1998, p. 508). At present, such an interpretation may be regarded as overruled.

Similarly, it has recently been stated by the Italian Supreme Court that, where the liquidator acts for the recovery of sums paid by the debtor but not due (under Article 2033 c.c.) he should be considered as a mere substitute of the debtor, which does not affect the legal foundation of the action [53].

Again, actions brought by the trustee seeking the early termination or the performance of a contract for reasons different from the exercise of the powers under Article 72 l. fall. (e.g. a breach of the contract on the part of the counterparty *in bonis* occurred prior to the opening of insolvency proceedings) and actions for the annulment or the declaration of nullity of the contract concluded by the debtor before the opening of insolvency proceedings do not derive from the opening of insolvency proceedings, nor the right underlying them is subject to the deviation from its typical scheme [54]. Tort actions relating seeking the indemnification of the damages, arising out of the breach of a contract, suffered by the debtor *in bonis* are not encompassed in the actions under Article 24 l.fall. as well [55].

Against this (all in all clear) backdrop, however, two typical situations however may be singled out.

The first occurs where, in the context of the action brought by the trustee before the ordinary civil court against the third party, the respondent raises, as a counterclaim (but not as a mere defence [56]), the fact that boasts a credit *vis à vis* the debtor.

Contrary to the previous orientation of the jurisprudence [57], the actual position of the case law supports that where the respondent invokes as a counterclaim the existence of a credit *vis-à-vis* the debtor, such a counterclaim should be declared inadmissible, as its assessment must be performed according to the rules of the insolvency procedure [58].

The second situation pertains to the case where insolvency proceedings are opened *vis à vis* the debtor who was sued by a third party claiming the payment of a sum, as a co-debtor, being severally liable with other parties towards the claimant.

In that situation, the case-law excludes the attraction of the action before the insolvency venue, because, given the several liability of the defendants, the claims against each co-debtor is autonomous

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53 Cass. 21 novembre 2016, n. 23630, in *Giust. civ. Mass.*, 2016. See also Cass. 25 May 2001, n. 7105 for the debate on the possibility that the trustee brings a derivative action on behalf of the debtor as the *creditor creditoris*.

54 Cass. 26 agosto 2004, n. 17057; Cass. 15 settembre 1997, n. 9156, Cass. 25 luglio 1997, n. 6976, Cass., 19 August 1992, n. 9659, in *Fallimento*, 1993, p. 60.

55 Cass., 5 July 2000, n. 8890 and Cass., 14 April 1999, n. 3685.

56 When the defendant raises the existence of an (opposable) counter-credit against the claim brought by the trustee, as a mere defence, it merely seeks to 'neutralise' the claim of the trustee, without seeking the satisfaction of that counter-claim. Therefore, in this case, the rules of article 93 and ff. would not come into play, forcing the creditor to seek the satisfaction of his claim with the insolvency procedure and the ordinary court could declare the set-off of the two claims. The possible residual part of the counterclaim of the respondent should be lodged before the insolvency court. See App. Trento, 18 May 2019, n. 57 in dejure.it, see also Cass. 18 February 2017, n. 30298.

57 The jurisprudence considered that if a counter-credit was opposed to the trustee acting for the recovery of a claim of the bankrupt, it was necessary to bring both cases before the bankruptcy court pursuant to art. 36 c.p.c. See Cass. SS.UU., 6 July 1979, n. 3878, in *Giur. It.*, 1980, p. 490 and Cass., 19 April 2002, n. 5725.

58 Cass., 21 December 2015, n. 25609, in *Giust. civ. Mass*, 2015.

from the others and therefore, the claims can be severed. The claim brought by the claimant *vis-à-vis* the co-debtors *in bonis* shall therefore continue before the ordinary court. As to the claim towards the co-debtor declared insolvent, the ordinary court must assess impossibility of taking further proceedings against it [59]. The co-debtors *in bonis* may then lodge their claim *vis-à-vis* the insolvent debtor in relation to the latter's quota relating to the debt.

I.2.3.3.2. Liability actions against directors and corporate actions

Liability actions against directors, auditors, shareholders and other corporate bodies, when brought by the trustee in the interest of the insolvency creditors [60], represents one of the abovementioned 'actions of the estate' (likewise the *actio pauliana* [61]).

The bankruptcy rule that vests the trustee with the *locus standi* to bring those actions (Article 146 l.fall.), however, does not (apparently) make a difference between corporate actions and actions brought on behalf of all the creditors. Therefore, it was decided to treat the two hypotheses together, as in any case they both certainly do not fall into the scope of the *vis attractiva concursus*.

Before analysing the features of the action brought in the context of bankruptcy proceedings, it is nevertheless appropriate to provide for a brief overview on the common liability regime of directors. At the outset it must be recalled that Article 2476(1) Italian Civil Code provides, as a rule of thumb, that « *directors are jointly and severally liable towards the company for any damage suffered resulting from the failure in the performance of their mission to comply with the duties incumbent upon them by virtue of the law and the corporate by-laws* » [62]. Among the duties that the law bestows upon the directors that are worth of being mentioned here there are the duty to detect without delay any cause for the dissolution of the company [63] and, in this case, the duty to manage the company for conservative purposes only [64].

In the light of those two provisions, it must be acknowledged that under the Italian system there is no specific provisions imposing to directors to file within a specific time-limit the petition to open insolvency proceedings. Yet, the prevention of wrongful trading is expressly provided under Article 2486 Italian Civil Code, which prevents directors from allowing companies to trade at the expense of its creditors, in case one of the causes for the dissolution of the company set forth by Article 2484 Italian Civil Code occurs.

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59 Cass., 26 September 2005, n. 18770 and Cass., 20 June 2000, n. 8366.

60 L. ABETE, 'La responsabilità degli organi di gestione, liquidazione e controllo nella riforma della legge fallimentare', in *Fallimento*, 2006, p. 5 ss. F. M. MUCCIARELLI, 'L'azione sociale di responsabilità contro gli amministratori di società quotate', in *Giur. comm.*, 2000, I, p. 61.

61 See *supra* I.2.3.2.

62 Other expressions of the general duties of care and loyalty incumbent upon directors when managing the company *in bonis* are found in fragmented provisions of the Italian Civil Code. For instance, scholars refer to the duty to act in an informed manner (art. 2381 c.c.), the duty to inform their conduct to standard of correct management (art. 2403 c.c.), the duty to draft the balance-sheets and financial documents relating to the company in a correct and truthful manner (art. 2423 Italian Civil Code).

63 art. 2485 Italian Civil Code.

64 art. 2486 Italian Civil Code.

Incidentally, it may be observed that in fulfilling the abovementioned obligations, the law requires that the conduct of directors complies with the standard of diligence and prudence which may be reasonably expected in the light of the nature of their mission, the role and their specific competences (art. 2392 c.c.). Also, it bears recalling that, pursuant to the s.c. business judgement rule, in principle directors cannot be held liable for unsuccessful managerial decisions. Although there is no specific provision in this sense, the Italian case-law is unanimous in recognising to directors a margin of discretion in undertaking corporate operations, ensuring that their decisions will not be reviewed, with the proviso that they act within this margin in compliance with the abovementioned duty of care [65].

In the vicinity of insolvency, there is no formal change as to the duties of directors, save for those conducts which are expressly requested by the law. Therefore, when faced with a situation of distress of the company, the law does not in principle impose mandatory conducts on the part of directors, which can resort to the toolbox of instruments provided by the law to tackle the specific situation of crisis. Indeed, it is fair to acknowledge that to different degrees of distress may lead to different reactions on the part of the director.

Against a wide range of technical remedies made available by the legislature, however, correspond a greater responsibility upon the director [66], who is required to provide himself with a complete set of information (which falls within the scope of the general duty to act in an informed manner under Art. 2381 Italian Civil Code) regarding the possible factors of success (or failure) of one solution with respect to another. Therefore, to avoid any liability [67], the director should adopt the remedy which, at that time and with that representation, appears to be the most adequate to safeguard the interests of creditors [68].

In this constellation, when the business crisis has overflown into insolvency, the remedies provided by the Italian systems in reaction to the infringement of the director's duties are to be found in Article

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65 *Ex multis* Cass., 2 February 2015, n. 1783; Cass., 12 February 2013, n. 3409; Trib. Milano, 4 October 2012, in *Redazione Giuffrè*, 2012, Trib. Milan, 3 giugno 2008, n. 7223 in *Giustizia a Milano*, 2008, 7-8, 54; Trib. Milan, 2 May 2007, in *Corriere del Merito*, 2007, 10, 1116. Cass., 28 April 1997, n. 3652.

66 Indeed, as noted by authoritative scholars, whenever the legislature confers more powers, the responsibilities are extended accordingly. See R. RORDORF, 'Doveri e responsabilità degli amministratori di società di capitali in crisi', in *Società*, 1995, 675; R. SACCHI, 'La responsabilità gestionale nella crisi dell'impresa societaria', in *Giur. comm.*, 2014, I, 306; R. ROSAPEPE, 'La responsabilità degli organi di controllo nella crisi d'impresa', in *Giur. comm.*, 2013, I, 896; L. TRONCI, 'Perdita della continuità aziendale e strategie di risanamento', in *Giur. comm.*, 2013, I 126; A. MUNARI, *Impresa e capitale sociale nel nuovo diritto della crisi*, Torino, 2014, 108; G. BOZZA, 'Diligenza e responsabilità degli amministratori di società in crisi', in *Fallimento*, 2014, 1112.

67 Therefore, in principle, the liability of the director for the inadequacy of the instrument chosen in reaction to the business crisis – albeit subject to the yardstick of the business judgement rule - cannot be excluded, where such inadequacy could have been assessed *ex-ante*.

68 D. GALLETTI, 'L'insorgere della crisi e il dover essere nel diritto societario', in *www.ilfallimentarista.it*., 19; P. MONTALENTI, 'La gestione dell'impresa di fronte alla crisi tra diritto societario e concorsuale', in *Riv. dir. soc.*, 2011, 825; G. BOZZA, *Diligenza e responsabilità degli amministratori di società in crisi*, cit., 1113; A. MAZZONI, 'La responsabilità gestoria per scorretto esercizio dell'impresa priva della prospettiva di continuità aziendale', in *Liber Amicorum A. Piras*, Turin, 2010, p. 840; R. SACCHI, 'La responsabilità gestionale nella crisi dell'impresa societaria', *cit.*, 314.

146 l. fall. which vests the trustee with the *locus standi* to bring the (ordinary civil and commercial) liability actions against directors in the context of insolvency proceedings [69].

In particular, the action brought by the trustee 'cumulates' [70] both the action on behalf of the company under Articles 2393 (for joint stock companies) and 2476 c.c. (for limited liability companies) and the action on behalf of the creditors under Articles 2394 (for joint stock companies), 2467 (for limited liability companies) and 2497 (for group of companies) c.c. [71]

The opening of insolvency proceedings, to a certain extent, does amend factually the conduct of those actions compared to when they are exercised outside the procedure.

Form a merely procedural standpoint, the criteria to determine *quantum* of the damage suffered is modified, and the burden of proof and the measures of inquiry are different from those available under ordinary actions brought outside of insolvency proceedings [72].

But what matters here the most is assessing whether the *locus standi* of the trustee is symptomatic of a 'transformation' of the substantive essence underlying the action, to the extent that it should be decided on the basis of law relating to insolvency before the insolvency court.

As regards the action brought on behalf of the company, it is relatively easy to exclude it.

Indeed, in that case, the trustee is a party to the action as a mere processual substitute of the debtor, by virtue of his divestment under Article 43 l. fall. The essence of the (breach of the) contractual right

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69 The recent reform brought about by Legislative Decree 12 January 2019, n. 14, has amended the former text of article 2476 Italian Civil Code relating to limited liability companies, introducing the express provision that « *directors are liable vis-à-vis corporate creditors for the failure to comply with the obligations relating to the preservation of the integrity of the company's assets. The action may be brought by creditors when the company's assets are insufficient to satisfy their claims* [Gli amministratori rispondono verso i creditori sociali per l'inosservanza degli obblighi inerenti alla conservazione dell'integrità del patrimonio sociale. L'azione può essere proposta dai creditori quando il patrimonio sociale risulta insufficiente al soddisfacimento dei loro crediti] ». Until the reform, the lack of any express rule providing for the possibility that corporate creditors of a limited liability company could bring liability actions against directors, gave rise to a lively debate. A part of the case-law denied that, in the context of insolvency proceedings against a limited liability company, the trustee could sue directors on behalf of the creditors (see for instance Trib. Naples, 11 November 2004, in *Foro.it*, 2005, I, 2218). On the contrary, another part of the case-law (supported by the majority of scholars) submitted that article 146 l. fall. did not exclusively refer to the specific provisions governing the liability of directors of joined stock companies. Instead, the broad formulation of that provision (as amended by the Legislative Decree n.5/2006) was to be interpreted as generally encompassing any liability action towards directors, including the liability of creditors against the directors of a limited liability company (See Trib. Milan, 14 November 2006, n.12390, in *Società*, 2007, p. 864, Trib. Milan, 18 October 2007, in *Società*, 2008, p. 1521; Trib. Rome, 21 April 2008). For literature see on this point, *ex multis*, S. AMBROSINI, 'la responsabilità degli amministratori nella nuova s.r.l.', in *Società*, 2004, p. 293; M. RESCIGNO, 'Rapporti e interferenze tra riforma societaria e fallimentare', in A. JORIO, M. FABIANI, *Il nuovo diritto fallimentare*, p. 2120).

70 Actually, many authors (and the case-law as well) minimise the distinction between the liability actions brought by the trustee against directors, because under article 146 l. fall. the actions are cumulated. Cass., 4 December 2015 n. 24715, Cass., 30 October 2014 n. 23117. For literature see F. BONELLI, *Gli amministratori di s.p.a. dopo la ridorma delle società*, Milano, p. 204 ff. and G. GUIZZI, 'L'art. 146 l. fall. nel sistema delle azioni di responsabilità nei confronti degli amministratori di società – un falso problema?', in *Riv. Dir. comm.*, 1999, p. 937.

71 Article 2497 Italian Civil Code provides that director of the mother company exercising activity of control and direction over the daughter company are held liable for the damages suffered by creditors of the latter.

72 For examples, documents failing to specify a sure date are not opposable to the trustee. See F. DE SANTIS, *op. cit.*, p. 68.

underpinning the action remains the exact same as if the action was brought by the company against directors outside the procedure and the proceeds revert in the first instance to the estate of the company, thus benefitting all the creditors only indirectly.

Therefore, it is fair to maintain that the action brought on behalf of the company are ordinary civil and commercial actions, which are not attracted to the competence of the insolvency forum.

Instead, the reasoning concerning the action brought on behalf of creditors, is less straightforward.

The *locus standi* of the trustee was construed in two different manners.

Under a first view, the action brought by the creditors would be the same (contractual) action of that one brought by the company. The trustee would be acting as a processual substitute of the creditors. The latter ones, however, would not be the bearers of an independent right, as they would merely subrogate in the right of the company, under Article 2900 Italian Civil Code. The supporters of this construction would deny that anyone, but the company, owns the right of compensation for damages suffered from the failure to preserve the integrity of the company's assets [(73)]. In this respect the action brought by the trustee on behalf of the creditors would be excluded, then, from the scope of the *vis attractiva concursus* likewise the action on behalf of the company.

The majority of scholars maintain, instead, that the legal foundation of the action lies with tort law [(74)]. When the directors fail to preserve the integrity of the company's assets, they cause an infringement of the right that the creditor boasts *vis-à-vis* the company. The anti-juridical nature of the conduct can be inferred from the violation of the obligations provided by the law and the by-laws (thus, it is not an *ex lege responsibility*, as it would not be sufficient that the company is insolvent, but the breach of the director's duties must be demonstrated), but it is not required that there is a pre-existing relationship between the directors and the damaged creditors [(75)].

To fully understand the *locus standi* of the trustee in the context of the liability actions against directors, then, one should focus the attention *ex latere creditoris* on the duty of the preservation of the corporate assets explained above. Where acting on behalf of the creditors, the trustee seeks the compensation

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73 Among others see M. BUSSOLETTI, 'Sulla « irresponsabilità » da direzione unitaria abusiva e su altre questioni aperte in tema di responsabilità ex art. 2497 c.c.', in *Riv. dir. comm*., 2013, I, 417; G. COTTINO, *Diritto societario*, Padova, 2011, p. 430; G. FERRI, *Manuale di diritto commerciale*, Turin, 2010, p. 431; A. NIGRO, 'Le società per azioni nelle procedure concorsuali', in G.E. COLOMBO and G.B. Portale (eds.), *Trattato delle società per azioni*, Turin, 1993, p. 372. For case law, see Cass., 14 December 1991, n. 13498, in *Foro it*., 1992, I, 1803; Cass., 28 February 1998, n. 2251, in *Foro it*., 1998, I, 3246; Trib. Palermo, 11 September 1992, in *Società*, 1993, 788; Trib. Perugia, 27 May 1982, in *Rass. giur. umbra*, 1983, 120; App. Cagliari, 25 January 1974, in *Giur. comm*., 1974, II, 602.

74 Cass., 20 September 2012, n. 15955; Cass., 22 October 1998, n. 10488, in *Foro it*., 1999, I, 1967; Cass., 25 July 1979, n. 4415; Cass., 27 July 1978, n. 3768, in *Giur. comm*., 1980, II, 904; Trib. Naples, 24 January 2007, in *Società*, 2008, 1155; Trib. Milan, 2 October 2006, in *Giur. it*., 2007, 382.

75 The majority of legal literature claims that the infringement of the obligation to preserve the company's assets is an unlawful act. In particular, it would be an act subsumable under the catalogue of facts that provoke a loss to the right of the creditors. In this respect, article 2394 Italian Civil Code would be nothing more than an expression of the general rule under article 2043 of the Italian Civil Code. A. MAZZONI, 'La responsabilità gestoria per scorretto esercizio dell'impresa priva della prospettiva di continuità aziendale', in AA.VV., *Amministrazione e controllo nel diritto delle società. Liber Amicorum Antonio Piras*, Turin, 2010, p. 823;

for the loss suffered by the whole body of creditors (and not only a part of them, as it occurs in the action under Article 2395 Italian Civil Code) due to the failure of directors to fulfil the obligations bestowed upon them by the law and by-laws.

It is important to note that - as it occurs with the *action pauliana* - the action (and its proceeds) benefits not only those creditors which are 'directly' harmed from the conduct of directors (*i.e.* creditors whose claim pre-existed to the director's wrongful conduct) but also those creditors whose claim arises at a later time, after the damage had already occurred (s.c. 'new creditors') (76).

Therefore, it must be acknowledged that the opening of insolvency proceedings 'transforms' and converges the individual and scattered right of the creditors (the right to the preservation of the debtor's assets serving as a general collateral for his claim, which is ordinarily exercised through an action leading to an 'individual result') into the remedy which aims at the reinstatement of the debtor's assets, in the interest of all the creditors that may be exercised by the trustee (under Article 146 l. fall.) (77).

That (apparent) derogation from the ordinary civil rules notwithstanding, the scholars and case-law are unanimous in excluding that those actions fall within the scope of the *vis attractiva concursus* (78). The legal foundation and the primary features of the action which the creditor can bring outside the procedure are not transformed by the opening of insolvency proceedings, in that the 'physiognomy' of the liability actions remains in its essence remain unchanged (79).

However, the fact that liability actions against corporate bodies are not attracted to the insolvency forum does not create significant inconvenience in practice (at a national level), since the ordinary rules for the allocation of the venue would still lead to anchor the competence of the liability actions before the court where the company has its real seat.

Eventually it is important to highlight that Article 378 of the Italian *Codice della crisi e dell'insolvenza* of 2019, has introduced a new possible method for the computation of the *quantum* of damages in

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76 M. RESCIGNO, 'Rapporti e interferenze fra riforma societaria e fallimentare', *cit.*, p. 2130.

77 See I. PAGNI, 'Le azioni di massa e la sostituzione del curatore ai creditori', *cit.*, p. 1040.

78 See Trib. Pordenone, 18 March 1999, in *Foro.it*, 1999, I, p. 3650. M. FABIANI, '*sub* art. 24', A. JORIO AND M. FABIANI (eds.), *Il nuovo diritto fallimentare*, Bologna, 2006, p. 430, F. DE SANTIS, *cit.*, p. 57, G. FAUCEGLIA sub art. 146, in Il nuovo diritto fallimentare, diretto da A. Jorio e coordinato da M. FABIANI, II, Bologna, 2007, 2143; A. NIGRO (nt. 41), p. 2143, G. BARTALINI, *La responsabilità degli amministratori e dei direttori generali di società per azioni*, Torino, 2000, p. 422; P. L. PELLEGRINO, 'Le imprese collettive', in *Trattato di diritto delle procedure concorsuali*, diretto a U. APICE, II, Torino, p. 777; C. MONTAGNANI, *sub art. 146*, in *Commentario alla legge fallimentare*, diretto da C. CAVALLINI, III, Milano, 2010, 229.

79 Also, it is noteworthy that, as observed by authoritative scholars, the exclusiveness of the trustee's locus standi on behalf of creditors does not safeguard the *par condicio creditorum*, nor it concerns the bar of individual actions : the subjects which are liable are the directors (and not the debtor himself) and the fact that it is exclusively the trustee that can sue directors is a choice of legislative policy. The capacity of the trustee to act on behalf of the body of creditors would be a case of *ex lege* exceptional processual substitution under article 81 Italian Civil Procedural Code, which underpins reasons of practical expediency. See M. FABIANI, 'Fondamento e azione per la responsabilità degli amministratori di s.p.a. verso i creditori sociali nella crisi dell'impresa', in *Giur. Com.*, 2015. F. DE SANTIS, *op. cit.*, p. 68.

director's liability actions, thus 'colouring' the liability actions against directors with a sanctioning character.

The new formulation of Article 2486 c.c., has introduced a strong presumption, which assumes that the damage provoked by the director must be calculated with the method of the s.c. 'net assets' (*i.e.* the difference between the net assets of the company at the moment of the opening of insolvency proceedings and the net assets at the moment in time in which the company should have opened the procedure or be liquidated). The provision represents a rebuttable presumption (the norm expressly states « *save for the proof of a different amount* »), but it nonetheless makes the position of the director more burdensome than in the previous regime [80]. The criterion of the 'net assets' is applicable with reference to both the action exercised in the context of insolvency proceedings and the action brought independently from it for instance when the company is only put into liquidation.

The last sentence of Article 2486 c.c., however, adds a specific provision concerning exclusively liability actions exercised in the context of insolvency proceedings, reading

« *if insolvency proceedings have been opened and the annual accounts are missing or if, due to the irregularity of the accounts or for other reasons, the net assets cannot be determined, the damage shall be settled to the extent of the difference between the assets and liabilities established in the proceedings* ».

Lacking any 'save for' clause, the wording of that provision seems to indicate that the legislature has introduced a presumption *iuris et de iure*. Should such an interpretation be followed the claim against the administrators would lose the flavour of compensation and would assume that of the sanction. The question arises, however, as to whether that is acceptable or whether, on the other hand, in the absence of damage, the new presumptive criterion can (or should) be set aside. In fact, before the CCI, the lack of regular accounting records was considered an unlawful behaviour of the administrators, certainly censurable, but in itself not directly producing a damage. Therefore, authoritative scholars consider that, the ordinary rules on the burden of proof being applied, the trustee should still demonstrate the exitance of the damage and, afterwards apply the criterion of the difference between the assets and liabilities for the *quantum* of the damage [81].

I.2.3.3.3. Actions for the abusive credit financing

The characterisation of the actions for the s.c. 'abusive credit financing' is much debated.

It is undisputed that they are not actions deriving from insolvency proceedings. However, it is also extremely controversial whether they may be regarded as 'actions of the estate' as well [82].

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80 G. FAUCEGLIA, *Il nuovo diritto della crisi e dell'insolvenza*, Turin, 2019, p. 240. A. BARTALENA, 'Le azioni di responsabilità nel codice della crisi d'impresa e dell'insolvenza', in *Fallimento*, 2019, p. 307.

81 M. FABIANI, Art. 378 d.lgs. 14/2019, Responsabilità degli amministratori (not yet published) and N.R. TORREPADULA, Il danno liquidabile nelle azioni di responsabilità. Tra criteri legali ed equità (not yet published)

82 C. ESPOSITO, 'L'azione risarcitoria «di massa» per «concessione abusiva di credito», in *Fallimento*, 2005, p. 857; A. CASTIELLO D'ANTONIO, 'La banca tra «concessione abusiva» e «interruzione brutale» del credito,' in *Dir.*

Traditionally, the Italian case-law has excluded that the trustee would be entitled to bring an action against third parties or creditors (usually banks and financial institutions) seeking the compensation suffered by the creditors for the financial support willingly granted to the already insolvent company, where, the support granted has allowed the undercapitalised business to be artificially continued, thus increasing the liabilities of the debtor. The main objection to the direct recurse to a tortious action on behalf of all the creditors, is that in this case, the injured party could not coincide with the undifferentiated body of creditors, because between them there would be the tortfeasor (*i.e.* the bank) which would cumulate at the same time the position of creditor and aggrieved party. Thus, the action could be conceivable only admitting that the trustee would act in the interest of a group of creditors (*i.e.* non-bank creditors), which would not be consistent with the notion of actions of the estate [83].

A part of the recent case law, however, has 'by-passed' the obstacle precluding to the trustee to directly bring a tortious action against the third party on behalf of the creditors through the legal theory (indeed, rather tortuous) that would equate the position ascribed to the bank to that of third party jointly and severally liable for the worsening of the damage caused to the debtor and its creditors, as a result of the abusive recourse to credit on the part of the director of the company (under Articles 146, l.fall., and 2393 and 2394 c.c.) [84]. In this case the action would be brought by the trustee on the purposive interpretation of Article 146 l. fall. Nevertheless, it is excluded that such an action would fall within the scope of the *vis attractiva concursus.*

It is not disputed, on the contrary, that the trustee could bring a tortious action against the bank for abusive credit financing where it is proven that the granting of the credit has directly prejudiced the debtor itself before the opening of the procedure [85]. In this case, the trustee would be acting as the mere substitute of the divested debtor pursuant to the *locus standi* vested upon him under Article 45 l.fall., which, as illustrated, would entail that that action would could not be considered as an action directly deriving from insolvency proceedings.

I.2.3.2.4. Actions concerning contracts legal relationships entered into by the trustee

According to some authors actions whose subject matter is a legal relationship (*e.g.* a contract) concluded by the trustee and a third-party (or a creditor) after the opening of insolvency proceedings should be considered as actions deriving from insolvency proceedings, because *genetically* they arise

fall., 2005, I, p. 766, L. BALESTRA, Crisi dell'impresa e abusiva concessione del credito, in Giur. comm., 2013, p. 109, ss.

83 *Ex multis*, Cass., 12 May 2017, n. 11798 in *Giur. Comm.*, 2018, 2, II, 236; Cass. SS.UU, 28 March 2006, n. 7030, in *Fallimento*, 2006, p.1128 (with observations of C. ESPOSITO, *La legittimazione del curatore fallimentare all'esercizio della azione danni per abusiva concessione di credito: una breve analisi dei percorsi possibili).*

84 See Cass., 20 aprile 2017, n. 9983 in *Giur. Comm.*, 2018, 2, II, 236 (with observations by A. JORIO, *Concessione abusiva di credito, fallimento, responsabilità della banca e legittimazione del curatore*). See also L. BALESTRA, *Crisi dell'impresa e abusiva concessione del credito*, in *Giur. comm.*, 2013, p. 109 and ff.

85 Cass. 20 aprile 2017, n. 9983; Cass. 1 June 2010, n. 13413.

following the opening of insolvency proceedings [86]. Those actions refer mainly to the interim exercise of the business of the undertaking, under Article 104 l. fall. [87]

Examples of those actions could be the recovery of debts arising out of a contract concluded by the trustee, or declaratory actions for the nullity of such contracts or, again, actions for the early termination of the contract for a breach of the obligations provided thereof. In all the above cases, the insolvency court would be competent to hear and decide the action, irrespective of whether the trustee is acting as the claimant or the respondent. In this respect, it must be borne in mind that in case the action is brought by the third party seeking the payment of a credit arisen out of the performance of the contract entered into with the trustee (which is generally a super-priority credit), the determination of such claim would be governed by the procedural rules under Article 93 and ff. l. fall. (including the rules on the ranking of that credit).

The main reason inducing their inclusion within the scope of the *vis attractiva* would be that those actions did not exist in the legal sphere of the undertaking before the opening of insolvency proceedings. Under this perspective, it is maintained that their genetic origin is the insolvency procedure. However, the case-law seems (correctly) to reach opposite conclusions, considering that those actions should not be encompassed within the scope of the *vis attractiva concursus* [88].

I.3. The Spanish system and the *vis attractiva concursus*

The Spanish system enshrines the principle of the *vis attractiva concursus under* Article 8 *Ley Concursual* (hereinafter 'LC') [89].

Unlike the Italian and French system, the Spanish legislator has not entrusted the identification of insolvency-related disputes to a general formula, but it has listed certain types of claims, which fall under the competence of the insolvency courts (*Juzgados de lo mercantil*).

In particular, actions that are devolved to the exclusive competence of the insolvency courts are *(i)* actions affecting the debtor's assets (Article 8(1) LC), *(ii)* enforcement actions on the debtor's assets (Article 8(3) LC); *(iii)* preservative measures affecting the debtor's assets (Article 8(4) LC); *(iv)* corporate actions against directors and shareholders (Article 8(6)-(7) LC; *(v)* actions dealing with employment contracts (s.c. *acciónes sociales*, Article 8(2) LC); *(vi)* Actions brought in the context of insolvency proceedings which are covered to free legal aid under Law 1/1996, of 10 January 1996.

At a first glance, it could be argued that the intention of the legislature is that of establishing a *numerus clausus* of actions that are attracted to the competence of the insolvency court. However, such an impression should be dispelled at once, if one considers that Article 8 LC mentions only actions whose subject matter are (monetary) claims against the debtor, thus subjected to the substantive and

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86 F. DE SANTIS, *op. cit.*, p. 49.

87 A. FAROLFI, 'Under art. 24', in F. DI MARZIO, *Codice della crisi d'impresa*, Milano, 2017, p. 235.

88 Cass. 8 June 2005, n. 12004; Cass. 15 February 1999, n. 1240.

89 *Ley* 22/2003, dated 9 July 2003, *Concursal* 2003, in «BOE», n. 164, of 10 July /2003.

procedural rules of insolvency law [90], intended as the field of law dealing with the collective distribution of the debtor's assets for the satisfaction of insolvency claims.

The scope of operation of the *vis attractiva concursus*, as governed under Article 8 LC read in conjunction with Article 49 LC, therefore, is only that of realising the substantive *councurso* and the *par condicio creditorum*, excluding the competence of other national courts with respect to the adjudication and the execution of insolvency claims, which are necessarily centralised before the insolvency court by virtue of Articles 50(1)-51(1) LC [91]. Therefore, akin the Italian system, also in Spain it is possible to retrace the double facets of the *concurso*, which entails the formal *concurso* (*i.e.* the bar of individual declaratory relief and enforcement actions) and the *substantive* concurso (*i.e.* the centralisation of those actions before the insolvency court) [92].

Nevertheless, as clearly stated by the case law, Article 8 LC cannot be interpreted as imposing a limit on the competition judge, but only to other judges (indeed, Article 8 LC states that « *La jurisdicción del juez del concurso es exclusiva y excluyente* [the jurisdiction of the insolvency court shall be exclusive and excluding]») [93].

It follows that the jurisdiction of the insolvency court regarding any other action (*i.e.* those brought by the trustee, acting either as the substitute for the divested debtor [94] or those which he exercises on behalf and in the interest of the creditors) is not excluded under Article 8 LC, but must be construed having regard to other specific provision disseminated in the Spanish *Ley concursal*.

It is then possible to argue that the same difficulties that the principle of the *vis attractiva concursus* entails with regards to the attraction of actions to the benefit of the insolvency estate may be found also in the Spanish system.

I.3.1. Actions falling within the scope of Article 8 LC

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90 See, for instance, article 194 LC

91 Articles 50 and 51 LC merely establish the bar of individual actions but they do not represent a provision directly governing the competence, which are regulated by article 8 LC (and article 86 *ter Ley Orgánica* 7/2015, of 21 July 2015).

92 See *supra*,§ I.2.1.

93 See Order AP Vitoria (Alava), 13 March 2006, in JUR 2006/154631, stating that « *esa norma no impone un límite al juez del concurso, sino a los demás jueces, con los efectos previstos en los artículos 50-1 y 51-1 de la Ley Concursal* ».

94 It must be mentioned that with the Royal Decree 3/2009, dated 27 March 2009, the Spanish legislature has significantly amended the effect of the divestment of the debtor produced by the insolvency proceedings (articles 40, 43, 44 LC), providing that in case of *concurso voluntario*, the debtor shall retain the possession and the power of managing and disposing of his assets during insolvency proceedings. The rationale underpinning such a modification of the previous regime rests on the idea that debtors would be incentivised to recur timely to insolvency proceedings, should they be allowed to remain in the control of their assets and continue the business. However, upon request of the trustee, the insolvency court can dispose at any time the divestment of the debtor, also during the *concurso volontario*. Only in case of '*concurso necesario*' the traditonal divestment of the debtor takes place as an automatic effect of insolvency proceedings.

As discussed, Article 8 lists a number of actions that are mandatorily devolved to the competence of the insolvency court [95].

Articles 8(1), (3) and (4) LC must be read together as they are the primary expression of the principle of the (substantive) universality of insolvency proceedings (Article 49 LC [96]), established as a general principle also under Articles 50-56 LC, concerning the bar of individual lawsuit.

The scope of application of the above rule (which does not pose major interpretative issues) requires two conditions: the action must have 'trascendencia patrimonial' (objective condition) and it must be brought against the assets of the insolvent debtor (subjective condition).

In principle, any civil (monetary) claim – such as (post opening) declaratory reliefs [97], enforcement actions [98] and preservative measures – brought by unsecured and secured creditors [99] *against* the assets of the debtor must be attracted to the jurisdiction of the insolvency court, with exception of matters regarding the status and legal capacity of persons, filiation, marriage and other specific subject matters involving particular interests (mainly those of tax autorities) [100].

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95 To those matters, Article 86 *ter* of the *Ley Orgánica* 6/1985, dated 1 July 1985*, del Poder Judicial* (as lastly amended by the *Ley Orgánica* 7/2015, of 21 July 2015) adds *(i)* actions relating to unfair competition, industrial and intellectual property and advertising, as well as all other similar actions that are promoted pursuant to the regulations concerning 'mercantile and cooperative' companies, *(ii)* action concerning national or international transport; *(iii)* actions concerning maritime and navigation law *(iv)* Collective actions provided for in legislation relating to general conditions of carriage and protection of consumers; *(v)* Appeals against decisions of the Directorate-General for Registers and the Notary's office, *(vi)* actions concerning the procedures for the application of articles 81 and 82 EC Treaty (now 101 and 102 TFEU) and its secondary legislation.

96 Article 49 LC reads « *Declarado el concurso, todos los acreedores del deudor, ordinarios o no, cualquiera que sea su nacionalidad y domicilio, quedarán de derecho integrados en la masa pasiva del concurso, sin más excepciones que las establecidas en las leyes* ».

97 Article 50 LC establishes the prohibition for individual creditors to commence declaratory reliefs after the opening of insolvency proceedings. Article 51 LC provides for a different regime as to *declaratory reliefs* brought by the debtor (acting as a claimant) or against the debtor (responded to those actions) that are already pending when insolvency proceedings are opened. Those actions shall continue before the original court where they were commenced. See on this point F. CORDÓN MORENO, 'Capítulo II: de los efectos sobre los acreedores', in F. CORDÓN MORENO (ed.), *Comentarios a la Ley Concursal,* Navarra, 2010, p. 601.

98 Articles 55-57 LC. Article 55(1) LC establishes the general principle that individual creditors cannot commence enforcement actions (of monetary claims) after the opening of insolvency proceedings (with the exception of actions brought by specific subjects, namely tax authorities). Where enforcement proceedings are already pending, they must be mandatorily suspended, with the exception of those brought by the holders of a right *in rem* (article 56 LC). In this respect, it must be said that, apart for the specific hypothesis of pending enforcement actions, secured creditors holding a right *in rem* should bring their claim before the insolvency court, but it will be treated according to a difference regime (article 57 LC). Order AP JM-2 Madrid, 30 November 2004, AC, 2005/147. Order JM-2 Barcelona 24 May 2006, AC, 61, 2006/1217. See on this point J.L. GONZÁLEZ Montes, 'Acumulación en el concurso: acciones declarativas y ejecutivas' in I. QUINTANA CARLO, A. BONET NAVARRO, J.A.GARCÍA CRUCES GONZÁLEZ (eds.), *Las claves de la Ley Concursal*, Navarra, 2005, p. 281 and ff.

99 See article 76 LC, extending the principle of universality to all assets of the debtor, including also those ones covered by a right *in rem*, only excluding those with regards the (possible) continuation of the business activity of the debtor when he is not divested in the context of the *concurso volontario*. Order JM-1 Alicante, 23 February 2006, n. 95/2006.

100 Article 8(1) LC reads « *Las acciones civiles con trascendencia patrimonial que se dirijan contra el patrimonio del concursado con excepción de las que se ejerciten en los procesos sobre capacidad, filiación, matrimonio y menores a las que se refiere el título I del libro IV de la Ley de Enjuiciamiento Civil. También conocerá de la acción a que se refiere el artículo 17.1 de esta Ley* [*i.e.* provisional measures filed before the opening of insolvency proceedings].

The case-law has specified that the *vis attractiva concursus* under Article 8 LC concerns also his includes orders for payment injunction [101].

Article 9 LC further specifies that the competence of the insolvency court must be extended also to any 'questiones prejudiciales civiles' directly connected with insolvency proceedings, or the resolution of which is necessary for the proper conduct of the procedure.

As pointed out by scholars, such a rule underpins a different rationale than the *vis attractiva oncursus* traditionally envisaged as the procedural implementation of the *par condicio creditorum*. The Spanish legislature has revealed a clear proneness towards a greater attraction of actions before the insolvency courts for mere reasons of legislative policy expediency, which are not always justifiable on the basis of the *paritas creditorum* or the risk of irreconcilable judgements. instead, it provides the phenomenon of the insolvency court's *vis trahens* with a different explanation, which ultimately rests in the speediness of insolvency proceedings [102].

Article 8(2) LC establishes the exclusive competence of the insolvency court over *collective* actions ultimately referring to employment contracts (the provision bears heading '*acciónes sociales*').

The Spanish jurisdiction reveals a particular attention to the collective interests of the employees of the insolvent debtor, and provides that any action concerning the termination, modification or suspension of collective employment contracts to which the insolvent debtor is the employer, as well as the suspension or termination of senior management employment contracts, must be decided by the insolvency court, also where it is requested the consent of the workers' representatives.

It is specified that in adjudicating those matters, the insolvency court should apply the specific labour laws, taking into account the principles provided therein and the procedural rules of labour proceedings. That specification clearly reveals that the concentration of (collective) employment represents a case where the *vis attractiva concursus* is not supported by reasons relating to the *par condicio creditorum*, but rather to legislative policy reasons. Indeed, being governed by their own substantive and procedural rules, those actions are not encompassed within the insolvency proceedings because they directly affect the satisfaction of the creditors.

Moreover, it bears noticing that the *vis attractiva concursus*, within the broad meaning described above, in relation to employment contracts seems to be applicable exclusively with regards to *collective* employment contract. As far as individual actions are concerned, the competence of the insolvency court has been excluded by the case-law [103]

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101 OrderAP Bilbao (Vizcaya), 13 March 2006, in *JUR,* 2006/154171.

102 J. ALONSO-CUEVILLAS SAYROL, *La 'vis attractiva' del proceso concursal*, Cizur Menor, 2007, pp. 64-65 and 82, G. PEREZ DEL BLANCO, *Efectos procesales de la declaración del concurso: la vis attractiva concursal*, Madrid, 2007, p. 8.

103 Order AP Zamora 23 September 2005, in *JUR*, 2005/262648. See also Decision JM-1 Bilbao (Vizcaya), 07 April 2006, in *JUR*, 2006/147608.

Of more interest for the purposes of this work is the regime of *corporate* actions (*i.e.* the 'internal' liability of directors and shareholders *vis-à-vis* the company), governed by Article 8(6) and (7) LC [104], which reads

> « (6) *Las acciones de reclamación de deudas sociales interpuestas contra los socios subsidiariamente responsables de los créditos de la sociedad deudora, cualquiera que sea la fecha en que se hubiera contraído y las acciones para exigir a los socios de la sociedad deudora el desembolso de las aportaciones sociales diferidas o el cumplimiento de las prestaciones accesorias.* [Claims for social debts brought against the shareholders who are severally responsible for the company's claims, regardless of the date on which they were concluded, and actions to demand from the company's shareholders the payment of deferred social contributions or the fulfilment of accessory benefits].
>
> (7) *Las acciones de responsabilidad contra los administradores o liquidadores, de derecho o de hecho, y contra los auditors por los daños y perjuicios causados, antes o después de la declaración judicial de concurso, a la persona jurídica concursada.* [Liability actions against the directors or liquidators, *de jure* or *de facto*, and against the auditors for damages caused to the company before or after the judicial declaration of insolvency] »

The *ley concursal*, in order to dispel the doubts that had arisen on the concentration of those actions before the insolvency court, dedicates two further provisions to corporate actions, specifying that *(i)* any declaratory relief concerning the liability of the abovementioned subjects, where already pending at the first instance at the moment of the opening insolvency proceedings, must be suspended [105], that *(ii)* the *locus standi* to bring those actions in the context of insolvency proceedings rests on the insolvency trustee [106]

Keeping that in mind, it bears now briefly analysing the regime of *corporate* actions (*i.e.* the 'internal' liability of directors and shareholders *vis-à-vis* the company), which poses several uncertainties deriving from the misalignment between the director's liability regime under ordinary civil and company law and insolvency law [107].

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104 Lastly Amended by the *Ley* 38/2011, dated 10 October 2011.

105 See Article 51(2) LC, stating « *por excepción se acumularán de oficio al concurso, siempre que se encuentren en primera instancia y no haya finalizado el acto de juicio o la vista, todos los juicios por reclamación de daños y perjuicios a la persona jurídica concursada contra sus administradores o liquidadores, de hecho o de derecho, y contra los auditores* [by way of exception, all lawsuits relating to the damages suffered by the debtor subjected to insolvency proceedings against its directors or liquidators, de facto or de jure, and against the auditors, shall be joined ex officio to the bankruptcy, provided that they are in the first instance and the trial or hearing has not been completed] ».

106 Article 48 quatèr LC provides that « *Declarado el concurso, corresponderá exclusivamente a la administración concursal el ejercicio de las acciones de responsabilidad de la persona jurídica concursada contra sus administradores, auditores o liquidadores* [Once insolvency proceedings have been opened, it shall be the exclusive responsibility of the bankruptcy administration to exercise the liability actions of the insolvency legal entity against its administrators, auditors or liquidators] ». Similarly, article 48 *bis* LC, establishes that exclusively the trustee may bring an action against the shareholders.

107 J. QUIJANO GONZÁLEZ, 'Responsabilidad societaria y concursal de administradores, de nuevo sobre la coordinación y el marco de relaciones', in *Revista de derecho concursal y paraconcursal: Anales de doctrina, praxis, jurisprudencia y legislación*, 2009, pp. 19-48.

When insolvency proceedings are not opened, according to the *Ley de Sociedades de Capital* directors may be held liable *vis-à-vis* the company, a minority of shareholders, company's creditors and third parties.

In particular, under Article 238(1) LSC the company (*i.e.* the general meeting of shareholders), may bring an action against the director for the infringement of his duties towards the company (for gross negligence or bad faith) in the performance of their functions [108]. When the general meeting of shareholders approves a resolution to sue the director, the latter is automatically ceased from his role [109]. In this respect, the action is of both contractual and tortious nature, as it is directed at assessing the liability of the (also *de facto*) directors and at recovering the damage caused to the company by the misconduct of the director [110]. After one month from the resolution made by the general shareholder's meeting, in case of inactivity on the part of the company, the minority of shareholders may bring an action against directors on behalf of the company by way of subrogation [111].

The minority of shareholders or a single shareholder (representing the 5% of the company's share capital) may also bring an action directly (and not by way of subrogation) against the directors, in case the majority of shareholders have decided not to file an action against the directors, or an agreement for compensation is entered into between the majority of shareholders and the director [112]. In the latter case, it seems that the (direct) action of the minority shareholder, is still exercised on behalf of the company ('*cuando se fundamente en la infracción del deber de lealtad*'), although the

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108 Article 238(1) LCS reads « *The liability action against the directors shall be brought by the company, subject to the agreement of the general meeting, which may be adopted at the request of any partner even if it is not on the agenda. The statutes may not establish a majority other than the ordinary majority for the adoption of this resolution.* [La acción de responsabilidad contra los administradores se entablará por la sociedad, previo acuerdo de la junta general, que puede ser adoptado a solicitud de cualquier socio aunque no conste en el orden del día. Los estatutos no podrán establecer una mayoría distinta a la ordinaria para la adopción de este acuerdo] ».

109 See article 238(3) LSC reads « *The resolution to promote the action or the settlement with the directors shall determine the dismissal of the directors concerned.* [El acuerdo de promover la acción o de transigir determinará la destitución de los administradores afectados] ».

110 F. RODRIGUEZ ARTIGAS and F. MARIN de la BARCENA, 'Las acciòn social de responsabilidad', in G. GUERRA MARTIN (ed.), *La responsabilidad de los administradores de sociedades de capital*, Madris, 2011, pp. 153-194. F. SANCHEZ CALERO, *Los administradores en las sociedades de capital*, Navarra, 2007, p. 367. J. SANCHEZ-CALERO GUILARTE, 'La acciòn social de responsabilidad (algunas cuestiones pendientes)', in *Derecho mercantil*, 2011, pp. 95-101.

111 Article 239(1) LSC reads « *The shareholder or shareholders who individually or jointly have a participation that allows them to request the calling of the general meeting, may bring the action of responsibility in defense of the social interest when the directors do not call the general meeting requested for this purpose, when the company does not bring it within one month from the date of adoption of the corresponding resolution, or when this is contrary to the requirement of responsibility.* [El socio o socios que posean individual o conjuntamente una participación que les permita solicitar la convocatoria de la junta general, podrán entablar la acción de responsabilidad en defensa del interés social cuando los administradores no convocasen la junta general solicitada a tal fin, cuando la sociedad no la entablare dentro del plazo de un mes, contado desde la fecha de adopción del correspondiente acuerdo, o bien cuando este hubiere sido contrario a la exigencia de responsabilidad] ».

112 Article 239(2) LCS reads « *The shareholder or shareholders referred to in the previous paragraph may directly exercise the social action of responsibility when it is based on the breach of the duty of loyalty without the need to submit the decision to the general meeting.* [El socio o los socios a los que se refiere el párrafo anterior, podrán ejercitar directamente la acción social de responsabilidad cuando se fundamente en la infracción del deber de lealtad sin necesidad de someter la decisión a la junta general] ».

shareholder's initiative is based on the personal interest arising out of the indirect loss caused by the director's misconduct [113].

Under Article 240 LCS, when the company's assets are not sufficient to recover the debts, corporate creditors are entitled to bring the corporate action against the directors on behalf of the company, by way of subrogation, in case the company or the minority shareholders did not do so [114]. According to the majority of scholars, in this case, the creditors would not be the bearers of a personal and independent right, as the insolvency proceedings has not yet been opened and the loss caused to them by the general loss of the corporate's assets would only be indirect. Instead, the creditor would be acting on behalf of the company which is directly harmed by the misconduct of the directors [115]. As mentioned, pursuant to Article 8(6)-(7) LC, liability actions in the interest of the company are *ex lege* attracted to the jurisdiction of the of the insolvency court.

In the light of the above provisions, as a rule of thumb, the insolvency court has the exclusive competence to hear and determine corporate actions (*i.e.* actions under Articles 238, 239, 240 LSA) brought by the trustee against directors for the damages suffered by the company both before and after the opening of insolvency proceedings.

Thus as an exception to the general rule of the defendant's domicile, any corporate action - seeking compensation for the damage determined from the director's conduct - in which the debtor (declared insolvent) is a party to and that are pending at the moment of the opening of insolvency proceedings shall be attracted *ex officio* to the competence of the insolvency court. The sole exception is provided for those actions which at the moment of the opening of insolvency proceedings are at an advanced phase of proceedings (*e.g.* last hearing) or are pending before a court of second or last instance.

Although the action does not seem to undergo any particular transformation as to its legal foundation due to the opening of insolvency proceedings and the *locus standi* of the trustee derives from the mere divestment of the debtor, the rationale underpinning the *vis attractiva concursus* for those actions seems to lie with the fact that the Spanish legislature (unlike the Italian one [116]) considers that the concentration of those actions before the insolvency court preserves the whole body of creditors and enhances the efficiency of insolvency proceedings. Indeed, the compensation obtained from the company against the directors must be reverted to the insolvency estate, so that all the creditors

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113 In this case, scholars submit that the action of the minority shareholder would be in the interest of the company and therefore, there would be no need to wait until the time-limit of one month is expired. R. MARTI LACALLE, *El ejercicio de los Derecho de Minoria en la sociedad Anonima Cotizada*, Navarra, 2003, p. 241.

114 Article 240 LCS reads « *The company's creditors may exercise the social action of responsibility against the administrators when it has not been exercised by the company or its partners, provided that the social patrimony is insufficient to satisfy their claims* [Los acreedores de la sociedad podrán ejercitar la acción social de responsabilidad contra los administradores cuando no haya sido ejercitada por la sociedad o sus socios, siempre que el patrimonio social resulte insuficiente para la satisfacción de sus créditos] ».

115 See *infra,* § I.3.2.2. for the creditor's direct action *vis-à-vis* directors under article 241 LSC. J. QUIJANO GONZÁLEZ, 'Responsabilidad societaria y concursal de administradores: De nuevo sobre la coordinación y el marco de relaciones', in *Revista de Derecho Concursal y Paraconcursal*, 10, 2009, p. 22.

116 See *supra* §§ I.2.1. and I.2.2.

would (indirectly) benefit of the increase of the assets in which they can enforce their insolvency claim.

In particular, scholars [117] have submitted that the main reasons justifying this attraction are to be attributed to: *(i)* the connection of the insolvency proceedings with actions on behalf of the company, which affect the interest of the general body of creditors, *(ii)* the general preference of the legal system for a full jurisdiction of the insolvency court, *(iii)* the vicinity with the facts of the case *(iv)* the principles of unity of insolvency proceedings and *(v)* the *pari passu* principle.

It must be mentioned, however, that some scholars have (correctly) criticised the Spanish legislative policy choice [118] attracting corporate actions before the insolvency court, resorting to arguments which are indeed very similar to those that under the Italian system lead to the exclusion of those actions from the scope of the *vis attractiva concursus* [119]. To avoid unnecessary repetitions, reference is be made to the paragraphs above on the Italian system [120].

I.3.2. Actions out of the scope of Article 8 LC

As anticipated, the rule of competence established under Article 8 LC coves only actions directed against the assets of the debtor, without mentioning those actions that the trustee brings on behalf of the latter or on behalf of the creditors seeking the reinstatement of the estate.

Therefore, the allocation of the competence with the insolvency court for those actions must be found in other specific provisions (if any) of the Spanish insolvency law, bearing in mind that the rationale beyond such a (specific) allocation may be of legal policy expediency, rather than the necessary application of the specific insolvency law rules, aimed at the implementation of the distribution order and the *par condicio creditorum*.

Also, it must be borne in mind that as to the actions brought on behalf of the debtor (where divested), Article 54 LC provides for a *general* rule concerning the 'comprehensive' substitution of the trustee in the administration of his assets and the *locus standi* to be a party to legal proceedings.

On the contrary, as far as the actions brought on behalf of the estate are concerned, there is no general rule providing for the comprehensive *locus standi* of the trustee to act on behalf of the creditors. Therefore, the entitlement of the trustee to bring an action on behalf of the creditors must be assessed in respect of each action, on a case-by-case basis.

I.3.2.1 Acciones de reintegración and *acción rescisoria*

117 See *ex multis* J. ALONSO-CUEVILLAS SAYROL, *La "vis attractiva" del proceso concursal*, Navarra, 2007, pp. 63-73.

118 J. MACHADO PLAZAS, *El concurso de acreedores culpable. Calificación y responsabilidad concursal*, Madrid, 2006, p. 248.

119 J. A. GARCÍA CRUCES, 'Declaración de concurso y acciones societarias de responsabilidad frente a los administradores de la sociedad concursada', in *Anuario de Derecho Concursal,* 28, 2013, p. 299

120 See *supra* § I.2.3.3.2. (fn. 79).

Articles 71-73 LC regulate the s.c. 'acciones de reintegración' (*i.e.* actions for the reinstatement of the insolvency estate), which are comprised of avoidance actions (labelled in Spain as *acción rescisoria*) and other actions seeking the invalidation of acts [121].

For present purposes it is not relevant to analyse in detail the features of insolvency avoidance actions. Suffice here to highlight that, under the Spanish system, as an effect of the exercise of those actions by the trustee, the third party is ordered to return the asset to the debtor, and his credit will be admitted with the insolvency proceedings as a subordinate credit (the deterioration of the ranking position of the third party is considered by Spanish scholars as the 'sanction' imposed by the insolvency law to the conduct of the fraudulent third party, whose claim however is not extinguished). Instead, is important to focus the attention on the specific provision of Article 71(6) LC, which states that

> « *El ejercicio de las acciones rescisorias no impedirá el de otras acciones de impugnación de actos del deudor que procedan conforme a Derecho, las cuales podrán ejercitarse ante el juez del concurso, conforme a las normas de legitimación y procedimiento que para aquéllas contiene el artículo 72* [The exercise of avoidance actions shall not prevent the exercise of other actions to challenge the debtor's acts that proceed according to law, which may be exercised before the judge of the bankruptcy, according to the rules of legitimacy and procedure for the former contained in Article 72] ».

The rationale underpinning that provision, are the uncertainties that had arisen under the aegis of the former Código Commercial. Indeed, lacking any indication, it was rather debated whether the insolvency trustee could resort to other ordinary remedies to reinstate the insolvency estate on behalf of all the creditors.

When enacting the *Ley Concursal* the Spanish legislature has opted for the strategy of possible concurrence in the context of insolvency proceedings, of both the 'typical' (insolvency) *acción rescisoria* and other ordinary remedies of civil and commercial law directed at the reinstatement of the insolvency estate, vesting the trustee with the *locus standi* to exercise them on behalf of the creditors. The provision does not explicit which are the 'other actions' for the reinstatement of the insolvency estate, but it is undisputed that, among those, there most relevant is the *actio pauliana.*

The *actio pauliana,* governed by Article 1.111 and 1291 ff. Spanish Código Civil, is a typical civil remedy which vests the creditor with the possibility to challenge the transactions entered into between the debtor and a third party, where it is proven that those transactions conceal the fraudulent intention to subtract the debtor's assets from the enforcement on the part of the latter's creditors.

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121 M. LINACERO DE LA FUENTE, *Les acciones de reintegracion en la Ley Concursal*, Madrid, 2006, p. 46. F. CRESPO ALLUÉ, 'De los efectos sobre los actos perjudiciales para la masa activa', in J. PULGAR EZQUERRA, A. ALONSO UREBA, C. ALONSO LEDESMA, G. ALCOVER GARAU (eds.), *Comentarios a la legislación concursal*, II, Madrid, 2004, p. 1398.

Alike in other Member States, the conditions precedent of the *actio pauliana* are represented by the *consilium fraudis* and the *eventus damni* (which assumes that the creditor has actually suffered a prejudice, that must be proven when exercising the action).

A peculiar aspect of the *actio pauliana* in the Spanish system is that it represents a residual remedy, which may be exercised by the creditor only where there are no other available avenues to satisfy his claim *vis-à-vis* the debtor (Article 1291(3) CC) [122].

As to its effects, the (individual) *actio pauliana* does not produce any obligation that the third party returns the transferred asset, nor the transaction is declared null or void. It merely entails that the transaction between the debtor and the third party is ineffective *vis-à-vis* the creditor with respect to the amount of his claim (s.c. 'double relativity' of the *actio pauliana*'s effects). Ultimately, the usefulness of the *actio pauliana* for the claimant (*i.e.* the creditor) would not rest on the restitution of the assets to the legal sphere of the debtor, but 'only' on the fact that the transfer of that asset is not opposable against him, so that he can obtain a (separate) enforcement title to satisfy his claim.

Comparing the insolvency avoidance action with the *actio pauliana*, Spanish scholars have summarised the difference between the two actions as follows.

(i) The *acción rescisoria* is an action is not conceivable outside of insolvency proceedings, and therefore the *locus standi* to bring the action lies with the trustee (Article 72(1) LC). On the contrary, the *actio pauliana* is a remedy which is available to the individual creditor who suffers a direct prejudice by the conduct of the debtor and the third party (Article 1295.3 and 1298 CC);

(ii) the *acción rescisoria* has no residual character and may be freely exercised by the trustee (rather it represents the main tool to reinstate the insolvency estate). The *actio pauliana*, instead, has a residual nature with regards to other actions available to the individual creditor (Article 1291(3) CC);

(iii) the *acción rescisoria* is originally conceived as a remedy at the service of all the creditors, whereas, at the first instance, the *actio pauliana* protects the interest of the single creditor;

(iv) the *acción rescisoria* requires a burden of proof simplified for the trustee, which is exonerated from the demonstration of the *eventus damni* and the *consilium fraudis*;

(v) the effect of the *acción rescisoria* is the restitution of the asset to the debtor. On the contrary, the *actio pauliana* produces only the (twofold relative) non-opposability of the transaction *vis-à-vis* the creditor.

In the light of the above differences, the majority of scholars conclude that, in spite of some functional similarities between the two remedies, « *en relación con la acción rescisoria concursal algunas similitudes con las acciones rescisorias puede afirmarse que tienes rasgos y naturaleza jurídica propios, resultante de su especial regulación en los arts. 71-73 LC* » [123].

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122 STS, 5 December 1994 (RJ 1994/9408), STS 4 September 1995 (RJ 1995/6490), STS, 20 February 2001, STS, 2 April 2003; STS, 30 January 2004.

123 J. M. CAMPOY, *Adquirentes, subadquirentes y retroacción de la quiebra*, Valencia, 1986, p. 103; A. GULLON BALLESTEROS, 'La acción rescisoria concursal, in *Estudios sombre la Ley concursal. Libro Homenaje Manuel Olivencia*, Marcial Pons, 2005, IV, p. 4125-4135, M. DÍAZ MARTÍNEZ, *Presente y futuro de las acciones de reintegración*, in *Diario*

Once identified the different regime of the two actions - which in the Spanish system is particularly evident in particular as to the different legal consequences of the actions – it bears observing that the wording of Article 71(6) LC alludes that the different regimes between the two actions persists also where the *actio pauliana* is exercised by the trustee.

As stressed by scholars, while the *acción rescisoria* has its own insolvency-specific features, the legal foundation of the *actio pauliana*, where exercised in the context of insolvency proceedings by the trustee, continues to be governed by the ordinary (civil and commercial) substantive rules, except from two particular procedural profiles (*i.e.* the *locus standi* and the territorial competence), which are subjected to the procedural rules of insolvency law (124).

It follows that the insolvency court, which is vested with the competence to hear those actions by an express provision of insolvency law, in adjudicating those actions will apply the relevant ordinary rules of civil and commercial law (125).

Without overruling that conclusion, some scholars claim that the *actio pauliana* exercised by the trustee actually undergoes some (minor) amendments in its substantive features to 'fit' in the collective context of insolvency proceedings.

Those authors focus in particular on the *effects* that the *actio pauliana* would entail where it is exercised by the body responsible of the proceedings, which would functionally equate it to insolvency avoidance actions. The exercise of the action in the context of insolvency proceedings would transform the *actio pauliana* from a remedy at the service of a single creditor into a remedy benefitting the entire body of creditors 126.

For instance, some authors question whether the suspect period of insolvency avoidance actions would be applicable also to the *actio pauliana* (127). Other authors have raised the doubt that the *actio*

«La Ley», 5640, 24 October 2002.J.J. PINTO RUIZ, 'De la retroacción al retorno de las acciones rescisorias', in *Estudios sombre la Ley concursal. Libro Homenaje Manuel Olivencia*, *cit.*, p. 4303 and ff.

124 M. ALBALADEJO GARCÍA, 'Comentario al art. 1111 Codico civil', in M. ALBALADEJO GARCÍA, *Comentarios al Código Civil y Compilaciones Forales*, Madrid, 1986 p. 980, J. A. FÉRNANDES CAMPOS, 'Actuación de la acción pauliana, in *Estudios Homenaje al Prof. Diez Picazo*, II, *Civitas, 2003, p. 1824*. ID., 'El fraude de acreedores. La acción pauliana, Bolonia, 1998, pp. 220-221. See explicitly Tribunal Supremo de 10 de octubre de 2007, (RJ 2007/7097) « *la jurisprudencia de esta Sala ha diferenciado las acciones revocatorias concursales de las acciones revocatorias ordinarias, en atención a su distinto fundamento, características y efectos, lo que, como indica la sentencia de 30 de enero de 2004, se traduce no solo en una distinta legitimación activa - que corresponde, en las primeras, a los Síndicos, y en las segundas, a cualquier acreedor perjudicado en su crédito -, sino también en diferentes consecuencias, dado que las acciones concursales tienden a la reintegración de la masa, mientras que la pauliana beneficia únicamente de modo directo al acreedor o acreedores que la ejercitan, por lo que el provecho del ejercicio de la acción solo es para el accionante* ».

125 F. CRESPO ALLUÉ, 'De los efectos sobre los actos perjudiciales para la masa activa' in J. PULGAR EZQUERRA, A. ALONSO UREBA, C. ALONSO LEDESMA, G. ALCOVER GARAU (eds.), *Comentarios a la legislación concursal*, II, Madrid, 2004, p. 1398.

126 J. GIL RODRIGUEZ, 'Art. 73: De los efectos de la acción rescisoria concursal', in R. BERCOVITZ RODRIGUEZ CANO (ed.), *Comentarios a la Ley Concursal*, I, Madrid, 2004, p. 888; M. A. PARRA LUCÁN, 'La compatibilidad de la rescisoria concursal con otras acciones de impugnación de actos y contratos', in *Anuario de Derecho Concursal*, 19, Madrid, 2010, pág.12

127 The *ley concursual* does not mention the time-limit concerning the other action for the reinstatement of the insolvency estate. Therefore, some authors argue that the ordinary rules would apply also as regards that specific

pauliana exercised in the context of insolvency proceedings may produce the same effects of an avoidance action (*i.e.* the obligation that the third party directly returns the assets transferred to the debtor, and not merely the non-opposability of the transaction *vis-à-vis* all the creditors).

Nevertheless, it seems that according to the vast majority of scholars, the mere fact that the action is brought by the trustee does not significantly affect the legal basis of the action [128].

An isolated decision of 2004 has considered that the opening of insolvency proceedings does not affect the individual creditor's right to bring the action autonomously where he has suffered a direct prejudice. Although such a possibility is contested by the majority of scholars, the Spanish Supreme Court has stated that the ordinary *actio pauliana* could be exercised by the individual creditor outside of the insolvency procedure. The reasoning of the Court was based essentially on the (arguable) arguments that the *par concicio creditorum* would not be violated by the individual action of the single creditor, because the asset had already 'exited' from the assets of the debtor, therefore, the equal treatment of the creditors as regards the distribution for the debtor's assets would not be impaired. Nor a privilege would have been attributed to that creditor. Moreover, the Supreme Court considered that ultimately the general body of creditors would have benefitted of the individual action brought by the single creditor against the third party outside of insolvency proceedings, as ultimately, that creditor would have satisfied his claim autonomously, thus leaving more resources to the (collective) satisfaction of the other creditors [129].

The observations above concern not only the *actio pauliana* but all the other remedies that the Spanish civil law offers to creditors to protect the enforcement of their claims.

According to one scholar, under Article 71(7) LC the trustee acting as a representative body of the procedure would be entitled to bring before the insolvency court any action seeking the invalidation of acts and transactions that creditors would be able to exercise independently form insolvency proceedings, including the action seeking the invalidation of dissimulated contracts, the nullity of contracts or their the annulment on the ground of the lack of the debtor's legal capacity and any other action aimed at the protection of creditors, likewise derivative actions [130].

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profile. F. LEÓN SANZ 'Comentario art. 71', en A. ROJO FERNANDEZ-RÍO and E. M. BELTRÁN SÁNCHEZ (eds.), *Comentario de la Ley Concursal*, I, Madrid, 2004, pp. 1318-1319.

Other authors have argued that, provided that the ordinary time-limit of the concerned action is has not expired, the suspect period of avoidance actions would operate also with respect to the other actions. J. MAS-GUINDAL GARCIA, 'La Compatibilidad de los distintos mecanismos de reintegración en el concurso', 2013, available at http://portal.uned.es.

128 J. MAS-GUINDAL GARCIA, *cit.,* p. 15, who admits that the majority of scholars support the opposite opinion and that clearly such an interpretation does not correspond to the intention of the legislature.

129 STS, 30 January 2004 (RJ 2004/440).

130 J. MAS-GUINDAL GARCIA, *cit.,* p. 17 and ff. However, against the wide scope of Article 71(7) LC suggested, it may be objected that some of the actions that the author correctly refers to the initiative of the trustee are actually actions that outside of insolvency proceedings would be brought by creditors. Instead, actions such as derivatives actions, nullity or annulment of contracts for lack of legal capacity (mainly referred to contracts concluded by the directors operating beyond their powers) would rather pertain to the legal sphere of the

As a conclusive remark on this point, it must be noted that Article 71(7) LC vests the trustee with the *locus standi* to bring actions seeking the invalidation of transactions. All other tortious claims (with the exception of actions against corporate bodies, addressed afterwards) seems to be excluded from both the competence of the insolvency court and the *locus standi* of the trustee. It must be concluded that the Spanish system contemplates the possibility that creditors exercise those actions independently from insolvency proceedings, should the ordinary legal remedies allow them to do so for the protection of their claims.

I.3.2.2. The 'external' director's liability regime and its affection by the opening of insolvency proceedings

The analysis of the Spanish jurisdiction reveals a particular attention of the legislature to the protection of creditors. As illustrated above, individual creditors (under certain circumstances) are entitled to assert a derivative claim on behalf of the company *vis-à-vis* the director, to seek the compensation for the damage that the mismanagement of the latter has provoked to the company's assets (thus, indirectly affecting the creditor's interests). In addition to such an (indirect) remedy [131], the Spanish legislature has offered a further strong protection to the interests of the creditors, providing for three separated 'external' director's liability actions *vis-à-vis* corporate creditors.

In particular, the Spanish system vests creditors with the possibility to *(i)* bring an individual action, in an 'ordinary' civil and commercial scenario, for the personal and direct prejudice due to the director's mismanagement of the company (Article 241 LSC), *(ii)* bring an individual action, in a situation of material insolvency of the company, for the director's failure to file the petition for the opening of insolvency proceedings (Article 367 LSC) and *(iii)* bring a 'collective' action, via the initiative of the insolvency trustee, where the insolvency of the debtor is qualified as fraudolent (Article 172 *bis* LC).

Although in principle the three action above may ultimately all be traced back to the same judicial remedy (*i.e.* the tortious liability of the third party infringing the creditor's right that the value of the debtor's assets is preserved, as they serve the function of a general collateral for his credit), the treatment of each action is significantly different.

Article 241 LSC vests corporate creditors with an individual action against directors for the direct and personal damage suffered by them due to the (mis)management of the director (the s.c. 'external liability of directors)'.

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debtor and would benefit only indirectly the creditors. Therefore, they it is understood that they should fall within the scope of article 54 LC, rather than Article 71(7).

131 Given the possibility that creditors could act directly against directors, an author has contested that the derivative action of creditors under article 240 LSC would be superfluous. Such an objection seems not to consider, however, that the action under article 241 has a different (tortious) compensatory nature J. JUSTE, 'La legitimación subsidiaria para el ejercicio de la acción social', in Á. ROJO, E. BELTRÁN, *La responsabilidad de los administradores de las sociedades mercantiles*, Valencia, 2011, p. 163.

The majority of scholars and the case law submit that said provision establishes an additional (and *sui generis*) rule of external corporate liability of the director, which the Spanish legal system would juxtapose to the ordinary corporate liability of the company *vis-à-vis* creditors [132].

On the contrary, another part of the Spanish literature maintains that Article 241 LSC would be nothing more than an expression of the general rule of Article 1902 Spanish Civil Code, which is based on the principle '*alterum non laedere*' [133]. The nature of the claim would be, therefore, tortious (and not corporate) since creditors are not contractually bound with directors. In this scenario, the action brought by the single creditor would underpin a direct prejudice suffered by the claimant as an effect of the intentional or negligent misconduct of the director [134].

For instance, a personal action under Article 241 LSC may be grounded on a loss of reliance interests, when a creditor was induced to conclude a contract with the company specifically for the reputation of a certain director [135]. Also, a personal damage could be suffered by the corporate creditor when the director has concealed the real financial situation of the company or has provided misleading information with a view to enter into relationship with that creditor.

Article 367 LSC, instead, provides for an autonomous action against directors in case they fail to timely file the petition for the dissolution of the company [136] or for the opening of insolvency proceedings [137]. This provision is regarded as a form of joined liability of the company together with

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132 See SAP Barcelona, 12 November 2002, in *JUR* 2004\16368.

133 R. ARENAS GARCÍA, 'La responsabilidad de administradores sociales desde la perspectiva del Derecho Internacional Privado', in R. ARENAS GARCÍA, C. GÓRRIZ LÓPEZ, J. MIQUEL RODRÍGUEZ, *La internacionalización del Derecho de sociedades*, Barcelona, 2010, pp. 157-200, p. 188. G. ESTABAN VELASCO, 'La acción individual de responsabilidad', in Á. ROJO, E. BELTRÁN, *op. cit.*, p. 176. Also see F. M. DE LA BÁRCENA, *La acción individual de responsabilidad frente a los administradores de sociedades de capital (art. 135* LSA*)*, Madrid, 2005.

134 O. M. RADEJAS RUEDA, 'la acción individual de responsabilidad en el seno del concurso de acreedores: viabilidad y consecuencias', in *Documentos de trabajo del departamento de derecho mercantil*, 71, 2013 identifies three possible categories of 'direct damages' that the managerial conduct of the director may provoke to third parties (including shareholders and creditors): *(i)* Direct damage to third parties resulting from the so-called 'business offences', *i.e.* an illegal activity carried out by the director in the course of the company's business (e.g. acts of unfair competition or damage caused by placing on the market defective products). *(ii)* Direct damage to the shareholder, resulting from the unlawful interference of the directors in the relationship between the shareholder and the company (e.g. impairment of the shareholder to attend the general meeting or exercise the right to vote). *(iii)* Damages resulting from unlawful interference of the directors in the legal relationship of the company with third parties (e.g., interference in the negotiations of the contract or incorrect execution of the contract). See also See R. ARENAS GARCÍA, 'Suing Directors in International', in *Festschrift für Hopt*, Berlin, New York, I, 2010, p. 324. Also see F. SÁNCHEZ CALERO, *Los administradores en las sociedades de capital (Segunda edición)*, Navarra, 2007, pp. 412-413.

135 J. ALFARO ÁGUILA-REAL, 'La llamada acción individual de responsabilidad o responsabilidad "externa" de los administradores sociales', in *Indret* 3/2002.

136 The cause for the dissolution of the company are listed under Article 363 LSC. Among others, letter (e) thereof states that one cause for dissolution is the loss of more than a half of the capital of the company.

137 Article 367 LSC reads « *Responderán solidariamente de las obligaciones sociales posteriores al acaecimiento de la causa legal de disolución los administradores que incumplan la obligación de convocar en el plazo de dos meses la junta general para que adopte, en su caso, el acuerdo de disolución, así como los administradores que no soliciten la disolución judicial o, si procediere, el concurso de la sociedad, en el plazo de dos meses a contar desde la fecha prevista para la celebración de la junta, cuando ésta no se haya constituido, o desde el día de la junta, cuando el acuerdo hubiera sido contrario a la disolución. En estos casos las obligaciones sociales reclamadas se presumirán de fecha posterior al acaecimiento de la causa legal de disolución de la sociedad, salvo que los administradores acrediten que son de fecha anterior* [*The directors shall be jointly and severally liable for the corporate obligations*

the directors for the corporates debts towards creditors 'subsequent to the occurrence of the legal cause of dissolution' (138).

The nature of the action at stake is profoundly different from that one under Article 241 LSC.

At the outset it bears observing that Article 241 LSC is a remedy which is not available to the creditor exclusively in situations involving the material insolvency (or the financial distress) of the debtor. Irrespective of the characterisation of the action as corporate law or tort law, the director is liable for the *actual* damage suffered individually by the creditor. The creditor is, therefore, entitled to bring the action against the director whenever the mismanagement of the latter provokes a direct harm to his rights. It follows that all the 'regular' conditions set forth by Article 1902 Spanish Civil Code concerning tortious actions must be met and duly proven by the claimant (*i.e.* the triad damage-conduct-causal link) (139).

Instead, under the action pursuant to Article 367 LSC, the director is liable (together with the company) for the corporate debts: the liability of the director arises out of the mere fact he has failed to file for the dissolution of the company or the opening of insolvency proceedings, in presence of a cause for compulsory winding-up. The action under Article 367 LSC is considered as a form of *ex lege* objective liability, which would express the legislature's intention to envisage the role of the director as a 'guarantor' for the debts of the company (140). According to some authors, the liability under Article 367 LSC would not arise out of the breach of the contractual relationship between the company and the directors (not, apparently, from the breach of fiduciary duties), but it would be an exceptional duty required by ad hoc mandatory provisions aimed at incentivating a diesirable conduct of directors when the company is on the verge of insolvency (141).

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subsequent to the occurrence of the legal cause for dissolution if they fail to comply with the obligation to convene the general meeting within two months so that it adopts, where applicable, the dissolution resolution, as well as the directors who do not request the judicial dissolution or, if applicable, the company's bankruptcy, within a period of two months from the date scheduled for the holding of the meeting, when the latter has not been constituted, or from the day of the meeting, when the resolution would have been contrary to the dissolution. In these cases, the corporate obligations claimed shall be presumed to be dated subsequent to the occurrence of the legal cause for dissolution of the company, unless the directors certify that they are dated earlier] ». See J. VALENZUELA GARACH. *La responsabilidad de los administradores en disolución y en el concurso de las sociedades capitalistas*, Marcial Pons, 2007, p. 31 ff.; G. GUERRA MARTÍN et al., *La responsabilidad de los administradores de sociedades de capital*, ['1st ed. Wolters Kluwer España 2011, p. 229. A. ROJO, E. BELTRÁN. Comentario de la ley de sociedades de capital, ['Commentary of the Companies Act'], Vol. 2. Thomson Reuters 2011, p. 2572 ff. (in Spanish).

138 In presence of a cause for dissolution, the primary duty of the director is to timely detect it. Afterwards, he is obliged to call a general meeting of the shareholders, within two months. If the general shareholder's meeting does not take place or it decide not to take the appropriate measures in relation to the cause of dissolution, the director is under the obligation to file himself a petition for the dissolution of the company, or the opening of insolvency proceedings. Therefore, the director has an obligation to terminate the company in addition to the duty to call a general meeting in the occurrence of a cause for dissolution of the company. G. GUERRA MARTÍN et al., *La responsabilidad de los administradores de sociedades de capital*, Wolters Kluwer España, 2011, p. 238.

139 See SAP Leida, 29 January 2016, ECLI: ES:APL:2016:152.

140 STS 3900/2010, 30 June 2010.

141 M. VIÑUELAS SANZ, 'Reflexiones críticas sobre la naturaleza sancionadora de la responsabilidad concursal', in *Anuario Facultad de Derecho*, 2008, pp. 393-405, p. 394. defines the liability under article 367 LSC as having a 'punitive nature', in that it would represent a mechanism set forth by the law to forces directors to repay the corporate debts together with the company for the breach of fiduciary duties.

From a procedural standpoint, the burden of proof is extremely simplified for the claimant, as, in this case, it is not necessary to demonstrate the casual link between the director's infringement of his statutory duties and the financial loss (*recte* the material insolvency) of the company [142]. It is sufficient that one of the conditions for the dissolution or the opening of insolvency proceedings is met.

It must be noted that, according to the Spanish case-law, the joined liability of the directors arises exclusively with reference to the s.c. 'new creditors', *i.e.* those claims which arises after that the event triggering. the (omitted) obligation to dissolve the company or open insolvency proceedings has occurred [(143)]. The *rationale* underpinning the provision, therefore, is that of preventing the company which is materially insolvent to 'gamble with creditors money' and continue to manage the business according to a logic of going concern, instead of shifting the management towards a conservative approach, aimed at preserving the distribution of the assets to the creditors.

Nevertheless, the action is not considered as an insolvency-related action, as recently confirmed in a recent decision by the Spanish Supreme Court, which has stated that « *como el art. 367 LSC no establece una regla especial sobre la determinación del momento en que nace la obligación, resultan aplicables las reglas generales del Derecho de obligaciones. Y una vez establecido el momento de nacimiento de la obligación, habrá que contrastarlo con el de concurrencia de la causa de disolución, de manera que el administrador sólo responderá de las obligaciones nacidas después* » [(144)].

Once illustrated the main features of those actions *vis-à-vis* directors, it is now possible to analyse *if* and, if need be, how the insolvency regime interferes with them.

The fate of the action under Article 241 LSA during the course of insolvency proceedings is much debated, as the *Ley Concursual* does not clarifies whether its exercise is affected by the opening of insolvency proceedings or not.

Arguments militating in favour of the possibility that individual creditors may bring outside of insolvency proceedings an individual action against the directors are traced back to the fact that Article 241 LSA provides that the director is *personally* liable for the direct and individual damage suffered by the creditor. In other words, the action is not directed against the insolvent company, but *vis-à-vis* a separate legal entity. Form a strictly juridical standpoint, considering that the liability under

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[142] M. RUIZ MUÑOZ, 'Fundamento y naturaleza jurídica de la responsabilidad de los administradores del artículo 262.5 LSA (art. 105. LSRL): análisis contractual representativo', in *Revista de Derecho Mercantil,* 244, 2002 (April-June), pp. 469-568, p. 485. Also see M. DE LOS ÁNGELES MARTÍN REYES, 'La insolvencia de las sociedades de capital y la exigencia de responsabilidad a sus administradores', in *Revista de Derecho Mercantil*, 277, 2010 (July-September), pp. 853-898, p. 856.

[143] Recently the Regional court of Madrid clarified that 'subsequent corporate obligations' are those credit the genetic moment of which may be located after the event which would give rise to the obligation to file for the dissolution of the insolvency proceedings on the part of the directors. On the contrary those credits which are entered into between the company and the creditors before that moment, but which fall due after the relevant date do not fall within the scope of the director's liability under Article 367 LSC. See SAP Madrid, 9 February 2016, 1375/2016, ECLI: ES:APM:2016:1375. See also, SAP Coruña, 18 February 2016, SAP Coruña, 242/2016, ECLI: ES:APC:2016:242.

[144] STS, 10 April 2019, 1240/2019, ECLI: ES:TS:2019:1240.

Article 241 LSA, as said, entails an ordinary tortious/corporate action, one could argue that those actions should not be suspended in the course of insolvency proceedings.

Nevertheless, reasons of efficiency and effectiveness of the insolvency procedure may also lead to the opposite conclusion. Indeed, allowing the individual creditor to bring an action against the director may in practice seriously impair the possibility that the trustee recovers from the latter the compensation from corporate actions or those actions by virtue of which the director is severally liable with the company (*i.e.* Article 172 *bis* LC). Moreover, should the individual action under Article 241 LSA not be suspended, there is the risk that the individual creditor obtains a double satisfaction of his claim, as it is likely that, parallelly with the action against the director, he lodges a (*de facto* corresponding) claim also with insolvency proceedings [145].

It is not possible to give here full account of the interesting debate concerning the exercise of the individual creditor's action during insolvency proceedings. For present purposes, the takeaway point is that, in the event that their exercise parallelly with insolvency proceedings is deemed possible, the competence to hear those action would not fall within the rule of the *vis attractiva concursus*, as those actions would be heard and determined by the judge identified in accordance with the Spanish ordinary civil and commercial rules on the allocation of competence.

As to the action of 'new creditors' under Article 367 LSA, concerning the director's liability due to the failure of filing the petition to open insolvency proceedings, Article 51 *quatèr* LC provides that, even when already pending, they are suspended during insolvency proceedings. Once insolvency proceedings are closed, nothing prevents the creditor to resume the action [146].

The reasons underlying this provision is clearly that of preventing that a group of creditors obtain a separated satisfaction of their insolvency claims, because a judgement condemning the director to compensate the damage suffered by those creditors would eventually undermine the possibility of the directors to contribute to repay the insolvency claims of the other insolvency creditors within the context of insolvency proceedings, whose 'collective' rights could be exercised - under specific circumstances - by the trustee.

At this point, it bears noticing that, in the context of insolvency proceedings, the Spanish legislature has provided for another specific hypothesis of *ex lege* director's liability, which may be triggered exclusively when the insolvency court has judicially assessed that insolvency proceedings may be qualified as fraudulent (*'culpable'*) [147].

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145 O. M. RADEJAS RUEDA, 'la accion individual de responsabilidad en el seno del concurso de acreedores: viabilidad y consecuencias', in *Documentos de trabajo del departamento de derecho mercantil*, 71, 2013.

146 A. B. P. PERDICES HUETO, 'La responsablidad de los administradores por deudas sociales a la luz de la ley concursal', in *InDret*, 3/2005.

147 A. ALONSO UREBA, 'La responsabilidad concursal de los administradores de una sociedad de capital en situación concursal: el art. 172(3) de la LC y sus relaciones con las acciones societarias de responsabilidad', in A. ALONSO UREBA, R. GARCÍA VILLAVERDE, J.PULGAR EZQUERRA, *Derecho concursal: estudio sistemático de la Ley 22/2003 y de la Ley 8/2003 para la reforma concursal*, Madrid, 2003, pp. 505-576, pp. 533-534.

The *locus standi* to bring the action lie with the trustee or, in case of inertia of the latter, to the creditors that have requested formally the trustee to bring the action. The proceeds of the action revert to the insolvency estate. The limitation period applicable to the action is the ordinary one (for corporate actions under Article 949 C.Com.), although it seems to be discussed the moment in time from which it must calculated [148].

In order to correctly frame the action under art. 172 *bis* LC, it is necessary to make a brief 'procedural' digression and explain the role that the s.c. '*clarificación*' plays in the context of the Spanish insolvency procedure.

The *clarificación* is an independent (and merely possible [149]) sub-phase of the insolvency procedure, which is aimed at evaluating the conduct of the debtor and its representatives with a view to determine whether the occurrence of the material insolvency may be referred to an intentional or grossly negligent conduct [150].

The *Ley Concursal* expressly indicates the subjects whose conduct may be evaluated by the insolvency court, who are, namely, directors, liquidators, *de jure* or *de facto*, general attorneys-in-fact, and those who have been appointed in one of those roles within the two years prior to the date of the opening of insolvency proceedings, as well as the shareholders who have refused without reason to recapitalise the company or issue convertible securities or other instruments [151].

Without going into too much detail, the material insolvency may be qualified as 'culpable' under three different scenarios: *(i)* the general clause of 'culpabilidad' (Article 164.1 *LC*) [152]; *(ii)* the presumption

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148 J. J. GARCIA-CRUCES, 'El problema de la repression de la conducta de duedor comùn', in A. Rojo, *La reforma de la legislacion concusal: jornada sombre la reforma de la legislacion concursal, Madrid, 6 a 10 de mayo de 2002*, Madrid-Barcellona, 2002, p. 306.

149 Article 167 LC establishes the conditions to open the clarificación (s.c. '*formación de la sección sexta*'). It bears observing that not only the *Ley Concursal* seems to allow that this phase does not even take place during insolvency proceedings. It may also be commenced, archived and re-opened at a later stage. Critical about this set-up M. MARTÍNEZ MUÑOZ, 'La responsabilidad concursal', in *Cuadernos de Derecho y Comercio 201 Cuadernos de Derecho y Comercio*, 2016, 4, 60, p. 672.

150 P. YANES, 'La clarificación del concursus', in J. PULGAR EZQUERRA (ed.), *El concurso de acreedores. Adaptado a la Ley 38/2011, de 10 de octubre, de reforma de la Ley Concursal*, Madrid 2012, p. 527.

151 Article 172 LC reads « *La determinación de las personas afectadas por la calificación,* […] *En caso de persona jurídica* […] *administradores o liquidadores, de hecho o de derecho, apoderados generales, y quienes hubieren tenido cualquiera de estas condiciones dentro de los dos años anteriores a la fecha de la declaración de concurso, así como los socios que se hubiesen negado sin causa razonable a la capitalización de créditos o una emisión de valores o instrumentos convertibles en los términos previstos en el artículo 165.2, en función de su grado de contribución a la formación de la mayoría necesaria para el rechazo del acuerdo* ».

152 The assessment of the 'culpabilidad' under article 164(1) LC requires the (i) objective element consisting of the material insolvency; (ii) subjective element consisting of the fraud or (gross) negligence (iii) the causal element, inasmuch as it will be necessary that there is a causal link between the intentional or grossly negligent behaviour and the generation or aggravation of insolvency. SSTS, 5 June 2015, n. 343; STS, 10 April 2015, 2066/2015, ECLI: ES:TS:2015:2066; STS, July 2012 2012; STS, 20 April 2012; STS, 21 March 2012; STS, 16 January 2012; STS, 10 April 10 2015 (all available at http://www.poderjudicial.es); See on this point G. ALCOVER GARAU, 'La calificación culpable por generación o agravación del estado de insolvencia con dolo o culpa grave (artículo 164.1 de la Ley Concursal)' in *La calificación del concurso y la responsabilidad por insolvencia. V Congreso Español de Derecho de la Insolvencia. IX Congreso del Instituto Iberoamericano de Derecho Concursal*, Cizur Menor, 2013, p. 142

iura et de iure of 'culpabilidad' (Article 164.2 LC [153]); and *(iii)* the presumption *iuris tantum* of of 'culpabilidad' (Article 165 LC [154]).

If the material insolvency is found to be *culpable*, the insolvency court hands down a decision, which marks the closure of the sub-phase of the clarificación. The judicial assessment of the fraudulent nature of the insolvency and the indications of subjects that may be held liable for it represents the condition precedent for the applicability of a number of measures *vis à vis* those subjects, provided under Article 172 LC, such as the disqualification of directors for a period of two to fifteen years, the annulment of credits, the duty to return certain assets, and, for what matters here, the order to compensate the damages provoked.

In the light of the above, the *clarificación* has been defined as a civil remedy with a twofold punitive and compensatory nature.

It is a *lato sensu* punitive measure because it seeks to assess the conduct of the debtor and the other subjects that may be involved in the management of the company so that, in the event that they are found to be 'guilty' for having caused or aggravated the material insolvency of the debtor willingly or with gross negligence, certain consequences, both personal and personal, are produced.

Many scholars highlight that the nature of the *clarificación* is punitive, it being a phase aimed at the repression of certain conducts by means of the infliction of well-defined (civil) measures, identified by the legislature. The 'numerus clausus' of those measures, as well as that of the subject listed under Article 172 LC would reveal the typical character of disciplinary regulations, which is traceable also

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153 Article 164(2) LC exhaustively list a number of conducts whose presence automatically entail the assessment of the fraudlent nature of insolvency. SAP Barcelona, 27 April 2007 states that «(…) *el art. 164.2 LC tipifica una serie de conductas cuya realización resulta suficiente para atribuir la calificación culpable al concurso, con independencia de si dichas conductas han generado o agravado la insolvencia, y de si en su realización el deudor ha incurrido en dolo o culpa grave. Así se desprende de la dicción literal del precepto, que comienza afirmando que '(E)n todo caso, el concurso se calificará como culpable cuando concurra cualquiera de los siguientes supuestos:* […]'. *Esta expresión «en todo caso» no admite margen de exención de responsabilidad basado en la ausencia de dolo o culpa grave, pues la culpa grave subyace a la mera realización de la conducta tipificada a continuación, ya que se estima que cuando menos constituye una negligencia grave del administrador*». SAP Madrid, 5 February 2008, STS, 20 December 2012; STS, 19 July 2012; STS, 21 May 2012; STS, 16 January 2012, 6 October 2011, STS 23 February 201.

154 Article 165 LC as lastly amended by the reform of Law 9/2015, dated 25 May 2005, and illustrates some conducts which presumably entail the fraudulent nature of the insolvency, but they may be rebutted, thus complementing article 164(1)LC. The rationale underpinning the introduction of the provision is that of facilitating the evaluation of the insolvency court. STS, 20 June 2012, ECLI: ES:TS:2012:4589, STS, 17 November 2011, stating « *El art. 165 no contiene un tercer criterio respecto de los dos de los arts. 164.1 y 164.2, sino que es una norma complementaria de la del art. 164.1 en el sentido de que presume el elemento del dolo o culpa grave, pero no excluye la necesidad del segundo requisito relativo a la incidencia en la generación o agravación de la insolvencia. Si éste no concurre, los supuestos del art. 165 LC son insuficientes para declarar un concurso culpable* [Art. 165 does not contain a third criterion with respect to the two of arts. 164.1 and 164.2, but is a complementary rule to that of art. 164.1 in the sense that it presumes the element of willfuness or gross negligence, but does not exclude the need for the second requirement relating to the effect on the generation or aggravation of insolvency. If the latter does not concur, the cases of art. 165 LC are insufficient to declare a culpable insolvency] ». Similarly, SAP Coruña 28 February 2013, SAP Coruña, 31 January 2013; SAP Lleida, 24 January 2013; SAP Madrid, 9 March 2012, SAPde, 5 February 2010, 2 October 2009 .

as regards the provisions governing the clarificación [155], *i.e.* a phase pursuing the (civil) discipline of the debtor's conduct causing a fraudulent insolvency [156].

At the same time, the clarificación would also have a compensatory function, since the result of the the imposition of those sanctions would benefit the creditors by increasing the estate for the satisfaction of credits, thus combining the punitive function with the compensative one [157].

Nevertheless, it bears observing that, even where the clarificación has qualified the insolvency as culpable, the exercise of the action under Article 172 *bis* LC is not mandatory.

Moreover, to be exercised, such a liability action requires the further necessary condition, that the assets of the company are not sufficient to satisfy all the creditors [158].

Keeping that in mind, and turning the attention to the *responsabilidad concursual de los administradores* under Article 172 *bis* LC, upon initiative of the trustee, the directors, liquidators, *de jure* or *de facto*, general attorneys-in-fact, and those who have been appointed in one of those roles within the two years prior to the date of the opening of insolvency proceedings (*i.e.* the same subjects that are amenable to the *clarificación*) may be held liable - severally with the company - for the debts of the company and they are ordered to personally bear all or part of the insolvency debts, proportionally to their participation to the fraudulent conduct determining or aggravating the insolvency of the company [159].

Lacking any specification, it was unclear whether the action required to ascertain the causal link between *(i)* the conducts determining the qualification of the material insolvency as *culpable* in the *clarificación* and *(ii)* the assets shortfall (it being considered as the indirect harm provoked to the detriment of the creditors).

An intense debate has divided scholars and case-law on the legal foundation and the nature of the damage envisaged by of the action at stake.

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155 M. MARTÍNEZ MUÑOZ, 'La responsabilidad concursal', in *Cuadernos de Derecho y Comercio 201 Cuadernos de Derecho y Comercio*, 2016, 4, 60, p. 667-705.

156 J. J. GARCIA-CRUCES, 'El problema de la repression de la conducta de duedor comùn'*, cit.* p. 248. I. SANCHO GARGAZALEZ, *Las claves de la Ley Concursal,* Cizur Menor*,* 2007, pp. 1101-1102, A. PEREZ DE LA CRUZ, 'Reflexiones sobre la calificación del concurso y sus consecuencias en la nueva Ley Concursal', in *Estudios sobre la Ley Concursal. Libro homenaje a Manuel Olivencia*, V, Madrid-Barcelona, 2005, p. 5002. R. GALLEGO, 'Clarificacion del concurso y formaccion de la seccion sexts', in A. ROJO, E. BELTRAN, *Comentario de a Ley Concursal*, II, Madrid, 2004, p. 2516, I. SANCHO GARGALLO, 'Calificación del concurso', in C. QUINTANA CARLO, N. BONET, G. GARCÍA-CRUCES (eds.), *Las claves de la Ley Concursal*, Cizur Menor, 2005, pp. 545-580.

157 I. TIRADO MARTÍ, I 'Reflexiones sobre el concepto de «interés concursal» (Ideas para la construcción de una teoría sobre la finalidad del concurso de acreedores)', in *ADC*, 3, 2009, p. 1096; A. B. CAMPUZANO, 'La responsabilidad de los administradores sociales de la persona jurídica', in R. SEBASTIÁN QUETGLÁS and A.B. VEIGA COPO (eds.), *Problemas actuales del concurso de acreedores*, Cizur Menor, 2014, p. 398-399.

158 SAP Barcelona, 19 March 2007.Before the reform of 2011, the assets' shortfall was calculated by taking into account the proceeds out of the liquidation of the debtor's assets and all the creditors (including the creditors of the estate) since no exclusion was provided by the law.

159 R. RUIZ de VILLA*,* 'Primeros pronunciamientos del Tribunal Supremo sobre la naturaleza jurídica de la responsabilidad concursal de los administradores sociales (arts. 172.3 LC, originario, y 172 bis LC, reformado)', in J. A. GARCÍA-CRUCES (ed.), *Insolvencia y Responsabilidad*, Navarra, 2012, pp. 401-420, p. 418

According to the minority approach, Article 172 *bis* LC represented a 'regular' liability action, seeking the compensation for the damage generally suffered by the general body of creditor, referable to Article 1902 Spanish Civil Code [160]

Instead, according to the majority view, the provision established an *ex lege* punitive liability of directors [(161)] or, as more nuancedly stated by a more recent part of the jurisprudence, a *sui generis* liability 'por deuda aliena' [(162)].

With law 17/2014, dated 30 September 2014, the legislature put an end to the above contrast, by expressly adding the wording that the insolvency court should determine « *en la medida que la conducta que ha determinado la calificación culpable haya generado o agravado la insolvencia* [to what extent the conduct, which has determined the qualification [of the insolvency] as culpable, has generated or aggravated the insolvency] ».

Therefore, the director's liability under Article 172 *bis* LC was specifically characterised as a tortious liability action.

As a conclusive remark on this point it is noteworthy that while the intervention of the legislature has clarified the question of the legal nature of the action, nonetheless according to some scholars it has created problems of coordination with the other *corporate* actions exercised by the trustee and one of the abovementioned measures that the insolvency court may impose as an outcome of the *clarificacion* (*i.e.* the order that the subjects whose conduct was evaluated in that phase must indemnify the damage provoked with their conduct), which would overlap with the action under Article 172 *bis* LC as they both have the same objective of compensating the damage suffered by the general body of creditors [(163)].

I.3.2.3. Liability actions against the trustee

Article 36 LC governs, *inter alia*, the actions for the liability of the trustee and its auxiliaries.

The Spanish law distinguished between two actions, depending on the interest that are protected. Pursuant to Article 36(1) LC « *Los administradores concursales y los auxiliares delegados responderán frente al deudor y frente a los acreedores de los daños y perjuicios causados a la masa por los actos y omisiones contrarios a la ley o realizados sin la debida diligencia* ».

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160 STS, 23 February 2011, n. 56; STS 12 September 2011 n. 615; STS, 17 November 2011, n. 614.

161 STS, 20 April 2012, n. 259; STS, 26 April 2012, n. 255; STS, 21 May 2012, n. 298.

162 J. A. GARCÍA-CRUCES, 'Responsabilidad concursal', in A. ROJO E. BELTRÁN, *La responsabilidad de los administradores de las sociedades mercantiles*, Valencia, 2013, pp. 310-328; *Id., La calificación del concurso,* Cizur Menor, 2004, pp. 179-188; E. BELTRN SÁNCHEZ, 'La responsabilidad concursal', in J. A. GARCÍA-CRUCES (ed.), *Insolvencia y responsabilidad*, Cizur Menor, 2012, pp. 232-238; J. MACHADO PLAZAS, *El concurso de acreedores culpable. Calificación y responsabilidad concursal*, Cizur Menor, 2006, pp. 264-270. See also STS, 16 July 2012, n. 501, STS, 14 November 2012, n. 669; 20 December 2012, n. 744; 12 February 2013, n. 29; STS, 28 February 2012, n. 74

163 M. MARTÍNEZ MUÑOZ, 'La responsabilidad concursal', in *Cuadernos de Derecho y Comercio 201 Cuadernos de Derecho y Comercio*, 2016, 4, 60, p. 700.

The competence to hear the action lies with the insolvency court and the limitation period, which is expressly provided by Article 36(4) LC, is of four years (164).

Instead, Article 36(6) LC provides for the individual action of the debtor, the creditor or a third party to whom the conduct of the trustee has provoked a harm.

It is clear that the former action is an action brought on behalf of the entire body of creditors, while the second one is conceptually different as it seeks the compensation on the individual interest of the claimant. Despite the stark difference between the two judicial initiatives, there is no unanimity between scholars between the different regimes of the two actions.

Some authors label the 'collective' liability under Article 36(1) LC as an insolvency action, arising out of the breach of the contractual relationship between the general body of creditors (165), whereas the second action would have an extracontractual nature. Other authors agree on the distinction between contractual and extracontractual liability but exclude the insolvency nature of the first type of claims (166). The Spanish case-law has not taken a clear stance on the legal foundation of the action, merely considering that the action under Article 36(1) LC is a 'collective' or 'insolvency' action, the exercise of which benefit the whole body of creditors (167).

Provided that there is no indication as to the competence over the second type of actions, it is questioned whether the insolvency court should be vested with the competence to adjudicate individual actions under Article 36(6) LC (168).

I.3.2.4. Actions brought on behalf of the divested debtor

The Spanish case law seems rather unanimous in considering that actions that already existed in the legal sphere of the debtor, where brought in the context of insolvency proceedings (after it opening (169)) should fall the ordinary regime of the Code of Civil procedure, and apply the relevant substantive rules depending on the subject matter of the dispute (170). Therefore, they are not attracted before the insolvency court. This applies where such actions are brought by the insolvency trustee and *a fortiori*

164 Although scholars keep separated the action brought against directors and those *vis-à-vis* the trustee, it must be noted that the limitation period corresponds to that of director's liability actions under article 949 Código de Commercio.

165 J. QUIJANO GONZÁLEZ, 'Revista de derecho concursal y paraconcursal: Anales de doctrina, praxis, jurisprudencia y legislación', in *ISSN*, 18, 2013, pp. 1698-4188.

166 J.A. ROMERO FERNÁNDEZ, Aproximación al estudio de la responsabilidad civil de los administradores concursales, Sevilla, 2009. J ROCA GUILLAMÓN, 'Responsabilidad civil de los administradores concursales', in *Revista de Derecho Concursal y Paraconcursal*, 10, 2009.

167 STS, 11 November 2013, n. 669, SAP Córdoba, 7 July 2008, n.142.

168 R. DE ANGEL YÁGÜEZ, 'Responsabilidad de la administración concursal', in *V Congreso Nacional de la Asociación Española de Abogados Especialistas en Responsabilidad Civil y Seguro*, Pamplona. Available at www.asociacionabogadosrcs.org. (last access November 2018).

169 If proceedings commenced by the debtor (as the claimant) were already pending at the moment of the opening of insolvency proceedings, they fall in the scope of Article 51 LC (STS, 28 May 2012, n. 1044/2009).

170 STSJ País Vasco 27 January 2010, n. 1735/2007.

where the debtor is not divested [171]. In this respect it must be noted that pursuant to Article 54 LC, in case of inertia of the trustee, the action may be brought by those creditors which have formally requested the trustee to bring those actions.

As an exception to the general rule stands the allocation of the competence of actions concerning the termination of contracts to the insolvency court.

I.3.2.5. Actions for the termination of contracts

As to the termination of pending contracts to which the debtor (subject to insolvency proceedings) is a party, Article 62(1) LC provides that the opening of insolvency proceedings shall not affect the power to terminate contracts for breach by either party. Article 62(2) LC goes on by stating that the action for the termination of the contract shall be brought before the bankruptcy court and shall be decided pursuant to the insolvency *procedural* rule ('*incidente concursal*').

As to the substantive rules to be applied it appears that the ordinary provisions of Articles 1.124 and ff. Civil Code. Such an 'hybrid' regime should be applied not only where the breaching or non-performing party is the insolvent debtor (which is most typical scenario in practice) but also when the insolvent party is the complying party and, therefore, is entitled to request the termination of the contract or its performance. The competence of the insolvency court stands even if the action of resolution and the action of compliance are exercised cumulatively, despite the latter claim is not encompassed in the scope of Article 64 LC [172].

I.4. The French system and the *vis attractiva concursus*

The origin of the principle of vis attractiva concursus in the French system has ancient origins. It was already stated in Article 635 of the Commercial Code dated 1807 and was subsequently reaffirmed in law n. 67-563, dated 23 July 1967 [173], *sur le règlement judiciaire, la liquidation des biens, la faillite personnelle et les banqueroutes*.

Despite the numerous legislative reforms to which the French regime on insolvency proceedings has been subjected, this principle has never been called into question, and today it is stated in Article R-R. 662-3 Code Comm., which has kept almost unchanged its original formulation [174].

Pursuant to that provision

171 STS, 18 May 2005, n. 871/2003.

172 Order JM, 29 December 2017, Order JM Madrid, of 29 December 2017, available at www.poderjudicial.es.

173 Article 112 loi n. 67-563, dated 23 July 1967, *sur le règlement judiciaire, la liquidation des biens, la faillite personnelle et les banqueroutes* read « *Les tribunaux saisis d'une procédure de règlement judiciaire ou de liquidation des biens connaissent de tout ce qui concerne le règlement judiciaire, la liquidation des biens, la faillite personnelle ou autres sanctions, conformément à ce qui est prescrit à la loi du 13 juillet 1967 et au présent décret, à l'exception des actions en responsabilité civile professionnelle exercées à l'encontre des syndics ou des administrateurs provisoires qui sont de la compétence du tribunal de grande instance* ».

174 C. LEBEL, in *JCP* E 2008, p. 1750.

« *Sans préjudice des pouvoirs attribués en premier ressort au juge-commissaire, le tribunal saisi d'une procédure de sauvegarde, de redressement judiciaire ou de liquidation judiciaire connaît de tout ce qui concerne la sauvegarde, le redressement et la liquidation judiciaires, l'action en responsabilité pour insuffisance d'actif, la faillite personnelle ou l'interdiction prévue à l'article L. 653-8, à l'exception des actions en responsabilité civile exercées à l'encontre de l'administrateur, du mandataire judiciaire, du commissaire à l'exécution du plan ou du liquidateur qui sont de la compétence du tribunal de grande instance* ».

The French case law has always acknowledged the principle pursuant to which the insolvency court is vested with the exclusive competence to hear and determine '*tout qui concerne'* the procedures of *sauvegarde, le redressement et la liquidation judiciaires*, to the extent that it is defined an exclusive competence of public policy [175].

Although some interpretative aid may be grasped to determine the scope of the *vis attractiva concursus*, the wording adopted by the provision under discussion remains undoubtedly vague. Therefore, the jurisprudence coined an alternative formula (since then constantly used by the French Supreme Court), which allows to draw the boundaries between the allocation of the internal competence between the ordinary courts and the exclusive competence of the insolvency court

Since 1979 [176], French courts identify whether an action is attracted to the jurisdiction of the insolvency court, on the ground that an action « *stems from the (opening of the) insolvency proceedings or the procedure bears* [upon it] *a legal influence* ».

In the light of this definition, the guidelines that are (theoretically) followed by the case law would allow to group the extensive jurisprudence within three general categories of actions:

(i) actions nées de la procedure, are those disputes that could not have arisen without the opening of the insolvency proceedings, because the underlying right derives from the opening of insolvency proceedings. An action cannot be regarded as deriving from the insolvency proceedings where the action could have been brought in the same way, regardless of whether the person concerned is subject to collective proceedings;

(ii) actiones sur lesquelles la procédure exerce une influence juridique, actions that are somewhat affected by the insolvency proceedings. As efficaciously stated by an author « *peu importe que l'action ait une influence directe sur le déroulement de la procédure collective : le juge de la procédure collective est compétent si l'action est soumise à l'influence juridique de cette procédure, non au cas contraire* » [177];

It must be said, however, that the systematization of the jurisprudence on this topic reveals considerable difficulties for the foreign interpreter, since it seems that rather than proceeding by typical categories of actions, the French courts have focused on a case-by-case approach, continuing

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175 The nature of the *vis attractiva concursus* as a rule of '*ordre public*' was recently reaffirmed by Cass. Soc. 12 June 2019, n. 17-26.197, in *Dalloz*, 2019. Actu. 1277.

176 Cass. com., 11 December 1979, in *Dalloz* 1980, s. 4. See also T. Confl., 29 October 1888, DP 1889. 1. 13 « *le tribunal de la faillite connaît des actions nées de la procédure, ou sur lesquelles la procédure exerce une influence juridique* »

177 P. CAGNOLI, 'Entreprise en difficulté : procédure et organe', in *Répertoire de droit commercial*, in *Dalloz*, at [6].

to reinstate the above formula, which, however, seems to be ill-equipped to the real scope of the decisions. Recently, the *Commissaire du Government* seems to have shared that impression, suggesting that it would then be preferable to renounce to such a reductive phraseology [178].

I.4.1. The limitations to the jurisdiction of the Tribunal de Commerce

Before establishing the exclusive competence of the insolvency court for matters that are inherent to the insolvency procedure, Article R. 662-3 RR C. Comm. sets the boundaries of such a competence, illustrating three limitations to its operation which are helpful to curtail the scope of the *vis attractiva concursus*.

I.4.1.1. The different role of the *juge commissaire* and of the *Tribunal de Grande Instance*

First of all, the *vis attractiva concursus* does not concern the competence of the *juge commissaire*, who is the judicial body of the procedure entrusted, *inter alia*, with the supervision of the insolvency procedure and the activity of the trustee, together with the admission, verification and the order of payment of insolvency claims (including the right of separate satisfaction and segregation of secured creditors [179]). Instead, all the disputes falling within the scope of Article R. 662-3 C. Comm. are devolved to the *Tribunal de Commerce* (generally composed of three judges), which is the body of the procedure responsible for taking the most important decisions, such as the opening of insolvency proceedings [180], the appointment of the *juge commissaire* [181] and the trustee [182] and, depending upon the type of procedure, the *interim* prosecution of the business [183], the assessment of the date of the *cessation des paiements* [184].

I.4.1.2. Actions for the trustee's liability

As a second clarification, Article R. 662-3 C. Comm specifies that civil liability actions brought against the trustee (*recte* the *administrateur,* the *mandataire judiciaire,* the *commissaire à l'exécution du plan* or the *liquidateur*, depending upon the type of proceedings concerned) for the damages provoked in the performance of his tasks in the course of insolvency proceedings are subtracted from the jurisdiction

178 Tribunal des conflits, 13 April 2015, n. 3988.

179 See Article L. 624-2 and ff. together with Article R. 624-3 Cod. Comm.

180 See Articles L. 621-1 and L. 628-1 Cod. Comm. (*sauveguarde*), L. 631-7 Cod. Comm. (*redressement judiciaire*), L. 641-1 Cod. Comm. (*liquidation judiciaire*).

181 Articles art. L. 621-4(1) (*sauveguarde*), L. 631-9(1) (*redressement judiciaire*) and L. 641-1(2)(1) Cod. Com. (*liquidation judiciaire*).

182 On the appointment of the *administrateurs judiciaires* see Articles L. 621-4(3), (4), L. 622-1, L. 631-9 et L. 641-10 Cod. Comm.

183 See Articles L. 641-10 et L. 642-2(1) Cod. Comm. (*liquidation judiciaire*).

184 On the relationship between the bodies of the procedure and in particular the Tribunal de Commerce and the *juge commissaire* see F. PÉROCHON, Entreprise en difficulté, Paris, 2019, pp. 76-85.

of the insolvency court, to be devolved instead to the exclusive jurisdiction of the *Tribunal de Grande Instance*.

The personal liability of the trustee (and of other bodies of the procedure, such as the creditor's committee [185]) is expressly excluded from the scope of the *vis attractiva*.

The decisions rendered on this type of actions may concern, for instance, the task of the *liquidateur* to distribute the proceeds to creditors according to their ranking or the execution of the plan in the context of a procedure de *sauveguarde* or of *redressement judiciaire*.

In a recent decision, the French Supreme Court has stressed that the jurisdiction of actions concerning the personal liability of the trustee and seeking compensation for the damages provoked by him (in that case the *liquidateur judiciaire* did not consider a claim lodged by the creditor) must be treated differently from an action concerning the resolution of the *plan de sauveguarde* and the opening of the liquidation proceedings. *The Tribunal de Commerce* would have the competence to determine only the latter actions, while the *Tribunal de Grande Instance* should be seised for the former [186].

I.4.1.3. The exclusive jurisdiction of other courts

The third (implicit) exception to the competence of the Tribunal de Commerce is represented by the exclusive competence of other judicial authorities which prevails over the *vis attractiva concursus* in the event that during insolvency proceedings certain matters, falling within the sphere of their jurisdiction.

Indeed, the competence of the insolvency court yields to the exclusive competence of other national judicial authorities. For instance, the insolvency court cannot decide over the existence and the validity (for the purposes of admitting a claim with the insolvency procedure) of a claim relating to a contract concluded with a public authority ('*contrat administratif*'), which is a matter falling within the competence of the administrative court. Similarly, actions concerning tax litigations seem to pose delicate questions of demarcation [187]. In addition, some specific claims regarding the employees of the debtor should be brought before the *conseil des prud'homme*, such as disputes concerning the

185 Com. 12 Jan. 2000, no. 97-45.511.

186 Cass. Comm., 5 December 2018, No. 17-20.065, in *Dalloz*, Dicember 2018, with observations of X. DELPECH 'Action en responsabilité civile contre un organe de la procédure collective : tribunal competent. See also Cass. Comm., 12 January 2000, n. 97-45.511

187 T. Conflits, 13 November 2000, n. 3189, in *Dalloz* 2001, p. 236. the action brought by the public authority to seek the payment of a sale (covered by reservation of title, under article L. 621-124 Code Com.) against the debtor subject to *redressement judiciaire* falls within the scope of the jurisdiction of the Tribunal de Commerce. The administrative court is, in principle, competent court to rule (only) on the existence or performance of the contract. On the other hand, the insolvency court, is competent to hear the actions whose subject matter does not pertain to the existence of the contract, but merely concern the admission of the liabilities arising out of that contract or the distribution of the proceeds of assets (which do not call into question the division of jurisdiction between administrative and insolvency judicial authorities)

regularity of the procedure for the termination of employment contracts carried out during insolvency proceedings (188).

Other difficulties arise in respect to the demarcation of the jurisdiction between the *juge de l'execution* and the *tribunal de commerce*, as the interpreter is faced with two provisions which are difficult to coordinate (189).

On the one hand, the 'enforcement judge' is vested with the exclusive competence to hear all the difficulties relating to enforceable titles and disputes arising in the course of the enforcement (190). Any other judge must decline *ex officio* its competence to adjudicate over those question when arising in disputes devolved to its competence. On the other hand, Article R. 662-3 Code Comm provides that the *tribunal de commerce* has the exclusive competence to hear any dispute concerning the insolvency procedure, *i.e.* all the actions that derive directly from insolvency proceedings or that are affected from it.

Needless to say, in the light of such an allocation of competence, it is anything but rare that the *juge de l'execution* may play a role in the course of insolvency proceedings, which are by definition a form of (collective) enforcement proceedings.

According to some scholars the possible conflicts of competence that may arise should be solved according to the general principle of the *lex specialis derogat generali*, which would apply to the demarcation of competence between the enforcement judge and the court of collective proceedings, having regard to the subject matter ('*le fond du droit*') of the dispute: if the subject matter of the action merely relates to a question of enforcement, the *juge de l'execution* shall be competent (*lex generalis*). However, if the opening of insolvency proceedings affects the subject matter of the dispute, the insolvency court should be competent (*lex specialis*) (191).

In practice, however, such a demarcation has posed some uncertainties, as witnessed by some inconsistencies of the case-law on this point.

Admittedly simplifying, the competence to hear and determine actions which existed in the legal sphere of the debtor before the opening of insolvency proceedings are not covered by the competence of Article R. 662-3 Cod. Comm (192). It follows that *a fortiori* the difficulties arising in the enforcement of those claims fall within the competence of the *juge de l'execution*. The opening of insolvency proceedings does not affect the legal foundation of the action.

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188 Soc. 12 January 1999, no. 96-41.756.

189 T. Conf., 9 Mach 2015, n. 3988, available at tribunal-conflits.fr.

190 Article L. 213-6 *Code de l'organisation judiciaire* states that the *juge de l'execution* has the exclusive competence to determine « *des difficultés relatives aux titres exécutoires et des contestations qui s'élèvent à l'occasion de l'exécution forcée, même si elles portent sur le fond du droit à moins qu'elles n'échappent à la compétence des juridictions de l'ordre judiciaire* ».

191 M. HARDOUIN, 'Procédures civiles d'exécution et procédures collectives', in *Revue juridique de l'Ouest*, 1993-1994, pp. 75-83.

192 See *infra* § I.4.3.3.

As to the creditor's claims, in a recent decision, the French Supreme Court has clearly stated that the principle of the *vis attractiva concursus* attributes to the insolvency court the jurisdiction to hear the actions brought under Articles L. 632-2 Cod. Com. (*i.e.* the annulment of payments received, and preservative measures obtained by a creditor after the *cessation des paiements* where the creditor knew the situation of material insolvency of the debtor [193]) and Article L622-21 (*i.e.* the bar of individual enforcement measures) [194]. The legal foundation of those claims (*i.e.* the disputes concerning their enforcement) being influenced by the principles of insolvency law (which is clearly the case as to the bar of individual actions and the actions for the nullity or annullability of transactions detrimental to the general body of creditors), their adjudication should be deferred to the insolvency court.

By contrast, any other action where the rules of insolvency proceedings do not affect the legal foundation of (the enforcement of) the claim, any question concerning the execution should be attributed to the *juge de l'execution* [195]. This was the case, for instance, of a case regarding the enforcement of an order of payment against the public notary entrusted with the sale of the debtor's assets, who had violated the instructions of the *juge commissaire* to pay a part of the proceeds out of the sale to the *liquidateur* [196].

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193 See *infra* § 1.4.2.1.

194 Cass. Comm. 14 April 2014, n. 13-13572, available at https://www.legifrance.gouv.fr, with observations of LE MESLE, in *Bull. Joly Entrep. diff.,* 2014, 4, p. 254. One company obtained a *saisine-attribution* (*i.e.* an enforcement procedure allowing a creditor holder of an enforceable title evidencing a liquid and due claim to seize the claim that his debtor owes to a third party) *vis-à-vis* the debtor's bank accounts before the *redressement judiciaire* was opened. The Court of Appeal de Lyon considered that the Tribunal de Commerce lacked the competence to hear the action brought by the trustee, it being deferred to the exclusive competence of the enforcement judge, by virtue of article 213-6 *Code de l'organisation judiciaire*. The main argument of the Court was that the *juge de l'execution* retains the competence to decide of the « *difficultés relatives aux titres exécutoires et des contestations qui s'élèvent à l'occasion de l'exécution forcée, même si elles portent sur le fond du droit à moins qu'elles n'échappent à la compétence des juridictions de l'ordre judiciaire* ». The Supreme Court overruled such a decision, stating that actions under articles L. 622-21 and L. 632-2 Cod. Comm. stem directly from insolvency proceedings. Analogously, Paris, 17 December 2009, RG n 09/20628, in *Rev. proc. proc. coll.*, 2010. Comm. 223, note G. BLANC.

195 It bears also recalling that in 2009 the French Supreme Court has dealt with a case concerning the *lis pendens* between an action *en nullité de periode suspecte* seeking the declaration of voidness of the assignement of claims brought by the trustee before the Tribunal de Commerce, whereas the assignee had brought an action for the enforcement of the assigned claims begore the Tribunal De Grande Instance. The Supreme Court has overruled the decision of the Tribunal de Grande Instance to decline its competence, stating that both the two courts seized must retain the competence over the case submitted to each of them, until the correct qualification of the transaction (in that specific case *cession de créance* or *délégation de paiement*) is not decided. It was the Court's opinion that, should the assignment be declared void under article L. 632-2 Cod. Comm., this would have surely affected the decision of the Court de Grande Instance, but other procedural remedies would be available to avoid the risk of irreconcilable judgements (Cass. Com., 7 April 2009, n. 08-16884)

196 See Cass. Comm., 28 April 1998, n. 95-18132, available at https://www.legifrance.gouv.fr.

It seems more debated the competence of the Tribunal de Commerce over some specific disputes concerning the existence of some privileges and the ranking order between creditors [197]. In some cases, the case law has (arguably) found that they may be decided by *juge de l'exécution* [198].

I.4.2. Actions stemming from the opening of insolvency proceedings or legally affected by them

Once partially defined the scope of application of the *vis attractiva concursus*, it is now possible to examine some actions that the French case-law seems to consider as typically 'stemming from the opening of insolvency proceedings of legally affected by it', thus falling within the competence of the insolvency court.

1.4.2.1. Avoidance actions

The French version(s) of avoidance actions (commonly labelled as the '*actiones en nullité de la période suspecte*') are governed by Articles L. 632-1 - L. 632-4 Cod. Comm., which provide that, save for some specific exceptions [199], any payment or transaction undertaken by the debtor between the date of the *cessation des paiements* and the opening of insolvency proceedings are either void *iuris et de iure* or may be annulled according to the discretion of the Tribunal de Commerce (Article L. 632-2 L. Comm.) [200], if it is proven that the if it is proved that creditor (or the third party) was aware of the insolvency of the debtor if it is proved that the creditor was aware of the insolvency of the other party [201].

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197 S. PIERRE-MAURICE, 'Tribunal de commerce : organisation et compétence – Principes légaux de compétence d'attribution', in *Rép. Proc. Civ.*, 2015, at [449].

198 Cass. Com., 14 mars 1984, n. 103, in *Bull. civ.* IV, Cass. Com., 19 October 1993, n. 91-11.385, in *Dalloz*, 1994, p. 179 *Contra* Com. 6 February 1996, in *RJDA*, 6, 1996, n. 828, T. confl., 13 November 2000, n. 3189, in *Dalloz*, 2001, p. 236, Cass. Com, 28 October 1986, in *Dalloz*, 1988.

199 See article L. 632-3 Cod. Comm.

200 See article L. 632-1 Cod. Comm. and L. 632-2 Cod. Comm, pursuant to which are automatically void, *inter alia*, gratuitous transfer of movable or immovable property (Cass Com., 19 September 2018, n°17-16055); synallagmatic transactions in which the debtor's obligations significantly exceed those of the other party (Cass com 20 March 2019, n°18-12582 ,Cass com 12 June 2019, n. 18-10788); any payment, whatever the method, for debts not due on the day of payment; any payment for debts due, made otherwise than in cash or other method of payment commonly accepted in business relationships; the constitution of conventional mortgages or pledges constituted on the debtor's property for debts previously contracted (Cass. Com. 21 January 2003, n. 99-15667, C. com 14 March 2000, n. 97-18328; Cass. Comm., 4 January 2000, n. 97-15712, Cass. Com. 20 January 1998, n. 95-16402, Cass. Com. 12 November 1997, n. 95-14900, Cass. Com., 1 July 1997, n. 95-11375; Cass. Com. 28 May 1996, n. 94-10361; Cass. Com., 2 April 1996, n. 93-20562; Cass. Com., 17 November 1992, n. 90-22058; Cass. Com. 29 November 1988, n. 86-15821; Cass. Com., 11 February 1970, n. 67-13398; Cass. Com. 10 January 1983, n. 81-15389. Needless to say, the voidness of the transaction does not represent an effect *ex lege* automatically produced by the opening of insolvency proceedings, but it must be judicially ascertained by the Tribunal de Commerce, upon initiative of the trustee. It follows that should the trustee erroneously seek a declaration of inopposability of the transaction and not the declaration of voidness, the insolvency court would not be obliged to declare *ex officio* the voidness of the transaction concerned (Cass. Com. 17 April 2019, n. 18-12558).

201 The creditor's knowledge of the state of *cessation des paiements* is not presumed. The supreme Court has overruled the decision that considered the that the burden of proof was met on the sole ground of the payee's (in the case at stake a director) « *obvious personal assessment of the situation and therefore his knowledge of the insolvency* ». Cass., Com. 6 March 2019, n. 17-17686.

It is interesting to note that the 'suspect period' is not fixed, as it happens under the Spanish and the Italian system, it being contingent upon the assessment of the date of *cessation des paiements*, which is ascertained by the court opening the insolvency proceedings [202].

For present purposes it bears observing that - apart from the (now practically dispelled) uncertainties described above, which mainly arise when the creditor seeks to enforce his claim outside of insolvency proceedings - when brought by the trustee, those actions are generally considered as actions *nées de la procedure*, since their legal foundation rests on insolvency law [203].

As recently stated by the French Supreme Court « *The trustee who seeks the declaration of voidness of a transaction on the basis of the provisions of Article L. 632-1(1)(2) Cod. Comm. does not substitute itself for the divested debtor acting on his behalf, but he exercises an action in the name and in the collective interest of creditors* » [204].

Therefore, although they are not expressly mentioned by Article R. 662-3 Cod. Comm., the French case-law and the scholars seems rather unanimous in considering that the trustee, who is expressly vested with the *locus standi* to bring those actions under Article L. L632-4 Cod. Comm. must initiate the action *en nullité de la periode suspecte* before the Tribunal de Commerce [205] (and not the *juge commissaire* [206]). The case-law has also specified that where the transaction is subject to an avoidance action provides for a choice-of-forum clause, this is not enforceable against the trustee [207]

1.4.2.2. *L'action en responsabilité pour l'insuffisance de l'actif*

The *action en responsabilité pour l'insuffisance de l'actif'* (or *action en comblemebt du passif social*) plays - *recte* played - a central role in the French regulation of insolvency law.

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202 In this respect it bears noticing that the provisions under discussion are not applicable to the *sauveguarde*, where, by definition, there is no *cessation des paiments.*

203 T. Paris, 20 Dec. 2007, in *RTD* com. 2008, 421, with comments by A. MARTIN-SERF.

204 Cass. Soc., 12 June 2019, n. 17-26.197, in *Dalloz*, 2019, n. 1277 « *L'action en nullité de la transaction, fondée sur l'article L. 632-1, I, 2, du code de commerce selon lequel est nul tout contrat commutatif dans lequel les obligations du débiteur excèdent notablement celles de l'autre partie, est née de la procédure collective et soumise à son influence juridique et elle relève, par conséquent de la compétence spéciale et d'ordre public du tribunal de la procédure collective édictée à l'article R. 662-3 du code de commerce, qui déroge aux règles de compétence de droit commun. Le liquidateur qui demande à titre principal la nullité d'un acte sur le fondement des dispositions de l'article L. 632-1, I, 2, du code de commerce ne se substitue pas au débiteur dessaisi pour agir en son nom mais exerce une action au nom et dans l'intérêt collectif des créanciers de sorte que le moyen qui soutient que le liquidateur a agi en qualité de représentant de l'employeur, partie à la transaction, est inopérant* ».

205 Cass. Com., 18 May 2017, n. 15-23.973, in *Dalloz*, 2017, actu. 1117, Cass. Com., 7 April 2009, n. 08-16.884, in *Act. proc. coll.*, 2009, 10, no. 163, with comments by ROLLAND;

206 Cass. Com. 28 September 2004, in *Dalloz*, 2005. p. 297, with observations by P.-M. LE CORRE, T. Versailles, 5 Septemebr 2002, in *Dalloz*, 2003, p. 897 (« *L'action en nullité échappe à la compétence du juge-commissaire, fût-ce dans le cadre de la procédure de vérification des créances. En effet, la procédure de vérification et d'admission des créances ne tend qu'à la détermination de l'existence, du montant et de la nature de la créance, et le juge-commissaire ne peut en profiter pour annuler une sûreté prise par un créancier pendant la période suspecte* »). See also T. Chambéry, 13 March 1995, in *Rev. proc. coll.*, 1997, p. 83.

207 Cass. Comm., 17 November 2015, n. 14-16.012, in *Rev. Soc.*, 2016, p. 198.

It establishes that the *de facto* or *de jure* director of a legal person may be sentenced to bear part or all the liabilities of the company where he is found to have committed a mismanagement that contributed to the insufficiency of the assets.

To fully understand the current function of the action under discussion (which, as will be seen in the Chapters below, is of pivotal relevance for the purposes of this research) it is not possible to neglect the historical evolution of the action, which has completely overturned the very nature of the action *en comblement du passif social*.

The genesis of the action dates back to the Law 16 November 1940, on the *sociétés anonymes* [208], which provided an action sanctioning the conduct of directors in the context of insolvency proceedings. The punitive measure was subsequently extended to the directors of the companies with limited liability (*S.à.r.l.)* by Decree n. 53-706 of 9 August 1953 and, ultimately, in 1967, Article 99 of the French insolvency law provided that it to any director of a legal person exercising a business activity or pursuing, *de facto*, a lucrative activity [209].

The action regulated by Article 99 Law n. 67-563, established an *ex lege* punitive action, seeking an order condemning the director to bear part or all the debts of the company declared insolvent, whose assets proved to be insufficient to satisfy its creditors. In case of '*insuffisance d'actif*', the trustee could easily obtain such an order: the rule of Article 99 provided a simplified regime of a double presumption (*iuris tantum*). Neither the proof of the director's negligent conduct, nor the causal link with damage provoked by it was incumbent upon the trustee. On the contrary, it was up to the director to demonstrate that he had acted in compliance to the duties of care and loyalty provided by the law, in order to avoid the assessment of his liability.

It is noteworthy that, in the light of the profound difference between the *action en comblement du passif* and the ordinary civil regime of director's liability [210], the French jurisprudence was unanimous in allowing that under the regime established by the Law n. 67-563, the trustee could bring together an action *en comblement du passif* and an ordinary liability action based on civil and company law [211].

The punitive nature of the action under Article 99 Law n. 67-563 was radically amended by the law dated 1985, which eliminated the double presumption regime, thus approaching the nature of the *action en comblement du passif* to that one of an action pursuant to the ordinary civil and commercial regime [212], since the new rule established that the burden of proof (concerning the negligence and

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208 *Loi* n. 40-383, dated 16 November 1940, in *JORF* of 26 November 1940, p. 5828.

209 *Loi* n. 67-563, dated 23 July 1967, *sur le règlement judiciaire, la liquidation des biens, la faillite personnelle et les banqueroutes*. In anticipation of what will be explained in detail afterwards, it bears keeping in mind that, in the *Gourdain* case, the ECJ decided on the action regulated by article 99 law n. 67-563.

210 J. GUYÉNOT, 'Une analyse des dispositions de l'article 180 de la loi du 25 Janvier 1985 en comparaison des dispositions de l'article 99 de la loi du 13 Juillet 1967', in *Rev. huissiers*, n. 21, 1986, p. 1022.

211 See Cass. Comm. 22 May 1957, in *RTD com.*, 1957, p. 1015; Cass. Com., 16 April 1991, in *Bull. Joly*, 1991, p. 705.

212 See article 180 law 85-98, dated 25 January 1985, in *JORF* of 26 January 1985. As stated by scholars « *la loi du 25 Janvier 1985* [a] *réformé les conditions de fond de l'action en comblement du passif pour en faire une pure et simple action*

the causal link with the damage) lied with the trustee. A significant amendment consisted in the fact that the Court was granted the discretion to decide whether (or to what extent) condemning the director to bear the company's liability, irrespective of the actual assessment of his liability.

In that constellation, the French Supreme Court was somewhat forced to overrule its precedent case-law allowing the possible accumulation of the insolvency liability action with the civil liability action. Therefore, the nature of the two actions being almost coincident, from 1992 it is settled case law that, when the condition for its exercise are met [213], the *action en comblement du passif* [214] prevails over an ordinary action [215]. However, an individual tort action brought by a shareholder or a third party for the direct prejudice suffered due to the conduct of the director was considered (as still is the case) admissible.

The current statutory location of the rules concerning the *action en comblement du passif* is to be found in Articles L. 651-2 – 651-4 Cod. Comm. (read in conjunction with Articles R. 651-1 to R. 651-3, R. 651-6 and R. 661-1 Cod. Comm.). The rules governing the action were amended at various times, the reforms of 2005 (*loi de sauvegarde*)[216], 2008 [217] and 2010 [218] had a significant importance, since - while maintaining the nature of the action as amended in 1985 - have significantly enhanced the indemnification nature of the action and weakened the sanctioning profile [219]. For instance, the law

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en responsabilité civile pour faute quant à sa nature ». See J.-J. Daigre, 'Entreprise en difficulté : personnes morales et dirigeants – Sort des membres ou associés, des partenaires et des dirigeants de la personne morale en redressement judiciaire', in *Repertoire de droit commercial*, December, 1996.

213 See *infra* in this paragraph.

214 C.A. PARIS, 2 April 1992, in *RJDA*, 8-9, 1992, n. 871; Cass. Comm., 31 January 1995; Cass. Comm. 28 February 1995, Cass. Comm., 21 March 1995, Cass. Comm., 9 May 1995, Cass. Comm., 6 June 1995; Cass. Comm., 20 June 1995. See also M.-C. PINIOT, 'Responsabilité civile des dirigeants sociaux. Non-cumul des actions du droit des sociétés et du droit des procédures collectives', in *RJDA*, 7, 1995, p. 639. J.-J. DIAGRE, 'Une évolution jurisprudentielle bienvenue, le non-cumul de l'action en comblement du passif et des actions en responsabilité de droit commun', in *Bull. Joly*, 1995, p. 953.

215 Therefore, the following actions brought by the trustee on behalf of all creditors were excluded: an ordinary tort action against directors under articles 1240 (formerly art. 1382-1383) French Civil Code, a tort liability action against directors under article 180 of the law 85-98 (*redressement et à la liquidation judiciaires des entreprises*), a liability action against directors under article 1850 Civil Code (company law), an action under articles L. 223-22 ou L. 225-251 du code de commerce (formerly articles 52 and 244 law 24 July 1966) and a (contractual) action brought by an individual shareholder based on the abovementioned company law.

216 See Loi n. 2005-845, dated 26 July 2005. The law of 2005 had introduced a new action against directors, named the *action en obligation aux dettes sociales*' (article L. 651-1 Cod. Comm.). The operation of the *action en obligation aux dettes sociales* raised significant issues in practice as its scope frequently ended up in overlapping with that of the *action en comblement du passis*. Therefore, in 2008 the French legislature abrogated the provision of article L. 651-1 Cod. Comm.

217 See Ordonnance n. 2008-1345, dated 18 December 2008.

218 See Ordonnance, n. 2010-1512, dated 9 December 2010, which has amended article L. 651-2, alinéa 2 Cod. Com. in order to allow, in the event of judicial liquidation of a sole trader with limited liability, that an action *en comblement de passif* may be brought against him, with regard to his personal assets ('*patrimoine non affecté*') (« *Lorsque la liquidation judiciaire a été ouverte ou prononcée à raison de l'activité d'un entrepreneur individuel à responsabilité limitée à laquelle un patrimoine est affecté, le tribunal peut, dans les mêmes conditions, condamner cet entrepreneur à payer tout ou partie de l'insuffisance d'actif. La somme mise à sa charge s'impute sur son patrimoine non affecté* »). It is the unique case where the action is not brought against directors but *vis-à-vis* the debtor.

219 C. MASCALA, 'Le comportement fautif du chef d'entreprise: de la sanction à la réparation?, in La loi du 25 janvier 1985 a 20 ans! Entre bilan et réforme', in *RLDA*, March 2005, p. 71. See also

of 1985 had retained the punitive measure establishing the possibility that, following the judgement *en comblement du passif*, the collective procedure could be extended *de iure* towards severally liable shareholders [220]. The automatic opening of collective proceedings against shareholders or members of a legal entity jointly and severally liable for the company's liabilities (formerly provided under Article L. 624-1 Cod. Comm.) has been abolished by the law of 2005. Because of that, insolvency proceedings may be opened against those subjects where all the ordinary conditions provided by the law are met (which may well be the case, in practice), but not as a punitive measure, regardless of their fault.

It bears noticing also that the law of 2008 has significantly curtailed the scope of application of the action *en comblement du passif* (which was renamed in 2005 '*action en responsabilité pour l'insuffisance de l'actif*', thus reflecting its close nature with the ordinary civil and commercial action). Before 2008, the action was applicable in the context of the *sauveguarde*, the *redressement judiciaire* and the *liquidation judiciaire*. The broad scope of operation of the action represented, however, a disincentive for debtor to recur to the (rescuing) *sauveguarde* procedure. With a view to make the anticipated recourse to said rescue collective proceedings more appealing, the French legislature not only excluded the *sauveguarde* from the scope of application of the severe regime against directors provided by article L. 651-2 and ff. Code Comm. The *redressement judiciaire* was also subtracted from the scope of application of the *action en comblement du passif* [221].

Turning briefly to the main features of the current rules governing the action [222], keeping in mind that it applies only in the context of the *liquidation judiciaire* [223], Article L. 651-2 Cod. Comm. reads

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220 Se on this point, F.-X. LUCAS, 'Interrogations sur la qualité de commerçant de l'associé en nom', in *Procédures collectives et droit des affaires*, in *Mél. en l'honneur d'Adrienne Honorat*, 2000, p. 281.

221 It must be mentioned that, however, the loi du 12 March 2012 has introduced severe measures against directors in the context of *redressement judiciaire* (see, for instance art. L. 631-10-1 Cod. Comm).

222 The same regime described in the text with reference to the *action en comblement du passif* applies, *mutatis mutandis*, to the action brought by the trustee against the mother company, where the *liquidation judiciaire* opened against the daughter company proves that the assets are insufficient to satisfy the insolvency creditors and the conduct of the mother company has contributed to such insufficiency. See article L. 512-17 Cod. Comm.

223 The fact that the *action en comblement du passif* can be exercised in the limited context of the *liquidation judiciaire*, in addition to depriving the company of economic resources useful for the success of the restructuring plan (deriving from the proceeds of the action, see C. MASCALA, *op. cit.*, p. 76), does not shield directors from the risk that the action will be brought at a later date. It must be recalled that, in the event of default of the rescuing plan in the context of the *sauvegarde* or of the *redressement judiciaire*, as soon as the debtor's state of *cessation des paiements* is assessed, under articles L. 626-27 and L. 631-20-1 Cod. Comm. the insolvency court may open judicial liquidation proceedings against the debtor. The *action en comblement du passif* may then be brought by the trustee, concerning the director's conducts undertaken after the opening of the rehabilitation proceedings, contributing to the deficiency of assets. In that case, the moment in time when the limitation period should commence, is the date of the judicial declaration of the plan's termination (Com. 20 January 1998, n. 95-19.488 P, in *Dalloz* 1998). As noted by scholars, considering that a rescuing plan may last for many years, directors are left with the restlessness that an action can be still brought against them (See P. LE CANNU, 'La responsabilité civile des dirigeants de personne morale après la loi de sauvegarde des entreprises du 26 juillet 2005', in *Rev. sociétés*, 2005. p. 743). It follows from the foregoing that an *action en comblement du passif* may be brought either when the *liquidation judiciaire* is opened against directors *ab insitio*, or also when the judicial liquidation is pronounced during the observation period of the *sauvegarde* or the *redressement judiciaire*; or when the judicial

« *Lorsque la liquidation judiciaire d'une personne morale fait apparaître une insuffisance d'actif, le tribunal peut, en cas de faute de gestion ayant contribué à cette insuffisance d'actif, décider que le montant de cette insuffisance d'actif sera supporté, en tout ou en partie, par tous les dirigeants de droit ou de fait, ou par certains d'entre eux, ayant contribué à la faute de gestion. En cas de pluralité de dirigeants, le tribunal peut, par décision motivée, les déclarer solidairement responsables. Toutefois, en cas de simple négligence du dirigeant de droit ou de fait dans la gestion de la société, sa responsabilité au titre de l'insuffisance d'actif ne peut être engagée. Les sommes versées par les dirigeants* […] *entrent dans le patrimoine du débiteur. Elles sont réparties au marc le franc entre tous les créanciers. Les dirigeants* […] *ne peuvent pas participer aux répartitions à concurrence des sommes au versement desquelles ils ont été condamnés* ».

The conditions precedent for the (*de iure* or *de facto*) director's liability under Article L. 651-2 Cod. Com. is the opening of insolvency proceedings and the *insuffisance d'actif*. Asset insufficiency is the difference between the debts and company's assets, and therefore the net liabilities: the portion of debts not covered by social assets. The debt results from verified and accepted insolvency claims [224]. The assets correspond to the market value of the proceeds from their realisation in the context of the procedure [225]. The *insuffisance d'actif* may be assessed at any stage of the procedure, without awaiting for the end of the procedure, because it is not required that it is precisely quantified, as it is sufficient that it is certain [226].

Apart from this, what is important to observe for present purposes is that the substantive nature of the right underlying the action, albeit not perfectly coincident [227], is very close to an ordinary civil tort action (which, as discussed, is non-cumulable with an *action en comblement du passif*). The action is

liquidation is opened, after resolution of the *sauvegarde* or the *redressement judiciaire*, because of the *cessation des paiements* observed during the execution of the above procedures, under the respective conditions.

224 Asset deficiency is therefore different from the mere cessation des paiements because it compares all liabilities payable to all the company's assets, regardless of the debtor's possession (Com. 24 mai 2018, n. 17-10.117, in *RJDA*, 2018, n. 667 « *L'existence d'une insuffisance d'actif ne peut se déduire de l'état de cessation des paiements* ».

225 The sale price alone, however, cannot be taken into account, since it may be determined by considerations entirely unrelated to the real value of the company. F. PÉROCHON, *Entreprises en difficulté*, Paris, 2014, at [1706]. T. MONTEÉRAN, 'Pour améliorer le droit des entreprises en difficulté, osons la réforme', in *Gaz. Pal.*, 23-24 January. 2008, p. 13. See also, Cass. Com., 18 March 2008, in *Dalloz*, 2009, p. 349.

226 See, *ex multis*, Cass. Com. 7 June 2005, in *JCP E*, 2005, p. 2058 and Cass. Comm., 25 January 1994, in *Bull. civ.*, IV, n. 32. In this case the court would pronounce a provisional judgement to be finalised in the *quantum* when the exact amount of the net liabilities is known (Com. 30 June 2015, n. 13-28.537, in *Gaz. Pal.*, 18-20 October 2015, p. 36).

227 In particular, reference is made here to the different limitation period, which, in the case of the *action en comblement du passif*, expires after three years following the judgement opening the *liquidation judiciaire*, regardless of the moment in time when the unlawful conduct of the directors was undertaken. Cass. Com. 8 April 2015, n. 13-28.512, in *Dalloz Actualité*, 2015, n. 862.

based on the traditional triad damage [228], unlawful conduct (in this case, the '*faute de gestion*') [229] and causal link [230]. The burden of proof, as anticipated, lies with the claimant.

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228 The element of the damage is somewhat absorbed in the assessment of the deficiency of the company's assets, which, as discussed, is a condition precedent to the *action en comblement du passif*.

229 According to the text, the relevant unlawful conduct of the director must be a mismanagement. It was submitted that the '*faute de gestion*' should not be understood strictly and distinguished from the general duty of directors to comply with obligations incumbent upon him by virtue of the law or the bylaws. (see article 1850 Code Civil). The expression 'faute de gestion' must be understood as « *any fault committed in the general administration of the legal person* [toute faute commise dans l'administration générale de la personne morale] » (R. ROBLOT, *op. cit.,* at [3285]). The loi n. 2016-1691 dated 9 December 2016 (*relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*) excluded the liability for insufficient assets in the event of simple negligence on the part of the director. Also, the director may not be personally sanctioned on the basis of art. L. 651-2 Code Comm., provided that he has not committed any management fault, notwithstanding the company's bad performance due to the unfavourable economic situation (Cass. Comm. 30 January 2019 n. 17-31009, *business judgement rule*). The case-law on what may constitute a director's mismanagement within the meaning of Article 651-2 Code Comm. is extensive. *Inter alia*, it may be recalled here T. Paris, 8 September 2000, in *Droit des sociétés*, 2001, 5, which considered that the mismanagement of the directors was represented by the fact that it had not set up an organisational structure and management tools sufficient to allow him or the company to ascertain the actual financial and economic situation of the company, so as to be able to put in place a timely and effective reaction to the crisis situation. This 'anarchy' - as the court defines it - was then the cause of the insufficiency of the assets that was accrued without even the administrator had noticed. Also, the director's mismanagement was found where the business activity was voluntarily continued when the director knew that the undertaking was materially insolvent (see, *ex multis*, Cass. Comm. 4 December 2013, in LEDEN, 2/2014, p. 3; Cass. Comm. 14 January 2004, in *Droit des sociétés*, 2004, p. 168; T. Douai, 29 November 2012, in *RTD Comm.*, 2013, p. 334; T. Versailles, 13 November 2018, n. 18/02009, in *JCP E*, 2019, p. 1162 - where the company continues the business activity, notwithstanding the fact that it had been subject to several restructuring proceedings. See also Cass. Comm. 20 March 1999, in *RJDA*, 1999, n. 704; Cass. Comm., 27 April 1993, n. 91-14.204.P, in *Dalloz*, 1993, IR 120; Cass. Comm. 14 Mat 1991, n. 89-19.081.P). The failure to refrain from continuing the activity without obtaining the resources necessary to recapitalise the company also constitutes a *faute de gestion.* See Cass. Comm., 12 July 2016, n. 14.23.310, in *Rev. Sociétés*, 2017, p. 44. Similarly, the failure to inform and consult the general shareholders' meeting when a loss of 50% of the share capital occurs (under article L. 223-42 Cod. Comm.) and the failure to demand the recapitalisation of the company represent a mismanagement on the part of directors, T. Paris, 17 February 2009, in *RJDA*, 2009, n. 564 and Cass. Comm., 13 October 2015, n. 14-15.755, in *RJDA*, 206, n. 136. The *faute of gestion* occurs also in case of accounting manoeuvres directed at artificially reduce losses, concealing the actual situation of distress of the company, in order to induce (new) creditor's reliance (Cass. Comm., 18 January 2014, in *BJS*, 2000, p. 498, Cass. Comm., 11 February 2014, in *Rev. sociétés*, 2014, p. 455). Directors mismanage the company also where they cooperate to the pay-out of dividends to shareholders, thus depriving the company of the liquidity necessary to continue the business activity. See Cass. Comm. 25 October 2011, in *BJS* 2012, p. 243 (in Cass. Comm. 24 May 2018, n. 17.10.1999, in *LEDEN*, 7/2018, p. 6, the pay-out also prevented the continuation of a crucial pending lawsuit). The mismanagement may also result in the late disclosure of the *cessation des paiements* (see, *ex plurimis*, T. Rennes, 5 April 2000, in *Dr. Sociétés*, 2001, n. 42 and T. Paris 27 February 2001, in *RJDA,* n. 888). In the latter case, the failure to declare the material insolvency of the company within the time-limit established by the law (two months) must be assessed with regard to the date of *cessation des paiements* as assessed by the judgement opening insolvency proceedings. Cass. Comm., 4 November 2014, n. 13.23.07.P., in *Dalloz Actualité*, 2014, n. 2238; Cass. Comm., 20 March 2015, n. 12-16.956.P, in *Dalloz Actualité*, 2015, n. 678. Cass. Comm., 27 September 2016, n. 14-50-034, in *Rev. Sociétés*, 2016, p. 767, T. Versailles, 20 February 2018, n. 16/09049, in *BJS*, 2018, p. 532. The appointment of a *mandataire ad hoc* does not deprive the directors of their powers of management, Therefore, they cannot invoke the appointment of the *mandataire ad hoc* to justify the violation of their duties. See Cass. Comm., 18 May 2016, n. 14-16.895, in *Rev. Sociétés*, 2016, p. 621. On the contrary, the case-law excuded the *faute de gestion* where, for instance, the director informed of the financial situation of the company accepted to be appointed and managed (diligently) the company until the inevitable *cessation des paiements* (see Cass. Comm., 18 November 1992, n. 90-20-299.P, in *Dalloz*, 1992, IR 277). Also, the inadequacy of the recapitalisation of the company cannot be attributed to a mismanagement of the director, as it is a task incumbent upon shareholders (see Cass. Comm. 10 March 2015, in *Dalloz Actualité*, 2015, n. 678).

230 The director of a legal person may be held liable (and therefore condemned to bear all the company's debts which are not covered by the debtor's assets) on the basis of Art. L. 651-2 Cod. Comm. even if the

A special feature of the action *en comblement du passif*, which differentiates it from an ordinary civil law action [231], is that, even where the liability of the director is ascertained, the court retains full discretion in deciding whether condemning the director to bear the debts which the assets are insufficient to satisfy, and, in case, the amount of the debts to be borne by the director [232]. The only limit to the court's decision is represented by the 'amount of the [insufficient] asset' [233].

Moving to the procedural aspects of the *action en comblement du passif*, in principle the *locus standi* lies with the trustee (and the public prosecutor), pursuant to Article 651-3 Cod. Comm.

In some circumstances (namely the trustees' inertia) the action may be also exercised, on behalf of all the creditors [234], by the s.c. creditors '*contrôleurs*', that represent the majority of insolvency creditors [235].

Under Article R. 651-1 Cod. Comm. (and of course R. 662-3 Code Comm) the insolvency tribunal has the exclusive competence to hear and decide on the *action en comblement du passif*.

In the light of the above, despite the amendments that the reforms have embedded to the *action en comblement du passif*, which - by amending the 'punitive' nature of the action - have significantly approached its nature to that of an ordinary tort action on the basis of Article 1382 French Civil Code, it may be inferred that the French legislature still considers that the action under Article L. 651-2 Cod. Comm. as an action which is still considered as affected (or affected to a sufficient extent) by the opening of the insolvency procedure.

Indeed, the action may be brought only in the context of insolvency proceedings (*recte* of the *liquidation judiciaire*) and the condition precedent of the assessment of the *insuffisance de l'actif* represents an element that intertwines the action to the procedural context of the insolvency

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mismanagement is only one of the causes of the asset deficiency. It must be highlighted that the mismanagement must have contributed, not to the company's insolvency, but to the insufficiency of assets.

231 See Cass. Com. 12 June 2019, n. 17-23.176, where the Supreme Court stated that the action « *diffère d'une action en responsabilité de droit commun en ce que le juge a la faculté, même après avoir retenu l'existence d'une faute de gestion commise par un dirigeant, de ne pas prononcer de condamnation ou de moduler le montant de la condamnation indépendamment du préjudice subi par les créanciers de la société en liquidation judiciaire, ce qui garantit une prise en compte proportionnée des circonstances de chaque espèce* ».

232 The decision concerning the *quantum* of the director's conviction being a decision on the merits, the Cour de Cassation has no jurisdiction to assess the proportionality of the decision of the court of first instance. Cass. Com. 9 May 2018, n. 16-26.684 P, in *Dalloz*, 2018.

233The reform of 2008 substituted expression « *dettes de la personne morale* » with the wording « *montant de* [l'] *insuffisance d'actif* », thus clarifying that the director's conviction cannot exceed the deficiency of the assets as assessed on the date in which the judgement is rendered.

234 The fact that the contrôleurs must act in the interest of all creditors precludes that the *action en comblemend du passif* can be brought when they act only on behalf of a part of creditors. The exercice of the substitutive *locus standi* of the creditors is subject to a number of formalities (article R. 651-4 Cod. Comm.). See Cod. Com. 24 May 2018, n. 17-10.005 P, in *Dalloz*, 2018.

235 It was submitted that the alternative creditors' *locus standi* has significantly weakened the criticisms regarding the rule of non-cumulation of an ordinary tort action and the *action en comblement du passif* ()

procedure (the legal foundation of the action, however, does not seem to be affected anymore by the existence of the procedure).

Because only the *action en comblement du passif* is attracted to the insolvency court it must be highlighted that all the other actions in the interest of the general body of creditors must be brought by the trustee before the ordinary civil and commercial courts (for instance where the *action en comblement du passif* is not applicable, *i.e.* in the context of the *sauveguarde* or the *redressement judiciaire* or when the *liquidation judiciaire* proves that the assets are not insufficient, thus precluding the operation of Article L. 651-2 Cod. Comm., but still the conduct of the director has caused a prejudice to the body of creditors).

In this respect it is understood that a part of French case-law submits that the *action en comblement du passif* regards the only the conduct of the director prior to the opening of insolvency proceedings [236]. The actions concerning the mismanagement of the director subsequent to the judgment may be prosecuted under the ordinary civil or company law, whether it is Article 1240 of the Civil Code (formerly Article 1382 Code Civil), or Articles L. 223-22 or L. 225-251 Commercial Code.

1.4.2.3. Actions concerning the termination or the continuation of contracts (and the residual category of actions implying the application of rules governing insolvency proceedings)

Another recurring principle that seems to guide the interpretation of the scope of application of the *vis attractiva concursus* is whether the decision of the dispute involves the application of insolvency rules (« *la solution du litige ne met pas en jeu les règles applicables aux procédures collectives* »).

On this ground, it seems established case-law that actions (only) concerning the exercise of trustee's power to terminate or continue the pending contracts that were concluded by the debtor *in bonis* with a third-party fall within the scope of Article R. 622-3 Cod. Com. [237]. The French Supreme Court has further made it clear that the exclusive competence of the Tribunal de Commerce stands also when the action concerns an immovable property [238].

Any action concerning the 'fate' of the contract following the exercise by the trustee of such a power, are instead excluded from the *vis attractiva concursus* and must be brought before the ordinary courts, because the dispute could have been brought also independently from the opening of the insolvency procedure [239]. It is important to recall here that for all actions which remain subject to the rules of

236 Cass. Com., 14 March 2000 n. 97-17753.

237 T. Versailles, 1 July 1999, in *Act. proc. coll.*, 2000. Comm. 34, with (critical) comments by VALLANSAN.

238 C.A. Paris, 6 March 1991, in *Dalloz,* 1991. Cass. com., 25 January 1994, in JCP 1994, II, p. 22290, with observations by L. LEVY.

239 Cass. Comm., 9 April 1991 and 1 October 1991, in *Dalloz* 1993. s. 10, with comments of F. DERRIDA.

ordinary jurisdiction (but only for those [240]), the contractual provisions adopted by the parties continue to apply [241], whether they are choice-of-court clauses [242] or an arbitration clause [243].
By the same token, any action arising out of the divestment of the debtor have been considered attracted to the exclusive competence of the insolvency court [244].

I.4.3. Actions excluded from the scope of Article R. 662-3 Cod. Com.

At this point of the reasoning it is appropriate to analyse the treatment of the actions that are brought by the trustee on behalf of all the creditors [245]. In this respect it must be stated that Article L. 622-20 Code Comm. provides that *mandataire judiciaire* [246] « *a seul qualité pour agir au nom et dans l'intérêt collectif des créanciers* ». Such a provision establishes the monopoly of the trustee, acting as a body of the procedure, to exercise any action against third parties seeking the compensation for the harm collectively suffered from the general body of the creditors [247].
It is understood that, however, such a general *locus standi* of the trustee is considered by the constant orientation of the case-law as non-exclusive, because the individual creditor would still be entitled to bring an action against the third party acting for his own interest ([248]).

I.4.3.1. Le *soutien abusif du credit*

The first action that must be taken into account is the action for the *soutien abusif du* credit, which, as discussed, aims at compensating those situations in which any third party (usually a bank, financial institution or privileged partner) has provided support, through loans or other facilities (e.g. willing failure to recover a claim as it falls due) where, if that support had not been granted, the insolvency of the debtor would have been disclosed.

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[240] Cass. Comm., 20 February 1996, n. 92-21.945, confirming the inopposability of a prorogation clause to the trustee in the context of an action challenging the authorisation of the *juge commissaire* to the termination of a contract of a licence contract.

[241] Cass. Comm., 6 June 1995, n. 93-14.356.

[242] Cass. Com., 14 April 1992, in *Bull. civ.*, V, n. 157 and Cass. Comm., 17 January 1995, in *Dalloz*, 1995. IR. 66.

[243] Cass. Comm., 19 May 1987, in *Dalloz*, 1988.

[244] T. Paris, 6 mars 1991, in *Dalloz*, 1991, IR 127.

[245] Some of the observation expressed here may be applicable *mutatis mutandis* also to the *action en comblement du passif,* where undoubtedly the trustee acts in behalf of the general body of creditors see *supra* § 1.4.2.2.

[246] Such a principle applies also as regards the *commissaire à l'exécution du plan* (Article L. 626-25 C. Comm.) and *the liquidateur* (Article L. 641-4 Cod. Comm.).

[247] L. SAUTONIE-LAGUIONIE, 'Exercice de l'action paulienne'. See Com. 13 November 2001, n. 98-18.292, in Dalloz, 2001. 3617, with comments by A. LIENHARD; Cass. Com. 9 July 2002, in *Rev. proc. proc. coll.*, 2004, 69, with comments by BLANC, Cass. Civ., 29 May 2013, n 12-16.541, in *Bull. Joly*, 2013, with comments by L. SAUTONIA-LAGUIONIA.

[248] Cass. Com., 8 October 1996, n. 93-14.068, in *Bull. civ.*, IV, n. 277. See J. MESTRE, Des effets de l'action paulienne, in RTD, 199, p.116

The basis assumption according to which the (financial) support is defined a 'abusive' is that it should not have been granted by a diligent third-party (that should have perceived the serious financial distress of the debtor) as it may damage the undertaking's 'new creditors': indeed if the support had not been granted, the creditors, or at least some of them, would not have contracted with the company which would have (or should have) already ceased its activity [249]. Therefore, at the outset, it must be highlighted that the prejudice which the action aims at indemnifying is that one suffered by the s.c. 'new creditors', *i.e.* creditors whose claims arose after the moment in time when, without such support, the state of *cessation des paiements* of the debtor would have been revealed. It follows that the liability of the third party is equal to the increase in the insufficiency of assets, the worsening of the material insolvency of the debtor.

Before 2005, there was no specific provision in the French system regulating the financing third party's liability *vis-à-vis* creditors in the context of insolvency proceedings.

Nevertheless, the French case-law (unlike the Italian one) allowed the trustee to directly bring an action seeking the indemnification of the prejudice suffered by the creditors due to the conduct of the third party granting (*inter alia*) new finance to the debtor facing insurmountable difficulties. The action was considered as based on general tort law (Article 1240 French Code Civil), thus requiring the trustee to prove the damage suffered by the creditors, the unlawful conduct of the third party and the casual link between the two [250]. The French Supreme Court ruled on many occasions that the unlawful conduct characterising the *soutien abusif* was represented by the fact that the third party granted the credit to the debtor when he knew or should have known that the financial situation of the latter was irremediably compromised [251].

Lacking any restriction to the exercise of the action in the context of insolvency proceedings, it was settled practice that trustee resorted almost always to this type of actions against banks and credit institutions, thus discouraging the lending of new finance to distressed (but potentially rescuable) companies [252].

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249 Cass com 27 March 2012 n. 10-20077.

250 Article 1240 Code Civil (formerly Article 1382 Code Civil) reads « *Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer* ».

251 See, *ex multis*, Cass. Com., 7 June 2006, n. 05-14076; Cass. Comm., 25 April 2006, n. 04-17462; Cass. Comm. 8 November 2005, n. 0410906; Cass. Comm., 22 March 2005, n. 03-12922. In C.A. Pau, 15 February 2005, in *Jurisdata*, n. 269250, the finance leasing was assessed as a *soutien abusif* since the court found that there was a significant difference between the credit granted and the actual value of the business, which rendered impossible for the creditor to be fully repaid of his credit. The credit was granted with the objective of allowing the company (in distress) to repay newly contracted debts, continue the business and recapitalise the company. For a study concerning the case-law before the reform, see P.-M. LE CORRE, 'Droit et pratique des procédures collectives', in *Dalloz Action*, 2012/2013, n. 833.

252 As emerges from the Report accompanying the reform of 2005, « *Le cantonnement du champ ratione materiae à trois cas limitatifs et d'appréciation a pour objet de lever l'aléa juridique né des évolutions de la jurisprudence par une consécration législative des principaux fondements de la responsabilité des créanciers retenus par les tribunaux* ». see Ph. Marini, Commission des Finances pour l'État, Avis n. 355, dated 26 May 2005.

By law dated 20 July 2005, n. 845 [253], the French legislature introduced a specific presumption concerning the liability of creditors for the deterioration of the debtor's insolvency.

Article L. 650-1 Cod. Comm. states that

> « *les créanciers ne peuvent etre tenus pour responsables des préjudices subis du fait des concours consentis, sauf les cas de fraude, d'immixtion caractérisée dans la gestion du débiteur ou si les garanties prises en contrepartie de ces concours sont disproportionnées à ceux-ci* [creditors cannot be held liable for the damages suffered as a result of the assistance granted, except in cases of fraud, gross interference in the debtor's management [of the business] or if the guarantees taken in return for such assistance are disproportionate to them] »

The declared objective of said provision is that of encouraging the financial support (in particular on the part of banks and credit institutions) for companies in difficulty. The impact of the reform of 2005 was significant, as it curtailed the liability for the s.c. '*soutien abusif*' within the specific cases provided under Article L. 650-1 Cod. Comm [254].

It follows that the exercise of the action under the reformed regime has rendered much more difficult for the trustee (but also for a third party who is directly prejudiced by the conduct of the lander, such as a co-borrower [255]) to bring an action for *soutien abusif* as it may be brought only in the three hypothesis [256] that *(i)* the third party (and the debtor) have acted fraudulently [257], *(ii)* the financing

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253 See Loi n. 2005-845 du 26 July 2005 *de sauveguarde des entreprises*, art. 126. The introduction of article L. 650-1 Cod. Com. was anticipated by the proposal for the introduction of a mitigation of the liability concerning the lending of finance to a debtor in distress in the context of the procedure of *conciliation*. Cfr. article 8 of the *projet de loi* dated 12 May 2004. The rationale underpinning the proposal was that in the context of that proceedings the resolution of the debtor's crisis is negotiated between the parties, which are all informed of the situation of the debtor and of the lending of new finance.

254 On the reform of 2005, see, *inter alia,* D. LEGEAIS*,* 'Les concours consentis à une entreprise en difficulté', in *JCP* E, 2005, p. 1510*;* P. HOANG*, 'La responsabilité des créanciers dispensateurs de crédit', in Dalloz, 2006, Chron. 1458*. D. ROBINE, 'L'article L. 650-1 du code de commerce : un cadeau empoisonné', in *Dalloz*, 2006. Chron. 69.

255 See on this point Cass. Comm. 17 September 2013, n. 12-21871.

256 For further case-law on the three hypotheses where the *soutien abousif* may be claimed, see H. KENSICHER, 'Six ans déjà, et toujours rien de bien rassurant à propos de l'article L. 650-1 du code de commerce', in *Journal des sociétés,* 3/2012, p. 29. Article L. 6-650-1 Cod. Comm. does not address the settled hypothesis of liability singled out by the case law before the reform of '*crédit ruineux pour l'entreprise*' (*i.e.* a loan the amount and cost of which are incompatible with the company's financial situation and its ability to repay it) and the '*connaissance de la situation irrémédiablement compromise de l'entreprise*'. It is submitted that under an (arguably) broad interpretation, they may be subsumed under the scenario of the third party's fraudulent conduct. D. ROBINE, *op. cit.,* at [25].

257 On the (unproblematic) notion for fraud see Cass. Com. 13 December 2017, n. 16-21.498, T. Chambéry, 7 June 2018, n. 17/00741, in *Gaz. Pal.*, 15 January 2019, p. 78, T. Orléans, 13 January 2011, T. Versailles, 20 January 2011, in *JCP E*, 2011*,* p. 1882, n. 10. (« *fraud in civil or commercial matters is not dissimilar to criminal fraud and is an act which has been carried out using unfair means intended to induce consent, to obtain a material or moral advantage unduly or with the intention of avoiding the application of a mandatory or prohibitive law* [la fraude, en matière civile ou commerciale, ne se démarque guère de la fraude pénale et il s'agit d'un acte qui a été réalisé en utilisant des moyens déloyaux destinés à surprendre un consentement, à obtenir un avantage matériel ou moral indu ou réalisé avec l'intention d'échapper à l'application d'une loi impérative ou prohibitive] »). For cases where the liability for *soutien abousif* was excluded for fraud see Cass. Com. 8 mars 2017, n. 15-20.288, where the French Supreme court stated that if, by granting a loan, accompanied by the provision of a guarantee, the bank has sought to protect its own interests, this fact alone is not sufficient to characterise fraud in the absence of manoeuvring, deception or violation of the law or regulations, since the granting of credit in exchange for a security interest is a lawful operation and the bank is unable to ignore the principle of equality of creditors,

represents an interference in the management of the debtor's business activity [258] and *(iii)* the securities granted in favour of the financing credit are manifestly disproportioned with regard to the loan disbursed by the financing creditor [259]. Incidentally it may be observed that the notion of liable creditors does not only encompasses banks and financial institutions (which are surely the primary addressees of the provision at stake), but it must be broadly construed, as also comprising shareholders granting financial provisions to the distressed company and any other creditor, including suppliers giving credit or delaying the payment of their credit to the company in a situation irremediably compromised [260], the State or other entities of public law for the public financing granted to the company [261]. By the same token, also the concept of '*concours consentis*' should be broadly interpreted, as generally referring to any form of 'financial assistance' (thus, not only it concerns loans, nut also discounts, mobilisation of receivables, contributions on bank accounts, delaying of payment terms [262]). It is debated whether the status of 'creditor' must exist at the moment of the opening of insolvency proceedings or, instead, whether those subjects who are not (anymore) creditors (for instance, a credit institution whose credit arising out of the financing has been already

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which applies only from the opening of the collective proceedings. See also Com. 2 oct. 2012, in *Dalloz Actualité,* 2012, p. 2445 (The failure to close the account despite the negotiation of agreements to reschedule the debit balance does not constitute fraud). See on this point V. FORRAY, 'Commentaire complémentaire de l'article L. 650-1 du code de commerce', in *RTD com*., 2008.p. 661 and ff.

258 The concept of 'interference' causes a number of interpretative uncertainties. Scholars and case-law submit that it is similar to the notion of *de facto* director. It must be highlighted that, so far, the case-law has assessed in few cases the liability for '*immixtion*' and *de facto* directors. Among those, see Cass. Com., 27 June 2006, n. 04-15.831 P (*Banque Worms*, commented, *inter alia*, by R. DAMMANN et J. PASZKUDZKI, 'La condamnation du banquier à combler l'insuffisance d'actif', in *Dalloz*, 2006, p. 2534) where the French Supreme Court qualified a bank as a de facto director by intermediary persons (two of its executives, whom it had had appointed to the board of directors of the debtor company). See Cass com 21 November 2018 n. 17-21025 and T. Bordeaux, 10 January 2007, cited by par V. ROUALET, S. SCEMLA et D. FONTAINE-BESSET, 'L'irresponsabilité du banquier: un principe ou une exception?', in *Journal des sociétés*, July 2009, p. 27.

259 Lacking any distinction, the concept of 'garanties disproportionnées' is interpreted broadly, as encompassing securities *in rem* and equivalent rights *in personam*, as well as according to some, other mechanisms acting as a security such as a letter of intent, delegation, a promise of execution (see, for instance on this, Cass. Com. 13 Dec. 2005, in *Dalloz,* 2006). Also, it was submitted that the right of retention (which is not a security right for French case law) and transfer of property used as security would be covered, since the text refers generally to 'guarantees'. With that in mind, Article L. 650-1 Cod. Comm. requires that the guarantees are 'given in return for the granting of the credit", which would logically exclude from the scope of the provision post-financing guarantees, unless it is demonstrated that they are closely linked one with another. See on this point R. DAMMANN, 'Banque et banquiers responsables, in Responsabilité et régulations économiques', in *Presses de Sciences Po et Dalloz,* 2007, p. 73, and P. CROCQ, 'La réforme des procédures collectives et le droit des sûretés', in *Dalloz,* 2006, n. 16.

260 Cass. com. 30 October 2000, n. 97-21.154, (*SA Affichage Giraudy c/ Delaby*) in *JCP E*, 2000 (panorama) p. 2029. In that case the French Supreme Court eventually overruled the decision of the Cour d'Appel, deeming that it had not been demonstrated « *en quoi la situation de la débitrice était irrémédiablement compromise au moment où le fournisseur lui a fait crédit et si celui-ci, peu important qu'il ait agi par intérêt personnel, la savait ou aurait du le savoir* ». See also C.A. Versailles, 11 September 2003, in *RJDA*, 2004. Cass. com. 27 February 2007, n. 06-13.649, in *Jurisdata* in *Bull. Civ.*, 72, CA Pau, 13 February 2007, n. 2007-339756 in *Jurisdata*; C.A. Aix-en-Provence, 17 November 2004, n. 2004-264975, in *Jurisdata.*

261 M. JEANTIN and P. LE CANNU, *Droit commercial, Entreprises en difficulté*, Paris, 2007, p. 51.

262 A. CERATI-GAUTHIER, 'L'associé dans la loi de sauvegarde des entreprises', in *Rev. Sociétés*, 2006. p. 305.

reimbursed by the debtor) may not benefit of the exclusion of liability provided by Article L. 650-1 Cod. Comm. (263).

It is important to note that the above situations do not represent *ex lege* presumptions of liability: the burden of proof concerning the three elements of (the tortious) liability of the third party remains incumbent upon the trustee (264). In case the liability of the third party is assessed, Article L. 650-2 Cod. Comm. provides a punitive measure consisting of the annulment or reduction by the judge of the securities relating to the credit (« *pour le cas où la responsabilité d'un créancier est reconnue, les garanties prises en contrepartie de ses concours peuvent être annulées ou réduites par le juge* ») (265).

With that in mind, turning to the aspects of the action which are relevant for present purposes, the trustee is vested with the *locus standi* to bring an action for *soutien abusif* (266), in the interest and on behalf of the creditors (267). The action is directed against the liable 'creditors' of the debtor against which insolvency (truly collective) proceedings is opened (268). It seems possible that a single creditor suffering a direct prejudice from the conduct of the creditor may bring an independent tortious claim against the third party *uti singulo* (269).

It is noteworthy that the reform has not amended the legal basis of the action, which continues to be based on the common rules of tort law.

In other words, although Article L. 650-1 Cod. Comm. has limited the objective scope of the *action en soutien abusif* - because it has specifically narrowed down the cases in which financing can be considered abusive - for those cases where it is still exercisable by the trustee, but it has not introduced specific amendments to the right underlying the action for the fact that it is brought in the context of insolvency proceedings (270).

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263 R. BONHOMME, 'La place des établissements de crédit dans les nouvelles procédures collectives', in *Mél. B. Bouloc, Dalloz*, 2006, p. 59, n. 17. The French Supreme Court generally relies on the breadth of the terms used by the text to give a flexible interpretation to the rule of article L. 650-1 Cod. Comm., considering that, since the latter does not distinguish between whether or not the creditor has declared a claim in the debtor's collective proceedings, it is not possible to exclude from the benefit of its application a former creditor who is no longer such at the date of the opening of the collective proceedings (Cass. Com. 19 September 2018, n. 17-12.596 P, in *Dalloz Actualité*, 2018, n. 1862.

264 Cass. Comm., 27 mars 2012, commented, *inter alia,* by R. DAMMANN et V. RAPP*,* 'La responsabilité pour soutien abusif de l'article L. 650-1 du code de commerce : la fin des incertitudes', in *Dalloz*, 2012, p. 1455.

265 See R. ROUTIER, 'Les retouches de l'article L. 650-1 du code de commerce', in *Gaz. Pal.*, 10 mars 2009, p. 5.

266 Art. 622-20 Cod. Comm.

267 In a case concerning, *inter alia*, the challenge of the exclusive competence of the insolvency court, on the ground of an arbitration clause, the French Supreme Court expressly stated that « *the trustee acts on behalf of the creditors of the company* [le liquidateur agissant au nom des créanciers de la socitée] ».

268 It bears observing that the Ordonnance n. 2008-1345 dated 18 December 2008, art. 129, has clarified that the provision applies exclusively to 'truly collective' proceedings, *i.e.* the *sauveguarde*, the *redressement judiciaire* and the *liquidation des biens*). Criticisms against the limitation of the non-liability presumption to such proceedings were raised by R. ROUTIER, 'Les retouches à l'art. L. 650-1 C. com.', in *Gaz. Pal., 8-10 mars 2009, p. 53*. D. CARAMALLI, 'Quelques réflexions sur la responsabilité du banquier pour soutien abusif dans un contexte de LBOs en difficulté', in *JCP E*, 2009.

269 Cass. Com. 17 September 2013, n. 12-21871.

270 For example, the limitation period is the ordinary one, under article 2224 code civil, as amended by the loi n° 2008-561 du 17 July 2008.

In the light of the above, the French Supreme Court has recently held that the action *en sutien abusif* even though exercised by the trustee in the interest of all the creditors is not attracted to the exclusive competence of the insolvency court, as the opening of insolvency proceedings does not affect the *essential* right underlying the action (*i.e* the insolvency procedure does not have '*une influence juridique'* upon the action) [271].

By the same token, actions seeking the compensation for the harm provoked by third parties, even if brought by trustee, on behalf of the creditors fall outside the scope of the Tribunal de Commerce. That was the case of actions based on acts of unfair competition [272] and of an action for liability against a banker for wrongful interruption of the credit [273] or, again, the action brought *uti singuli* by the employees against a third party (e.g. the mother company) that has concurred to the insolvency of the debtor and hence the termination of the employment contracts [274].

I.4.3.2. The *actio pauliana* exercised by the trustee

Considering the foregoing, the approach adopted by the French courts towards the *actio pauliana* exercised by the trustee in the context of insolvency proceedings (which in this jurisdiction has a significant practical importance, since avoidance actions apply only to transactions undertaken after the *cessation des paiements*) is anything but surprising.

Without recalling here the common rules regulating the action (provided by Article 1167 and ff. French Civil Code), which in fact are very similar to those of the Italian legal system and do not present any profile worthy of note for present purposes, what must be highlighted here is that the case-law rather constantly [275], has considered that, on the one hand, pursuant to Article L. 622-20 Code Comm, the *actio pauliana* can be exercised by the trustee to the benefit of all the creditors, even those who, in a normal civil and commercial context, would not have been in the position to challenge the fraudulent act of the debtor.

On the other hand, it has found that also the individual creditor is allowed to challenge the act *uti singulo*, irrespective of the insolvency procedure, when he proves that he has personally suffered a damage from the fraudulent transaction. On one occasion, the *Cour de Cassation* has stated that the exclusiveness of the *locus standi* of the trustee in the context of the *action en comblement du passif* which

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271 Cass com 12 July 2016, n. 14-29429 « *l'action en responsabilité délictuelle intentée par un mandataire liquidateur pour des faits de soutien abusif du débiteur commis avant l'ouverture de la procédure collective n'est ni née de cette procédure, ni soumise à l'influence juridique de celle-ci* […] *que les règles propres à la procédure collective n'exercent en effet aucune influence juridique sur l'appréciation de ces comportements fautifs du créancier, antérieurs à la procédure collective, qui doit dès lors relever de la compétence du juge de droit commun* ».

272 Cass. Com., 3 March 1998, n. 94-16.715, in www.legifrance.gouv.fr

273 Com. 25 June 2002, n. 99-14.761, in www.legifrance.gouv.fr

274 Cass. Soc., 13 June 2018, n° 16-25873.

275 Cass.Com., 7 June 1957, in *Gaz. Pal.*, 1957, II, p. 306; Cass. Comm., 26 January 1988, in *Bull. civ.*, IV, n. 54, p. 38, See more recently Cass. Com. 13 November 2001, in *RTD com.*, 2002, n. 1855 p. 151. *Contra* Cass. Com., 26 January 1988, n. 86-13.053; Cass. Com., 7 June 1967, n. 65-10.712; Cass. Com. 13 November 2001, in *RTD com.*, 2002, n. 1855 p. 151.

precludes to individual creditors to bring autonomously an action against the directors, does not apply with regards to the *actio pauliana* [276].

That demonstrates that the case-law does not consider that the opening of insolvency proceedings affects the legal foundation of the action.

In particular, the Court acknowledged that « *la révocation de l'acte frauduleux, dès lors qu'elle est prononcée après l'ouverture d'une procédure de règlement judiciaire ou de liquidation de biens à l'encontre de l'auteur de la fraude, perd son caractère normalement relatif pour produire effet à l'égard et au profit de tous les créanciers y compris ceux dont le droit est né postérieurement à la fraude et qui sans la survenance de la procédure collective n'auraient pu invoquer ni les dispositions de l'article 1167 du code civil, ni bénéficier de leur application* » [277].

The 'collectivisation of the action, however, does not preclude the Court to conclude that the action is not « *nées de la procédure collective ou sur laquelle cette procédure n'exerce pas une influence juridique* » and that the action has a mere occasional link with the insolvency procedure. Therefore, it excludes the competence of Article R. 662-3 Cod. Comm. [278].

The approach bolstered by the Court is debated among scholars. Some authors severely criticise the solution adopted hitherto by the case-law, arguing in particular that the transformation of the action as regards its effects (which, from relative, would become collective where exercised in the context of insolvency proceedings) represents a sufficient impact of the procedure on the action to attract it before the insolvency court. A further criticism concerns the contradiction in providing that individual creditors can also act individually. The interpretation concerning the prerogatives of the trustee would reveal an approach of the Court still anchored at the concept of the general body of creditors as a separate legal entity, which would not take into consideration that the autonomous legal personality of the *masse des créanciers* was suppressed by the reform of 1985 [279].

Another part of the scholars, instead, consider that the arguments of the *Cour de cassation* must be shared, because to rule otherwise would ultimately result in including all actions for reinstatement of

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276 Cass. Com. 8 October 1996, in Dalloz, 1997, p. .87, note F. DERRIDA; Cass. Com. 2 November 2005, n. 04-16.232, in *Dalloz*, 2005, p. 2872, with observations by A. LIENHARD.

277 Cass. Comm., 13 February 1990, in *Dalloz*, 1990, p. 59.

278 Cass. Soc., 13 June 2018, n. 16-25.873, in *Dalloz actualité*. Similarly, Cass. com., 16 June 2015, n. 14-13.970, Cass. com., 6 July 1993, n. 91-13.834 (concerning that an *actio pauliana* already pending when the insolvency procedure was opened could continue before the ordinary court). *Contra* although pertaining to a different case (action for seeking the declaration of nullity of a gratuitous transaction undertaken six months before the *cessation des paiements*, which was pending when the procedure was opened) Cass. com., 1 February 2000, n. 97-16.484).

279 Under the former regime of the *loi* n. 67-563 of 13 July 1967, the general body of creditors was conceived as a separate legal from the creditors concurring in its formation. Such a regime was abolished by the *loi* n. 85-98 of 25 January 1985. For the case-law prior to the reform see, *inter alia*, Cass. Com., 25 May 1981, in *Dalloz*, 1981, p. 643, Cass. Civ. 7 June 1987, in *Bull. civ.*, III, n. 232. See, *inter alia*, J. MESTRE, 'Des effets de l'action paulienne', in *RTD* civ, 1991, p. 116, who highlights that the solution is also arguable for the fact that by virtue of the (former) article 46(2) law n. 85-98, « *les sommes recouvrées à la suite des actions du représentant des créanciers entrent dans le patrimoine du débiteur et sont affectées en cas de continuation de l'entreprise selon les modalités prévues pour l'apurement du passif* ». Therefore, according to that author, the achievement of the collective effect of the *actio pauliana* in the context of the collective procedure, would ultimately benefit also the fraudulent debtor.

the insolvency estate brought by the trustee falling within the jurisdiction of the insolvency court. According to those authors, the *vis attractiva concursus* must be considered as an exceptional rule (of public policy), to be interpreted narrowly, as it significantly derogates from the rules of ordinary law of the courts [280].

I.4.3.3. Other actions excluded from the scope of the *vis attractiva concursus*

The French case law excludes from the scope of the *vis attractiva* all the actions in relation to which the insolvency proceedings represents only the occasion to bring the action, which could have been exercised in any event, also outside of insolvency proceedings *(« procédures ne sont que l'occasion de voir naître des actions qui se seraient de toute façon produites, la compétence revient aux juridictions civiles* ») [281].

Needless to say, among these there are all the actions which the debtor could have brought independently from the procedure [282]. Examples of those actions are the action for recovery of a claim of the company subject to the *liquidation judiciaire* [283].

Also, a part of the case-law excludes the competence of the insolvency court for « *actions qui prennent leur source dans des faits antérieurs à l'ouverture de la procédure collective et sur lesquelles l'état de redressement ou de liquidation judiciaires n'exerce pas d'influence juridique* [actions which originate from facts prior to the opening of collective proceedings and over which the insolvency proceedings does not exercise any legal influence] » [284].

I.5. An alternative to the *vis attractiva concursus:* the German system

The German system has not espoused the principle of the *vis attractiva concursus*.

The express choice of refusing the principle according to which actions brought in the context of insolvency proceedings must, under some circumstances, be heard and decided by the same insolvency court dates back to the period of the *Konkursordnung* dated 1987 [285]. The German legislature considered that the retention of the ordinary civil and commercial jurisdictional regime for

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280 P. R. GALLE, 'L'action paulienne ne relève pas du tribunal de la procédure collective', in *Bull. Actu,* Greff. 2015, 88; P.-Y. GAUTIER, 'Action paulienne', in *Rép. civ. Dalloz*, V, n. 99.

281 Cass. Comm., 11 December 1979, in *RTD com.*, 1980, p. 768, T. Paris, 26 January 1979, in *RTD com.*, 1980, p. 770,

282 *Ex multis,* Cass. Com., 17 January 1995, n. 92-17.886, in *Bull. Civ.*, IV, n. 15; Cass. Comm.,16 November 1993, n, 91-13.890, Cass. Com. 28 Apr. 1998, n. 95-22.265; Cass. Soc., 14 October 1997, n. 96-18.876, in *Bull. civ.*, V, n. 312.

283 Com. 24 May 2005, in *Droit des Socétés.*, 2005. comm. 14, with observations by C. LEGROS.

284 Cass. Com., 17 January 1995, n. 92-17.886 in *Bull. civ.*, IV, n. 15, Cass. Com., 6 June 1995, n. 93-14.356, in *Bull. civ.*, IV, n. 170, Cass. Com., 15 November 2017, n. 16-12941 (liability actions brought against the auditor of the debtor based on facts prior to the opening of insolvency proceedings, where the solution of the dispute was considered as not involving the rules applicable to collective proceedings).

285 The former *Konkursordnung* was substituted on 1 January 1999 by the *Insolvenzorndung* (hereinafter 'InsO').

disputes arising in the course of insolvency proceedings would ultimately benefit the efficiency and the effectiveness of the procedure's administration [286].

At the outset, it bears noticing that under the German insolvency law, insolvency proceedings seem to be configured as purely enforcement procedures [287], where the judicial interventions of the insolvency court are extremely limited [288]. Indeed, the fundamental principle underlying the *Insolvenzordung* (*i.e.* the German insolvency act, hereinafter 'InsO') is that, as a rule of thumb, insolvency creditors may only pursue (*i.e.* satisfy by way of enforcement [289]) their claims in accordance with the provisions governing insolvency proceedings [290].

However, should any substantive question concerning the right underpinning the satisfaction of insolvency or secured creditors arise in the context insolvency proceedings the insolvency court would play no role, as it is provided that no substantive questions are deferred to its jurisdiction.

The regulation of the territorial allocation of competence for 'insolvency related' claims is established in § 180 InsO, which provides that the local court (*Landgericht*) located in in the district of the insolvency court (*Amtsgericht*) has the exclusive competence to hear and determine insolvency claims. The role of the insolvency court is thus limited to the 'execution' profile of the credits [291].

Therefore, for present purposes, one should acknowledge that, under the German system, any type of action, whether insolvency-related or not, that arises during insolvency proceedings, are decided

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286 S. MADAUS, 'Artikel 6 - Zuständigkeit für Klagen, die unmittelbar aus dem Insolvenzverfahren hervorgehen und in engem Zusammenhang damit stehen', in B. M. KÜBLER, H. PRÜTTING, R.BORK, in *KPB InsO, Kommentar zur Insolvenzordung*, Cologne, September 2019, at [6].

287 See § 1 InsO, declaring that the purpose of insolvency proceedings is the collective satisfaction of the debtor's creditors through realisation of the debtor's assets and distribution of the proceeds or through agreement on an alternative arrangement in an in- solvency plan, particularly in order to maintain the enterprise. Debtors who have acted in good faith will be given the opportunity to have their remaining debts discharged.

288 The tasks of the *Amtsgericht* are, *inter* alia, to verify the conditions for the opening of insolvency proceedings (I*nsolvenzeröffnungsverfahren*, §§ 26-27 InsO), convene and supervise the meeting of the creditors and the hearing for the admission of claims (*Prüfungstermin*) (§ 74 InsO) and monitor the actions of the trustee (for instance, § 59 InsO).

289 V. SANGIOVANNI, 'la domanda di ammissione al passivo dell'insolvenza nel diritto tedesco alla luce del regolamento comunitario n. 1346/2000", in *Il diritto fallimentare*, 2005, 6, p. 1204.

290 See § 87 InsO.

291 § 180 InsO reads « *An action for acceptance of a claim must be brought in ordinary proceedings. The local court at which the insolvency proceedings are or were pending has exclusive jurisdiction for the action. If the matter in dispute is not within the competence of local courts, the regional court within whose district the insolvency court is located shall have exclusive jurisdiction. If an action concerning the claim was pending at the time of commencement of insolvency proceedings, acceptance of the claim shall be pur- sued by resumption of the action.* [Auf die Feststellung ist im ordentlichen Verfahren Klage zu erheben. Für die Klage ist das Amtsgericht ausschließlich zuständig, bei dem das Insolvenzverfahren anhängig ist oder anhängig war. Gehört der Streitgegenstand nicht zur Zuständigkeit der Amtsgerichte, so ist das Landgericht ausschließlich zuständig, zu dessen Bezirk das Insolvenzgericht gehört. (2) War zur Zeit der Eröffnung des Insolvenzverfahrens ein Rechtsstreit über die Forderung anhängig, so ist die Feststellung durch Aufnahme des Rechtsstreits zu betreiben] ». § 183 InsO adds that if an action for acceptance of a claim cannot be brought by recourse to the ordinary courts, acceptance of the claim shall be pursued at the other court with jurisdiction or by the competent administrative authority.

by the competent venue identified under the general rules of the German code of civil procedure (§ 19 ZPO [292]).

Nevertheless, it was considered necessary, on the one side, to briefly mention the regime regulating the lodging, admission and verification of insolvency claims, in order to highlight the profound differences compared to that of Italy, France and Spain [293].

On the other side, the lack of the *vis attractiva concursus* entails that, at a national level, the legal foundation of the action is irrelevant for the purposes of the allocation of the functional competence between the ordinary civil courts and the insolvency courts (as the latter would have in any case no jurisdiction to hear an insolvency-related claim). Yet, the nature and the features of some actions that were mentioned above with reference to the other jurisdictions will turn out to be relevant in the last Chapter of this work. Hence, it was deemed necessary to provide also few considerations with reference to some corporate actions and director's liability actions under the German system.

I.5.1. Directors' corporate liability under the German system

Alike all the other Member States analysed above, the German system provides that directors must comply with the duties provided by the laws and the company by-laws [294].

The general rule governing the liability of directors towards the company is § 43(1) GmbHG [295], according to which directors shall conform their conduct to the diligence of the prudent businessman in corporate matters and, in case of mismanagement of the company, they are liable for the damage caused to the company (§ 43(2) GmbHG). In principle, such a liability serves only indirectly to the protection of creditors and therefore it can be limited by the company's by-laws for cases of minor infringement of such a duty [296].

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[292] See in particular § 19a ZPO, providing a general rule of jurisdiction, according to which « *The general venue of an insolvency administrator for actions concerning the insolvency estate is determined by the seat of the insolvency court* ». The rule aims at primarily purport to prevent the establishment of a trustee's exclusive venue.

[293] See *infra* § I.5.4.

[294] Reference will be made here principally to the provisions of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (the German limited liability company act, 'GmbHG'), governing the limited liability companies. Similar rules apply to the *Aktiengesetz* (German Stock Corporation Act, 'AktG'). For the director's general duty of care towards the company, see § 93(1) AktG. See, in general, A. CAHN, D. C. DONALD, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, Cambridge, 2010, pp. 369-370.

[295] The reference to the 'prudent businessman' in the provision at stake is equated to the role of a fiduciary administrator of third party's assets, *i.e.* a person who independently and fiduciarily safeguards the interests of other people's assets in a managerial and responsible position. M. LUTTER and P. HOMMELHOFF, 'under § 43', in M. LUTTER and P. HOMMELHOFF *GmbH-Gesetz*, 2000, Cologne, at [21].

[296] Being stated in general terms, the actual content of the duty of diligence required to the directors has been progressively specified by way of interpretation. It encompasses, *inter alia*, *(i)* the duty of loyalty towards third parties, *(ii)* the organisation of the internal management of the company according to law and statute, *(iii)* the diligent business policy planning and advisory *vis-à-vis* shareholders, *(iv)* the implementation of the business policy and the instructions established by the shareholders *(v)* the duty to maintain secrecy over confidential information and company secrets (§ 85 GmbHG). See on this point U. SCHOLZ and H. SCHNEIDER, 'Under § 43', in U. SCHOLZ and H. SCHNEIDER, *Kommentar zum GmbH-Gesetz*, Cologne, 2010, at [42]. K. MADISSON, 'Duties and liability of company directors under German and Estonian Law: a comparative analysis'', in *RGSL Research papers*, 7, 2012, pp. 1-80, p. 21.

The action brought by the company against the director seeking the compensation for the infringement of the duty under § 42(1) GmbHG provides for a presumption *iuris tantum* of the director's negligence. The acting company must (only) prove the causal link between the damage suffered and the (presumed) mismanagement of the director, and the harm provoked to the company. Therefore, unlike the Italian and French system, in Germany the burden of proof lies with the director, who must prove, to rebut the presumption, that he has acted with the diligence of a prudent businessman and that the damage suffered by the company does not derive from his managerial acts [297]. Moreover, the director's liability is excluded where has acted on the basis of binding instructions given by another corporate body [298], or when the shareholders have approved his conduct (§ 46 n. 5 GmbHG) or, again, where the claim concerns an event that was acknowledged or foreseeable by the shareholders.

In this respect it may be worth mentioning that § 93 AktG acknowledges expressly the business judgement rule, with the proviso that the abovementioned presumption may be rebutted where it is demonstrated that the basis for the business decision taken by the director had be determined diligently, recurring to all sources of factual and legal information available for that specific decision, assessing the advantages and disadvantages of the possible options and taking into account the foreseeable risks [299].

Together with the contractual liability under the general clause of § 43(1) GmbHG (which may be traced back to the duty of care), the German system imposes upon directors also a duty of loyalty towards the company, pursuant to the general provisions on tort law of § 823 and ff. BGB [300].

The German system assumes, in facts, that the internal corporate relationship, seen as a whole and severed from the personal right of the shareholder (*mitgliedschaftsrecht*, *i.e.* the relationship between the company and the shareholders and the horizontal relationship between shareholders) represents an 'absolute' right under § 823(1) BGB, the infringement of which entails a tortious liability.

The practical usefulness of such a general provision of tortious liability of directors *vis à vis* the company seems to rest on the possibility vested with the company to claim monetary compensation

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297 T. BAUMS, 'Personal Liability of Company Directors in German Law', pp. 1-20, p. 11 available www.jura.uni-frankfurt.de (last access on June 2019). See also BGH, 04 November 2002 - II ZR 224/00, in *BGHZ* 152, 280 and *NJW* 2003, 358.

298 BGH, 10 May 1993 - II ZR 74/92, in *ZIP*, 1993, p. 917.

299 The business judgement rule was expressly provided in 2005. A. CAHN, D. C. DONALD, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, Cambridge, 2010, p. 392. K. DAVIES, R. J. HOPT, R. J. G. NOWAK, G. VAN SOLINGE (Ed.), *Corporate Boards in Law and Practice. A Comparative Analysis in Europe*, Oxford, 2013, p. 321. M. T. ANDENÆS, *European Comparative Law*, Cambridge, 2009, p. 271. See also BGH, 14 July 2008 - II ZR 202/07, in NJW, 2008, p. 3361.

300 § 823(1) BGB enshrines the general principle of the *neminem ledere*, providing that anyone who intentionally or negligently injures the life, body, health, freedom, property or any other right of another person unlawfully shall be obliged to compensate the other person for the resulting damage. § 823(2) BGB, establishes the tortious liability arises whenever the conduct of the tortfeasor breaches violates the protection of another law. If, according to the content of the law, a breach of this law is possible without fault, the obligation to pay compensation shall only apply in the event of fault.

for damages provoked by the directors in the event of criminally relevant conducts such as infidelity (§ 266 StGB), fraud (§ 263 stBG), misappropriation, non-payment and embezzlement of wages, and - for what matters here - insolvency-related offences (§ 283 and ff. stBG) [301].

Also, in the event of *wilful* misconduct or mismanagement contrary to accepted principles of morality (mainly in cases where the director abuses his position, acting to safeguard his own interests without complying with the minimum standard of loyalty and fairness towards the company), § 826 BGB [302] provides for an additional hypothesis of tortious 'internal' liability [303].

In addition to the abovementioned general principles, German company law provides for a number of specific hypothesis triggering the corporate director's liability [304].

For instance, as an expression of the general duty to constantly monitor the financial and economic situation of the company, § 49(3) GmbHG (and § 92(1) AktG) establishes the duty of the executive board to convene the shareholders' meeting without delay, where a loss of more than a half of the capital is detected, in order to inform the shareholders of this fact and put them in the position of deciding whether to liquidate the company or supply new equity (pursuant to the rule 'recapitalise or liquidate'). Should the directors fail to fulfil such an obligation, they shall be held liable towards the company under § 43(2) GbmHG and 823(2) BGB.

German scholars consider that the duty to convene the general meeting of shareholder's does not underpin a protective purpose (*schutzgesetz*) towards corporate creditors (if not indirectly) [305]. Therefore, in principle, the latter subjects are not entitled to bring an action against the directors under this scenario [306].

For present purposes, it is worth taking into account also another form of director's liability which is set forth by § 43(3) first subparagraph GmbHG and provides that directors are liable towards the company [307].

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301 BGH, 17 July 2001 - II ZR 178/99, in *NJW*, 2001, p. 3622 (*Bremer Vulkan* case, on the liability of shareholders), BGH, 27.06.2005 - II ZR 113/03, in *BGH NZG*, 2005, p. 755.

302 § 826 GmbHG represents another general rule of tort law according to which a person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage.

303 BGH, 12 June 1989 - II ZR 334/87, in *BGH NJW-RR*, 1989, p. 1255BGH, 16.07.2007 - II ZR 3/04, in *NJW*, 2007, p. 2689 (*Trihotel* case) which has overruled the previous case-law attributing to creditors the possibility to allocate directly a claim against shareholders (but the same reasoning could be applied to directors) invoking § 826 BGB. See *infra* (fn. 350).

304 One example of minor interest here is the liability of directors (together with shareholders) for incomplete or misleading information provided at the time of incorporation of the company (the Gründungsschwindel) or, under §54(3) GmbGH in the event of an increase of capital (*Kapitalerhöhungsschwindel*). In this case, the company may claim the reimbursement of any missing payment and any other damage resulting for the lack of information.

305 On the concept of *schutzgesetz* see *infra* I.5.2.

306 M. LUTTER, *Legal capital in Europe*, 2006, Berlin, p. 114, U. HÜFFER, '§ 92', in U. HÜFFER, *Aktiengesetz*, Munich, 2006, n. 15.

307 S. GREULICH and J. BUNNEMANN, 'Geschäftsführerhaftung für Zahlungsunfahigkeit fuhrende Zahlungen an die Gesellschafter nach § 64 II 3 GmbHG-RefE-Solvenztest im deutschen Recht?', in NZG, 2006, pp. 681-684, K. SCHMIDT, Reform der Kapitalsicherung und Haftung in der Krise nach dem Regierungsentwurf des

« *Insbesondere sind sie zum Ersatz verpflichtet, wenn den Bestimmungen des § 30 zuwider Zahlungen aus dem zur Erhaltung des Stammkapitals erforderlichen Vermögen der Gesellschaft gemacht oder den Bestimmungen des § 33 zuwider eigene Geschäftsanteile der Gesellschaft erworben worden sind.* [to pay compensation if payments contrary to the provisions of § 30 have been made from the assets of the Company required to maintain the share capital or if own shares of the Company contrary to the provisions of § 33 have been acquired] ».

The joint interpretation of §§ 30, 31 and 43(3) GmbHG sets forth specific forms of directors' liability for the performance of pay-outs to shareholders with funds from the share capital, which give rise to adverse balance, thus infringing the duties of capital maintenance (*i.e.* the capital of the company proves to be insufficient to cover the liabilities, ownership's equity, and guaranteed capital) [308].

It is interesting to note that, exceptionally, § 43(3) GmbHG does not require that the payment performed by the director has harmed the assets of the company (a 'payment' could then be also a payment to a corporate creditor already fallen due), not it is possible for the director to argue that he has acted in compliance with the shareholders instructions (as it is the case for § 43(2) GmbHG). Such an exceptional regulation seems to rest on the interest *indirectly* underpinning the provision under discussion (*i.e.* the indirect protection of creditors through the maintenance of capital requirements). Therefore, the action does not require the assessment of the existence of an actual damage to the company's assets, but it seeks the reinstatement of the *status quo ante* [309].

In this constellation it must be highlighted that the breach of capital maintenance duties represents the only scenario under which directors are directly liable towards shareholders (unlike the Italian system, where the duty of directors towards shareholders are undoubtedly broader).

Indeed, not only the infringement of the duty of capital maintenance under the abovementioned provision triggers the liability of the directors and the recipient of the payment (the specific shareholder), but all the other shareholders are considered to be liable for the reimbursement of the payment (*Ausfallhaftung*). Where the latter shareholders are held liable for the 'reimbursement' of payments made by the director under § 30(1) GmbHG, they have a claim of recourse against the director.

MoMiG, in GMBHR, 2007, pp. 1072-1079. D. ATWELL, Das Europäische Gesellschaftsrecht. Die Auswirkungen des MoMiG auf den Gläubigerschutz, 2017.

[308] § 30 GmbHG provides that, as a rule of thums, the assets of the company required to maintain the share capital should not be paid out to the shareholders. However, a number of exceptions are provided to the general rule, such as payments which are made when a domination or profit transfer agreement exists, payments which are covered by a fully-fledged claim for consideration or restitution against the shareholder, the repayment of a shareholder loan and payments on claims arising from legal acts which economically correspond to a shareholder loan. § 31 GmbHG addresses the legal consequences of the unlawful payment.

[309] Se M. HABERSACK and J. SCHÜRNBRAND, 'Die Rechtsnatur der Haftung aus §§ 93 Abs. 3 AktG, 43 Abs. 3 GmbHG', in *WM*, 2005, p. 957, who speak of *Folgenbeseitigungsanspruch eigener Art*. I understand that in this case the *compensation lucri cum damno* would not operate in the computation of the *quantum* to be reimbursed by the director.

Apart from such a specific case, it is understood that shareholders themselves cannot bring a claim against directors deriving from the mismanagement of the company, because the directors only owe fiduciary duties towards the company.

It would follow that, in principle, the shareholder's personal claim against the director is not admissible under German company law rules [310]. Instead, shareholders may however bring a derivative action on behalf of the company in case of inertia on the part either of the managing or the supervisory board in commencing the action against the director.

That notwithstanding, directors may still be 'indirectly' liable towards the shareholders for the infringement of the abovementioned *mitgliedschaftsrecht* (*i.e.* the autonomous corporate right of the shareholder) under §823(2) GmbHG, when it is assessed that they have violated the right of a shareholder, for instance by changing the corporate structure, or the objectives pursued by the business, or interfering in the exercise of the shareholder's powers in the general meeting.

I.5.2. [segue] *Directors' liability towards creditors*

As a rule of thumb, individual creditors cannot bring individual actions directly against the directors (and the shareholders) for corporate mismanagement, because they are not contractually bound with them. Instead, they may seek a remedy directly from the company, pursuant to § 31 GmbHG.

However, it is important to highlight - for reasons that will become clearer at the end of this work - that under § 823(1)-(2) and § 826 BGB, in principle, any creditor may commence directly an action *vis à vis* directors for claims based on the 'external liability' [311].

The condition precedent of such a tortious liability (*i.e.* the typical triad represented by the (unlawful) conduct-harm-causal link) would however assume a rather specific connotation because it requires that the following conditions are met: *(i)* intentional wrongful injury, *(ii)* the breach of an explicit statutory provisions the violation of which entitles to damages, *(iii)* the wilful or negligent violations of certain defined rights or protected interests (such as property) [312].

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310 P. KINDLER, 'La responsabilità nella gestione delle società e il risarcimento del danno prodotto dagli amministratori nel diritto tedesco', in *La discrezionalità del giudice. Le esperienze in Italia e Germania. Spunti per una comparazione funzionale all'esercizio delle professioni giuridiche*, Napoli, 15-16 October 2010.

311 An example of such a general principle is illustrated in See BGH, 05 December 1989 - VI ZR 335/88, in NJW 1990, p. 976 (*„Baustoff"-Fall* case), where the director was held personally liable towards the company's creditor, for the violation of a 'lenghtened' reservation of title (the '*verlängerter Eigentumsvorbehalt*'). He was considered to have contributed to the damage suffered by the seller, by not ensuring that company did not circumvent the reservation of title clause by means of an agreement with another party prohibiting the assignment of claims. See also BGH, 12 March 1996 - VI ZR 90/95, in ZIP 1996, 786 (*Lamborghini* case). *Contra* recently BGH, 26 April 2018 – IX ZR 238/17, in *NJW*, 2018, p. 2125.

312 G. H. ROTH and H. ALTMEPPEN, 'under §43', in G. H. ROTH and H. ALTMEPPEN (eds.), *Gesetz betreffend die Gesellschaften mit beschra¨nkter Haftung, GmbHG*, Munich, 2005, at [37]; G. EMMERICH, 'under § 311', in K. REBMANN, F.K. SACKER, R. RIXECKER, *Münchener Kommentar zum BGB*, Munich, 2006, at [208]-[219] T. BAUMS, 'Personal Liability of Company Directors in German Law', p. 14 available www.jura.uni-frankfurt.de (last access on June 2019).

Therefore, the personal liability of the director towards corporate creditors may arise under § 823(2) and § 826 BGB when the conduct of the director violates a (necessarily) 'protectionary provision' (*schutzgesetz*). As it will be demonstrated, the right to seek the compensation of such an 'external liability' often arises when the company becomes insolvent.

Among protectionary rules that it may be worth mentioning there are § 32 *Kreditwesengesetz* (the General banking statute) and § 265b StGB (a provision dealing with abusive credit financing) and § 82(2) GmbHG (incorrect and fraudulent information on the financial situation of the company).

Instead, according to the majority of scholars, § 43(1) GmbHG does not represent a protectionary rule for the purposes of § 832(2) BGB [313]. Therefore, creditors should not be able to assert a claim directly against the director for the mismanagement of the company. However, in more than one occasion, the case law has found the liability of the director towards creditors based on § 43(1) GmbHG [314].

Beyond this general remark, it bears observing that under particular circumstances directors may be held personally liable against the creditor (regarded as the party to a contract undertaken with the company) on the basis of the *culpa in contrahendo*.

In 2002, the German system has embedded in the BGB an express statutory provision concerning the *culpa in contrahendo* [315], ultimately codifying the general principle set forth by the case-law.

Needless to say, in principle, only the parties to the contract may be held liable for the damages provoked by the infringement of the duty of acting in *bona fide* during the negotiations of such a contract, whereas the personal liability of the representatives of the company may arise only under tort law (*i.e.* when their conduct has provoked a direct and immediate damage to one of the

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313 The personal liability of directors under the join interpretation of § 43(1) GmbHG and § 823(1) BGB is highly controversial between German scholars. The majority of the authors rejects the broad personal responsibility of the director that such an interpretation would entail, because it would ultimately double the obligations of diligence of the director towards both the GmbH and its creditors. Also, it is understood that another argument invoked against a general (external) tortious liability of directors, is that § 43(1) GmbHG would lack the character of a rule of protection under § 823(2) BGB, which would not enable the creditors to trigger the (external) liability of directors. M. LUTTER, P. HOMMELHOFF, D. KLEINDIEK, 'under § 43', *op.cit.*, at [46] and ff. It is worth mentioning also that the same debate applies *mutatis mutandis* also with regards to the position of the shareholders. The case-law on the the s.c. *Haftung aus einem existenzvernichtendem Eingriff* (*i.e.* liability of shareholders for destroying the economic basis of the company) pursuant to which creditors can bring an action directly against the controlling shareholders, on the basis of § 826 BGB (see BGH, 17.09.2001 - II ZR 178/99, in NJW 2001, p. 3622 (*Bremer Vulkan* case), BGH, 24.06.2002 - II ZR 300/00, in *ZIP*, 2002, 1578 (*KBV* case).

314 Therefore, according to a part of the German case-law, the director commits an unlawful act, for example, when he simply sells or gives an order to sell a third party's property through the company. If the owner loses his rights of property as a result of a *bona fide* purchase, in the opinion of BGH, this constitutes a breach of ownership within the meaning of § 823(1) BGB and the director is personally liable for it *vis-à-vis* the creditor. An example of such a general principle is illustrated in BGH, 05 December 1989 - VI ZR 335/88, in NJW 1990, p. 976 (*„Baustoff"-Fall* case), where the director was held personally liable towards the company's creditor, for the violation of a 'lenghtened' reservation of title (the '*verlängerter Eigentumsvorbehalt*'). He was considered to have contributed to the damage suffered by the seller, by not ensuring that company did not circumvent the reservation of title clause by means of an agreement with another party prohibiting the assignment of claims. See also BGH, 12 March 1996 - VI ZR 90/95, in ZIP 1996, 786 (*Lamborghini* case).

315 See § 241(2) and 311(2) and (3) BGB.

contracting parties). Nevertheless, a significant exception is provided under § 311(3),(1) BGB, which provide that, exceptionally [316], the director may be held directly liable towards the company's business counterparty on the ground of the *culpa in contrahendo* where *(i)* he has taken advantage of the personal reliance of the business counterparty that goes beyond the normal level of reliance during the negotiations (§ 311(3)(2) BGB) or *(ii)* if the director has concealed his own direct economic interest in concluding the contract [317].

In particular, the director is deemed to take advantage of a specific personal reliance when he induces the business counterparty to believe that he himself will ensure the proper performance of the contract, without taking into account the situation of the company and when such a reliance is determinative to the consent of the party to the conclusion of the contract. In this case, the creditor of the company is entitled to seek the compensation from the director for the s.c. 'reliance loss' (*Vertrauensschaden*).

As to the second hypothesis of the director's conflicting interest, it is considered that the director's *culpa in contrahendo* arises where it emerges that since the moment of the negotiations with the company's business counterparty, the director intended not to forward the considerations arising out of the contract, but to use them for its own purposes. However, practice reveals that such a liability is hardly triggered, also considering that the direct personal economic interest of the director cannot be linked, for instance, to the mere fact that he is a major (or the sole) shareholder of the company [318].

It must be also mentioned that under §93(5) AktG the creditor is entitled assert a derivative claim against directors for their breach of duty if the assets of the stock company prove to be insufficient to pay all the corporate creditors [319]. It is important to note, however, that in this case the creditor could not seek *vis-à-vis* the director the direct compensation for the damage suffered, since the provision at stake does not provide for an additional liability regime for creditors. Instead, it pursues the compensation of the damage suffered by the company due to the directors' misconduct., which would benefit the creditor only indirectly [320].

I.5.3. [segue] *Director's duties and liability in the vicinity of insolvency*

316 It is understood that the German case-law are rather reluctant to consider fulfilled the conditions required to trigger the personal liability of directors under § 311 BGB. BGH, 06 June 1994 - II ZR 292/91, in *NJW*, 1994, p. 2220.

317 BGH, 20 March 1995 - II ZR 205/94, in *NJW*, 1995, p. 1739; BGH, 05 October 2001 - V ZR 275/00, in *BGH NJW*, 2002, pp. 208-212.

318 BGH, 23 October 1985 - VIII ZR 210/84, in *NJW*, 1986, p. 586.

319 T. STOHLMEIER, *German Public Takeover Law: Bilingual Edition with an Introduction to the Law*, The Hague, 2002, p. 15.

320 J. J. DU PLESSIS, B.GROßFELD, C. LUTTERMANN, I. SAENGER, O. SANDROCK, M. CASPER, *German Corporate Governance in International and European Context (Second Edition)*, Berlin/Heidelberg/New York, 2012, p. 84.

Turning now the attention to insolvency scenarios, it must be said at the outset that the German legislature has deployed the legislative technique of the 'duty to file', burdening directors with specific duties (and corresponding liabilities) when the company is on the verge of material insolvency [321].

Needless to say, the first of those insolvency-related duties is represented by the duty to timely file the petition for the commencement of insolvency proceedings, as provided under § 15 InsO [322].

It is interesting to note that, before the reform brought about in 2008 by the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (the Law Governing Private Limited Companies and to Combat Abuses, 'MoMiG' [323]), the duty to file was traced back to § 64(1) GmbHG.

Therefore, with the reform of 2008, formally the German legislature has shifted the duty to file from corporate/tort law to the statute of insolvency law. Nevertheless, as correctly pointed out by an author such an 'insolvification' of the duty to file had no substantive bearing about the classification as protective law in the sense of § 823 sec. 2 BGB [324], because the provision of § 15 InsO factually corresponds to the previous 'civil and commercial' rule of § 64(1) [325].

Apart from this, §15(a)(1) InsO establishes the statutory duty, incumbent upon directors and shareholders [326], according to which as soon as it emerges that the company is insolvent or over-indebted - *i.e.* the company is not able to pay debts as they fall due or its liabilities exceed it assets, within the specific meaning, respectively, of §§ 17 and 19 InsO - they must file a petition for the opening of insolvency proceedings without undue delay, and, in any case, within three weeks. According to some German scholars and case-law, the obligation to file an insolvency petition cannot be regarded as an 'upgrade' of the duty towards the company to convene the shareholder's general meeting for serious capital loss [327].

Instead, the liability of directors towards creditors arising from the failure to file the insolvency petition would be triggered by the joint interpretation of § 823(2) BGB and § 15 InsO.

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321 For a comparative study see C. GERNER-BEUERLE, P. PAECH, E. SCHUSTER, 'Study on Directors duties and liabilities', in *LSE Entreprise Limited*, April 2013.

322 § 15(a)(1) GmbHG reads « *Wird eine juristische Person zahlungsunfähig oder überschuldet, haben die Mitglieder des Vertretungsorgans oder die Abwickler ohne schuldhaftes Zögern, spätestens aber drei Wochen nach Eintritt der Zahlungsunfähigkeit oder Überschuldung, einen Eröffnungsantrag zu stellen.* [If a legal entity becomes illiquid or overindebted, the members of the representative body or the liquidators must apply for commencement of insolvency proceedings without undue delay but in any event no later than three weeks after the occurrence of illiquidity or overindebtedness] ».

323 Bundesgesetzblatt Jahrgang, 2008 Teil I, Nr. 48, of 28 October 2008, p. 2026 - *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)*, in force since 23 October 2008.

324 On this point the German Federal Parliament pointed out in the explanatory report accompanying the MoMiG that 'nothing is changed about the applicable legal situation'. RegE MoMiG BTDrucks 16/6140, p. 133

325 M. CASPER, 'Liability of the Managing Director and the Shareholder in the GmbH (Private Limited Company) in Crisis', in *German Law Journal,* 2009, 9, p.1125.p. 1138.

326 The reform of 2008 has introduced the duty to file upon the shareholders where the corporate governance of the company does provide for directors (*Führungslosigkeit*, see § 35(1) GmbHG).

327 M. LUTTER, *op.cit.,* p. 114.

Since the leading case decided by the German Supreme Court in 1955 [328], the duty of directors to file for insolvency proceedings has been unanimously understood as underpinning a *schutzgesetz*, a protectionary rule for the purposes of § 823(2) BGB [329].

As mentioned, the personal liability of the director towards third parties may result from the application of § 823(2) BGB read together with a (necessarily) 'protectionary provision'. The rule provided for by § 15 InsO is regarded as falling within that definition, since it pursues the objective of excluding an undertaking from the market, in order to prevent third parties from being harmed in their financial interests or suffer damage after having granting credit to the insolvent company. Therefore, unlike the duty under § 49(3) GmbHG, the failure to comply with the statutory duty to file for insolvency proceedings gives rise to the liability of the directors *vis-à-vis* creditors for the damage assumedly [330] resulting from the late opening of insolvency proceedings (the s.c. *Insolvenzvertiefungshaftung,* liability for the immersion of insolvency [331]).

The above remarks allow to address the issue of the s.c. 'new creditors', which emerges with particular clarity in the German system (more than in the other jurisdictions).

Indeed, in Germany a clear distinction is drawn between two groups of creditors, which affects not only the *quantum* of the damages which the creditor is entitled to seek the compensation for, but that significantly affects the action brought by each group of creditors, albeit deriving from the same legal basis.

The first group of creditors are the s.c. *Altgläubiger* (*i.e* creditors whose claims had already arisen when the company becomes materially insolvent). Those creditors may seek the compensation of the s.c. *quotenschaden*, *i.e.* the loss consisting of the difference between the recovery rate that they could have obtained in the case of timely filing and the actual rate (so-called 'rate reduction loss') [332]. The tortious action towards directors obeys to the ordinary principles of tort liability, in that it is necessary for the creditor to demonstrate the existence of causation link between the directors' misconducts

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328 BGH, 21 December 1955, in *BGHZ* 100, 19 (21) and in *NJW*, 1987, p. 2433

329 BGH, 09 July 1979 - II ZR 118/77, in NJW, 1823 (1979); BGH, 30 March 1998 - II ZR 146/96, in *NJW*, 1998, p. 2667; BGH, 6 June 1994 - II ZR 292/91, in *NJW*, 1994, p. 2220; BGH, 5 February 2007 - II ZR 234/05, in *GmbHR*, 2007, p. 482; BGH GmbHR 599, 600 (2007). see M. LUTTER, P. HOMMELHOFF, D. KLEINDIEK, 'under § 64', in M. LUTTER, P. HOMMELHOFF, D. KLEINDIEK (eds.), *GmbH- Gesetz*, Cologne, 2004, at [41]; H. ROWEDDER and C. SCHMIDT-LEITHOFF, 'under § 64', in H. ROWEDDER and C. SCHMIDT-LEITHOFF, *GmbH-Gesetz*, Munich, 2002, at [38]; K. SCHMIDT, U. SCHOLZ, 'under § 64' in *Kommentar zum gmbhg*, at [37].

330 See BGH, 16 December 1958 - VI ZR 245/57 (BGHZ 29, 100), in *NJW*, 1959, p. 623. which specifies that this protection in in favour of the creditors would be even more appropriate since the partners of a GmbH are not personally liable for the debts of the company (§ 13 para. 2 GmbHG).

331 S. GREULICH and J. BUNNEMANN, 'Geschäftsführerhaftung für Zahlungsunfahigkeit fuhrende Zahlungen an die Gesellschafter nach § 64 II 3 GmbHG-RefE-Solvenztest im deutschen Recht?', in NZG, 2006, pp. 681-684, K. SCHMIDT, 'Reform der Kapitalsicherung und Haftung in der Krise nach dem Regierungsentwurf des MoMiG', in *GMBHR*, 2007, pp. 1072-1079. D. ATWELL, *Das Europäische Gesellschaftsrecht. Die Auswirkungen des MoMiG auf den Gläubigerschutz*, 2017.

332 C. GERNER-BEUERLE, E. SCHUSTER, 'The Costs of Separation: Friction between Company and Insolvency Law in the Single Market', in *LSE Legal Studies Working Paper*, 6/2014, pp. 1-44, p. 26.

and the reduction of corporate assets due to the delay or failure of the commencement of the insolvency proceedings.

Where insolvency proceedings are opened, under article 92 InsO, the trustee is vested with the exclusive *locus standi* to bring the tortious actions of the insolvency creditors for the compensation for loss suffered collectively by the latter creditors as a result of the reduction in the value of the debtor's assets before or after commencement of insolvency proceedings (collective loss) (333).

The essential features of the right underlying the tortious action are not amended for the mere fact that the trustee acts on behalf of the creditors. By contrast, where insolvency proceedings are not opened (for instance, for insufficient assets under § 26 InsO) *Altgläubiger* may seek the compensation of the damage that they have suffered (*i.e.* the deterioration of their claim) independently (334).

The second group of creditors are the s.c. *Neugläubiger* (*i.e.* creditors whose claims arose after the material insolvency of the company). Essentially, such a category refers to those creditors who have entered into a business transaction with the company unaware of the distressed situation of the latter, and therefore, their claims arise as originally 'affected' by the insolvency of the debtor. Accordingly, the failure of the director to fulfil the duty to timely file the request to commence insolvency proceedings triggers the personal liability of the director *vis à vis* the new creditors (335). The latter creditors are entitled to claim the compensation for the breach of their 'negative interest' (the *Kontrahierungsschaden*) in concluding the transaction from which their claim stemmed, thus substantially claiming to be put in the condition in which they would have been without having concluded the contract with the (already materially insolvent) debtor.

Moreover, the *Neugläubiger* can also be entitled to compensation for loss of chance if they demonstrate that, as a result of the conclusion of the contract with the insolvent company, they have missed a profitable business opportunity.

In this respect, it is worth recalling the already mentioned personal liability of the directors based on the *culpa in contrahendo*.

By recognising a *culpa in contrahendo* of the director concealing the company's insolvency to the 'new creditors', the German Supreme Court (336) stated that, in the light of the general principles on damage

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333 With specific reference to reference to the position of the *Altgläubiger* see BGH, 06 June 1994 - II ZR 292/91, in *NJW*, 1994, p. 2220. In particular BGH, 30 March 1998 - II ZR 146/96, in *NJW,* 1998, p. 2667 BGH states that *Altgläubiger* cannot individually pursue the *Quotenschaden* against the director, in the light of the provision set forth under § 92 InsO.

334 M SCHILLIG, 'The Transition of Corporate Governance to Bankruptcy Governance – Convergence of German and US law?' in ECFR, 7, 2010, p.116 and pp. 126-137.

335 T. BACHNER, 'Wrongful Trading: A New European Model for Creditor Protection?', in *European Business Organization Review,* 2004, 5, pp. 293-319, p. 316.

336 BGH, 06 June 1994 - II ZR 292/91, in *NJW*, 1994, p. 2220, BGH, 07 July 2003 - II ZR 241/02, *NZG*, 2003, p. 923 *Contra BGH, 19 September 2007 - XII ZR 121/05*, in *NJW,* 2007, p. 3346 (which highlights the relevance of the moment of the conclusion of the contract with the company to distinguish between the two categories of creditors) See also R.A. ALTMEPPEN, 'Insolvenzverschleppungshaftung Stand ', in *ZIP*, 2001, p. 2201 who submits that the obligation to file for insolvency is a law that protects only the existing creditors of the company.

and causation, the positions of the *Altgläubiger* and the *Neugläubiger* require to be treated differently: while the "new creditors" can directly bring their claim against the directors for the 'loss of reliance', and such a claim can be brought beyond the insolvency proceedings, the *Altgläubiger* can only seek the compensation of their claims through the action of the insolvency trustee pursuant to § 92 InsO [337]. The inclusion of the *Neugläubiger* in the protection of § 15 InsO. and the related issue concerning whether the trustee is allowed to also collect their quota deterioration damage seems to be still rather debated [338].

Also, it is still highly debated the nature of the legal foundation of the liability of the directors deriving from the duty to file the insolvency petition. According to some authors the legal foundation of such a liability would rest on company law [339]. Some other authors maintain that since the right to file for insolvency proceedings is governed by insolvency law, then also the corresponding obligation should be considered of the same nature. Also, the inclusion of the duty to file within the § 15 InsO would demonstrate that that norm regulates a problem that is specific to insolvency law [340]. Other authors (convincingly) characterise the legal basis of § 15 InsO *and* § 823(2) BGB as tort law [341].

A further duty of directors concerning the 'twilight zone' that deserves to be analysed for the purposes of this work is the prohibition of payments under § 64 GmbHG.

When addressing the corporate duties of directors, it was illustrated that directors are liable (only) towards the company for the infringement of capital requirements under § 42(3) GmbHG.

In 2008 the MoMiG, acknowledging the insufficiency of the remedies provide under §§ 30, 31 and 43(3) GmbHG [342], has expressly introduced the additional remedy of the *Insolvenzverursachungshaftung* (*i.e.* liability for payments that have caused the material insolvency of the company) and has partially embedded, with reference to directors, the legal theory of the *Haftung aus einem existenzvernichtendem Eingriff* (*i.e.* liability *of shareholders* for destroying the economic basis of the company) [343].

Said provision states that directors are obliged to compensate the company for payments made after the material insolvency of the company has occurred or after it has been established that the company is overindebted, unless it is not proven that they are consistent with the standard care of the prudent businessman. The liability of directors arises also for payments to shareholders, if such payments

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As regards the *Neugläubiger*, it is a question, according to the author, of the protection of the community and not of the protection of the individual creditor.

337 A. SCHORK, 'Directors' liability: Germany', available at: www.insol-europe.org

338 M. CASPER, 'under § 64', in P.ULMER, M.HABERSACK, and M. WINTER, *Großkommentar zum gmbh-gesetz*, 2008), at [106].

339 P. ULMER, AUFSÄTZE – 'Gläubigerschutz bei Scheinauslandsgesellschaften', in *NJW,* 2004, p. 1201. H. ALTMEPPEN, 'Niederlassungsfreiheit von Daily Mail bis Inspire Art, Anmerkungen zum Aufsatz', in *NJW*, 2004, 97 ff. See also AG Bad Segeberg, 24 March 2005, in *NZI*, p. 411.

340 T. ZERRES, 'Teleologische Eingrenzung des Anwendungsbereuchs', in *DZWi*R, 2006, p. 356.

341 K. PANNEN, S. RIEDMAN, in *NZI*, 2005, pp. 413-414.

342 M. CASPER, 'Liability of the Managing Director and the Shareholder in the GmbH (Private Limited Company) in Crisis', in *German Law Journal,* 2009, 9, p. 1125.

343 M. CASPER, *op. cit.* p. 1125.

have led to the insolvency of the company, unless this outcome could not perceptible even by the director acting according to the standard of care of the prudent businessman (344).

At the outset it bears observing that § 64 GmbHG provides for two separate hypotheses entailing the director's liability. On the one side, under § 64(1) GmbHG, the director is liable towards the company for payments made *after* the insolvency of the company has occurred. On the other side, § 64(3) GmbHG, provides that the director must 'reimburse' the company for payments to shareholders where those *have caused* the material insolvency of the company, irrespective of the fact that those payments have to lead to an adverse balance as required by §§ 30, 31 GmbHG (345).

The two situations require a separate discussion.

Starting with the *Insolvenzverursachungshaftung*, it seems clear that the German legislature deemed it appropriate to aggravate the directors' regime (346), requiring the latter to pay particular attention whenever payments are made to shareholders (ultimately, the legislature is prohibiting the distribution of dividends and profits of the company when the distressed financial situation of the company reveals a risk of insolvency).

Under Article 64(3) GmbhG, not only directors are liable for payments eroding the share capital of the company (§ 42(3) GmbhG), but for any payment that is directly and causally linked to the subsequent material insolvency of the company (347).

The burden of proof requires that the claimant (typically the trustee) proves the typical elements of the 'damage' (*i.e.* the insolvency or the over-indebtedness of the company, which would absorb the concept of the harm) and the causal link. Instead, the unlawfulness of the payment seems to be presumed, and the director can overrule the presumption only demonstrating that that the payment was consistent with the standard duty of care of the prudent businessman, but, unlike § 43(2) GmbHG, he cannot argue that he has performed the payment on the basis of the binding instructions given by another corporate body (348).

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344 Literally « *Die Geschäftsführer sind der Gesellschaft zum Ersatz von Zahlungen verpflichtet, die nach Eintritt der Zahlungsunfähigkeit der Gesellschaft oder nach Feststellung ihrer Überschuldung geleistet werden. Dies gilt nicht von Zahlungen, die auch nach diesem Zeitpunkt mit der Sorgfalt eines ordentlichen Geschäftsmanns vereinbar sind. Die gleiche Verpflichtung trifft die Geschäftsführer für Zahlungen an Gesellschafter, soweit diese zur Zahlungsunfähigkeit der Gesellschaft führen mussten, es sei denn, dies war auch bei Beachtung der in Satz 2 bezeichneten Sorgfalt nicht erkennbar. Auf den Ersatzanspruch finden die Bestimmungen in § 43 Abs. 3 und 4 entsprechende Anwendung.* ». See also §§ 93 (3) no. 6, 92 (2) first paragraph AktG.

345 RegE MoMiG, BTDrucks No. 16/6140, p. 111; M. CASPER, *in* G. BACHMANN, M. CASPER, C. SCHÄFER, and R. VEIL*, Steuerungsfunktionen des haftungsrechts im gesellschafts- und kapitalmarktrecht*, 2007, pp. 33, 41 D. GESMANN-NUISSL, 'Quo vadis GmbH?', in *WM*, 2006, pp.1756-1763.

346 Which appears to be taking on increasingly draconian profiles in light of the recent case-law (BGH, 26 April 2018 – IX ZR 238/17, in *NJW* 2018, 2125, OLG Celle, 1 April 2016 - 8 W 20/16) stating that insurance cover of a D&O insurance does not cover the claim of an insolvent company against its insured managing director for compensation payments made in breach of insolvency law in accordance.

347 The explanatory report accompanying the MoMiG makes it clear that « *the payment must lead to the insolvency of the company without the addition of further causal contributions* ». See BT-Drucks. 16/6140, p. 46.

348 See BGH, 9 October 2012 - II ZR 298/11, in *ZIP* 2012, p. 239 (much debated by scholars). This is the precise reason underpinning the remit of § 64(3) GmbHG to § 43(2)-(3) GmbHG. If the director is asked to

As far as the damage is concerned, a part of the case-law considers that the claimant meets the burden of proof incumbent upon him by simply demonstrating the mathematical illiquidity test or the over-indebtedness [349].

The application of the *Insolvenzverursachungshaftung* entails a specific focus on the causality link between the payment and the occurrence of the material insolvency, which must be particularly rigorous in assessing that the specific payment concerned is the direct cause of the material insolvency. In other words, the rule under discussion should not entail that whatever pay-out to shareholders performed prior to the occurrence of the material insolvency is suitable to trigger the liability of directors. Instead, the claimant should demonstrate, on the basis of a prognostic *ex post* evaluation taking into account the temporal and the factual circumstances under which the payment was made (*i.e.* the financial situation of the company at the time of the performance of the payment), that it was the *condicio sine qua non* for the material insolvency.

The introduction of Article 64 GmbHG entailed a vivid doctrinal debate in Germany, mainly due to the fact that the new rule deals with a factual situation which may be placed in the 'evanescent' twilight zone between the financial stability of the company and the material insolvency, where occurs a shift in the interest to be protected (shareholders vs. creditors) that must be reflected in the interpretation of a provision which, however, belongs to the realm of ordinary company law.

In particular, it is debated among scholars whether the legal foundation of the actions that may arise under § 64 GmbHG entail an 'internal liability' (*i.e.* an action which is brought by the company, or the trustee if insolvency proceedings are opened, to the *indirect* benefit or the creditors) or an 'external liability' (*i.e.* an action that individual creditors may bring).

It is unanimously shared the conclusion if the action is brought in the context of insolvency proceedings, to the *locus standi* of the action lies with the trustee. However, the distinction between internal or external liability takes on relevance when, for whatever reason, the procedure is not opened.

Because of the specific creditor-protection profile of the action (which is also stressed in the explanatory Report of the MoMiG, which states that the objective of the reform is to protect creditors by reducing the probability of insolvency) the rule could be considered as underpinning a *schutzgesetz*,

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perform a payment by the shareholders, rather than executing the instructions and risk to incur in the liability under Article 64 GmbHG he should resign. See BT-Drucks. 16/6140, p. 47.

349 OLG Munich, ZIP 2010, 1236 , 1237, *OLG Celle*, 23 December 2003 – 9 U 176/03, in *GmbHR*, 2004, pp. 568-569 and *FCJ*, 19 November 2013 – II ZR 229/11, in NZI, 2014, pp. 232-234 (this would entail that the damage under §64(1) and §64(3) would be equated, as it ultimately consists of the material insolvency under the definition provided by § 17 InsO). *Contra Baumbach / Hueck / Haas, 'under § 64', in Baumbach / Hueck / Haas (eds), GmbHG, 19th ed., at [99], Kolmann, 'under § 64', in in Saenger / Inhester (eds.), GmbHG, at [90]* claiming that §64(3) GmbH should have a narrower scope, and, therefore the liquidity balance test would not be sufficient (BGH, 19 November 2013 - II ZR 229/11, in *NZI*, 2014, pp. 232-234, stating that in examining whether excessive indebtedness under § 19InsO the balance-sheet test presented by the insolvency trustee is merely indicative).

a protectionary rule for the purposes of §§ 823(2) or 826 BGB. Such a characterisation would entail that also creditors would be entitled to bring an action against directors, when insolvency proceedings are not opened [350].

However, under a literal interpretation, it seems that the *locus standi* to bring the action under § 64(3) GmbHG lies with the company, in the light of the remit made to § 64(1) GmbHG, which explicitly refers to the company (« *Gesellschaft* »). Therefore, one part of the German doctrine considers that the provision under § 64(3) GmbHG would be nothing than an equivalent remedy to §§ 30, 31 and 42(3) GmbHG and other provisions dealing with capital requirements [351], which *should* not entitle creditors to assert an action directly against the directors (but only against the company, thus indirectly benefitting of the proceeds of the action brought by the latter). This seems implicitly the approach bolstered by the German Supreme Court in a recent case, where it refers to the (mere) *legal consequences* of the action under §64 GmbHG [352]

Turning now the attention to § 64 (1) and (2) GmbHG, the directors [353] are liable towards the company for payments made after the occurrence of the insolvency or over-indebtedness [354].

The rule serves to guarantee the principle of the *par condicio creditorum* in the context of the (likely) subsequent insolvency proceedings, pursuant to the aforementioned objective of the insolvency procedure, under §1 InsO. That imposes to directors to preserve the company's assets that exist at the point in time when the material insolvency occurs, in order to avoid any preference in the satisfaction of the company's creditors within the (possible) insolvency proceedings. It is, indeed, assumed that only the trustee can decide to whom payments must be made [355].

Article 64(1)-(2) GmbHG serves, undoubtedly, therefore, a protectionary function: as it ultimately protects the equal treatment of creditors in the contest of the insolvency procedure. With a view to

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350 The doctrinal debate is extremely complex, and it is not an ambition of this work to analyse it in detail. It may be worth mentioning that legal theories may be divided in two major groups: (i) A first approach argues with the *KBV* case (BGHZ 151, 181 =NJW 3024 (2002) and assumes that § 64(3) GbmHG entails an 'external liability' based on § 826 BGB for the misuse of the legal form (see *supra* § I.5.1). The misuse of the legal form would be represented by the failure of the director to respect the predetermination concerning the assets of the company and the guidelines of proper liquidation proceedings. Many sub-approaches may be traced back to the 'external liability' theory (mostly referable to a purposive interpretation of § 13(2) GmbHG and §§ 1, 128, 129 HGB). All those approaches ultimately equate the *Insolvenzverursachungshaftung* to the Anglo-Saxon theory of the 'lifting the corporate veil', which would allow creditors to sue shareholders (and, here, directors) when the corporate liabilities exceed the company's assets. (ii) An opposing approach would instead argue that 64(3) GbmHG represents an 'internal liability', much alike §43 (3). The major exponent of this approach is R.A. ALTMEPPEN, 'Insolvenzverschleppungshaftung Stand', in *ZIP*, 2001, p. 1847. Other authors support the 'internal liability' on the basis of §§ 280(1), 241(2) and 276 BGB or, again, on the ground of an analogous application of §§ 30,31 GmbHG (invoking the conclusions of the *Trihotel* case). W. ZÖLLNER, *Gläubigerschutz durch Gesellschafterhaftung bei der GmbH, in* B. DAUNER-LIEB, P. HOMMELHOFF, M. JACOBS, D. KAISER, and C. WEBER (eds.), in *Festschrift für horst konzen, Tubingen*, 2006, pp. 999 -1018

351 J.S. SCHRÖDER, 'under §135', in J.S. SCHRÖDER (ed.), in *Hamburger Kommentar,* Berlin, 2015, at [4].

352 BGH, 21 May 2019 - II ZR 337/17, in *ZIP*, 2019, p. 1719

353 Including *de facto* directors (BGH, 25 February 2002 - II ZR 196/00, in *NJW*, 2002, p. 1803).

354 The material insolvency must be assessed pursuant to §17 and 19 InsO.

355 BGH, 31 March 2003 - II ZR 150/02, *NJW*, 2003, p. 2316.

implement to the largest possible extent such a protection, the concept of payment is interpreted in a very broad sense (thus not only including pecuniary payments) (356).

It is pivotal to underline that the payment should not be necessarily detrimental to the company's assets, entailing the depletion of the company's assets value. The prohibition to make payments encompasses also those payments which extinguish a previous liability fallen due or actually produce a financial advantage for the company. As recently stated by the Supreme Court the action does not pursue the compensation for a financial loss, but it is a « *claim for compensation of its own kind* » (357).

In the event of the refusal to commence insolvency proceedings due to insufficient assets (§ 26 InsO), the action of the company towards the directors may be brought also (directly (358)) by the individual creditors, because the claim itself (which pertains to the company) is interpreted as part of the company's assets, thus attachable by individual creditors (that, in turn, exercise it against the directors) (359).

I.5.4. The rules governing the lodging, verification and admission of insolvency claims under the German system

Starting with the first profile, the conduct of insolvency proceedings under the German system reveals profound differences compared to that of Italy, France and Spain.

In particular, what significantly differentiate the German system from the other systems described above, are the rules concerning the procedure for lodging, verification and admission of the insolvency claims.

Contrary to what occurs, for instance, under Articles 52 and 93-102 of the Italian l. fall., the admission and the determination of insolvency claims is not centralysed before the insolvency court, which applies the procedural rules specific to insolvency law (360). In Germany, neither the insolvency court, not the trustee is requested to verify on their own motion the accuracy of lodged insolvency claims.

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356 The German case-law has further specified the content of the concept of payment, specifying that it also includes the deposit of cheques issued by customers into a company account with a negative balance (BGH, 29 November 1999 - II ZR 273/98, in *NJW*, 2000, p. 668; BGH, 11 September 2000 - II ZR 70/99, in *NJW*, 2001, p. 304; BGH, 08 January 2007 - II ZR 334/04, in *NZG*, 2007, p. 462 with observations by K. SCHMIDT, in *ZIP*, 2008, p. 1401 and ff.) the sale of goods belonging to the company's assets for their market value and even the anticipated satisfaction of the Treasury as regards the due tax, since occurring the material insolvency the tax authorities can't be satisfied in a privileged way either (BGH, 08 January 2001 - II ZR 88/99, in *NJW*, 2001, p. 1280).

357 BGH, 8 January 2001 - II ZR 88/99, in NJW 2001, 1280; BGH, 31 March 2003 - II ZR 150/02, in ZIP 2003, 1005.

358 BGH, 11 September 2000 - II ZR 370/99, NJW, 2001, p. 304, BGH, 18 November 1969 - II ZR 83/68, in *BGHZ*, 53, p. 71-74, Sen. Urt. V. 15 June 1992 -II ZR 229/91, in *ZIP*, 1992, p. 992.

359 § 92 InsO reads « *claims of the insolvency creditors for compensation for loss suffered collectively by these insolvency creditors as a result of a reduction in the value of the assets of the insolvency estate before or after commencement of insolvency proceedings (collective loss) may be asserted during the insolvency proceedings only by the insolvency administrator* ».

359 However, according to some authors creditors may benefit of the liability regime established under Article 64, only after they have acquired enforceable writ against the Gmbh G. H. ROTH and H. ALTMEPPEN, 'under §64', in G. H. ROTH and H. ALTMEPPEN (eds.), *Gesetz betreffend die Gesellschaften mit beschra¨nkter Haftung, GmbHG*, Munich, 2005, at [9].

360 See in particular *supra* § I.2.1.

It is up to the creditor to pursue the assessment of his claim (in the ordinary civil and commercial), in order to participate to the distribution of the debtor's assets [361].

Instead, under § 174 InsO. (*Insolvenzording*), insolvency creditors must transmit their claims in writing [362] to the trustee (and not to the insolvency court [363]).

Once the trustee has received all the petitions, he must register each claim in a schedule, where admissible. If the creditor's petition does not comply with the formal requirements the irregularities are signalled to the creditor, who can adjust accordingly its petition [364]. The amount and ranking of the filed claims shall be verified at the verification meeting, supervised by the insolvency court, where the insolvency claims and the creditors holding a right of segregation of separate satisfaction registered in the schedule are cross-examined by the trustee, the other creditors and the debtor.

If a claim is disputed by the insolvency trustee or one of the insolvency creditors, it is left to the creditor to pursue acceptance of the claim against the party disputing the claim, unless the title of the claim is represented by an enforceable debt instrument or a judgement having *res judicata* effects. In that case it is deferred to the contesting party to pursue the objection in the ordinary venue.

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361 Should the creditor fail to demonstrate the validity and the existence of his claim, the German law provides for the forfeiture of his claim (§§ 89(1) and 301(1) InsO).

362 Creditors must indicate the title underlying their credit (and, in particular, the contractual or extracontractual nature of the claim), amount and criteria for the computing of the interest accrued and join all the documents attesting his credit. If the creditor is entitled to the satisfaction of more claims, they must be indicated separately.

363 It may be worth mentioning that under the former § 134, 139 KO insolvency creditors had to file their claims with the insolvency court.

364 Therefore, the control carried out by the trustee concerns merely the admissibility of the claim. G. Nowak, 'Under § 172', in *Münchener Kommentar Insolvenzordnung*, Munich, 2002, at [7].

CHAPTER II
EUROPEAN INSOLVENCY LAW AND VIS ATTRACTIVA
THE OUTLINE OF THE PROBLEM

CONTENTS SECTION I: A brief overview on the history and background of the European initiative on insolvency law - SECTION II: II.1. The rules on 'insolvency proceedings' of the Insolvency Regulation - II.2. The rules of civil and commercial matters: the 'Brussels Regime' and the Lugano Convention - SECTION III: The boundaries between the Insolvency Regulation and the Brussels Regulation: outline of the problem. SECTION IV: The individual dimensions of the problem: Annex Actions. IV.1. The vis attractiva concursus in Phase I of the Bankruptcy Project - IV.2. The (lack of) provisions expressly addressing the vis attractiva concursus under the Insolvency Regulation - IV.3. [segue] Some (unsuccessful) attempts of scholars to find a rule on jurisdiction on Annex Actions - IV.3.1. The applicability of the rules of private international law of each Member State - IV.3.2. The interpretation of Article 3 EIR as allocating (directly or by way of analogy) jurisdiction of Annex Actions - IV.3.3. The applicability of the Brussels I Regulation - IV.3.3. The general applicability of the *lex fori concursus*

SECTION 1

A BRIEF OVERVIEW ON THE HISTORY AND BACKGROUND OF THE EUROPEAN INITIATIVE ON INSOLVENCY LAW

CONTENTS: I.1. The phases of the EC Insolvency Project - I.2. Phase I of the EC Insolvency Project: unity and universality and the Preliminary Draft Convention of 1970 - I.3. [segue] the Draft Convention of 1980 and its subsequent amendments - I.4. The Istanbul Convention of the Council of Europe and the Convention on Insolvency Proceedings dated 1990 - I.5. Phase II of the Bankruptcy Project: the European Insolvency Convention of 1995 - I.6. Phase III: The EC Regulation 1346/2000 - 1.7. Phase IV: The Recast Insolvency Regulation 2015/848 [reference]

I.1. The phases of the EC Insolvency Project

The process of concluding a convention regulating the conduct of insolvency proceedings between the Member States took nearly 40 years to the European Union (formerly, European Community).

To recall the background and the evolution of the European initiative on insolvency law takes on relevance not merely for purposes of incidental historic interest or a 'mere antiquarianism'. Besides, as will emerge hereinafter, it fosters a programmatic approach to the subject matter of the present dissertation, since the provisions envisaged in the *avant projets*, that will be analysed in the following pages, have exercised a significant influence over the provisions currently in force, thus representing a crucial starting point for the study of the latter (although they remained dead letter at that time) [365].

365 The value of a historic analysis for the purposes described above, despite the abandonment of the projects of convention so long ago, was endorsed by a large number of authors (among others, C. VELLANI, *L'approccio giurisdizionale all'insolvenza transfrontaliera*, Milano, 2006, and M. VANZETTI, *L'insolvenza transnazionale storia del problema*, Milano, 2006). Indeed, as pointed out also by authoritative doctrine, it might be supposed that, during the years from 1960 to 1980, the evolution of the (Preliminary) Draft Convention, is primarily of historic interest, nevertheless « *some accounts of its principal features, and also reasons of its ultimate failure, should be placed on record, partly to provide a better understanding of the intentions that were later to accompany Phase II of the project, but also in*

In particular, that holds true as far as the subject of the *vis attractiva concursus* is concerned. It would have been undesirable to address the issue at stake without considering the specific regime set forth therein and to assess whether (and how far) that has affected the shaping of the subsequent regulatory texts.

Following the foundation of the European Communities in 1957, one of the objectives expressed in the Foundation Treaty of the European Economic Community (366) was that of establishing a common market and progressively approximating the economic policies of Member States (367). The process of integration of the economic field, along with the more ambitious purpose of abolishing all obstacles to freedom of movement for goods, persons, services and capitals, entailed the need of creating a common legal system (at least) in the field of civil and commercial law matters (368).

More specifically, the need was felt to develop instruments securing the simplification of formalities governing the reciprocal recognition and enforcement of judgements (369).

The need for such harmonisation of the Member States' different laws was well envisaged at the time of drafting the Treaty of Rome. Indeed, to attain these goals, two possible paths were provided therein (370): first, under Article 100 EEC Treaty the Commission could issue directives for the « *approximation of such provisions laid down by law, regulation or administrative action in Member States as directly*

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the hope that some errors will not be repeated in the course of some future projects of this kind ». See I. FLETCHER, *Insolvency in private Law*, Oxford, 2005, p. 346.

366 The Treaty Establishing the European Economic Communities signed in Rome on 25 March 1957.

367 Under Article 2 EC Treaty «*The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it* ».

368 It is worth mentioning that in a note sent to the Member States on 22 October 1959, inviting them to commence negotiations, the Commission of the European Economic Community pointed out that « *a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem* ». It was Giscard d'Estaing who, on the occasion of the Council of Europe held in Brussels on 5 December 1977, stated « *La construction de l'Union de l'Europe devrait s'enrichir d'un nouveau concept, celui de l'espace judiciaire* ». See also J. CHARPENTIER, 'Vers un espace judiciaire européen', in *Annuaire Fraçais de droit international*, 1978, p. 927. See also the point. 28 of the Tampere Presidency Conclusions of 15 and 16 October 1999, where it is stated that « *In a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States* ». See also points 5, 33, 34 and 39 thereof. Indeed, clear and predictable rules on jurisdiction and enforcement of decisions on cross-border civil matters foster the goal of internal market integration. On this point, among others, see A. NUYTS, N. E. HATZIMIHAIL, *Cross-Border Class Actions: The European Way*, Sellier, 2014, p. 32 and G. BARRET, 'Introduction' in G. BARRETT (ed.), *Creating a European Judicial Space, Prospects for Improving Judicial Cooperation in Civil Matters in the European Union, Academy of European Law*, Trier 2001, pp. 7-14; P. J. OMAR, 'Genesis of the European Initiative in Insolvency law', in *Int. Insolv. Rev.*, 12, pp. 147-170.

369 P. J. OMAR, *op. cit.* p. 149.

370 C. VELLANI, *op. cit.*, pp. 232-233.

affect the establishment or functioning of the common market » [371]; second, Article 220 EEC Treaty committed the Member States to enter « *into negotiations with each other with a view to securing for the benefit of their nationals:* […] *the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards* » [372].

It was under the aegis of the latter provision [373], that on 18 February 1960, following a proposal by the EC Commission, the Committee of Permanent Representatives of the Member States, bestowed upon a committee of experts [374] the task to draft a convention on the recognition and enforcement of decisions in civil and commercial matters (the soon-to-be 'Convention on jurisdiction and the enforcement of judgments in civil and commercial matters', signed in Brussels on 27 September 1968, hereinafter the 'Brussels Convention') [375].

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371 Article 100 EEC Treaty (now amended in art. 94 of the TFEU) reads « *The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market* ». See R. KOVAR, 'under Art. 100', in V. CONSTANTINESCO, J. P. JACQUÉ, R. KOVAR, D. SIMON (eds.), *Traité instituant la CEE, Commentaire Article par article*, Paris, 1992, pp. 549-558. As pointed out by scholars, it was reasonable to find such an effect also in the field of insolvency law, due to the impact of insolvency proceedings over the national economy. See C. VELLANI, *op. cit.*, p. 233. See also, the 'Report on the convention relating to bankruptcies, compositions and analogous procedures', prepared by J. NOËL, AND J. LEMONTEY (16.775/XIV/70-E), p. 10, available at http://aei.pitt.edu (hereinafter, Lemontey Report).

372 See article 220 EEC Treaty (now amended in art. 293 TFEU), which « *prévoit la négociation de conventions entre les états members, dans divers domaines relavant principalement du droit international privé, en vue de réaliser des objectifs de la Communauté par des règles de droit uniformes* ». D. BUREAU, 'Les conflits de conventions ', in *Droit international privé*, 2001, p. 203. Art 220 EEC Treaty, however, had no binding effect, for it merely invited the Member States to enter into negotiations 'as far as necessary'. According to a part of scholars, the entry into force of a convention adopted under article 220 EEC Treaty was not subjected to the ratification of all the Member States. However, as noted by an author, at point 5 of the Opinion of the Commission dated 10 December 1981, on the Project of Convention on bankruptcy, compositions and analogous procedures' (81/1068 CEE), in *OJ*, L. 391/23 of 31 December 1981, the Commission stated that « *the project of convention on insolvency proceedings shall entry into force upon ratification of all contracting Member States* ». A. LUPONE, *L'insolvenza transnazionale: Procedure concorsuali nello stato e beni all'estero*, Padova, 1995, p. 71-72. Despite the aforementioned inconsistency, what bears observing is that by choosing art. 220(4) EEC Treaty as legal basis of the Preliminary Draft Convention, the prominent interest of the Commission was to build the consensus of all the Member States around the Convention.

373 Formally, the choice of article 220 EC Treaty over article 100 EEC Treaty as the legal basis of the Preliminary Draft Convention was due, on one hand, mainly to the fact that the harmonisation of the national laws would have taken much longer and would have raised greater difficulties. See on this point Lemontey Report, p. 48. On the other hand, it was necessary to preserve the consistency with the instrument chosen for the Brussels Convention. See L. DANIELE, *op. cit.*, p. 234. L. A. BURTON, 'Toward an international bankruptcy policy in Europe: four decades in search of a treaty', in *Annual survey of international & comparative Law*, 5, 1999, p. 210, fn. 21.

374 The working group included delegates of the six Member States, as well as observers for the Benelux Committee for the Benelux Commission for the study of the unification of law and from the Hague Conference on Private International Law.

375 The Brussels Convention was the sole instrument of judicial cooperation that was adopted on the basis of article 220 EEC Treaty. Albeit extremely efficient and successful, for almost thirty years it was the sole tool of European procedural law. Actually, the Convention on the law applicable to contractual obligations opened for signature on 19 June 1980 and published in *Official Journal*, C. 027 of 26 January 1998 (released as Document 80/934/EEC), despite not having its legal basis in art. 220 EC Treaty, has always been regarded as a Community act. The Rome Convention was adopted as a traditional convention of international law, but it is a 'close' instrument to which only Member States may accede. See on this point the Report on the Convention on the law applicable to contractual obligations, prepared by M. GIULIANO and P. LAGARDE, in *Official Journal*, C. 282, 31 October 1980, in particular at [3].

According to the original intention, the Brussels Convention was conceived to regulate the whole field of civil and commercial law, providing a general set of rules for the free circulation of judgements, with no exclusions or limitation as to its substantive scope (376). However, in the course of the working party's activity, it soon became apparent that the complexity of the insolvency branch required *ad hoc* negotiations and tailored-made rules (377). Therefore, in order to avoid any delays in the drafting of the Brussels Convention, the solution envisaged as preferable was « *not to provide in the* [Brussels Convention a rule on] *recognition and enforcement of decisions in bankruptcy matters, but to work out a special convention relating to bankruptcy and proceedings* » (378).

As a consequence, in July 1960, a parallel commission of experts was therefore formed to engage negotiations towards a specific convention regulating the conduct of insolvency proceedings as between the six founding Member States (379).

The moment of the appointment of that working group marks the beginning of the protracted and uneven saga of the adoption of a common regime in the field of insolvency law (or, to use the expression of an eminent author, the 'Insolvency Project' (380)), which will be scanned into four phases, spanning from 1960 to 2015.

More in particular, Phase I coincides broadly with the publication of two texts, namely the 'Preliminary Draft Convention on bankruptcy, compositions and analogous proceedings' dated 16 February 1970 (hereinafter the 'Preliminary Draft Convention' (381)) and, the 'Draft Convention on bankruptcy, compositions and analogous proceedings', dated 23 June 1980 and subsequently amended in 1982 and 1984 (the 'Draft Convention' (382)).

Phase II occurred in the years between 1989-1995 and culminated with the publication on 23 November 1995 of the 'Convention on insolvency proceedings' (383).

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376 L. DANIELE, *op. cit.*, 234. J. NOËL, 'Lignes directrices du projet de convention CEE relative à la faillite', in *Revue trimestrelle de droit européen*, 1975, p. 12. See also the 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters', in *Official Journal*, C. 59/1, 1979, prepared by P. JENARD, p. 1.

377 A. LUPONE, *op.cit.,* p. 73.

378 Indeed, as clearly expressed in the Lemontey Report accompanying the Preliminary Draft Convention, due to the « *complexity of the problems posed by bankruptcy, and the concern not to delay work on the General Convention* », the solution envisaged as preferable was « *not to provide in the* [Brussels Convention a regime on] *recognition and enforcement of decisions in bankruptcy matters, but to work out a special convention relating to bankruptcy and proceedings which must be grouped with it either by reason of their being analogous or because they aim to prevent bankruptcy and to avoid it being pronounced* », cfr. Lemontey Report., p. 2.

379 Namely, France, Federal Republic of Germany, Italy, Luxembourg and Netherlands.

380 I. FLETCHER, *op.cit.*, p. 341.

381 Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings released as Doc. 3.327/1/XIV/70-F and available at available at http://aei.pitt.edu.

382 Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings, in Bulletin of the European Communities Supplement 2/82.

383 The Convention on Insolvency Proceedings of 23 November 1995 (released as Council Doc. CONV/INSOL/X1 and available at http://aei.pitt.edu).

It is worth noticing that Phases I and II involved the Member States (initially six, and afterwards, with the enlargement of the Community's membership, nine) as contracting parties of international conventions.

Phase III corresponds to the adoption of the Regulation (EC) 1346/2000 on insolvency proceedings [384]. During this phase, the Insolvency Project assumed the form of a regulation adopted by the EC Council by virtue of the amendments to the institutional framework of the European Union as per the modifications produced by the Treaty of Amsterdam.

Finally, Phase IV of the Insolvency Project, ended with the adoption of the Regulation (EU) 2015/848 on insolvency proceedings [385], is the result of ten years' application of the EIR. The latter phase will be treated more in detail in Chapter IV.

I.2. Phase I of the Bankruptcy Project: Unity and Universality and the Preliminary Draft Convention of 1970

The first phase, spanning the years 1970-1984, begins with the draft of a first proposal [386] of a 'Convention on bankruptcy, compositions and analogous proceedings', produced by a working group of experts chosen among representatives of the six State Members of the EC in 1970.

As mentioned above, the working group was expressly convened by the Commission in 1960, with the specific task of negotiating a convention concerning bankruptcy and related matters, in parallel with the commission of experts, already formed in 1960, dealing with the conclusion of the Brussels Convention on civil and commercial matters.

In the light of the above, it is worth noticing henceforth that the Preliminary Draft Convention, was considered as complementary to the Brussels Convention [387].

Moving briefly to its principal features, it must be pointed out, that the Preliminary Draft Convention is in the first place a convention of private international law [388]. As a matter of fact, the approach chosen by the working group was to draft a convention (almost only) dictating conflict of law rules, therefore shelving the - far more ambitious - attempt to reach, if not the unification, at least the harmonisation of the legal systems of the six Member States. Said objective was deferred to also because it should have postulated the unification of national laws of obligations. Despite being

384 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in *OJ* L. 160, 30 June 2000.

385 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in *Official Journal*, L. 141, 5 June 2015.

386 Actually, the very first draft of a convention dates 1960 (the 'Project of Convention concerning the execution insolvency judgements and analogous decisions between the Member States of the Common Market'). It encompassed a short text of 8 articles, and it was committed to the implementation of the principles of unity and universality of insolvency proceedings. See M. VANZETTI, *op. cit.*, p. 439.

387 See Lemontey Report, p. 1.

388 L. DANIELE, *op.cit.*, pp. 228-229.

theoretically desirable, said « *unification of the laws of obligation* [was indeed] *a very wide-raging task* » [389]. Therefore (with the exception of what will be said below on the provisions of Annex 1) the working group opted for the drafting of a convention of private international law, also considering that « *in the present state of the Common Market, a bankruptcy convention is of such interest that it was impossible to post-pone its introduction in such a way* ». In other words, the Preliminary Draft Convention did not aim at creating a 'European' model procedure of insolvency or at modifying the rules of national laws on insolvency, but it fostered a « *European-wide effect to bankruptcies by settling conflicts between national laws and between the courts of different Contracting States* » [390].

As to the structure of the Preliminary Draft Convention, drafted in French, it was comprised of a text of 82 Articles, two annexes and one protocol. Annex I proposed a model law of six articles concerning specific features of insolvency law. Annex II contained a number of possible reservations by the contracting States, by which they could refuse to introduce into their national laws one or more provisions either of the uniform law or of the convention itself. Finally, the protocol set forth judicial and administrative provisions for the implementation of the convention.

Article 1 of the Preliminary Draft Convention provided that the set ot rules thereof should apply to bankruptcy proceedings *stricto sensu* (that Article 1 defined jointly as 'faillite' listed in Article 1(a) of the protocol), as well as to compositions and analogous proceedings (listed in Article 1, (b) of the same protocol [391]). However, from the categories of proceedings the Convention applied to, those concerning all types of insurance undertakings, other than re-insurer and certain types of undertakings listed in the protocol were excluded.

Also, the Preliminary Draft Convention referred to all insolvency proceedings, even the purely national ones, the application of the Convention depending exclusively upon the opening of procedure listed in Article 1 of the protocol, irrespectively of whether the proceedings had cross border elements with one or more contracting States or not.

The cornerstone of the Preliminary Draft Convention was a strict concept of universality and unity of insolvency proceedings [392].

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389 Lemontey Report, p. 1

390 Lemontey Report, p. 11.

391 Intuitively, the distinction between these two types of proceedings depends on the purpose pursued. The first group of proceedings aims at the satisfaction of creditors throughout the proceeds out of the liquidation of the debtor's assets, whereas proceedings falling within the second group tend the reorganisation of the company. Actually, as noted by Daniele, little room was left to the latter proceedings in the Preliminary Draft Convention. The vast majority of provisions therein were clearly inspired to liquidation proceedings and only a few articles provided for a set of rules directly applicable to compositions or analogous proceedings. At the time, too, this approach was criticised by scholars in the light of the developments in various national systems, in which pure liquidation insolvency proceedings were becoming increasingly marginalised, to favour instead proceedings aimed at restructuring of companies. See L. DANIELE, *op. cit.*, p. 240.

392 Hunter recalls that the goal of unity and universalism of insolvency proceedings has often been sought in the past, for instance in the context of the Hague Conference of 1925-1928 on the subject of international bankruptcy, the Draft International Bankruptcy Treaty produced by the International Law Association, and by

From a subjective point of view, unity of proceedings entails that the insolvency procedure opened against the undertaking by the courts of one Member State automatically takes full effect *ipso iure* in all others contracting States, precluding the possibility to open parallel insolvency proceedings against the same debtor. In principle, the procedure against the debtor is therefore unique throughout all the contracting States.

That principle was enshrined in Article 2 Preliminary Draft Convention, reading « *Les procédures visées à la présente Convention, lorsqu'elles ont été ouvertes dans un des État contractants, produisent de plein droit leurs effets sur le territoire des autres États contractants et y mettent obstacle à l'ouverture de toute autre de ces procédures* ».

From an objective point of view, the universality of proceedings means that all the assets of the debtor, wherever located, are subject to the same procedure. Indeed, pursuant to Article 33 thereof, « *la faillite prononcée conformément aux dispositions de la présente Convention produit ses effets à l'égard de tous les biens du failli situés sur le territoire des États contractants* ».

While easy to be praised in theory as objectives, unity and universality needed to be implemented by the provisions of the Preliminary Draft Convention. However, as noted by an author, such attempt was defective in many details, in that the Convention did not achieve its goals (393). Indeed, the drafters of the Preliminary Draft Convention were not able to enforce unity and universality against all assets and in respect of all creditors wherever situated (394).

The practical difficulties in enacting unity and universality of insolvency proceedings were first reflected in the regime of the jurisdiction, which was the first issue to be affected by the conceptional approach adopted by the drafters of the Convention. Needless to say, in order to realise the *judicium concursus* provided for in Article 2 Preliminary Draft Convention, it was crucial to identify the sole *forum* vested with the jurisdiction to administer the centralised insolvency estate.

Yet, the ultimate shape of the jurisdictional regime of the Preliminary Draft Convention eventually failed to reach the objective of unity (and universality) of proceedings.

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the bilateral and trilateral conventions between several Member States. M. HUNTER, 'The Draft Bankruptcy Convention of the European Economic Communities', in *Int'l & Comp. L.Q.*, 1972, p. 685.

393 I. FLETCHER, *op. cit.*, p. 348.

394 In any case, the Convention provided for certain exceptions to the principle of unity and universality. For instance, pursuant to article 56 of the Preliminary Draft Convention, an *action en opposabilité* was conferred upon any interested party to challenge a judgement opening insolvency proceedings against a debtor in another contracting State, according to the conditions of article 56 (*i.e. (i)* in the event that, for reasons of circumstances the debtor could not be held responsible for, the debtor had not received adequate notice of insolvency proceedings, so as to ensure his defense thereto or to avail himself of the remedies against the judgement opening insolvency; *(ii)* the judgement opening insolvency proceedings was contrary to public policy). Should the *action en opposabilité* be successful, the decision opening insolvency proceedings handed down in another contracting State would cease to take effect in the contracting State where that action was brought. However (and here lies the exception to the principle of unity) article 60 provided that insolvency proceedings could still be opened in the latter contracting State against the same debtor, but the effects of such proceedings would have been confined to its territory. See V. COLESANTI, 'Unità e universalità del fallimento nel progetto di convenzione nella C.E.E.', in *Banca, borsa e titoli di credito*, 1971, p. 557. M. HUNTER, *op.cit.,* p. 682.

Under Articles 3-5 thereof, a three-tier hierarchy of jurisdictional criteria was proposed [395]. The first rank was accorded to the courts of the Member State where the debtor had its '*centre des affaires*' [396]. The second rank allocated jurisdiction with the courts of the contracting State where the debtor had an 'establishment' [397], provided that the centre of administration of the same debtor was outside the contracting States. Eventually, the third rank provided an 'exorbitant' ground for jurisdiction, which was intended to apply to situations where neither the *centre des affaires* nor an establishment of the debtor were located in a contracting State, providing that « *les jurisdictions de l'État contractant dont la législation permet de prononcer la faillite sont compétentes* ».

While the 'prevailing' jurisdiction of the *centre des affaires* was conceived as a unique and exclusive *forum*, evidently the establishments of the debtor could be several and located in the territories of more than one contracting State. As a result, the Preliminary Draft Convention - despite the declaration of intent of maintaining the unity of insolvency proceedings [398] - did allow for the opening of parallel insolvency proceedings in the States where the establishment(s) of the same debtor were located [399]. Therefore, the scheme of the Preliminary Draft Convention could well lead to conflicts of jurisdiction (as well as to irreconcilable judgements) [400]. To mitigate that risk, the Preliminary Draft Convention provided for provisions governing conflicts of jurisdiction in Articles 15 and 16.

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395 As the Lemontey Report states « *the basic principle of the Convention rests on a hierarchy of rules of jurisdiction at the summit of which is found the centre of administration* ». See Rapport Lemontey, p. 33. See also, I. FLETCHER, *Insolvency in private international law,* Oxford, 2005, p. 349.

396 The Lemontey Report specified that the criterion of the 'centre des affairs' was a compromise solution between several possible criteria discussed by the commission, which opted for the elaboration of a new criterion. It was intended as « *is the place where the administration of the principal interests of the debtor is usually carried on* ». See Rapport Lemontey, p. 29.

397 The Lemontey Report defined 'establishment' as « *secondary business premises, an agency or a branch, that is to say, any base for industrial or commercial activities, which differing from a subsidiary company, remains directly dependent on the principal office (seat) of the enterprise and has therefore no debts on its own* ». See Lemontey Report, p. 33.

398 Daniele submits that the mere fact that a convention that was built upon the principle of unity of insolvency proceedings provided for alternative jurisdictions contrasted with the very spirit of the Preliminary Draft Convention. The same author refers that it was proposed to allocate exclusive jurisdiction to the courts of the contracting State, where the most important establishment was located. However, the Lemontey Report explained that such a solution was rejected. It would have entailed complex verification upon the judge seised for the opening of insolvency proceedings. It would unjustifiably have delayed the opening of insolvency proceedings (See Lemontey Report, p. 34). I tend to agree with the opinion of the author mentioned above, according to whom this justification was not entirely convincing. As Daniele submits, the risk of (positive) conflicts of jurisdiction and irreconcilable judgements proves to be no less significant than the problems encountered by the judge when assessing whether the establishment of the debtor represents the most important one. L. DANIELE, *op. cit.* pp. 228-229.

399 Therefore, the ground for jurisdiction under art. 4 of the Preliminary Draft Convention was considered as providing for alternative jurisdiction.

400 In addition to the concurrent fora provided by article 4 Preliminary Draft Convention, it could well occur that more than one court claimed to have jurisdiction, when they considered that the *centre des affaires* of the same debtor was located within the territory of their Contracting State. Conflict of jurisdiction could have also arisen under Articles 6 and 8 of the Preliminary Draft Convention. According to such provisions, in the event of a transfer of the centre of business (or the establishment) to another Contracting State, a sort of *perpetuatio jurisdictionis* was envisaged. In this situation, an 'interim alternative jurisdiction' - or, as the Lemontey Report calls it, a 'transitional duality of jurisdiction', (p. 36) - would arise, according to which for six months after the transfer, the courts of both the first and the second state would have jurisdiction.

Pursuant to Article 15(1), when the conflict of jurisdiction arose between the courts of the State of the centre of administration and the courts of the establishment, the first one should prevail, and the courts of the latter State should decline jurisdiction, or stay proceedings until the judgement rendered by the former became binding.

If the conflict of jurisdiction arose between concurrent *fora* of the same rank (for instance, whenever two courts of the States in the territory of which the establishments of the same debtor were located declared they both had jurisdiction), under Article 15(2) the jurisdiction of the court first opening insolvency proceedings was to prevail over the others.

The Preliminary Draft Convention addressed also the recognition and enforcement of judgements, which in turn witnessed the profound impact that the objectives of unity and universality of insolvency proceedings had in formulating the provisions of the Preliminary Draft Convention.

Article 50 provided that judgements handed down by the court of the contracting States (and the effects thereof) should be recognised in all other contracting States with no further formalities [401].

The *ratio* underlying the bulk of provisions on recognition and enforcement seems to be clearer (albeit arguable) in the light of the subsequent Articles 51 and 52 thereof, that were defined as the 'true essence of the Convention': the whole point of the rules on recognition of the Preliminary Draft Convention was not 'how' foreign judgements were recognised, but 'which' judgement should be recognized.

As mentioned above, the system of the Preliminary Draft Convention not only did not exclude, but, under certain circumstances, even expressly allowed multiple decisions opening insolvency proceedings *vis-à-vis* the same debtor.

To overcome the risk of a plurality of irreconcilable judgements, Article 51, completing the regime of conflicts of jurisdiction, provided that « *lorsque la faillite d'un même débiteur a été prononcée pas des juridictions d'États contractants différents, et que la compétence de l'une d'elles prévaut en application de la présente Convention, la décision émanant de la juridiction dont la compétence prévaut produit seule ses effets, même dans les États où les autres décisions ont été prononcées* ».

Similarly, Article 52 read « *lorsque la faillite d'un même débiteur a été prononcée pas des juridictions d'États contractants différents ayant le même fondement de compétence selon les dispositions de la présente Convention, la décision de la juridiction qui a statué en premier lieu produit seule ses effets, même dans les États où les autres décisions ont été prononcées* ».

Accordingly, concurrent judgements opening insolvency proceedings subsequently handed down by the courts of the other contracting States should become ineffective. Nevertheless, arguably all the acts performed by liquidators appointed in the context of those proceedings remained effective, according to Article 53.

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401 The text of this provision echoed the wording of the abovementioned article 2 of the Preliminary Draft Convention; thus, scholars have doubted on the utility of said provision. L. DANIELE, *op. cit.*, p. 271. V. COLESANTI, *op. cit.*, p. 26 and ff.

It was submitted that the rules of recognition under those provisions represented a 'filter' in respect of multiple decisions opening insolvency proceedings. Indeed, only one procedure could assume the Community dimension pursued by the Convention, thus restoring the unity and universality of insolvency proceedings in all the contracting States, which Articles 2 and 33 Preliminary Draft Convention aimed at (and that the drafters could not achieve with the rules on jurisdiction).

The Preliminary Draft Convention did not address exclusively the profile of the jurisdiction and the recognition and enforcement of decisions opening insolvency proceedings. As the judgment opening insolvency proceedings is only the first step of a more complex procedure concerning the assets of the debtor, the Preliminary Draft Convention provided for rules governing the issues regarding the conduct of such procedure. Therefore, unity of proceedings was pursued in different ways, both with rules of uniform law and with conflict of law provisions.

It goes beyond the scope of this research to analyse them all [402].

Suffice here to mention that, as to the rules of uniform law, the Preliminary Draft Convention proposed a model law comprising of six articles, contained in Annex I, dedicated to some central aspect of insolvency [403] in regard to which the drafters hoped to introduce, at least [404], a single bankruptcy law applicable to all the contracting States with a unified procedural code ancillary to it [405]. In addition, several provisions in the *corpus* of the Preliminary Draft Convention (mainly in Title IV), dictated a specific norm applicable to insolvency proceedings autonomously from national laws [406].

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402 For a more detailed analysis see L. DANIELE, *op.cit.*, pp. 280-300.

403 Namely, the extension of insolvency proceedings of firms, companies and other legal persons to directors and managers (Annex I, art. 1); Insolvency of persons responsible for the management of the company (Annex I, art. 2); Suspect period and exercise of paulian action (Annex I, art. 4); Set-off (Annex I, art. 5); Contracts of sale with reservation of title (Annex I, art. 6). These rules were extensively examined by commentators. See, among others, G. ZANARONE, *Un progetto europeo di legge uniforme sul fallimento*, in A. Grisoli, *L'integrazione economica Eurpoea all'inizio degli anni settanta*, Pavia, 1973, p. 399. C. CONNERTON, 'Directors' Liability and the EEC Draft Convention on Bankruptcy', in *European Business Law*, 1977, p. 8; G. PAJARDI, 'Problemi specifici della convenzione CEE sul fallimento: il fallimento dei dirigenti sociali', in *Mon. Trib.*, 1976, p. 172 and ff.; J. LEMONTEY, 'Perspectives d'unification du droit dans le projet de convention CEE relative à la faillite' in *Revue trimetrelle de droit européen*, 1975, p. 173.

404 It has already been explained above that the drafters of the Preliminary Draft Convention admitted that, although the ideal course would have been to draft a uniform bankruptcy law for the whole Community, that was politically an unattainable objective. Accordingly, they confined their efforts in this field to producing the limited number of uniform provisions set out in Annex I. See M. HUNTER, *op. cit.*, p. 672.

405 C. TJUR, 'An analysis of the 1980 Draft EEC bankruptcy Convention', in *International Business Lawyer*, 1982, 10(i), p. 22.

406 An example of uniform law provision was article 20, according to which insolvency proceedings entailed the divestment of the debtor, regardless of whether such an effect was governed under the *lex fori concursus*. However, as pointed out by Daniele, the Convention did not make it clear what the divestment of the debtor actually consisted of, who must take possession and manage the assets of the debtor, and at what date this effect occurs. Those aspects were deferred to the *lex fori concursus*. L. DANIELE, *Il fallimento del diritto internazionale private e processuale*, Padova, 1987, p. 288. Also Articles 21 and 22 set out rules of uniform law, as they provided that the opening of insolvency proceedings should impose in all other contracting States the stay of individual enforcement measures, even though already pending.

As to the provisions establishing uniform conflict of law rules, it must be pointed out that, pursuant to the fundamental principles of unity and universality, the Preliminary Draft Convention provided that, in principle, all procedural and substantive matters of insolvency proceedings were to be governed by the same law. Therefore, under Articles 18 and 19 thereof, the *lex fori concursus* of the contracting State opening insolvency proceedings should be the law applicable to the conditions for the opening of proceedings, its conduct and effects (407).

However, it must also be mentioned that the general application of the *lex fori concursus* was subject to a number of exceptions relating to certain aspects that the drafters of the Preliminary Draft Convention deemed more appropriate to be governed by a different law than the *lex fori concursus* (408). The most significant one regarded the (delicate) regime of the rights of secured and preferential creditors. Indeed, from the principle of unity and universality it should have followed that the rights of all creditors should be determined by the provisions of the *lex concursus*. Due to the fundamental differences between the national laws of contracting States on that topic (as well as to the fact that it was impractical at that stage to attempt any alignment or harmonisation of substantive law (409)), the draftsmen decided to leave the treatment of the rights of secured and preferential creditors to the regime of the *lex rei sitae* and the law of the State under which a creditor's preferential status and its ranking was originated (410).

The Preliminary Draft Convention met with almost universal opposition. The theoretically elegant twin principles of universality and unity of insolvency proceedings were implemented through an over-rigid and muddled system that was perceived as unworkable and cumbersome (411).

I.3. [segue] the Draft Convention of 1980 and its subsequent amendments

407 The Lemontey Report clarified that the *lex fori concursus* was considered differently depending on whether it applied to procedural or substantive aspects. In the former case, reference was made solely to the relevant substantive provisions of the *lex fori concursus*, whereas in the latter case, the *lex fori concursus* should be regarded as a whole, thus encompassing also national rules of private international law (therefore it may be implemented with provisions of foreign law to which reference was made). See Lemontey Report, at p. 63. That distinction was further cleared by the subsequent text of the Draft Convention, where, for instance, article 18 provided, at paragraph 1, that the internal law of the state opening insolvency proceedings applied to its conduct and, at paragraph 2, that the law of the State opening insolvency proceedings, including its rules of private international law, should govern the effects of insolvency proceedings and the enforceability of insolvency proceedings *vis à vis* third parties.

408 See, for instance, article 32(2) governing the liquidation of the debtor's assets, which made reference to the *lex rei sitae*. Also, under article 36 the law governing the effects of insolvency proceedings on employment contracts were governed by the *lex contractus*.

409 I. FLETCHER, *Insolvency in private international law*, Oxford, 2005, p. 351 and C. TJUR, 'An analysis of the 1980 Draft EEC bankruptcy Convention', in *International Business Lawyer*, 1982, 10(i), p. 24. See also L. DANIELE, *Il fallimento nel diritto internazionale privato e processuale*, 1987, Padova, p. 299, nt. 188, who rejects the possibility to embed into the Preliminary Draft Convention the solutions already adopted by the Hague Convention or the Benelux Treaty, both applying the *lex fori concursus* only to certain rights (the former, only the general preferential credits and the latter secured credits on moveable property).

410 See articles 40-46 of the Preliminary Draft Convention.

411 V. COLESANTI, 'Unità e universalità del fallimento nel progetto di convenzione nella C.E.E.', in *Banca, borsa e titoli di credito*, 1971, p. 581.

In 1973 United Kingdom, Ireland and Denmark joined the European Community.

Therefore, as a result of both the thrust of critical comments and the amendments called for after the accession of the new participants in the negotiations [412], after several unofficial drafts, in 1980 the text of the Preliminary Draft Convention was recast in a new version, the Draft Convention, which significantly weakened the original scheme.

The most significant amendment was the abandonment of the project of the model law. The uniform rules provided therein were removed from Annex I, which was reduced to only three rules of minimal significance (dealing with rules on property claims by the debtor's spouse, set-off and reservation of title). Thus, the Draft Convention turned simply to a code of private international law, the bankruptcy law of each contracting State remaining ultimately unaltered in substance [413].

As to the text of the Draft Convention, the basic scheme built upon the principles of unity and universality remained substantially unchanged [414].

The Draft Convention, however, deleted from the Preliminary Draft Convention the ground for jurisdiction under Article 5 (*i.e.* the jurisdictional ground that was previously labelled as the 'third rank'). Therefore, proceedings opened according to national exorbitant criteria were excluded from the scope of the Draft Convention.

Despite that amendment, the (now two-tier) jurisdictional scheme of the Draft Convention resulted still inadequate, mainly because the definition of 'centre of administration' was regarded as lacking sufficiently clear definition [415].

Another significant change was the introduction of the concept of 'sub-estates' in the process of distribution, which strengthened the idea that the theoretical objective of universality yielded every time it came to defend local interests (in this particular case in matters of preferential treatment of local creditors). Under the Draft Convention the principles behind the rules governing secured and preferential rights did not differ much from those of the Preliminary Draft Convention.

For the reasons already explained above [416], the impossibility of constituting a single bankruptcy estate (where to virtually convey all the debtor's assets and perform the distribution of the proceeds

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412 Significant amendments directed at the simplification of the former text were suggested by the s.c. Cork Committee, 'Report of the review Committee into Insolvency Law and Practice', 1982, cmd. 8558.

413 C. TJUR, '*An analysis of the 1980 Draft EEC Bankruptcy Convention*', in *International Business Lawyer*, 1982, 10(i), p. 22.

414 Some scholars maintain that the amendments were merely due to the enlargement of the European Community. Other authors argue that the changes to the first test were minor in substance, albeit echoing some of the criticisms expressed towards the Preliminary Draft Convention. See L. GANSHOF, 'Le projet de convention CEE relative à la faillite', in *Cahiers Droit Européen*, 1983, p. 163. An author states authoritatively that, although the main outline and the basic conceptions in the Draft Convention remained the same, the Draft Convention brought «*rigorous revisions* […] *in the incorporation of numerous modifications and refinements in detail, and some transformation on matters of principle*». See I. FLETCHER, *Conflict of laws and European community law*, Amsterdam, 1982, p. 191. See also P. OMAR, *op. cit.*, p. 154.

415 As Fletcher puts it, « *even in the modified form of the 1980 version, however, the proposed jurisdictional scheme was fraught with perils and uncertainties* ». I. FLETCHER, *op. cit.*, p. 349.

416 See *supra* this Section, § I.2.

according to the *lex fori concursus*) led to the creation of a series of sub-estates formed by specific pools of assets realised in each State where the debtor's assets were located, available to meet preferential claims and secured credits in the relevant State according to the local law (417). However, with the introduction of the 'sub-estates', secured and preferential creditors could invoke their preferential status only with respect to the assets located in that contracting State (418).

In addition, by suppressing the previous rules (419), the Draft Convention provided that the Brussels Convention should be applicable in relation to the recognition and enforcement of decisions 'other' than those opening insolvency proceedings (or approving the composition agreement) and relating to the conduct thereof (420). Finally, a new Title VI on the interpretation of the Draft Convention was introduced, attributing to the ECJ the powers to control its interpretation and application (421).

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417 See art. 43 of the Draft Convention. As in the Preliminary Draft Convention, the rights of secured and preferential creditors belonging to any of the contracting State could continue to be governed by the *lex rei sitae* of any secured property and by the local law of the State under which a creditor's preferential status and its ranking were generated.

418 As to distributional questions, the Draft Convention provided a complex mechanism (efficaciously summarized by J. ISRAËL, *European Cross-borded insolvency regulation. A study of Regulation 1346/2000 on Insolvency proceedings, in the light of a paradigm of cooperation and a Comitas Europea*, Antwerpen - Oxford, 2005, p. 231). The draft Convention provided that where in any of the sub-estate, a credit was equally ranked with another category of claims, the contribution of that sub-estate could not exceed the amount that would have been available in that sub-estate. In the event that one of those sub-estates was depleted before the claim was fully satisfied, the remaining sub-estate could in turn contribute, on the same basis. In cases where a claim received general priority in different sub-estates not equal in rank, the creditor would be first satisfied with the resources of the sub-estate with the highest ranking. If the creditor was not fully satisfied, contribution from the other sub-estates would have been sought. Such a complex system was almost unanimously lambasted by scholars. See J. THIEME, 'Die Entwurf eines Konkursübereinkomens der EG-Staaten von 1980', in *RabelsZ*, 1981, p. 459. A. E. ANTON , 'Note of reservation', in *Report of the Advisory Committee on the EEC Preliminary Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings*, London, 1976, p. 118; A. HIRSCH, 'vers l'universalité de la faillite au sein du Marché Commun ?', in *Cahiers de droit européen*, 1970, p. 54 and ff. According to I. FLETCHER, *Insolvency in private international law*, Oxford, 2005, p. 351-352 the mechanism governing the distribution entailed an « *inelegant, and cumbersome arrangement* […] *the sheer complexity of the exercise was truly horrifying and would have resulted in much wasteful expenditure of administrative resources* ». Also M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 485 states that, under this system, one liquidator would be held responsible for the distribution of assets according to a full range of legal regimes and « *an animal capable of discharging such a task was yet to be bred* ». *Contra* Daniele, considered that, in spite of its complexity, the system designed by the Draft Convention was acceptable and the sole viable alternative, and suggested that it could be improved by providing the appointment of local trustees. See L. DANIELE, *Il fallimento nel diritto internazionale privato e processuale*, 1987, Padova, p. 299, p. 298, nt. 186. M.E. GALLESIO-PIUMA, 'Progetto di convenzione CEE sul fallimento, i concordati ed i procedimenti affini', in *Giur. Comm.*, 1981, p. 484.

419 See *supra* this Section, § I.2.

420 See articles 61-67 Draft Convention. In particular, art. 61 provided that decisions rendered in the contracting State opening insolvency proceedings with reference to insolvency-related actions under art. 17 thereof could be enforced in the territory of another Member State (provided that the *exequatur* was granted).

421 The Draft Convention used the model of the Brussels Convention as far as the principle of interpretation of its provisions was concerned. However, as Omar noted that an important difference from the Brussels Convention lay in that only national courts to whose decisions there is no appeal could make a request for a preliminary ruling to the ECJ or seek a decision on the interpretation of the convention's provisions. See P. OMAR, 'Genesis of the European initiative in insolvency law', in *Int. Insolv. Rev.*, 12, p. 155. For further details on the amendments brought by the Draft Convention see C. TJUR, 'An analysis of the 1980 Draft EEC Bankruptcy Convention', in *International Business Lawyer*, 1982, 10(i), p. 22 and ff.

The Draft Convention was subsequently amended in 1982 and revised again in 1984. The amendments were perceived as continuing correcting some of the excess of the Preliminary Draft Convention. However, even the Draft Convention never gained enough support to be opened for signature. Its basic scheme was considered to be overambitious and unattainable by the majority of the States (422).

All in all, the Draft Convention's main shortcoming was perceived as the failure to provide for a coherent set of rules, due to the obstinate attempt to pursue the theoretical objectives of unity and universality of insolvency proceedings at any cost (423).

Due to the firm opposition (especially on the part of Germany), negotiations were suspended in 1985 and the two drafts elaborated in Phase I were consigned to oblivion.

I.4. The Istanbul Convention of the Council of Europe dated 1990

Upon request of some EEC Member States (whose tacit intention was to impede the Community Bankruptcy Project (424)) in 1981 a different organisation commenced parallel and concurrent negotiations for an alternative convention on insolvency proceedings (425). With remarkable celerity, in 1990 the Council of Europe delivered a proposal for a 'European convention on certain international aspect of bankruptcy' (hereinafter, the 'Istanbul Convention') (426).

Contrary to the Preliminary Draft Convention and the Draft Convention, the Istanbul Convention was overtly inspired to a pragmatic and flexible approach. Indeed, the text elaborated by the Council

422 Extremely harsh criticism was raised by Fletcher, who defined the Draft Convention as a « *fatally flawed, meretricious, and unworkable* » text. See I. FLETCHER, *op. cit.*, p. 352.

423 J. ISRAËL, *op.cit.*, p. 231.

424 L. DANIELE, 'La convenzione europea su alcuni aspetti internazionali del fallimento', in *Rivista di diritto internazionale privato e processuale*, 1994, p. 499. The author stresses that such parallel negotiations were perceived as a reaction to the (disastrous) outcome of Phase I of the Bankruptcy Project. Omar shares this view, alleging that 'the failure of the European community project to advance in the 1980s acted as a direct catalyst to the Council of Europe proposals. See P. OMAR, 'Genesis of the European initiative in Insolvency Law', in *Int. Insolv. Rev.*, 12, p. 155.

425 It is noteworthy that, in any event, representatives of the European Community took part as observers at meetings of the Committee of Expert set up by the Council of Europe and they contributed to the initial discussion about identifying the question and points of interest.

426 The 'European convention on certain aspects of bankruptcy', in *European Treaty Series*, No. 136, was adopted in the reunion of 19-23 February 1990 and was opened for signature on June 5, 1990.The text was signed by Italy, Belgium, France, Germany, Greece, Luxembourg and Turkey. However, none of those States went so far as to ratify or adopt it. In literature see V. PROTO, 'La convenzione europea sugli aspetti internazionali del fallimento', in *Documenti di giustizia*, 1990, 11, p. 28; C. MAUPOIL, 'Convenzione europea su alcuni aspetti internazionali del fallimento', in *Fallimento*, 1991, p. 1021; C. DORDI, 'La Convenzione europea su alcuni aspetti internazionali del fallimento: la consacrazione dell'universalità limitata degli effetti delle procedure concorsuali', in *Dir. Comm. Int.*, 1993, p. 617 and ff.; J. L. VALLENS, 'La Convention du Conseil de l'Europe su certains aspects internationaux de la faillite', in *Revue Critique*, 1993, p. 137; A. BOTTIAU, 'La convention Européenne sur certains aspects internationaux de la faillite', in RPC, 1990, p. 99; I. FLETCHER, *Harmonisation of jurisdictional and Recognitional Rules: The Istanbul Convention and the Draft EEC*-Convention, in J. S. Ziegel, *CurrentDevelopments of International and Comparative Corporate Insolvency Law*, Oxford, 1994, p. 709; L. A. BURTON, 'Toward an international bankruptcy policy in Europe: four decades in search of a treaty', in *Annual survey of international & comparative Law*, 5, 1999, p. 216.

of Europe was intended only to facilitate the solution of a limited number of specific issues arising from the context of cross border insolvencies (427), namely *(i)* the exercise of extraterritorial powers by the trustee appointed in the course of insolvency proceedings opened in one State in the territory of another State (428); *(ii)* the opening of 'secondary' insolvency proceedings in one or more States in addition to 'main insolvency proceedings' opened in another State (429); *(iii)* the participation and the protection of foreign creditors in the context of insolvency proceedings (430).

The result was a leaner text, encompassing 44 articles, and two annexes (431). Briefly reviewing the key aspects that differentiate the Istanbul Convention from the abovementioned texts of 1970 and 1980, it is worth noticing that the Istanbul Convention applied exclusively to liquidation insolvency proceedings, listed in Annex I thereto (432). It excluded restructuring proceedings, as their inclusion in the Preliminary Draft Convention and the Draft Convention had created many disagreements. Rejecting the 'maligned' and overambitious twin principles of unity and universality of insolvency proceedings, the key tenet of the Istanbul Convention was a flexible approach to the universalist theory. According to the Istanbul Convention's scheme, the main proceedings opened in the State where the debtor had its 'centre of main interest' (433) could be supplemented by secondary

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427 The preamble to the Istanbul Convention literally read « *it is necessary to guarantee a minimum of legal co-operation by dealing with certain international aspects of bankruptcy such as the power of administrators and liquidators in bankruptcy to act outside the national territory, the possibility of resorting to the opening of secondary bankruptcies in the territory of other Parties and the possibility for creditors to lodge their claims in the bankruptcies opened abroad* ». In June 1980, when a Committee of Experts was set up with the mission of exchanging information on the status of national insolvency laws and the progress of the current law reforms, the topics concerning the powers of the trustee and the protection of foreign creditors were already singled out as a basis for the work to be conducted by them. P. OMAR, *op.cit.*, p. 155. Besides, the first circulated drafts of the Istanbul Convention did not provide for the possibility of opening local secondary proceedings, introduced only subsequently. The introduction of Section III of the Convention conferred to the proposal of the Council of Europe a profoundly innovative content on a text which would otherwise have been of little value. See L. DANIELE, *op.cit.*, p. 510. See also V. PROTO, 'Le procedure concorsuali nella Comunità Europea', in *Fallimento*, 12, 1995, p. 1170.

428 Section II, articles 6-15 Istanbul Convention.

429 Section III, articles 16-28 Istanbul Convention.

430 Section IV, articles 29-32 Istanbul Convention.

431 Annex A listed national (liquidation) proceedings which the Istanbul Convention could be applied to, according to each national law. Annex B listed national subjects that could be covered by the definition of 'syndic' under the Convention.

432 Under article 1, the convention applied to « *to collective insolvency proceedings which entail a disinvestment of the debtor and the appointment of a liquidator and which may entail the liquidation of the assets* ».

433 Essentially, the mechanism set forth by the Istanbul Convention provided that the provisions therein should apply to insolvency proceedings opened in a State by the competent authority (under article 4), already effective in that State under its national laws and not manifestly contrary to the public policy of the country where the liquidator wished to exercise the powers deriving from the Convention. The Convention allowed the liquidator appointed in the course of proceedings opened in the State of the centre of main interests two alternatives: the first one was to act directly on the debtor's assets located in another State (under the conditions laid down in Section II). The second option was to initiate secondary proceedings in that State, where an establishment or assets of the debtor were located (article 28 Istanbul Convention). Unlike the Preliminary Draft Convention and the Draft Convention, the Istanbul Convention did not provide for direct jurisdictional rules, but only for indirect ones (see article 4 thereof, bearing heading 'Indirect international competence'. The only exception was article 17, entitled 'direct competence', establishing the direct jurisdiction of the courts of any State in which an establishment of the debtor is situated). C. DORDI, 'La Convenzione europea su alcuni aspetti internazionali del fallimento: la consacrazione dell'universalità limitata degli effetti delle procedure concorsuali', in *Dir. Comm.*

proceedings in any other State in which the debtor had an 'establishment' or the 'assets of the debtor [were] situated' (434).

Therefore, the necessarily unitary nature of insolvency proceedings enshrined in the previous texts was overcome, and the possibility of several insolvency proceedings of purely liquidatory nature against the same debtor was admitted. Moreover, since the national laws of the State of the establishment (or of the debtor's assets) governed secondary proceedings, the problems concerning the treatment and the ranking of secured and privileged creditors were solved (435).

The limited rules provided therein left no room for the regulation of ancillary issues, as the provisions of the Istanbul Convention were tailored to specifically address well-identified issues arising in the context of insolvency (as it also emerged from its title). Accordingly, no mention of the issues of insolvency related actions and of the *vis attractiva concursus* can be found within the Istanbul Convention (436). The Istanbul Convention was timidly welcomed at the time of its proposal. The new convention was undoubtedly perceived as an improvement and a considerable compromise when compared to the previous EEC texts, a flexible instrument that would give a partial response to the problems of the international dimension of insolvency (437). Nevertheless, it was still criticised (438).

Int., 1993, p. 629 and nt. 52. Some authors argue that the rules on indirect competence in article 4 (that required no amendment of the national jurisdictional rules) could not be deemed as disciplining the automatic recognition of the judgment opening the main proceedings. The mechanism used by the Istanbul Convention was not to attribute effects to the decision opening insolvency proceedings, in that it was a (recognised) foreign judgment. Instead, in the system designed by the Convention, the decision opening insolvency proceedings represented a preliminary condition under which the specific effects provided for in the Convention could be produced, such as the power of the trustee to act in another State or to request the opening of secondary proceedings (which demonstrates an ambition of the text elaborated by the Council of Europe lower than the former texts of the Phase I of the Bankruptcy Project). See L. DANIELE, *op. cit.*, p. 503.

434 See article 17 of the Istanbul Convention. Under the Istanbul Convention, secondary proceedings could be opened upon request of the trustee of the main insolvency proceedings and by any other person granted the right to request the opening of a bankruptcy according to the local law of the State where the opening of the secondary bankruptcy was requested. The Istanbul Convention provided also for rules of coordination between liquidators of main and secondary proceedings (articles 25-26). It is noteworthy that under article 16 of the Convention, to open secondary proceedings it was irrelevant whether the debtor was insolvent in the State of secondary proceedings pursuant to the local laws.

435 As to the distribution of proceeds, according to articles 21 and 22 Istanbul Convention, preferred creditors, secured creditors (over land or other property), public law claims, as well as claims arising from the establishment of the debtor in the State of secondary proceedings had to be verified and, if admitted, satisfied out of the proceeds of the liquidation of secondary proceedings' assets. After the payment of secured and preferred creditors, it was provided that the remaining assets of secondary proceedings should form part of the estate in main proceedings.

436 Actually, it could not have been otherwise, considered that the Convention did not even provide for criteria of jurisdiction in relation to insolvency proceedings (see *supra*, nt. 216).

437 P. OMAR, *op. cit.* p. 157.

438 One of the most debated aspects of the Istanbul Convention was (again) the ambiguity of the pivotal concepts of 'centre of main interest' and 'establishment'. Also, the fact that no mandatory rules of direct jurisdiction were provided therein was considered as source of further divergence between States. L. A. BURTON, 'Toward an international bankruptcy policy in Europe: four decades in search of a treaty', in *Annual survey of international & comparative Law*, 5, 1999, p. 215. *Contra* P. DOM, 'La Convention Européenne sur certains aspects internationaux de la faillite', in *LPA*, 1995, n. 154, p. 24. The absence of a central body entrusted with providing a uniform interpretation of the rules of the Istanbul Convention (comparable to the ECJ) also gave rise to a certain degree of caution (but it was the same under the Preliminary Draft Convention and the Draft

Actually, it did not have a more fortunate fate than the Preliminary Draft Convention and the Draft Convention, since it never entered into force among the Member States of the Council of Europe. However, the distinction of primary and secondary proceedings adopted therein marked an important innovation (439) from the model proposed by the European Community until then. Indeed, with this text the modified universalism 'tiptoed' into the transnational scene (440).

I.5. The Phase II of the Bankruptcy Project: the Insolvency Convention of 1995

Although never entered into force, the Istanbul Convention gave new impulse to negotiations in the context of the European Community. Indeed, in May 1989 the Council of Minister entrusted a new working party (441) with the task of relaunching a new phase of the Bankruptcy Project in the context of the European Community (at that time soon to be enlarged to 15 States (442)).

It bears observing that the legal foundation of the Insolvency Convention was 'Pillar III' of the European Union (named 'Justice and Home Affairs') established under the Treaty of Maastricht (443). In particular, Title VI of the TEU provided that

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Convention). The main criticism focused on the fact that the Convention provided for an opt-out clause allowing States to exclude the applicability of characteristic aspects of the text, such as the recognition of the liquidator's powers and the possibility of opening secondary proceedings (to the extent that one author referred to the Convention as an '*à la carte*' convention. M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 494.

439 The system of the limited universalism adopted in the Istanbul Convention was not new, since it was 'borrowed' from other systems already adopting it (namely, Switzerland and the United States of America). See L. DANIELE, 'La convenzione europea su alcuni aspetti internazionali del fallimento', in *Rivista di diritto internazionale privato e processuale*, 1994, p. 510. However, J. ISRAËL, *op. cit.* p. 236, pointed out that the Istanbul Convention represents the first attempt to use that mechanism in the context of a multilateral treaty on insolvency proceedings

440 However, the adherence to the theory of limited universality was not expressly stated here (also for the reasons already explained *supra* nt. 216). The legislature of the Istanbul Convention intended to set only minimum rules for coordination between legal systems, avoiding the complex and cumbersome rules of the former projects. See M. VANZETTI, *op.cit.*, p. 445.

441 The new working party was chaired by Manfred Baltz, who also provided useful account on the Insolvency Convention in M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 485.

442 In 1986 Spain and Portugal joined the European Community. In 1993 Austria, Finland and Sweden became Members of what had become the European Union, following the Maastricht Treaty dated 7 February 1992.

443 The policy of policy in the field of judicial cooperation (both in civil and criminal matters) was included for the first time in the s.c. 'Pillar III' of the European Union (named 'Justice and Home Affairs') established under the Treaty of Maastricht, as one of the 'matters of common interest' for the achievement of the objectives of the European Union. (See Title VI, articles K-K.9 of the Treaty on European Union (hereafter 'TEU'). See J. *Monar*, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform and the Price of fragmentation', in *European law Review,* 1998, p. 320 and ss.) In particular, Title VI of the TEU provided that « *for the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest* […] *6. judicial cooperation in civil matters* » . Yet, at this early stage of integration, matters relating to Pillar III remained primarily anchored intergovernmental cooperation. Therefore, the impact of the new institutional framework still depended upon the willingness of the Member States to cooperate in areas traditionally regarded as deferred to state sovereignty. Each Pillar of the European Union being characterised for a differentiated regime as regards the type of acts, the procedures for their adoption and the mechanisms of judicial control, the intergovernmental cooperation was enacted mainly by the Council, with limited involvement of other institutions (The Commission had initiative powers, whereas Parliament had, at best, a consultative role). Acting unanimously, the Council could

« *for the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest […] 6. judicial cooperation in civil matters* » (444).

In elaborating a new draft convention, the working party adopted an eclectic approach, combining fresh ideas of its own to elements 'borrowed' from the texts of Phase I of the Bankruptcy Project, on the one hand, and the Istanbul Convention, on the other (445).

For instance, the 'Convention on insolvency proceedings' (446) (hereinafter, the 'Insolvency Convention'), akin the *avant projets* elaborated during Phase I, set out direct jurisdictional grounds and applied to both purely liquidation and restructuring proceedings. Besides, mirroring the model proposed by the Istanbul Convention, the principles of rigid unity and universality were abandoned in favour of the 'limited universalism' (which was untied from the principles of unity of insolvency proceedings), according to which the same debtor could be subject to universal main proceedings and secondary (territorially limited) proceedings at the same time.

The features and the scheme of the Insolvency Convention need not be detailed herein because they were substantially transposed into the Insolvency Regulation (therefore, a more detailed analysis is will be provided afterwards (447)).

The overall impression is that the Insolvency Convention was inspired by a more realistic appraisal of the differences between the insolvency laws of the fifteen Member States and acknowledged the limited prospects of achieving harmonisation in this field (understood as a substantial uniform law).

The finalised text was comprised of 55 articles, divided into six chapters, and three annexes. Also, a detailed explanatory report, drafted by M. Virgós and M. E. Schmit, although never officially published, accompanied the circulation of the Insolvency Convention (the 'Virgós-Schmit Report'

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adopt joined positions and actions, decisions in the forms deemed more appropriate and drew up conventions. It bears noticing that the eligibility of some matters (including judicial cooperation in civil matters) to be subject to the s.c. 'passerelle procedure' provided by Article K.9 (*i.e.* a provision allowing the transfer from the Pillar III to the Pillar I, and therefore the application of Community law as to those matters) reveals the proneness of the European legislature to a progressive 'communitarisation' of civil matters. Since then, the idea of focusing more attention on judicial cooperation in civil matters (instead of criminal matters) was gaining ground, since it was believed to provide further room of manoeuvre, due to the lower reluctance of the Member States to cede spaces of sovereignty. The weaknesses of the intergovernmental system governing judicial cooperation in civil matters resulted in a limited impact of the Community action in that area: the legislature opted for a cautious approach, curtailing the use of the new instruments provided for by the Maastricht Treaty, instead focusing on the implementation of conventions, thereby continuing to follow the original approach of the EC Treaty and Article 220 thereof.

444 A definition of the area of freedom, security and justice on the action is provided in the plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (13844/98 - C4-0692/98 - 98/0923(CNS) in *OJ* C. 19 of 23 January 1999.B. NASCIMBERE, 'Lo spazio di libertà, sicurezza e giustizia in una prospettiva costituzionale europea', in L. S. ROSSI, *Il Trattato-Costituzione: verso una nuova architettura dell'Unione Europea*, Milano, 2004, p. 277.

445 I. FLETCHER, *Insolvency in private international law*, Oxford, 2005, p. 352.

446 Convention on Insolvency Proceedings of 23 November 1995 (released as Council Doc. CONV/INSOL/X1 and available at http://aei.pitt.edu).

447 See *infra* in this Chaper, Section 2.

(448)). The Insolvency Convention was adopted by the EU Council of Ministers on 25 September 1995 (449) and on 23 November 1995 (up to six months) it was opened for signature in Madrid. Indeed, the Insolvency Convention's legal basis being Article 220 EC Treaty, Article 49(3) thereof it could not « *enter into force until it has been ratified, accepted or approved by all the Member States of the European Union* […] *It shall enter into force on the first day of the sixth month following that of the deposit of the instrument of ratification, acceptance or approval by the last Member State of the European Union to take that step* ». By the time the period for signature expired, almost all the Member States had signed the text (450). However, the Insolvency Convention's entry into force was impeded by the non-cooperational attitude of the United Kingdom, that failed to sign the Convection, officially as a dissatisfaction gesture towards European institutions over the unresolved crisis in the British beef and dairy industry caused by the B.S.E. epidemic, which entailed the EU imposing a total ban *vis-à-vis* products exported from United Kingdom (451).

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448 The Report on the Convention on insolvency proceedings dated 8 July 1996 was released as EC Council document 6500/1/96, REV 1, DRS 8 (CFC). (Fletcher acknowledges the existence of a previous draft, document 11900/1/95 REV 1, published in February 1996. See I. FLETCHER, *Insolvency in private international law*, Oxford, 2005, p. 343, nt. 13). As said, it was not officially published by the European Community, nor was it ever approved by the Council. Because of that it does not technically have the value of *travaux préparatoires*. In *Re BRAC Rent-A-Car International Inc* [2003] BCC 248, 254D-G, Justice Lloyd showed some doubts as to the legal value of the Virgós-Schmit Report. Also, in *Re The Salvage Association* [2003] BCC 504, 509, Blackburne J at [22] stated « *The Convention on Insolvency Proceedings never came into force for want of sufficient signatures by members states although its provisions are closely mirrored in the Regulation. The Virgós-Schmit Report so far as concerns the meaning of the Regulation is of questionable status. Nevertheless, the broad approach to matters of interpretation commended in that Report encourages me to adopt a no less broad approach to the meaning of "court" in the definition of that expression in article 2(d)* ». However, as will be seen, the Virgós-Schmit Report is generally understood as an invaluable insight into the provisions of the Insolvency Convention and, even more importantly, of the Insolvency Regulation (that was the exact transplant of the Insolvency Convention into the different instrument of the Regulation). This acknowledgement is quite uniformly shared in literature and by courts. See B. WESSELS, 'The Hermeneutic Circle of European Insolvency Law', in E.H. HONDIUS, J.J. BRINKHOF, M. DE COCK BUNING, Contractor international *(Opstellenbundel aangeboden aan prof. F. Willem Grosheide)*, Den Haag, 2006, p. 351. For UK case-law see, for instance, *Re Macari*, [2017] NICh 5, where Justice Horner at [13] affirms « *The Virgós-Schmit report which provides useful guidance when interpreting the Regulations* ». See also *Trustees of the Olympic Airlines SA Pension & Life Insurance Scheme v. Olympic Airlines SA* [2013] EWCA Civ 643. In Dutch jurisprudence the Netherlands Supreme Court 9 January 2004, JOR 2004/87, NIPR 2004, 41 (*Fortis v. Vennink*); District Court Dordrecht 11 Augustus 2004 LJN: AQ6547; NIPR 2004/372 (*Müller Gerüstbau GmbH*) and District Court 's-Hertogenbosch 31 October 2005, LJN: AU5330 (*Collins & Aikman Automotive Trim B.V.*) stating « *the Virgós/Schmit Report, so significant for the Regulations' interpretation* ».

449 A preliminary draft was finalized in January 1992 (released as Doc 25419/91).

450 Twelve of the fifteen States signed right after the Insolvency Convention was opened for signature on 23 November 1995. The Netherlands signed in March 1996 and Ireland in April 1996. Besides, in spite of the general favour towards the Insolvency Convention expressed also by the Report of the House of Lords Select Committee on the European Communities of March 1996, the United Kingdom adopted a more cautious approach and tergiversated, alleging the need for further study of the Insolvency Convention.

451 Scholars maintain that the mad cow disease was taken as an excuse to cover the 'less readily curable' reason underlying the sabotage of the Insolvency Convention on the part of the UK, which was rooted in the century-long dispute between Spain and the United Kingdom concerning Gibraltar. Briefly explained, the political quarrel concerned the lack of a provision in the Insolvency Regulation similar to that of article 60 Brussels Convention, excluding Gibraltar and other external territories belonging to the Member States from the application of the regime of automatic recognition and enforcement of judgements in civil and commercial matters. An application of the Insolvency Convention to Gibraltar would have entailed an unacceptable erosion of the British sovereignty over that territory, which was granted to the United Kingdom in perpetuity under

I.6. Phase III: The EC Regulation 1346/2000

After the unfortunate British *volte-face* to the Insolvency Convention, a few years of uncertainty followed, due to widespread scepticism about the political climate ever allowing a minimum standard of cooperation in insolvency matters throughout Europe [452].

The abovementioned *impasse*, caused by the fact that, in order to enter into force, the adoption of the convention required signature and ratification of a convention by every Member State, was overcome by virtue of the Treaty of Amsterdam [453], which, *inter alia*, admitted the adoption of the rules on

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the terms of the Treaty of Utrecht of 1713. For further details on that issue see I. FLETCHER, *op. cit.* p. 345 and P. OMAR, *op. cit.*, p. 161.

452 According to Burton some scholars had identified three alternatives to such a deadlock: first, the EU convention could be resurrected. Second, a multi-lateral treaty could be concluded among the signatory states to the Insolvency Convention. Third, non-treaty measures could be identified to solve the problems of cross-border insolvencies. L. A. BURTON, *op. cit.*, p. 224

453 The Treaty of Amsterdam, singed in 1997, entered into force on 1 May 1999, transferred a number of areas of the EU from the conceptual 'Pillar III' to 'Pillar I', prompting Pillar III to be renamed from 'Justice and Home Affairs' to 'Police and Judicial Cooperation in Criminal Matters'. The partial communitarisation of Pillar III, clothed the Community with the power to legislate on certain aspects in the field of private international law. The new Title IV, entitled 'Visas, asylum, immigration and other policies related to free movement of persons', enabled the Council to adopt measures in the field of judicial cooperation in civil matters under Article 65, with the latter provision identifying various domain in which such measures could be taken. The impact of the new framework on the judicial cooperation in civil matters affected (i) the form of the acts (ii) the procedures for their adoption and (iii) the mechanisms of judicial control. Firstly, as to the form of acts that could be enacted, the fact that Title VI was covered by the EC Treaty meant that the Community institutions could resort to all the binding and non-binding, typical and atypical acts that are provided for by the EC Treaty, or that were established in practice. Secondly, as to their adoptions, the new arrangements provided for a greater involvement of the EC institutions in the law-making process, solving the abovementioned disadvantages of the previous system (namely the protracted ratification procedures and the necessity to renegotiate accession conventions with each enlargement). Finally, the Community regime entailed that acts adopted under Title VI of the EC Treaty were in principle subject to the control procedures laid down therein and, therefore, to the scrutiny by the Court of Justice, which was vested with the jurisdiction to give preliminary rulings on the interpretation of the provisions contained therein and on the interpretation and validity of the acts adopted on the basis thereof. Yet, the Community regime of private international law under the Amsterdam Treaty remained attenuated: first, it was set a transitional period of five years after its entry into force. Second, by exception to article 234 EC Treaty, article 68 reduced the powers of interpretation, for the preliminary rulings in the private international law field could only be requested by national courts of final appeal. Third, specific protocols provided by article 69 EC Treaty established derogations in respect of the UK & Ireland as well as Denmark. In furtherance, the coexistence of article 220 and article 65 EC Treaty raised several issues of coordination. For a general overview on the topic of communitarisation see A. TIZZANO, *Il diritto private dell'Unione Europea*, 2000, Torino. P. MANIN, 'The Treaty of Amsterdam', in *Columbia Journal of European Law*, 1998, 1-26; M. PETITE, 'European Integration and the Amsterdam Treaty', in *Saint Louis-Warsaw Transatlantic Law Journal*, 1999, pp. 87-122; J. MONAR, 'Justice and home affairs in the Treaty of Amsterdam: reform at the price of fragmentation', in *European Law Review*, 1998, pp. 320-335. A. FIORINI, 'Current developments of private international law', in *International & Comparative Law Quarterly*, vol. 4, 2008, pp. 969-984; D. O'KEEFFE, P. TWOMEY, *Legal issues of the Amsterdam Treaty*, Oxford-Portland, 1999. L. S. ROSSI, 'Verso una parziale "comunitarizzazione" del terzo pilastro', in *Dir. Un. Europea*, 1997, p. 448. U. DROBNIG, 'European Private International Law after the Treaty of Amsterdam- Perspectives for the next Decade', in *The King's College Law Journal*, 2000, p. 201. On the problems concerning the type of acts which may be adopted under Article 65 EC Treaty, see S. BARIATTI, 'la cooperazione giudiziaria in materia civile dal terzo pilastro dell'Unione Europea al Titolo VI del Trattato CE', in *Dir. Un. Eur.*, 2001, p. 271. M. CONDINANZI, 'La (fantomatica) competenza della Corte di giustizia della Comunità europee nelle convenzioni concluse degli Stati membri ai sensi dell'art. K.3 lett. c) del Trattato sull'Unione' in *Dir. Un. Eur.*, 1996, p. 579. J. BASEDOW, 'The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam', in *Common Market Law Review*, 2000, p. 69; A. DICKINSON,

insolvency proceedings - hitherto embedded in a convention - in the form of a Council Regulation (an instrument whose provisions are entirely binding, generally and directly applicable in all Member States [454]).

Under this new legal framework, and because the Treaty of Amsterdam vested with new powers the European Community, some of which in the field of judicial cooperation in civil matters, a renovated impetus towards the Bankruptcy Project came from Finland and Germany in May 1999, which later lead the Council of the European Union to recommend the Commission to draft a regulation or a directive on cross-border insolvency proceedings [455].

Finally, after forty years of negotiations, on the basis of Article 61 in conjunction with Article 65 EC Treaty [456], on 29 May 2000, the Regulation (EC) 1346/2000 on insolvency proceedings [457] was adopted by the Council (hereinafter, the 'Insolvency Regulation' or the 'EIR').

'European Private International Law: Embracing New Horizons or Mourning the Past?', in *Journal of Private International Law*, 2005, p. 197G. TESAURO, *Manuale di Diritto dell'Unione Europea*, Padova, 2012. See S. BARIATTI, 'la cooperazione giudiziaria in materia civile dal terzo pilastro dell'Unione Europea al Titolo VI del Trattato CE', in *Dir. Un. Eur.*, 2001, p. 261 and ff. L. S. ROSSI, *Le convenzioni fra gli Stati Membri dell'Unione Europea*, Milano, 2000, p. 111.

454 Indeed, the regime of cross-border insolvency being in the form of a regulation, no national legislative enactment is necessarily required and, pursuant to the principle of supremacy of EC law, a regulation's provisions must prevail over any conflicting or inconsistent provisions of national law. See in this respect, *ex multis*, ECJ, 15 July 1964, Case C-4/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, ECJ, 19 June 1990, Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd et al.*, ECLI:EU:C:1990:257, ECJ, 30 September 2003, Case C-224/01, *Gerhard Köbler contro Republik Österreich*, ECLI:EU:C:2003:513.

455 Initiative of Germany and Finland for a Council Regulation on Insolvency proceedings, in *OJ* 1999/C 221/6.

456 Authors submitted that articles 61 and 65 EC Treaty did not provide for a sufficient legal basis of the Insolvency Regulation since, on a proper construction, these provisions are limited to measures necessary for the free movement of persons as required by the internal market. See J. BASEDOW, 'The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam', in *Common Market Law Review*, 2000, p. 69; A. DICKINSON, 'European Private International Law: Embracing New Horizons or Mourning the Past?', in *Journal of Private International Law*, 2005, p. 197. J. ISRAËL, *op. cit.*, p. 250. It has been submitted that at the time of the adoption of the Insolvency Regulation, two provisions provided a suitable legal basis of the EIR. Under article 65 EC, on the one side, the Council was given the power to adopt measures in the field of judicial co-operation in civil matters, as is necessary for the proper functioning of the internal market. Article 95 EC, on the other side, granted general powers to take measures « *which have as their object the* […] *functioning of the internal market* ».

As stated in ECJ, 27 September 1988, Case C-165/87, *Commission of the European Communities v Council of the European Communities (International Convention on the Harmonized Commodity Description and Coding System)*, ECLI:EU:C:1988:458, where an institution's power is based on two provisions of the EC Treaty, it is bound to adopt the relevant measures on the basis of both provisions. However, the recurse to dual legal basis is excluded when the two provisions prescribe different legislative procedures. In that case, the legal basis must be chosen depending on the 'centre of gravity' of the measure to be adopted (see, for instance, ECJ, 11 June 1991, Case C-300/89, *Commission of the European Communities v Council of the European Communities (Directive on waste from the titanium dioxide industry),* ECLI:EU:C:1991:244). That was the case of articles 61/65 and 95 EC Treaty, before the entry into force of the Treaty of Nice. The former required the Council to act unanimously, after merely consulting Parliament. Instead, article 95 EC envisaged the co-decision procedure. Therefore, in order to adopt of the Insolvency Regulation, it was necessary to choose between two possible legal bases, according to the 'centre of gravity' of insolvency proceedings. In the light of the above, it was maintained that, although the Insolvency Regulation indeed may under certain circumstances involve the free movement of persons (arguments in support of this may be found in ECJ, 29 April 1999, Case C-267/97, *Eric Coursier v Fortis Bank and Martine Coursier, née Bellami*, ECLI:EU:C:1999:213), it was regarded as arguable that the 'center of gravity' of cross-border insolvency lied in the free movement of persons.

457 Council Regulation (CE) 1346/2000 of 29 May 2000 on insolvency proceedings, in *OJ*, 2000/L. 160/1.

It was submitted that the Insolvency Regulation arose 'like a phoenix' out of the ashes of the 1995's negotiations [458], as it followed the blueprint designed by the latter convention and retraced, almost identically in substance its text.

Indeed, Articles 1-42 Insolvency Convention were exactly copied into the text of the Insolvency Regulation [459], with the necessary formal amendments required from the altered nature of the instrument. Moreover, the system of the three Annexes was kept unchanged in the Insolvency Regulation, only references to Denmark were removed [460]. The new Articles 43-47 EIR contained transitional and final provisions.

However, with reference to its preamble, the Insolvency Regulation proves not to be a mere a transposition of the Convention. Unlike the Insolvency Convention (the provisions of which were preceded by a very short preamble, consisting essentially of a few nonimportant paragraphs) the Insolvency Regulation was preceded by an elaborate corpus of 33 Recitals.

The rationale behind the Recitals of the Insolvency Regulation was to provide guidance on the construction and application of the provisions and the objectives therein, instead of an accompanying explanatory report [461]. Such an objective was achieved by a somewhat uneven and selective *repêchage* of swaths of the abovementioned Virgós-Schmit Report. The Insolvency Regulation being almost identical in its substance to the (aborted) Insolvency Convention, the Virgós-Schmit Report (albeit formally referring to the text elaborated in 1995) is regarded as still providing a valuable aid in the interpretation of the EIR. Actually, it does not always provide clear guidance [462], in that several issues arose about the statements contained in Recitals, thus leaving room for a 'purposive' interpretation of the ECJ, to which a certain degree of discretion was conceded in interpreting the provisions of the EIR and attaining the objectives set forth by Recitals .

Unlike the Preliminary Draft Convention and the Draft Convention, the Insolvency Regulation abandoned the principles of unity and universality of insolvency proceedings. Besides, under the

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458 R. SHELDON, *Cross-Border Insolvency*, Bloomsbury, 2015, par. 2.2. and M.T. EPEOGLOU, 'The recast European insolvency regulation: a missed opportunity for restructuring business in Europe', in *UCL Journal of Law and Jurisprudence*, Volume 6, Issue 1, 2017, p. 1.

459 Two noteworthy changes concerned article 5 (where the definition of rights *in rem* was modified) and article 42 (where it was specified that in a State with two official languages, the creditor could recur to either of them to lodge its claim). Also, the altered nature of the legal instrument entailed that it was not necessary to expressly provide for the ECJ to interpret its rules (the interpretative task of the latter was already envisaged in articles 220 and 234 EC Treaty). See I. FLETCHER, *op. cit.*, p. 354.

460 On the position of Denmark see *infra* Section 2, § II.1.2.3.

461 As noted in G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings,* Oxford, 2016, p. 14 « *the EC Council perceived that it was contrary to settled practice to generate an officially sanctioned 'Explanatory Report' to a Community Act in the form of a Regulation* ».

462 Indeed, a proper understanding of those swaths would require understanding them within their original context (*i.e.* the whole Virgós-Schmit Report). See *Re Stojevic* [2007] BPIR 141, at [33], *Brian and Mary Patricia O'donnell v. Governr and Company of the Bank of Ireland* [2012] EWHC 3749 (Ch), at [24-25], where Newey J stated « *Recital (13) harks back to wording used in the Virgós-Schmit report (report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996). This report was designed to provide a commentary on a November 1995 Convention on Insolvency Proceedings. That Convention did not itself come into force, but it provided the basis for the Regulation* ».

'catalyst' of the Istanbul Convention, the EIR implemented the less ambitious mechanism of the modified universalism (thus tempering the over-rigid centralization of main proceedings, which was one of the main obstacles to the adoption of the previous texts) and envisaged that main insolvency proceedings should be opened in the State where the debtor had the centre of the main interests, whereas local proceedings could be opened in each Member State where the debtor had an establishment [463].

The EIR entered into force on May 31, 2002 [464]. Since then, two kinds of amendments to the original text (of Annexes) were required, both influenced by developments in the legal framework within the European Union. The first category of amendments pertains to purely domestic developments in national insolvency laws of the Member States, which needed to be reflected into the Insolvency Regulation, pursuant to the in-built procedure established under Article 45 EIR. Besides, the second type of amendments reflects the accession to the European Community of new Member States, which, under the terms of the relevant acts of accession, committed to the *acquis communautaire*, including also the Insolvency Regulation [465].

I.7. Phase IV: The Recast Insolvency Regulation 2015/848 [reference]

Aware that the Insolvency Regulation was the result of forty years of false starts and strenuous compromises, when enacting the Insolvency Regulation, the European legislature immediately envisaged the need to review and adjust the Insolvency Regulation (as is the case with all EU regulations) according to the needs emerged from its application.

Such a need was envisaged under Article 46 EIR, providing that

« *No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation* ».

The process of revision of the Insolvency Regulation, commenced in 2011 and led to its recast in 2015, with the adoption the Regulation (EU) 2015/848 (hereinafter the 'Recast Regulation' or 'RR'). The features and the significant amendments of the Recast Regulation will be dealt with afterwards, in Chapter V.

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463 It was argued that the philosophy of the Insolvency Convention was influenced more by the civil law of the continent of Europe than by the common law systems of England and Ireland. M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 469.

464 See art. 47 EIR.

465 See G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 15.

SECTION 2

THE LEGAL FRAMEWORK

CONTENTS: II.1. The rules on 'insolvency proceedings' of the Insolvency Regulation - II.1.1. The objectives of the Insolvency Regulation - II.1.2. The scope of application of the Insolvency Regulation - II.1.2.1- The material scope - II.1.2.2. The personal scope - II.1.2.3. The territorial scope - II.1.2.4. The temporal scope - II.1.3 The COMI and the jurisdictional regime - II.1.4. The regime of recognition and enforcement - II.2. The regime of civil and commercial matters: the 'Brussels Regime' and the Lugano Convention - II.2.1. From the Brussels Convention to the Brussels Ia Regulation - II.2.2. The objectives of the Brussels Ia Regulation; II.2.3. The material scope - II.2.4. Few rudimental notions on the rules of jurisdiction, and recognition and enforcement under the Brussels Ia Regulation - II.2.4.1. Jurisdiction at a glance - II.2.4.2. The rules of recognition and enforcement - II.3. The Lugano Convention

It is not possible to explain the problems concerning the relationship between two regulatory instruments without first defining their scope of application and those features that reveal all the concerns about the friction raised by their operation.

Therefore, before embarking on the analysis of the boundaries and grey-zones between the Insolvency Regulation and the Brussels Ia Regulation, it seems appropriate to outline, albeit very briefly, some essential features of the two Regulations which are functional to then focus the attention on the problematic profiles with regard to the boundaries between the provisions on cross-border insolvencies and the rules governing civil and commercial matters.

Therefore, the purpose of this Section is to explain the respective scope of application of each Regulation, in the light of their own objectives, and provide a summary of the principal features of the rules on jurisdiction, on the one hand. On the other, this section also provides a brief account of the rules governing recognition and enforcement of judgments.

II.1. The rules on 'insolvency proceedings' of the Insolvency Regulation

The Insolvency Regulation represented a pivotal achievement in the field of judicial cooperation in civil matters and a crucial step in the plan to harmonise procedural law at European level, both of which are objectives enshrined in Title IV of the Treaty of Amsterdam in its Articles 61-69 [466].

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466 In literature see, *inter alia*, H.C. DUURSMA-KEPPLINGER, D. DUURSMA AND E. CHALUPSKY, *Europifische Insolvenzordnung*, Wien-New York, 2002; J. ISRAËL, *European Cross-Border Insolvency Regulation. A Study of Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Cooperation and Comitas Europaea*, Antwerp, 2004; M. VIRGÓS and F. GARCIMARTIN, *The EC Regulation on Insolvency Proceedings: A Practical Commentary*, Alphen aan den Rijn, 2004; B. WESSELS, *Current Topics of International Insolvency Law*, Deventer, 2004); I.F. FLETCHER, *Insolvency in Private International Law*, Oxford, 2005; C.G. PAULUS, *Euopiiische Insolvenzordnung, Frankrurt-on-Main*, 2006; K. PANNEN, *European Insolvency Regulation*, Berlin, 2007; F. MÉLIN, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, Brussels, 2008; S. BARIATTI, *Cases and Materials on EU Private International Law*, Oxford, 2010, B. Wessels, International Insolvency Law, Deventer, 2006; B. WESSELS, *Cross-Border Insolvency Law; International Instruments and* Commentary, Alphen aan den Rijn, 2007; P.J. OMAR, *European Insolvency Law*, Aldershot, 2004. P. DE CESARI, G. MONTELLA, *Le procedure d'insolvenza nella nuova disciplina comunitaria*, *Commentario articolo per articolo del regolamento CE 1346/2000*, Milano, 2004; I. F. FLETCHER-G. MOSS-S. ISAAC,

Although fraught with shortcomings and imperfections, due to the fact that it was the result of the stratification of nearly forty years of negotiations, its set of rules represented the first attempt to regulate cross border insolvencies at the European level. It was generally acknowledged as a carefully drafted piece of legislation and, in comparative-law terms, an exceptional achievement in a field tackling delicate matters of political nature, where the agreement on the content of the rules are never easy to reach [467].

II.1.1. The objectives of the Insolvency Regulation

For a thorough understanding of the rules set forth by the Insolvency Regulation, account must be taken of the Recitals in the preamble, that identify the general objectives and the rationale which the provisions thereof are informed by. The identification of the objectives of a regulation is also important with the view to arrive at the autonomous interpretation of concepts provided therein, which, as will be explained, is essential to ensure equal and uniform operation of the EIR [468].

The EC Regulation on Insolvency Proceedings. A commentary and annotated guide, London, 2009; A. LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sulle procedure d'insolvenza*, Bari, 2008; VANZETTI M., *L'insolvenza transnazionale, storia del problema*, Milano, 2006; L. DANIELE, *Il regolamento 1346/2000 relativo alle procedure d'insolvenza: spunti critici*, in *Dir fall.*, 2004, I, p. 593; M. A. LUPOI, in *Commentario breve alla legge fallimentare a cura di Maffei Alberti*, Padova, 2009; S. BARIATTI, 'L'applicazione del regolamento CE n. 1346/2000 nella giurisprudenza', in *Riv. dir. proc.*, 2005, p. 673; C. SANTINI, 'Quaestio jurisdictionis nel regolamento comunitario n. 1346/2000 sulle procedure d'insolvenza', available at www.judicium.it; C. VELLANI, *L'approccio giurisdizionale all'insolvenza transfrontaliera*, Milano, 2006; L. FUMAGALLI, 'Il regolamento comunitario sulle procedure d'insolvenza', in *Riv. dir. proc.*, 2001, p. 677; S. VINCRE, 'Il regolamento CE sulle procedure d'insolvenza e il diritto italiano', in *Riv. dir. proc.*, 2004, p. 213; R. CAPONI, 'Il regolamento comunitario sulle procedure d'insolvenza, in *Foro it.*, 2002, V, c. 220; A. BONFANTI, *Le procedure concorsuali internazionali tra il regolamento 1346/2000 e la disciplina italiana di diritto internazionale privato*, in *Dir. comm. int.*, 2003, p. 407; V. PROTO, 'Il regolamento comunitario sulle procedure d'insolvenza e il sistema italiano nell'applicazione giurisprudenziale', in *Il fallimento*, 2009, p. 7; P. LASCARO, 'Brevi considerazioni sul regolamento CE n. 1346/2000 in tema d'insolvenza transfrontaliera', in *Dir. fall.*, 2004, II, p. 1324; H. EIDENMÜLLER, 'Abuse of Law in the Context of European Insolvency Law', in *European Company Finance Law Review*, 2009, pp. 1-28; P. R. WAUTELET, 'Some consideration on the Center of Main Interests as jurisdictional test under the European Insolvency Regulation', in G. AFFAKI (ed.), *Faillite internationale et conflit de juridiction: regards croisés transatlantiques: US-EU experience*, Bruxelles, 2007, p. 73; V. VITALONE, *Il regolamento n. 1346/2000 del consiglio delle comunità europee relativo alle procedure d'insolvenza*, in *Riv. dir. proc.*, 2004, p. 213. A. WALTERS- A. SMITH, '"Bankruptcy Tourism" under the Ec Regulation on Insolvency proceedings: A view from England and Wales', in *International Insolvency Review*, 2009, Vol.19, pp. 181-208; S. BLOCK-LIEB, 'The UK and EU cross-border insolvency recognition: from Empire to Europe to "Going It Alone"', in *Fordham Int Law J*ournal, 2017, pp. 1373–1412; L. CARBALLO PIÑEIRO, 'Towards the reform of the European Insolvency Regulation: codification rather than modification', in *Nederland International Privaatrecht*, 2014, pp. 207–215. I. QUEIROLO, *Le procedure d'insolvenza nella disciplina comunitaria: Modelli di riferimento e diritto interno*, Torino, 2007; S.M. CARBONE, 'Il Regolamento (CE) n. 1346/2000 relativo alle procedure di insolvenza', in S.M. CARBONE - M. FRIGO – L. FUMAGALLI, *Diritto processuale civile e commerciale comunitario*, Milano, 2004;

467 F. GARCIAMARTÍN, 'The review of the EU insolvency Regulation: some general considerations and two selected issues (hybrid procedures and netting arrangements) ', in L. LENNARTS and F. GARCIAMARTÍN, *The review of the EU insolvency Regulation: some proposals for amendment*, Report of the Netherlands association for comparative and international insolvency law, 2011.

468 See *infra* § Section 2, § II.1.2.1.1.

The Recitals to the EIR pinpoint the following general and specific objectives: efficiency and effectiveness of cross-border insolvency proceedings [469], coordination of the measures to be taken regarding an insolvent debtor's assets [470], avoidance of any incentive 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) [471], protection of the diversity of (local) interests [472], coordination of concurrent pending proceedings [473], immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings [474], protection of legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened [475], establishment, for the matters covered by it, of uniform rules on conflict of laws replacing, within their scope of application, national rules of private international law [476].

By contrast, the Insolvency Regulation expressly states that « *to introduce insolvency proceedings with universal scope in the entire Community* » and that « *the application without exception of the law of the State of opening of proceedings* » are not objectives of the EIR system (at least not at any cost) [477].

Ultimately, the main core objectives of the Insolvency Regulation may be summarised as follows

(a) Efficiency and effectiveness of insolvency proceedings [478] - the cornerstone of the rules provided by the Insolvency Regulation regime is that the administration of cross-border proceedings must be efficient and effective. It is superfluous to say that efficiency and effectiveness depend on the purposes which proceedings aim at. As will be explained below, the Insolvency Regulation mainly deals with traditional insolvency proceedings (*i.e.* proceedings aiming at the compulsory liquidation of the debtor's assets for the benefit of the general body of creditors). It follows that, from an economic point of view, effectiveness and efficiency of insolvency proceedings then correspond, on the one hand, to maximising the net assets to satisfy creditors' claims and to minimise bankruptcy costs, on the other [479]. In this respect, under a legal perspective, fundamental corollaries are the foreseeability and the exclusivity of the insolvency venue(s), predictability of the applicable insolvency

469 Recital 2 EIR.

470 Recital 3 EIR.

471 Recital 4 EIR.

472 Recital 12 and 19 EIR.

473 Recital 20 EIR.

474 Recital 22 EIR.

475 Recital 24 EIR.

476 Recital 23 EIR.

477 Recital 11 EIR.

478 Recitals 2, 8, 16, 19 and 20 EIR.

479 Confirmation of the economic value underlying the objective of efficiency and effectiveness of insolvency proceedings may be found in the abovementioned Recital 3, where it states that one of the objectives is that of coordinating the measures to be taken regarding an insolvent debtor's assets. See also H. EIDENMÜLLER, 'Abuse of Law in European Insolvency Law', in *European Company Financial Law Review*, 2009, p. 14.

law and the immediate recognition of (the first [480]) judgment related to insolvency proceedings. As stated by the Virgós-Schmit Report, international insolvency proceedings can be effectively conducted only if the States concerned recognise the jurisdiction of the courts opening the insolvency proceedings, the powers of their liquidators and the effects of their judgements. They may accept it only if the rules on conflict of laws are also harmonised, because that proves a degree of certainty that, in the event of insolvency, rights created or granted in their jurisdictions will be recognised throughout the Member States [481]. The primary objective of the efficient administration of insolvency proceedings should therefore inform the interpretation of the rules of the EIR.

(b) Protection of foreign creditors [482] - The goal of effective administration of proceedings is counterbalanced by the tenet of foreign creditors' protection. Although not expressly stated, the Insolvency Regulation sets forth a (foreign) creditor-oriented system [483], which in several cases allows to derogate to the primary objective efficiency of proceedings [484]. The main creditor protection mean is, for instance, the very possibility to open secondary proceedings, which is expressly based on the protection of local interests [485]. Also, creditors are granted the right to lodge their claims in each insolvency proceedings pending relating to the debtor's assets [486]. Every creditor is free to challenge the decision opening main insolvency proceedings in the purported COMI State. Also, the uniformity of the conflict-of-law-rules finds significant exceptions as regards certain categories of creditors [487].

(c) Avoidance of forum shopping - Another pillar of the system is the avoidance of forum shopping, which is defined by Recital 4 EIR as 'any incentive for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position'. The reasons underlying the EIR's hostility towards forum shopping - which, albeit referred generally to all the parties involved in insolvency proceedings, more often concerns the issue of the relocation

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480 According to the underlying idea of mutual trust between EU courts a procedure that is opened in one Member State has to be respected and recognised by courts in other Member States with the only restriction being the public policy exception in article 26 EIR. Consequently, this mechanism can enhance parties to engage in a 'virtual race' to the courthouse in order to reach the opening of insolvency proceedings with the benefit of « *full and unquestioned recognition throughout the EU* » even in constellations where the COMI is debatable. It was cynically stated that this could provoke parties « *to file first and to ask questions later* »; consequently, the creditor « *who hesitates is lost* ». W. G. RINGE, 'Forum shopping under the EU insolvency regulation', in *European Business Organization Law Review*, 2008, p. 10.

481 See Virgós-Schmit Report, at [8].

482 Recital 12, 19 and 20 EIR.

483 Rather than an aware choice of legislative policy, the proneness of the Community legislature to protect the interest of the creditors (and shareholders) must be regarded as the acknowledgement of the fragmentation of national laws (in particular as regards security interests and preferential rights enjoyed by some creditors).

484 The Insolvency Regulation has envisaged the (possible) parallelism between main proceedings (recognised elsewhere) and secondary proceedings, in order to enable creditors in another Member State to invoke a local instrument in order to safeguard their interests. See Virgós-Schmit, at [5].

485 Recital 12 and 19, Article 29 EIR.

486 Recital 21 and Article 22 EIR.

487 Articles 5-8 EIR.

of the debtor's COMI [488] - is the basic assumption that opportunistic (or even fraudulent) 'bankruptcy tourism' would always affect the creditor's right, especially those of 'non-adjusting' creditors [489].

The task of using those principles in interpreting the provisions of the Insolvency Regulation is ultimately conferred on the ECJ, that is vested with authoritative guidance as to (i) decide whether the objectives must be called on when interpreting a specific provision (as it will be seen in respect to Annex Actions the ECJ has generously resorted to a purposive interpretation of the EIR's provision invoking the Recitals), (ii) decide upon the limits of those objectives and (iii) balance the values expressed by conflicting objectives, establishing a hierarchy between them, in case they prove to be conflicting in any given case [490].

II.1.2. The scope of application of the Insolvency Regulation

The delimitation of the scope of application of the Insolvency Regulation (as of any other legal instrument) concerns several profiles.

First, it regards the scope of application *ratione materiae* (*i.e.* in which circumstances and to what kind of proceedings its rules apply). Indeed, the Insolvency Regulation only covers certain types of proceedings opened under certain circumstances [491]. Second, it addresses the application *ratione personae* of the EIR. The Insolvency Regulation provides certain restrictions about the type of persons

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488 It goes beyond the scope of this research to investigate in detail the phenomenon of transfer of COMI and forum shopping. In literature see H. EIDENMÜLLER, 'Abuse of Law in European Insolvency Law', in *European Company Financial Law Review*, 2009, p. 14, F. MUCCIARELLI, 'Centro degli interessi principali e forum shopping in materia fallimentare', available at http://www.orizzontideldirittocommerciale.it (last access April 2019). F. MUCCIARELLI, 'Spostamento della sede statutaria in un Paese membro della UE e giurisdizione fallimentare', in *Giurisprudenza commerciale*, 2006, p. 616 ss. F. MUCCIARELLI, 'Società di capitali, trasferimento all'estero della sede sociale e arbitraggi normativi', in *Quaderni di giurisprudenza commerciale*, 2010, p. 215 ss. W. G. RINGE, 'Forum shopping under the EU insolvency regulation', in *European Business Organization Law Review*, 2008; M. SZYDŁO, 'Prevention of Forum Shopping in European Insolvency Law', in *European Business Organization Law Review*, 2010, p. 253. G. MCCORMACK, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings', in *Cambridge Law Journal*, 2009, p. 191. M. BENEDETTELLI, 'Centro degli interessi principali del debitore e forum shopping nella disciplina comunitaria delle procedure d'insolvenza transfrontaliera', in *Riv. dir int priv. proc.*, 2004, p. 504 ss., G. MONTELLA, 'La procedura secondaria: un rimedio contro il forum shopping del debitore nel regolamento CE n. 1346/2000', in *Il fallimento*, 2009, 11, p. 1293 ss.

489 The expression 'non-adjusting creditors' indicates those unsecured creditors which either are involuntary creditors, since they do not agree on the terms of their credit (for instance, tort creditors) and or other creditors that although in the condition to bargain their credit abstain to do so because they lack skills or information or even because they deem it uneconomical to protect their claim. On the contrary, 'adjusting creditors' generally indicates sophisticated creditors, that can protect their credit through protective covenants or requiring guarantees (generally banks or investors or, in general, secured creditors).

490 For instance, scholars have submitted that the avoidance of forum shopping is ancillary to effectiveness and efficiency of insolvency proceedings. B. LAUKEMANN, 'jurisdiction – Annex Actions' in B. HESS, in B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2013, p. 166.

491 See *infra* § II.1.2.1.

whose insolvency is governed by the provisions therein [492]. Finally, the scope of application in time [493] and space [494] must be considered.

In principle, the scope of application of the Insolvency Regulation is defined in its Article 1 as well as in other provisions disseminated in the Recitals and *corpus* of the Regulation itself. As it will be seen, it offers elaborated answers to the issues listed above, however leaving more than one unsolved.

II.1.2.1. The material scope

The scope and subject matter of the Insolvency Regulation is provided by Article 1(1) EIR. Under said provision, the rules of the Insolvency Regulation cover « *proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator* ».

As that wording shows, in order to fall within the scope of the Insolvency Regulation (national) insolvency proceedings must meet four characteristics. They must be *(i)* collective; *(ii)* based on the debtor's insolvency; *(iii)* entail partial or total divestment of the debtor; *(iv)* prompting the appointment of a liquidator [495]. All four conditions must be satisfied at the same time.

As noted by scholars [496], Article 1(1) EIR does not expressly mentions the necessity that proceedings must be directed by a court. In this respect, the Virgós-Schmit Report states that the conduct of the procedure under the supervision of the judicial authority would be 'the general rule' as its provisions have been drawn up on the basis of proceedings with the involvement of a court. Nevertheless, the Report also expressly states that « *The requirement of intervention by a judicial authority was deliberately excluded to allow the Convention to be applied to ordinary non-judicial collective proceedings in countries such as the United Kingdom and Ireland (especially the creditor's voluntary winding-up)* » [497]. With that in mind, one should keep a flexible approach in interpreting this 'implicit' requirement.

Also, Recital 10 makes it clear that proceedings « *should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened* ».

Since the Insolvency Regulation defines its material scope by means of the extremely wide concept of 'collective insolvency proceedings' [498], those objective conditions must be read in conjunction with other provisions set forth therein. In particular, relevance must be given to the Recitals, that, as

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492 See *infra* § II.1.2.2.

493 See *infra* § II.1.2.4.

494 See *infra* § II.1.2.3.

495 Recital 10 echoes the same wording of article 1(1) EIR and sets out the same four requirements, reading « [insolvency proceedings] *should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator* ». The very same four characteristics were also pinpointed by ECJ, 2 May 2008, Case C-341/04, *Eurofood IFSC Ltd.* ECLI:EU:C:2006:281, at [46]. For literature see, among others, M. VIRGÓS - F. GARCIMARTÌN, *The European Insolvency Regulation: Law and Practice*, The Hague, 2004, p. 21.

496 See B. WESSELS, *International Insolvency Law*, Deventer, 2012, at [10508] and ff.

497 See Virgós-Schmit Report, at [52].

498 See Virgós-Schmit Report, at [49].

discussed, set out more in detail the rationale behind the EIR's schemes and objectives. Also, one must take into consideration Article 2 EIR, that, according to a settled practice in the elaboration of regulations (499), provides for some definitions illustrating the meaning of the expressions used in Article 1 EIR.

II.1.2.1.1. Collectiveness

The first condition set out by Article 1(1) EIR is that insolvency proceedings must be *collective*. The Insolvency Regulation does not define what collectiveness means. However, the Virgós-Schmit Report explains that it means that « *all the creditors concerned may seek satisfaction only through the insolvency proceedings, as individual action will be precluded* » (500).

Such a definition of collectiveness was criticised for it does not seem to consider that, under some national laws (and under the EIR too), secured creditors can often exercise rights (and, therefore, seek satisfaction) also outside of collective proceedings. Thus, it was submitted that the reference to 'all creditors' was too broad and that it would have be better to exclude secured creditors from that definition (501). Besides, it was argued that the definition of 'collectiveness' of proceedings put forward by the Virgós-Schmit Report, rather than on the idea that proceedings should satisfy 'all creditors', seems to be more focused on a negative element. Actually, the Report seems to allude that insolvency proceedings, to be collective, must not serve the initiative of one single creditor, seeking individual recourse or execution (502). Thereby, it has been observed that the notion of 'collectiveness' in Article 1(1) EIR refers exclusively to the point of view of creditors concerned by insolvency proceedings: it entails (only) that the Insolvency Regulation does not apply to those proceedings the opening of which, albeit based on the material insolvency of the undertaking, are requested by one single creditor to his own benefit (503).

It was correctly submitted that, as such, this definition refers to a merely formal concept of collectiveness, *i.e.* the bar to individual actions brought by creditors after the opening of insolvency proceedings (504). In other words, that definition is meant to stress the fact that proceedings procedurally involve all creditors but did not exclude a ranking of creditors (505).

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499 Art. 2 EIR is a s.c. 'definition norm', setting out the statutory definitions of the terms of the Regulation.

500 Virgós-Schmit Report, at [49(a)].

501 A.J. BERENDS, *Insolventie in het internationaal privaatrecht*, Amsterdam, 2005, p. 213. B. WESSELS, *International insolvency law*, Deventer, 2012, at [10500]. The author claims that a better definition of 'collective' insolvency proceedings was given by Rechtbank Middelburg, 16 February 2001, *NIP*, 2001, p. 2015, in which the Rechtbank stated that « *proceedings are collective if individual recourse or execution is impossible* ».

502 B. WESSELS, *International insolvency law*, Deventer, 2017, at [10500].

503 G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 280.

504 R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 61.

505 See in this respect *Re Leigh Estates (UK) Ltd*, [1994] BCC 292 and *Jacob v. Vockrodt*, [2007] EWHC 2403 (QB) where it emerges clearly that proceedings are collective in the event that the petition for the opening of insolvency proceedings (in the case at stake winding-up) is presented by a secured creditor, since that remedy entails a class right, thus requiring that the position of all creditors is taken into consideration by the court.

Accordingly, some Italian authors have maintained that the principle of 'collectiveness', embedded in the Insolvency Regulation significantly differs, for instance, from the domestic notion in the Italian law system. It was submitted that the (substantial) profile of the *par condicio creditorum* - separate, yet closely intertwined with the concept of formal 'collectiveness' - is not mentioned in Article 1(1) EIR, nor in the entire text of Insolvency Regulation, that profile being left to the *lex fori concursus* (506). It is indeed true that the principle of the *par condicio creditorum* is not expressly mentioned by the rule in question. However, the fact that the 'collectiveness' of insolvency proceedings within the meaning of the EIR also refers to the equal treatment of (unsecured) creditors, is specifically confirmed by the Insolvency Regulation itself and by the case law (507).

The equal treatment of creditors across the Member States is specifically addressed, for instance, by Article 20 EIR, bearing the heading 'return and imputation'.

That provision, first, prevents the creditors (508) from obtaining, 'by any means' and in particular through enforcement, satisfaction of their own claims over the debtor's assets located in another Member State (509), imposing in that case an obligation of restitution to the liquidator of what the creditor had obtained.

Second, to the express purpose of ensuring the equal treatment of creditors throughout possibly multiple proceedings, Article 20(2) EIR establishes the s.c. 'hotchpot' rule (*i.e.* a rule for the coordination of distribution of proceeds, deriving from the realisation of the debtor's assets, between more than one estate). Indeed, the right of the creditor to lodge a claim in more than one State (and, even before that, to request the opening of secondary proceedings (510)) might well entail that the

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506 P. DE CESARI, G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il Regolamento (UE) 2015/848 relativo alle procedure d'insolvenza*, Torino, 2017, p. 19. Those authors maintain « *la nozione autonoma di "procedura concorsuale" che emerge dalla intenzione del n. 1 dell'art. 2* […] *differisce non poco rispetto a quella tenuta presente, per esempio, in diritto italiano. Il concorso infatti nel regolamento è visto esclusivamente dal punto di vista soggettivo dei creditori interessati alla procedura* […] *Però viene qui in rilievo un'ulteriore caratteristica di solito insita nel concetto di concorso, ossia la par condicio creditorum.* […] *Quello di par condicio è, infatti, un concetto del tutto ignorato dal regolamento, che di esso non fa mai parola* […] *la disciplina dei rapporti tra i creditori sotto questo particolare aspetto è lasciata, pertanto, ai singoli diritti nazionali* ». I respectfully disagree with the statement that the *par condicio creditorum* is not mentioned within the EIR. It is true that under art. 4, lett. (i) EIR, the rules governing the ranking of claims and distribution questions are those of the *lex fori concursus* and, thus, the domestic law of the State of the debtor's COMI. Nonetheless, article 20 EIR ensures the equal treatment of creditors with the same ranking across the Member States, and such policy is considered as one of the fundamental princples of the Insolvency Regulation. See G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 376.

507 See recently, Case C-212/15, *ENEFI Energiahatékonysági Nyrt v. Direcţia Generală Regională a Finanţelor Publice Braşov (DGRFP)*, ECLI:EU:C:2016:841 and ECJ, 6 June 2018, Case C-250/17, *Virgílio Tarragó da Silveira v. Massa Insolvente da Espírito Santo Financial GroupSA*, ECLI:EU:C:2018:398.

508 With the exception of those creditors whose claims are mentioned in art. 5 and 7 EIR.

509 It was maintained by G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 282 that the assumption underlying art. 20(1) EIR appears to be the fact that no such improvement of the position of the creditor is available under the law governing the main proceedings. Besides, it may also be argued that the obligation to return to the liquidator what the creditor has obtained in violation of the *pari passu* principle appears to be an effect that the Insolvency Regulation associates autonomously to the opening of main insolvency proceedings, irrespectively of the *lex fori concursus*.

510 A. LEANDRO, 'Le procedure concorsuali transfrontaliere', in A. JORIO E B. SASSANI, *Trattato delle procedure concorsuali*, Milano 2016, p. 803.

ranking of the claim could vary in each proceedings, depending on the relevant *lex fori concursus* applicable thereto. That circumstance, however, cannot prejudice either the principle of equality of creditors, or the proper management of insolvency proceedings. Therefore, the creditor in one procedure could participate in the distribution of the assets in other proceedings « *only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend* ».

The idea that *collective* insolvency proceedings entails both the profiles of equal treatment of creditors (*par condicio creditorum* or substantial collectiveness) and the bar of individual enforcement (formal collectiveness) seems to be also consistent with the interpretation of insolvency proceedings provided by the ECJ and other EU acts (511)

For instance, in the *AMI Semiconductor* case the creditor's collective satisfaction of creditors was considered to be the crucial element of the notion 'insolvency proceedings'.

In this respect, the Court stated that

« *the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible* […] *the aim of Regulation No 1346/2000 is, as is clear in particular from recitals 2, 3, 4 and 8 in its preamble, to ensure the efficiency and proper coordination of insolvency proceedings within the European Union and thus to ensure equal distribution of available assets amongst all the creditors* » (512).

II.1.2.1.2. 'Insolvency' proceedings

Proceedings covered by the Insolvency Regulation, must be 'insolvency proceedings'.

No definition is provided either of 'insolvency' or 'proceedings'. As the Virgós-Schmit Report explains, 'insolvency proceedings' means that proceedings should be based on the undertaking's insolvency 'and not on other grounds' (513).

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511 For instance, article 2(1) of the Council Directive of 20 October 1980 on the approximation of the laws of the Member State relating to the protection of employees in the event of insolvency of their employer No.80/987/EC (in *Official Journal*, 1980, L. 283/23) defines the state of insolvency of the employer as « *the situation where a request has been made for the opening of proceedings involving the employer's assets* […] *to satisfy collectively the claims of creditors* ». The interpretation of (the employer's) insolvency focused on the collective satisfaction of creditors was confirmed also in the *Francovich* judgement. See ECJ, 9 November 1996, Case C-479/93, *Andrea Francovich v Italian Republic*, ECLI:EU:C:1995:372, in particular at [18]. See also the opinion of Advocate General Cosmas, delivered on 11 July 1995, ECLI:EU:C:1995:232, at [16]. S. BARIATTI, 'Recent case-law concerning jurisdiction and the recognition of judgements under the European Insolvency Regulation', in *RabelsZ,* 2009, 73, p. 632.

512 See, ECJ, 17 March 2005, Case C-294/02, *Commission v AMI Semiconductor Belgium and others*, ECLI:EU:C:2005:172. That concept was also submitted by Advocate General Kokott « *the purpose of insolvency proceedings is to distribute the available assets on the basis of equality among the creditors in a single procedure in which all the creditors take part. It is for that reason that national law precludes the bringing of separate legal proceedings once insolvency proceedings have been opened. Creditors can neither bring a direct action to obtain a separate entitlement nor levy individual execution on the basis of an existing entitlement. If that were not the case, some creditors could secure an advantage over others* ». See Opinion of Advocate General Kokott, delivered on 23 September 2004, ECLI:EU:C:2004:549, at [84].

513 Virgós-Schmit Report, at [49(b)].

Therefore, the insolvency of the undertaking (and only that) represents an objective condition for proceedings to be included within the material scope of the EIR.

However, as mentioned, from the very beginning of the Insolvency Project, the legislature renounced to provide for a uniform the substantive law of the Member States, and in particular the very basic concept of insolvency, since under each legal system it considerably differs [514]. Therefore, none of the (unsuccessful) instruments that were mentioned above in Section I had never defined insolvency.

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514 For instance, in France under art. L. 631-1 and art. L. 640-1 Code de Commerce, the *procédure de redressement judiciaire* and *liquidation judiciaire* respectively may be opened against the debtor that is in *état de cessation des paiements*, defined as the impossibility for the debtor to meet his obligations as they fall due with his available assets (« *l'impossibilité de faire face au passif exigible avec son actif disponible, est en cessation des paiements* »). On the contrary, a debtor is not in suspension of payments whenever he proves that the funds or moratoria of which he benefits from his creditors enable him to meet his obligations as they fall due (« *Le débiteur qui établit que les réserves de crédit ou les moratoires dont il bénéficie de la part de ses créanciers lui permettent de faire face au passif exigible avec son actif disponible n'est pas en cessation des paiements* »). Instead, art. L. 620-1, introduced by the loi n° 2005-845 of 26 July 2005 named '*de sauvegarde des entreprises*', provides the *procédure de sauveguarde* shall be opened *vis à vis* the debtor that, although not in suspension of payments, is experiencing insurmountable difficulties but has not yet reached the stage of cessation of payments (« *sans être en cessation des paiements, justifie de difficultés qu'il n'est pas en mesure de surmonter. Cette procédure est destinée à faciliter la réorganisation de l'entreprise afin de permettre la poursuite de l'activité économique, le maintien de l'emploi et l'apurement du passif* »).

In Italy, art. 2(1)(b) of the new Bankruptcy Code (the new '*Codice della crisi e dell'insolvenza*', recently approved with the Legislative Decree dated 12 January 2019 n° 14, published in the Official Journal on 14 February 2019) provides that 'insolvency' shall mean a condition of default or other external elements which show that the debtor is no longer able to meet his obligations as they fall due on a regular basis (« *lo stato del debitore che si manifesta con inadempimenti od altri fatti esteriori, i quali dimostrino che il debitore non è più in grado di soddisfare regolarmente le proprie obbligazioni* »). Besides, the distress is defined by art. 2(1)(a) as a condition of economic and financial difficulty which makes it likely that the debtor will become insolvent. For companies, this condition entails the inability of prospective cash flows to fulfill on a regular basis its obligations as they fall due (« *lo stato di difficoltà economico-finanziaria che rende probabile l'insolvenza del debitore, e che per le imprese si manifesta come inadeguatezza dei flussi di cassa prospettici a far fronte regolarmente alle obbligazioni pianificate* »).

In Spain, art. 2 of the *Ley concursal 22/2003* dated 9 July 2003, (entitled '*Presupesto objetivo*') provides that the debtor is in a state of insolvency and is unable to fulfil his obligations regularly («*Se encuentra en estado de insolvencia el deudor que no puede cumplir regularmente sus obligaciones exigibles* »).

In Germany, under art. §17(1) InsO, insolvency is defined as the inability to pay ('*Allgemeiner Eröffnungsgrund ist die Zahlungsunfähigkeit*). Pursuant to art. 17(2) InsO, « *There is inability to pay if a debtor is not in a position to meet payment obligations that have fallen due; insolvency is presumed as a rule if the debtor has stopped payments* ». (« *Der Schuldner ist zahlungsunfähig, wenn er nicht in der Lage ist, die fälligen Zahlungspflichten zu erfüllen. Zahlungsunfähigkeit ist in der Regel anzunehmen, wenn der Schuldner seine Zahlungen eingestellt hat* »). Also, the imminent insolvency (*drohende Zahlungsunfähigkeit*) represents an objective condition to open insolvency proceedings, under §18(2) InsO, pursuant to which the debtor is deemed to face imminent inability to pay if he is likely to be unable to meet his existing obligations to pay on the date on which they fall due « *Der Schuldner droht zahlungsunfähig zu werden, wenn er voraussichtlich nicht in der Lage sein wird, die bestehenden Zahlungspflichten im Zeitpunkt der Fälligkeit zu erfüllen* ».

In the United Kingdom, insolvency is considered as the inability to pay debts. Under article 123 of the Insolvency Act of 1986 a company is deemed unable to pay its debts if, *inter alia*, *(a)* the company has not paid, secured or compounded a claim for a sum due to a creditor exceeding £750 within three weeks of having been served with a written demand in the statutory form (known as a statutory demand); (b)the creditor has attempted execution or another enforcement process against the company in respect of a debt without success; (c) it is proven to the satisfaction of the court that the company is unable to pay its debts as they fall due (commonly referred to as the cash flow test). It is proven to the satisfaction of the court that the value of the company's assets is less than its liabilities, taking into account contingent and prospective liabilities (commonly referred to as the balance sheet test).

By the same token, also the EIR does not define 'insolvency' [515]. It merely states that 'insolvency proceedings' are those collective proceedings listed in Annex A, whereas 'Winding-up' proceedings (which are a type of 'insolvency proceedings', listed in Annex B) are defined as those aiming at the realisation of the debtor's assets, including proceedings closed by a composition or other measure terminating the insolvency, or closed by reason of insufficiency of the assets [516].

In that constellation, it is than clear that, as to the notion of insolvency, the EIR simply refers to the national laws of the Member States, and to proceedings laid down by the statutory provisions thereof [517].

Nevertheless, the Virgós-Schmit Report seems to suggest that the notion of insolvency in the EIR shows a 'common understanding' [518] that « *the* [Insolvency Regulation is grounded] *on the idea of financial crisis* » [519].

That would perhaps explain why Annex A EIR, by way of exception [520], listed also proceedings serving purposes other than liquidation [521]. The Virgós-Schmit Report specified that such proceedings are encompassed into the scope of application of the EIR provided that they are actually based on the insolvency of the debtor. The solution envisaged towards the difficulties concerning the classifications of those proceedings endorses that one proposed in the Schlosser Report [522]: Member

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515 J. L. VALLENS, 'Procédures d'insolvabilité: presentation du règlement sur les procedures d'insolvabilité', in *Lamy Droit Commercial*, No 125.

516 The problematic relation between Annexes and Article1(1) EIR will be dealt with afterwards. See *infra* in this Chapter, Section 3 § III.3.3.

517 This entails, as stated by the Virgós-Schmit Report, that no additional insolvency test other than that provided by the statutory provision of the State where insolvency proceedings are opened would apply («*Thus, if a national law is based on the occurrence of an act of bankruptcy listed in the bankruptcy law or on the evidence that the debtor has ceased to pay his debts, it is sufficient for one of these facts to be established in order that insolvency proceedings be opened and the Convention applied*». See Virgós-Schmit Report at [49(b)]). There are typically two insolvency tests to open insolvency proceeding: balance sheet or cash-flowbased and the application thereof may considerably differ from State to State. For further details on their application see D. VALIANTE, 'Harmonising Insolvency Laws in the Euro Area Rationale, stocktaking and challenges', in *CEPS Special Report*, No. 152, 2016, para. 2.2.1.

518 M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 485

519 However, Hess seems more correctly to restrict the notion of insolvency to a definition that « *corresponds to the traditional concept of insolvency, which presupposes lacking liquidity or a negative balance sheet of the debtor being unable to pay his creditors* » See B. HESS, in B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, p. 10.

520 See Virgós-Schmit Report at [49(b)].

521 The United Kingdom included among insolvency proceedings administration proceedings which can be opened also on grounds other than insolvency (the likelihood of insolvency). See S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017, p. 34, M. BALZ, 'The European Union Convention on Insolvency Proceedings', in American Bankruptcy Law Journal, 1996, p. 485. (See Virgós-Schmit Report, at [49(b)]). G. MOSS, I. FLETCHER, S. ISAACS, The EU Insolvency Regulation on Insolvency Proceedings, Oxford, 2016, p. 281.

522 See the explanatory report edited by P. SCHLOSSER (hereafter, the 'Schlosser Report'), accompanying the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Contents, in *OJ*, C. 24, 29 August 1994. On the relevance of the Schlosser Report in interpreting the scope of the Insolvency Regulation see *infra* in this Section, § 3.3.

States listing those kinds of proceedings were advised to provide « *sufficient means of identification of the proceedings to facilitate the application of the Convention. For instance, requiring their courts or competent bodies to specify clearly the grounds on which the decision to open proceedings is based, so that these can then be used as an identification 'label'* » [523].

This is the case of the Spanish *suspensión de pagos* [524] and of English *winding-up*. The latter proceedings, as will be explained [525], may be distinguished in different forms, only some of which are covered by the EIR [526]. Accordingly, winding-up opened on the ground of public interest or on other non-insolvency grounds must be regarded as excluded from Annex A (and the scope of Article 1 EIR) [527].

If the inclusion of 'double purposes' proceedings may then be somewhat justified (since eventually those proceedings would have been covered by the EIR only when actually opened on the basis of insolvency), it should not be unnoticed that Annex A includes also proceedings based *exclusively* on a state of crisis of the debtor that has not yet resulted in insolvency, thereby not fulfilling the requirements of Article 1(1) EIR.

For instance, Annex A included from the very beginning the Italian *amministrazione controllata* which was a procedure intended to offer a two-year moratorium at the end of which the undertaking in distress, but not yet insolvent, was supposed to regain balance and the capacity to meet its obligations [528].

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523 See Virgós-Schmit Report, at [49].

524 The Spanish *suspensiòn de pagos*, governed by the *Ley de la suspensiòn de pagos,* dated 26 July 1922, (abrogated by the Ley No. 22/2003) is a procedure concerning undertakings unable to fulfil their obligations on a regular basis, either for a mere illiquidity crisis or for an actual state of insolvency. It aims at avoiding the liquidation of the business, eventually by means of a composition with creditors.

525 See *infra* in this Chapter, Section 2, § II.2.3, fn. 479.

526 Note that the voluntary winding-up subject to the supervision of the court was abolished by legislative reforms of 1985-1986 for United Kingdom, but still applies to Gibraltar. See G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 48. It is also worth pointing out that according to the Schlosser Report such proceedings, in any case, did not fall within the notion of 'insolvency proceedings' under the scope of the Draft Convention, for the powers of the court in such a case were not sufficiently dearly defined for the proceedings to be regarded as judicial. On the contrary, it was included in Annex A of the EIR, which witnesses its different material scope from the texts proposed in Phase I of the Bankruptcy Project. Another form of winding-up is the member's voluntary winding-up, which is excluded from the scope of the EIR since it may be opened *via-à-vis* a solvent company (Insolvency Act 1986, ss. 89, 90, now substituted by the Small Business, Enterprise and Employment Act 2015). However, if latter proceedings are converted into a creditors' voluntary winding-up, the EIR applies, with the proviso that it is confirmed by the court (see *infra,* fn. 326).

527 *Re Marann Brooks CSV Ltd* [2003] BPIR 1159. An English author notices that, consistently with the advice of the Virgós-Schmit Report, the United Kingdom took the necessary steps to ensure that that judicial orders for the opening of insolvency proceedings specify whether the Insolvency Regulation applies. See I. FLETCHER in G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 281.

528 See article 187 l. fall. which read « *The debtor who is temporarily in difficulty in meeting his obligations may, if* [...] *there is evidence that the business can be restored to viability, apply to the court for supervision of the management of his business and the administration of his assets in order to protect the interests of creditors for a period not exceeding two years.* [L'imprenditore che si trova in temporanea difficoltà di adempiere le proprie obbligazioni, se […] vi siano comprovate possibilità di risanare l'impresa, può chiedere al tribunale il controllo della gestione della sua impresa e

With amending Regulation 694/2006, also the French *sauveguarde* was included in Annex A, although it concerns only undertakings in distress (but not insolvent) aiming at the reorganisation of the debtor's business (529).

In that constellation, somewhat contradictorily with the requirements set forth by Article 1(1) EIR, Annex A encompassed proceedings where even a threat or a danger of insolvency (and not the actual insolvency of the debtor) would have been sufficient to bring a procedure within the scope of application of the Insolvency Regulation (530).

Another consideration concerns the fact that, while explaining the conditions for the opening of the procedure (*i.e.* the insolvency of the undertaking), the Insolvency Regulation does not specify the purposes which insolvency proceedings should aim at (531).

Only 'winding-up proceedings' under Article 2(c) EIR are defined on the basis of (liquidation) purposes (*i.e.* the realisation of the debtor's assets for the benefit of the creditors), instead no reference to the objectives of 'insolvency proceedings' is made in Article 2(a) EIR.

At the time of negotiations an author described the issue of whether rehabilitation proceedings were to be included (and, if so, which ones) within the scope of the (then) Insolvency Convention, as one of the thorniest in the debate over the text to be adopted (532).

Although the working group took classical straight liquidations as its point of departure, later a more difficult discussion focused on rehabilitation proceedings. In the end, a compromise was reached including the latter ones within the scope of the Insolvency Convention, but with the (weak (533)) proviso that secondary proceedings should have been necessarily liquidation (winding-up), and not rehabilitation proceedings. In other words, once recognised, the rehabilitation procedure opened in one State can trigger liquidation proceedings in any other State where the debtor has an establishment (534).

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dell'amministrazione dei suoi beni a tutela degli interessi dei creditori per un periodo non superiore a due anni] ». The *amministrazione controllata* was abrogated by Legislative Decree n. 5 dated 9 January 2006.

529 It must be highlighted that the mistake in including the *sauveguarde* in Annex A does not lies in the fact that it is not 'collective' (because this is the case, see H. EIDENMÜLLER, 'what is an insolvency proceeding?, in *ECGI Working Paper Series in Law*, 2017, p. 6, fn. 19) nor in the fact that it pursues rehabilitation objectives, but in the fact that it is not related to an insolvent debtor.

530 See *infra* in this Chapter, Section 3, § III.3.3.

531 Actually, the objectives which insolvency proceedings tend to are not even hinted at. See K. PANNEN, 'Under Article 1', in K. PANNEN (ed.), *European Insolvency Regulation*, p. 24.

532 M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 500.

533 ECJ, 22 November 2012, Case C-116/11, *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o.*, ECLI:EU:C:2012:739, found that the EIR does not actually coordinate secondary and main proceedings. Besides, when main proceedings have a rescue purpose, the opening of a secondary liquidation proceedings « *risks running counter to the purposes served by main proceedings* ». See F. MUCCIARELLI, 'Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?', in *European Company and Financial Review*, 1, 2016, p. 25.

534 It was argued that, the definitions of article 1 EIR being general, it covers also proceedings pursuing the debtor's discharge, business reorganisation and individual debtor's relief. But see *infra* on the fact that the EIR

Accordingly, the Insolvency Regulation is commonly understood as encompassing also proceedings which, albeit based on the insolvency of the debtor's, result in the reorganisation or the restructuring of the business [535]. Indeed, nothing in the Regulation indicates that insolvency proceedings must be intended as exclusively aimed at the equal satisfaction of creditors through the liquidation of the estate for distribution purposes. Rehabilitation proceedings, in fact, were inserted in Annex A.

The above theoretical constructions notwithstanding, the text reflected the general 'only-liquidation' thinking of the time, a one-sidedness towards traditional insolvency proceedings aimed at the distribution of the undertaking's assets among creditors [536].

Such a view seems to be confirmed also by the (descriptive) definition of insolvency provided by the ECJ.

First and foremost, the interpretation bolstered by the Court of the formula 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, composition and analogous proceedings', excluded by the scope of the Brussels Convention under Article 1(2)(2) of the Brussels Convention.

In the *Gourdain* judgement [537], indeed, the Court found that « *as far as bankruptcy is concerned, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, according to the various laws of the contracting parties relating debtors who have declared themselves unable to meet their liabilities, insolvency or the collapse of the debtor's creditworthiness, which involve the intervention of the courts culminating in the compulsory 'liquidation des biens' in the interest of the general body of creditors of the person, firm or company, or at least in supervision by the courts* » [538].

It follows form the wording adopted by the Court, that the notion of insolvency proceedings must be regarded *tendentially* as focusing on the traditional concept of insolvency proceedings and not to reorganisation ones.

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neglects to provide for a suitable set of rules on individual bankyrutcy. E. SCHOLLMEYER, 'The New European Convention on International Insolvency', in *Bankr. Dev. J.*, 1997, p. 425.

535 See Virgós-Schmit Report at [49(b)]. In addition to the abovementioned *sauveguarde* and *amministrazione controllata*, an example of rehabilitation proceedings listed in Annex A is the Dutch *sursancevon betaling*, a sort of trustee supervised temporary moratorium (thus a rehabilitating procedure), which may be terminated by dismissal without a subsequent liquidation. See article 213 (1) *faillissementswetgeving*. On the contrary it must be noted that it is not correct to state that the Italian *concordato peventivo* was *ab origine* a rehabilitation procedure. When it was introduced in Annex A it served mainly liquidation purposes. It was only on 2005 that it was amended to such an extent that it became a reorganisation procedure. See M. FABIANI, *Il diritto della crisi e dell'insolvenza*, Bologna, 2017.

536 Wessels argues that the EIR reflects a one-sided approach to corporate distress (*i.e.* it addresses essentially classical liquidation proceedings). On the same view also See S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017, p. 33, according to whom the four requirements set out by art. 1(1) EIR indicate the traditional concept of insolvency proceedings which are exclusively aimed at the distribution of an insolvent debtor's assets among creditors.

537 ECJ, 22 February 1979, Case C-133/78, *Henry Gourdain v. Franz Nadler*, ECLI:EU:C:1979:49.

538 *Gourdain*, at [4]. On the applicability of the interpretation of article 1(2)(2) Brussels Convention to the material scope of application of the EIR, see *infra* in this Chapter, Section 3, § III.3.1.

II.1.2.1.3. The appointment of a liquidator

Under Article 1(1) EIR, insolvency proceedings necessarily entail the appointment of a 'liquidator', which is broadly defined in Article 2(b) as « *any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs* » [539]. Therefore, the notion of 'liquidator' goes much beyond the traditional concept as understood in many legal systems. This definition notwithstanding, as is the case with the concept of insolvency proceedings, the EIR leaves to Member States the indication of the persons and bodies of proceedings to be considered 'liquidators', which are listed in Annex C.

Besides, the EIR does not seem to involve necessarily the intervention of the judicial authority in the context of insolvency proceedings [540]. Indeed, according to Article 2(d) EIR, the expression 'court' within the context of the Insolvency Regulation should be given a broad meaning and include, in addition of course to judicial bodies, any other competent body vested with the power to open insolvency proceedings (for instance, the Italian Ministry of Economic Development opening the *amministrazione straordinaria* proceedings, or a creditors' meeting approving an out-of-court settlement [541], likewise in the context of the English creditor's voluntary arrangements [542]).

II.1.2.1.4. The partial or total divestment of the debtor

Article 1(1) EIR prescribes also that insolvency proceedings must entail the 'total or partial divestment of the debtor'.

In the Virgós-Schmit Report the divestment is explained as the transfer to another person, the liquidator, of the powers of administration and of disposal of all or part of the debtor's assets, or the limitation of these powers through the intervention and control of his actions [543].

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539 It was submitted that the choice of the term 'liquidator' to label the office holder appointed in insolvency proceedings demonstrates the one-sided approach to corporate distress. Therefore, the Insolvency Regulation would govern proceedings exclusively geared towards liquidation purposes. B. WESSELS, 'Themes for the future: rescue business and cross border cooperation, Insolvency Intelligence', in *Insol. Int.*, 2001, 27, p. 4.

540 Such a statement seems to run counter the interpretation bolstered in the *Gourdain* decision, in which, as was seen above, the Court expressly refers to the intervention of courts.

541 See Cons. Stato, 15 January 2007, n. 269, in *dir. comm. int.*, 2007, p. 513.

542 See *Re Salvage Association* [2003] EWHC 1028, where Blackburne J understood « *The definition of "court" in the Regulation and in understanding the reference in that definition to "other competent body of a Member State" as applying not merely to some organ of the state but, more widely, to any body recognised as competent in that member state to resolve upon* (*i.e.* 'open') *the insolvency proceedings in question* […] *that there is power in the Association under Part I of the 1986 Act* [*i.e.* a creditor's meetings] *to enter into a voluntary arrangement with its creditors* ». Also, the British creditor's voluntary liquidations, which are collective but do not require the involvement of courts, were included in insolvency proceedings under the EIR. It is noteworthy that, however, in 2002, a court's confirmation of a creditor's voluntary winding-up was introduced, for the express purposes of granting that those proceedings could benefit of the extra-territorial recognition and effectiveness under the Insolvency Regulation. See G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 49.

543 See Virgós-Schmit Report, at [49(c)]. See in this sense M. BODGAN, in G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 282.

It was noted that, in the light of the distinction - made by the wording of Article 2(b) EIR - between the administration or the liquidation of the debtor's assets and the supervisions of the administration of his affairs, the partial divestment can be considered as addressing both profiles separately. According to this interpretation, then, it was argued that the condition of the divestment of the debtor should be broadly interpreted, it being understood that it might occur even when a debtor retains a certain degree of authority to dispose of his assets, subject to the supervision and approval of the liquidator (544). This would entail that, although a partial divestment would suffice, the debtor must be (at least) deprived of the power of administering and controlling his affairs. Therefore, proceedings that - albeit collective - leave the debtor in full possession of his assets, are excluded from the scope of the Insolvency Regulation.

It must be specified that, once national proceedings have been opened, pursuant to Article 4(b) EIR the determination of the extent (*i.e.* the assets which form part of the estate and those that may remain in possession of the debtor, for instance, for his sustenance, along with the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings) and the practical measures for the ordering of the divestment are to be determined in accordance with the *lex fori concursus*.

II.1.2.2. The personal scope

As far as the personal scope of application of the Insolvency Regulation is concerned, it is somewhat axiomatic to specify that insolvency proceedings must involve a debtor.

However, in the light of the differences between Member States' legal systems towards the characterisation of insolvency proceedings and the renounce to supply a uniform definition of insolvency within the EIR, it is also intuitive that in principle the general concept of 'debtor', if not specified, may lead to encompass all the different ways in which the Member States categorise undertakings, under their national laws, within the personal scope of application of the Insolvency Regulation. Indeed, the categories of legal persons amenable to the insolvency law of a Member State may not coincide with those of the other Member States.

A first indication (albeit in negative terms) may be found in Article 1(2) EIR, which restricts the boundaries of the sphere of application of the Insolvency Regulation, via the exclusion of some particular categories of debtors.

544 See C.A. de Liege, 28 April 2011, in EIRCR(A) 418, where in relation to the Beligan *procédure de reorganization judiciaire* the court interpreted broadly the term 'divestment', also encompassing the partial and time-limited divestment of the debtor. See B. HESS, IN B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, p. 50.

Under that provision, insolvency proceedings concerning insurance undertakings (545), credit institutions (546), investment undertakings holding funds or securities for third parties and collective investment undertakings (547) are excluded from the scope of the Insolvency Regulation.

According to the Virgós-Schmit Report, the rationale behind this exclusion lies in the fact that those entities are subject to special arrangements and, to some extent, the national supervisory authorities have extensive powers of intervention (548).

Once it has been made clear which kind of undertakings do not fall within the personal scope of application of the EIR, it remains to interpret the vague notion of 'debtor'.

According to Recital 9 EIR, the Insolvency Regulation applies « *to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual* ».

Hence, in defining the notion of debtor, Recital 9 EIR is of little help, since it merely demonstrates the wide breadth of the scope *ratione personae* of the Insolvency Regulation, allowing for the broadest possible interpretation of such a concept. Accordingly, it should be determined by the applicable law in the jurisdiction opening insolvency proceedings whether a debtor is actually eligible for particular proceedings. Each Member State in which proceedings are opened in respect of a debtor must apply, in accordance with Article 4 EIR, its national rules to determine whether that debtor is subject to insolvency proceedings. For instance, also the deceased's estate may fall within the concept of debtor provided that it is amenable to insolvency proceedings (549).

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545 Insolvency proceedings concerning insurers are currently subsumed in Title IV Directive 2009/138 EC (s.c. 'Solvency II'), which took the place of the former Council Directive (EC) 2001/17. It was observed that, since the EIR does not define 'insurance undertakings', the scope of that definition must be construed in the light of the definition provided in Solvency II (*i.e.* a direct life or non-life insurance undertaking which har received an official authorization). It follows that those insurance undertakings excluded from the latter directive should fall within the scope of the Insolvency Regulation (otherwise a regulatory vacuum for certain insurance undertaking would be created). See on this G. MOSS and I. KAWALEY, *Cross frontier insolvency of insurance companies*, London, 2001.

546 Insolvency proceedings of credit institutions (*i.e.* banks and similar entities) are dealt with Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions, in *Official Journal*, 2001, L. 125.

547 There is no specific EU instrument dealing with the third category of investment undertakings, therefore the provisions governing relevant insolvency proceedings are left to private international law rules of each Member State. F. GARCIAMARTÍN, 'The review of the EU insolvency Regulation: some general considerations and two selected issues (hybrid procedures and netting arrangements)', in L. LENNARTS and F. GARCIAMARTÍN, *The review of the EU insolvency Regulation: some proposals for amendment*, Report of the Netherlands association for comparative and international insolvency law, 2011.

548 Therefore, as noted by Virgós and Garciamartín, the EIR is not the only instrument adopted by the European legislature dealing with transnational insolvency. These Community acts must be all regarded as forming a system of cross-border insolvency, which must be interpreted as a hermeneutic circle. M. VIRGÓS SORIANO, F. J. GARCIAMARTÍN ALFÉREZ, *The European Insolvency Regulation*: *law and practices*, The Hague, 2004, pp. 8-10.

549 See § 315 InsO. The District Court Cologne 12 November 2010, in *ZIP* 2011, p. 631 found that the *Nachlassinsolvenzverfahren* should fall within the definition of insolvency proceedings under Article 3 EIR. As noted by Wessels, it was not inserted in Annex A (at least not with its local name). B. WESSELS, *International Insolvency Law*, 2017, [10501].

It was maintained, that, at a closer look, such a construction of the personal scope of EIR may, however, turn to be not as inclusive as Recital 9 seems to suggest. Indeed, as will be explained (550), the Member States eventually have the final word on which insolvency proceedings are subject to the provisions of the EIR. As a consequence, the (discretional) exclusion of insolvency proceedings from Annex A would also determine the exclusion of the category of undertakings that, under that national law, are concerned by those (excluded) insolvency proceedings (551).

II.1.2.3. The territorial scope

The Insolvency Regulation lacks a clear and general provision defining its territorial scope. In this respect, recitals may however shed some lights (albeit not decisive).

In terms of general territorial scope, Recital 33 clarifies that Denmark is not subject to the Insolvency Regulation.

It must be borne in mind that the legal basis of the Insolvency Regulation being Articles 61 and 65 EC Treaty, its provisions do not automatically apply to all Member States. Indeed, pursuant to Article 69 EC Treaty, measures adopted under Title IV thereof are subject to the provisions of the Protocol (No. 21) on the position of the United Kingdom and Ireland and of the Protocol (No. 22) on the position of Denmark.

Thereby, on the one side, the UK and Ireland in principle do not take part in the adoption of measures, adopted under Title IV of the EC Treaty but they may decide to 'opt-in'. As regards the Insolvency Regulation, such possibility was exercised, for those States notified their intention to participate in its adoption and application (552).

On the other side, Denmark has opted-out of the measures within the 'Area for freedom, security and justice' entirely. It follows that the Insolvency Regulation does not apply to Denmark, which, for the purposes of the Insolvency Regulation should be considered likewise a third state (553).

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550 See *infra* in this Chapter, Section 3, § III.3.1.

551 R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 54.

552 Recital 32 EIR.

553 Recital 33 EIR. See *Swiss Marine Corporation Limited v. O.W. Supply & Trading A/S (in bankruptcy)*, [2015] EWHC 1571 (Comm), in which English Courts did not grant antisuit injunction against Danish proceedings, and OLG Frankfurt/Main of 24 January 2005, 2W527/04, in *ZInsO*, 2005, p. 715, in which the recognition and enforcement under art. 25 EIR of a Danish judgement opening insolvency proceedings were refused, on the ground of the exclusion of the applicability of the Insolvency Regulation to Denmark. On 9 April 2008, the Spanish Supreme Court referred to the ECJ the question whether Member States should not apply the Insolvency Regulation to judicial declarations of insolvency handed down in Denmark. The ECJ could not decide over the question as the reference for a preliminary ruling was withdrew (see ECJ, order of 7 January 2009, Case C-148/08, *Finn Mejnertsen v. Betna Mandal Barsoe*, ECLI:EU:C:2009:1). It may be observed that unlike other acts with the same legal basis as Article 61 and 65 EC Treaty, the lawmaker did not define 'Member States' expressly excluding Denmark from that notion, as is the case under art. 1(3) Brussels I (but not Brussels I bis). It is unclear whether that may lead one to argue that the Insolvency Regulation does not exclude the application of Danish law by another Member State, if turns to be applicable for whatever reason under the provisions of the EIR. See J. ISRAËL, *op. cit.* p. 257.

Apart from that profile, Recital 14 EIR merely provides that the Insolvency Regulation applies to proceedings where the debtor's COMI is located in the Community.

Therefore, the Insolvency Regulation is partially silent on the territorial dimension of insolvency proceedings falling within its sphere of application. In this respect, some help may be gleaned from the Virgós-Schmit Report, which states that the Insolvency Regulation covers only the 'intra-Community effects' of insolvency proceedings. That should entail that, as the Report further explains, whenever the COMI of the debtor is located in a third country (and in Denmark), the Convention does not apply. The national private international rules of each Member State should govern that kind of cross-border insolvencies, including the effects of such proceedings with other Member States [554].

In spite of the (clear-cut) clarifications provided by the Report, over the years two profiles regarding the territorial scope of the Insolvency Regulation have remained unclear.

First, it was debatable whether the EIR only applies to cross-border (infra-Community) insolvencies, thus excluding purely national insolvency proceedings [555]. On a simple reading of the EIR, arguments supporting the exclusion of domestic insolvencies from the application of the Insolvency Regulation seems to lie with Recital 8 EIR, which provides that one of the objectives of the Insolvency Regulation is to improve the efficiency and effectiveness of « *insolvency proceedings having cross-border effects* » [556]. Moreover, it could be argued that, being the Insolvency Regulation a Community act setting out private international law rules, the necessarily international nature of proceedings listed therein could not be called into question [557].

Notwithstanding that, the necessarily cross-border nature of insolvency proceedings is not expressly mentioned in any part of the text of the Insolvency Regulation. Because of that, doubts have been raised as to the necessary existence of a cross-border element. It seemed fair then to assume that, under the system designed by the EIR, within one Member State the same national insolvency procedure could have two different developments: proceedings in the context of which no cross-border elements arise during the entire duration of the procedure, that would not be covered by the

554 Virgós-Schmit Report, at [44].

555 In the sense of the exclusion of purely national proceedings from the scope of the Insolvency Regulation see, *inter alia*, N. CARSTENS, *Die internationale Zuständigkeit im europäischen Insolvenzrecht*, Heymann, 2005, p. 28. It might be worth recalling that also the Preliminary Draft Convention applied also to purely domestic proceedings. See *supra* Section 1, § I.2.

556 The necessarily international character of insolvency proceedings seems to emerge also from Recitals 1, 3 and 4 EIR. Also, Bork and Mangano submit that arguments in support of the necessity that cross border connections must exist can be inferred from art. 65 EC Treaty, which, as was explained, serves as the legal basis of the Insolvency Regulation. See R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 69.

557 L. C. HENRY, 'Le champ d'application territorial du Règlement', in F. JAULT SESEKE and D. ROBINE, *Le nouveau règlement insolvabilité : quelles évolutions ?*, Paris, 2015, p. 9. K. PANNEN, '*sub* Art. 1', in K. PANNEN (ed.), *European Insolvency Regulation*, at [112] submits that what is essential is a foreign element.

Insolvency Regulation [558]; and proceedings where some transnational implications emerge at some point of the procedure, that would instead be subject to Community regime [559].

However, practical reasons may lead to claim that the EIR must be understood as applicable also to purely internal insolvency proceedings. Indeed, it was observed that in principle cross-border elements may appear only in the advanced course of proceedings, after the opening of insolvency proceedings. The application of the Insolvency Regulation being anchored to the determination of the COMI at the moment of the request for the opening the insolvency proceedings [560], at the national level, a delayed disclosure of cross-border connections may affect the efficiency of the procedure, since it would irremediably postpone the verification of the jurisdiction [561].

Second, assuming that the Insolvency Regulation requires the presence of a cross-border element, it was unclear whether it applies exclusively when connecting factors involve the territory of another Member States thus excluding any third-country relation. More in particular, it is unsettled whether a s.c. 'qualified' foreign connection (*i.e.* when foreign elements concern both non-EU countries and Member States) is required or whether a s.c. 'simple' foreign connection (foreign connections involving exclusively third countries) will suffice.

As will be seen further in Chapter IV, some answers to those questions were provided by the ECJ case-law [562].

II.1.2.4. The temporal scope

The time of applicability of the Insolvency Regulation is specified in its Article 43, which in this respect supplements Article 1 EIR. The provisions of the Insolvency Regulation apply only to insolvency proceedings 'opened' after its entry into force, on 31 May 2002 and replace all conventions and treaties among the Member States [563].

Article 43(2) EIR also expressly stated that acts undertaken by a debtor before that date continue to be governed by the law which applied to them at the time they were done.

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558 S. BARIATTI, 'L'applicazione del regolamento CE n. 1346/2000 nella giurisprudenza', in *Riv. dir. proc.*, 2005, p. 673-700.

559 P. DE CESARI AND G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il Regolamento (UE) 2015/848 relativo alle procedure d'insolvenza*, Torino, 2017, p. 31.

560 As established by ECJ, 17 January 2006, Case C-1/04, *Susanne Staubitz-Schreiber*, ECLI:EU:C:2006:39, in which the Court held that « *the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened* », at [29].

561 See for example C.A. Versailles, 13 ch., 11 January 2007, RG n° 06/01087, with observation of P. NABET, in *JCP E*, 2007, p. 27, where the French court considered the Insolvency Regulation to be applicable to insolvency proceedings opened against a company with registered office in Nanterre and a subsidiary in Toulouse.

562 See *infra* Chapter III, Section 2, § 17.2.1.

563 Practice has revealed sometimes an anticipated application of the Insolvency Regulation. This was not considered as being contrary to the EIR, since it merely requires that it applies after its entry into force. Whether it is possible to apply it before that date, is regarded as a question deferred to the national laws.

Because of that, the point in time at which proceedings 'are opened' is determinative.

Article 2(f) EIR established that proceedings are opened when they become effective pursuant to the *lex fori concursus*. National rules of relation back period (*i.e.* the fictive anticipation of the opening insolvency proceedings to the moment of lodging the petition) are not thus relevant in this respect [564].

Although the Regulation has no retrospective application, practice has revealed sometimes an anticipated (indirect) application of its provisions by national courts, as an interpretation aid for the previously applicable law or as gap-filling for those cases in which lacked a rule applicable to a given case and the regime of the EIR not yet in force matched with the former system [565]. This was not considered as being contrary to the EIR since it merely requires that it applies after its entry into force [566]. Whether it is possible to apply it before that date, is regarded as a question deferred to the national laws [567].

II.1.3. The COMI and the jurisdiction

The starting point to address the rules on the jurisdiction set out by the EIR is the pivotal concept of the *centre of main interest* (COMI). The COMI represents the cornerstone of the Insolvency Regulation, since it plays multiple vital functions within the system governing insolvency proceedings [568].

Firstly, as briefly mentioned above, it is crucial to determine the (territorial and temporal) scope of application of the Insolvency Regulation. Secondly, it represents the connecting factor to allocate the jurisdiction for the opening of main proceedings between Member States (and more generally, it coordinates cross-border insolvency proceedings in the European Judicial Area). Third, as to the

564 M. VIRGÓS SORIANO, F. J. GARCIMARTÌN ALFÉREZ, *The European Insolvency Regulation: law and practices*, The Hague, 2004, at p. 30. S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, p. 545.

565 For instance, Hoge Raad der Nederlande, 24 October 1997, in *NIPR*, 1998, p. 114, mentioned by B. WESSELS, *Current topics of international insolvency law*, Deventer, 2004, p. 196, which represents a typical example of anticipated application of the EU instrument before its entry into force.

566 M. VIRGÓS SORIANO, F. GARCIMARTÌN ALFÉREZ, *The European Insolvency Regulation*: *law and practices*, The Hague, 2004, at p. 30

567 *IBID.,* p. 30.

568 The central role of the COMI in insolvency matters has been described by English doctrine with the expression 'comicile', comparing its crucial role to that of the domicile in the system of the Brussels Regulation (see *infra* in this Chapter, Section 2, § II.2.4). See on this point see S. BARIATTI, 'L'applicazione del Regolamento CE n. 1346/2000 nella giurisprudenza', in *Riv. dir. proc.*, 2005, pp. 673-700; P. DE CESARI, 'L'onere della prova del "centro degli interessi principali del debitore"', in *Fallimento*, 2009, pp. 65-73; F.C. VILLATA, 'Determinazione del "COMI" e libertàdi stabilimento delle società nell'Unione europea', in A. LEANDRO - G. MEO - A. NUZZO, *Crisi transfrontaliera di impresa: orizzonti internazionali ed europei*, Bari, 2018, p. 83; P. KINDLER, 'L'amministrazione centrale come criterio di collega- mento del diritto internazionale privato delle società', in *Riv. dir. int. priv. proc.*, 2015, 897; U.P. GRUBER, 'The International Jurisdiction for Main Proceedings: Practical Difficulties in the Application of Art. 3 Ins. Recast', in I. QUEIROLO and S. DOMINELLI (eds.), *European and National Perspectives on the European Insolvency Regulation*, Rome, 2017, p. 39 ff. and Z. CRESPI REGHIZZI, 'La disciplina della giurisdizione in materia di insolvenza: il Reg. UE n. 2015/848', in *Giur. it.*, 2018, p. 256.

substantive profile of the law applicable to insolvency proceedings, the COMI serves as a parameter to identify the *lex concursus* applicable to both main and secondary proceedings, thus ensuring tendentially the synchronisation *forum* / *ius*.

Focusing briefly on the jurisdictional profile, the Insolvency Regulation provides for a uniform set of exclusive rules on international jurisdiction, directly applicable in all Member States in respect to all situations that fall within its scope of application.

It was explained that the Insolvency Regulation espoused the model of the 'modified universalism', thus establishing a hierarchical system of (two) categories of proceedings that may be opened *vis-à-vis* the same undertaking [569].

Accordingly, Article 3(1) EIR establishes that main proceedings can be opened only by the courts of the Member States where the COMI of debtor is located. In principle, main proceedings have universal scope: the effects of the judgement opening main insolvency proceedings benefit of the simplified automatic recognition regime provided by Article 16 EIR, thus encompassing all the debtor's assets and all creditors throughout the European Union (except Denmark).

Article 3(2) EIR allows that other insolvency proceedings may be opened parallelly to main proceedings by the courts of another Member State, provided that in that territory the debtor owns an establishment.

Secondary proceedings are of purely territorial nature, since their effects concern only the debtor's assets located within the territory of the Member State of the establishment. Nevertheless, they entail an estoppel-like effect to the universal character of main proceedings, shielding the Member State of the establishment from the effects of main proceedings.

Such an exception to the principle of universalism is mitigated to a certain extent by the fact, on the one hand, that secondary proceedings must have only liquidation purposes (thus significantly limiting the type of proceedings that may be opened, see Annex B) and that they may also be opened upon request of the trustee appointed in the context of main proceedings, on the other.

It follows from the above that within the system designed by the Insolvency Regulation, the establishment operates as an alternative and subordinate head of jurisdiction with respect to the COMI. In fact, according to the Regulation, a territorial procedure (even when independent [570]) cannot be opened in the Member State in which an establishment is located, if the COMI of the same debtor is not located in another Member State.

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569 F. CORSINI, 'Le azioni (indirettamente) derivanti dal fallimento, tra regolamento n. 44 del 2001 e regolamento n. 1346 del 2000', in *Rivista trimestrale di diritto e procedura civile*, 2010, p. 1080. J. BEGUIN and M. MENJUCQ, *Droit du commerce international*, Paris, 2011, at [16622].

570 Actually, two forms of territorial proceedings are envisaged by the Insolvency Regulation: *(i)* secondary proceedings are opened in the State where the debtor has an establishment only after main insolvency proceedings in the State of the COMI, *(ii)* under certain conditions (laid down by article 3(4)(a) and (b) EIR) it is however possible that (independent) territorial proceedings are opened before main proceedings, with the proviso that where main proceedings are opened, territory proceedings must be considered secondary proceedings.

While Article 2(h) EIR defines an establishment as « *any place of operations where the debtor carries out a non-transitory economic activity with human means and goods* » (571), the COMI is not expressly defined by the EIR.

A vague attempt of definition is provided by Recital 13 EIR, which states that « *The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties* » (572).

It was explained that the concept of debtor within the Insolvency Regulation defers to national the determination of the debtors amenable to insolvency proceedings and that, accordingly, both legal persons and natural persons can be debtors under the Insolvency Regulation.

Therefore, in principle, the same connecting factor of the COMI should apply to the jurisdiction of insolvency proceedings concerning companies and individuals. That is confirmed also by the Virgós-Schmit Report, which clarifies that the term 'interest' used in Recital 13 EIR highlights the intention to address, not only business, industrial and professional activities, but also general economic activities, including those of private individuals (should they be eligible for insolvency proceedings under that national laws Member States) (573).

Although the COMI of legal persons and that of individuals should thus be distinguished, Article 3(1) EIR neither provides for a definition nor presumptions concerning the COMI of natural persons (574).

On the contrary, as to corporations, Article 3(1) EIR establishes a presumption that the COMI equates to the registered office.

The practical application of that definition revealed however that the key principle of the Insolvency Regulation was essentially shaped on the idea of the insolvency of a single company, which (despite having links with other Member States) essentially runs its activity within the borders of one Member State. Hence, the shortcomings of the definition of COMI with respect to companies operating in more than one Member State and groups of companies immediately emerged (575).

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571 The ECJ has further specified that the notion of establishment reques a 'place' of 'operation' where a 'minimum level of organization' and 'a degree of stability' for the purpose of pursuing an economic activity are present. ECJ, 20 October 2011, Case C-396/09, *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti* SpA, ECLI:EU:C:2011:67, at [62].

572 See Virgós-Schmit Report, at [75]. In *Contra Re Stojevic'*, [2007] BPIR 141, HCJ it was debated whether the formula of recital 13 EIR could amount to an actual definition of the COMI.

573 Virgós-Schmit Report, at [75].

574 The Virgós-Schmit Report states at [75] that the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. Note that secondary insolvency proceedings cannot be opened *vis-à-vis* natural persons not exercising a business activity, as article 3(2) EIR requires that the debtor has an establishment which is a notion that is interpreted as a place where an economic activity is carried out.

575 In this respect, at [75] the Virgós-Schmit Report specifies the expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres

The (unfortunate) lack of positive definition of the determinative concept of COMI in the Insolvency Regulation and the abstractness of the formula provided by the Recital entailed that from the very beginning of the entry into force of the Insolvency Regulation, the application of the COMI has been in the spotlight of the ECJ, which the ultimate interpretation of the key features of that concept is deferred to.

Although it would be out of place to give full account of the multitude of decisions concerning the questions evolving around the interpretation of the COMI, it is not possible to neglect here some fundamental principles that were established by the ECJ case-law.

At the outset, it bears noticing that the concept of the COMI is peculiar to the Regulation. Therefore, in line with the general approach of the ECJ towards the interpretation of EU private international law it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation (576).

Also, the rationale behind the notion of the COMI is to provide for a criterion based on transparency, continuity and objective ascertainability: insolvency is a foreseeable risk and international jurisdiction must be based on a place known to the debtor's potential creditors (577).

Turning briefly to the definition of the COMI, its interpretation has been progressively shaped by the ECJ case-law. For the minimum descriptive profiles that are relevant here, it is appropriate, for the sake of clarity, to divide the case law of the Court relating to the concept of COMI on the basis of three main topics (even if these have been dealt with jointly in more than one judgment).

The first controversial profile which gave rise to a problematic application of the COMI from the beginning was the value of the presumption of the place of the registered office of legal persons. In the pre-Eurofood phase, the absence of indications as to the assessment of the COMI led national courts to apply 'generously' the possibility to rebut the equation of the COMI to the registered office (578). National courts have often anchored their jurisdiction (in particular when faced with a group of companies or more entities tied with one another by strong economic or financial relationships, so to administer multinational enterprise insolvencies) according to the s.c. 'head office function' approach (or 'Mind of management theory'). Under that doctrine, what is determinative to identify the COMI of a company is the place where head office functions are carried out, rather than the location of the head office (579). The COMI test was thereby ultimately focused on the element of the

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576 *In primis* the leading cases ECJ, 2 May 2006, Case C-41/04, *Eurofood IFSC Ltd*, ECLI:EU:C:2006:281, at [30] and ECJ, 20 October 2011, Case C-396/09, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, ECLI:EU:C:2011:671, at [43].

577 See Virgós-Schmit Report, at [75].

578 The High Court in *Ci4net.com Inc.*, [2004] EWHC 1941 states « *There seems to be no reason to suppose that the presumption that a company has its COMI at the place of its registered office is a particularly strong one. It is, rather, just one of the factors to be taken into account with the whole of the evidence in reaching a conclusion as to the location of the COMI* ».

579 See *Re BRAC Rent-A-Car International Inc*, [2003] 1 WLR 1421; *Ci4net.com Inc.*, [2004] EWHC 1941; *Daisytek-ISA*, [2004] BPIR 330; *Lennox Holdings Plc*, Re [2009] B.C.C. 155 Ch D., *Re Hellas Telecommunications (Luxembourg) II SCA*, [2009] EWHC 3199 (Ch). In France see Tribunal de commerce Nanterre, *EMTEC*, 15 February 2006, in *Bull. Joly Socitétés*, May 2006, p. 575; Trib. de Grand Instance de Lure, *Energotech Sarl,* 29 March 2006; Tribunal

'habitual administration of the debtor's interests', mostly disregarding (or at least giving a lot less weight) the cumulative condition of the 'ascertainability by third parties' provided by Recital 13 EIR [580]. In the leading case *Eurofood* [581], the ECJ condemned that approach [582], finding, *inter alia*, that the COMI must be identified by reference to criteria that are both objective *and* ascertainable by third parties. In other words, the ECJ considered that simply to look at the place where head office functions are actually carried out, without considering whether the location of those functions is ascertainable by third parties, was the wrong test [583].

The Court held that the presumption could be (exceptionally) rebutted only if objective and ascertainable-by-third parties elements lead to establish « *that an actual situation exists which is different from that which locating it at that registered office* » [584]. On that occasion, however, the Court seems to have adopted a too restrictive approach, suggesting that the rebuttal of the presumption could occur in exceptional cases, singling out the example of the 'letter-box' company. Because of that, the various

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de commerce Paris, *Eurotunned France ltd*, 2 August 2006. In Italy, Trib. Roma 26 novembre 2003, Cirio Finance Luxembourg S.A., in *Foro it.*, 2004, I, 1567; Trib. Parma 4 febbraio 2004, nei casi n. 10/04 (Parmalat Netherlands BV, in *Riv. Dir. int. Priv. e proc.* 2004, 693 ss.

580 P. WAUTELET, 'Some considerations on the center of main interests as jurisdictional test under the European insolvency Regulation', in G. AFFAKI, (ed), *Cross-border insolvency and conflicts of jurisdictions: A US-EU experience*, Brussels, 2007, p. 86. It is noteworthy that, in rebutting the presumption of article 3(1) EIR some national courts had adopted the 'business activity' approach, according to which it would only be possible to rebut the presumption of the registered office where the place in whose favour the presumption is rebutted is verifiable by third parties. See Trib. Luxembourg, 7 April 2006, in *Bull. Information sur la jurisprudence*, 2006/5, p. 130, In Belgium, Trib. Comm. Tournau, 24 May 2005, *S.A. Fortis Banque c. SPRL Gabriel Tricot* (A/05/00171).

581 ECJ, 2 May 2006, Case C-41/04, *Eurofood IFSC Ltd*, ECLI:EU:C:2006:281, at [30] and ECJ, 20 October 2011, Case C-396/09. See for literature, *inter* alia, of L. BACCAGLINI, 'Il caso Eurofood: giurisdizione e litispendenza nell'insolvenza transfrontaliera', in *Int'l Lis*, 2006, p. 123; M. CASTELLANETA, 'L'utilizzo del centro degli interessi principali del debitore come titolo di giurisdizione secondo il regolamento comunitario n. 1346/2000 sulle procedure d'insolvenza', 2006, available at www.notariato.it; M. WINKLER, 'Le procedure concorsuali relative ad imprese multinazionali: la Corte di Giustizia si pronuncia sul caso Eurofood', in *Int'l Lis*, 2007, p. 15.; P. De CESARI, 'L'onere della prova del "centro degli interessi principali del debitore', in *Fallimento* 2009, p. 65; L. FUMAGALLI, *Apertura della procedura principale, competenza giurisdizionale e riconoscimento della decisione*, in *Giur. Comm.*, 2007, II, 324; T. BACHNER, 'The Battle over Jurisdiction in EC Insolvency Law', in *European company and financial law review*, 2006, p. 310; J.-P. REMERY, *L'application à une filiale du règlement communautaire relatif aux procédures d'insolvabilité*, in *Revue des sociétés*, 2006, p. 360; G. Moss, *Asking the right question? Highs and lows of the ECJ Judgement in Eurofood*, in *Insolvency Intelligence*, 2006, p. 97; J. GARASI'C, 'What is right and what is wrong in the ECJ's Judgement on Eurofood IFSC LTD', in *Yearbook of Private international law*, 2006, p. 87 ss.; P. CATALLOZZI, *Il regolamento europeo e il criterio del Comi (centre of main interests). La parola alla Corte*, in *Il fallimento*, 2006, p. 1249; B. WESSELS, *Twenty suggestions for a Makeover on the EU Insolvency Regulation*, 2007, in www.bicl.org.; F. MUCCIARELLI, 'Eurofood, ovvero: certezza del diritto formale e incoerenza dei principi', in *Giur. comm.*, 2008, p. 1224. L. DIALTI, '*Il caso Eurofood, tanto rumore per (quasi) nulla?*', in *Dir. Fall.*, 2006, 787; J. R. SHANDRO-M. MONTGOMERY, *Comi and Groups of Companies*, in *Insolvency Intelligence*, 2005, p. 158. F. MUCCIARELLI, 'Spostamento della sede statutaria in un Paese membro della UE e giurisdizione fallimentare', in *Giur. comm.*, 2006, II, p. 616; LUPOI M.A., 'Conflitti di giurisdizioni e di decisioni nel regolamento sulle procedure d'insolvenza: il caso "Eurofood" e non solo', in *Riv. Trim. Dir. Proc. Civ.*, 2005, LIX, p. 1393.

582 Moss deems 'heretical' to read the *Eurofood* decision as having rejected the 'head office functions' approach, which would have always assumed the use of objective and ascertainable criteria. See G. MOSS, 'Group Insolvency - Forum - EC Regulation and Model Law Under the Influence of English Pragmatism Revisited', in *Brooklin Journal of Corporate, Finance and Commercial Law*, 2014.

583 Similarly, *Stanford* [2010] 3 W.L.R. 941.

584 *Eurofood*, at [34].

national courts have continued to deviate from this rigour, often leaving ample room for rebutting the presumption of coincidence between the COMI and the statutory seat [585]. In the *Interedil* [586] judgement, the Court further developed (and, according to some authors, rebalanced [587]) the scope of the presumption, specifying that it operates whenever « *a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State* » [588].

The court then indicated the exercise of economic activities, the presence of (immovable) properties, or the conclusion of contracts with financial institutions, as examples of factors that can be taken into account in the overall analysis regarding the location of the COMI, in that those factors are likely to be public and therefore ascertainable by typical third party in the ordinary course of business with the company.

It goes without saying that the definition of COMI is a factual one, heavily depending on the specific circumstances of each case.

Moreover, in the *Interedil* judgement the Court introduced a hypothesis where the presumption is not rebuttable, *i.e.* where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties [589] , in that place.

A second debated profile, which the case-law has been focusing on, concerned the operation of the COMI of multinational groups. The extensive application of the 'head office function' approach entailed that often national courts attracted to their jurisdiction both the insolvencies of the parent company and of its subsidiaries (regardless to their registered office being in another Member State) on the assumption that the parent companies, in fact, control the subsidiaries' activities and policy. In *Eurofood*, the Court established an 'entity-by-entity' approach, pursuant to which, despite being in the same group, each company must be considerate as a separate legal entity in each Member State where it has its COMI [590]. The mere fact that the subsidiary's economic choices are or can be

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585 Trib. Isernia, 10 April 2009, G. MONTELLA, 'Il fallimento del COMI?', in *Fallimento*, 2010, p. 61.

586 ECJ, 20 October 2011, Case C-396/09, *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA.*, ECLI:EU:C:2011:671.

587 To put is as Hess, in *Interedil* the ECJ adopted a more relaxed standard. B. HESS, IN B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, p. 105.

588 *Interedil*, at [53].

589 It was noted that the identification of the third parties to whom the COMI should be recognisable presents some profile of uncertainties as in many decisions a subjective test was used. Third parties could be investors, employees, suppliers, all bearers of different interests. It was suggested that the COMI should be ascertainable by all creditors, thus adopting an objective perspective. B. WESSELS, 'COMI: past, present and Future', in *Insolvency Intelligence*, 2011, vol. 24. P. WAUTELET, 'Some consideration on the Center of Main Interests as jurisdictional test under the European Insolvency Regulation', in G. AFFAKI (ed.), *Faillite internationale et conflit de juridiction: regards croisés transatlantiques: US-EU experience*, Bruxelles, 2007, p. 100 ; R. VAN GALEN, 'The European Insolvency Regulation an Group of Companies', in *TVI*, 2004, p. 15.

590 See in this sense, Trib. Comm. Beaune, 16 July 2008, which refrained from opening proceedings against the six subsidiaries based in Poland of a Franco-Polish group, whose mother company was SA Belvédère, with registered office in Beaune, in accordance with the above-mentioned case law. As will be explained, in that case

controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation. Therefore, the EIR excludes the possibility to open unitary insolvency proceedings against all the companies which the group is comprised of [591]. Accordingly, in *Rastelli* [592] the ECJ has considered that the French action enabling to extend insolvency proceedings to a separate legal entity on the basis of the *confusion des patrimoines* [593] could not operate *vis-à-vis* a company (*i.e.* a separate legal entity) with registered seat in another Member State. In this respect, the Court found that an intermixing of properties (which is the legal basis for the substantive consolidation of proceedings) « *may be organised from two separate management and supervision centres situated in two different Member States* » [594]. Therefore, the fact that two companies form a sole *de facto* centre of interest, has no bearing on the legal personality of each company, which must be treated as separate legal entities for the purposes of the Regulation [595].

Also, pursuant to abovementioned principles of the objectivity and ascertainability by third parties of the COMI, the Court held that intermixing properties and the general criteria used by French courts

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the Tribunal opened eight *sauveguarde* proceedings against the French subsidiaries companies expressly applying the Insolvency Regulation (which was criticised by scholars, See R. DAMMANN and G. PODEUR, 'Les groupes de sociétés face aux procédures d'insolvabilité', in *Dr. affaires*, Mai 2007, p. 65). See *infra*, Chapter II, Section II, § 17.2.1.

591 Some scholars (particularly fond of the doctrine of the head of office function test) have maintained that, in principle, the 'head office function test' elaborated in *Interedil*, may lead in any case to locate the COMI of the subsidiaries in the same place of the parent company, in case the head office functions are carried out, in a manner that is ascertainable by third parties, from a single group head office. See G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 312.

592 ECJ, 15 December 2011, Case C-191/10, *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, ECLI:EU:C:2011:838. J.-L. VALLENS, Extension d'une procédure collective à une société étrangère : localisation du centre des intérêts principaux en France, in *Dalloz*, 2012, p. 403. F. JAULT-SESEKE, 'Incidences d'une situation de confusion des patrimoines dans le cadre du règlement Insolvabilité : la Cour de cassation applique les réponses données par la CJUE dans l'arrêt Rastelli du 15 décembre 2011', in *Dalloz*, 2012, p. 1803; R. DAMMANN and F. MÜLLER, 'Coup d'arrêt de la CJUE au mécanisme de l'extension de procédure en cas de confusion de patrimoines', in *Dalloz*, 2012, p. 406; M. MENJUCQ, 'L'arrêt Rastelli de la CJUE : un arrêt en trompe-l'œil sur l'extension de procédure', in *Rev. proc. Coll.*, 2012, p. 11; G. KHAIRALLAH, 'Compétence internationale et extension d'une procédure d'insolvabilité à une société étrangère', in *Rev. critique du droit interational privé*, 2012, p. 435. T. MASTRULLO, 'L'extension de procedure collective pour cause de confusion des patrimoines est elle compatible avec le règlement n. 1346/2000?, in *Rev. des soc.*, 2010, p. 597. F. CORSINI, 'Il sistema francese di estensione della "giurisdizione fallimentare" non supera il vaglio della Corte di giustizia', in *Fallimento*, 2012, p. 278. L. PANZANI, 'La nozione di COMI nella disciplina comunitaria dell'insolvenza transfrontaliera: i casi Interedil e Rastelli', in *Int'l lis*, 2012, p. 31 ff. G. CORNO and C. HONORATI, 'A double lesson from Interedil: higher courts, lower courts and preliminary ruling and further clarifications on COMI and establishment under EC Insolvency Regulation', in *International Insolvency Law Review*, 2013, p. 18. It is noteworthy that the action was characterised (as it is the case under French law) as an action directly deriving from insolvency and closely related to insolvency proceedings, on the assumption that does not have the consequence of instituting new proceedings, which would be independent in relation to the proceedings initially opened, but has the sole consequence of extending the initial proceedings to another entity. However, the Court seems to reject such a characterization, deeming that action as producing the same effects as the decision to open insolvency proceedings. The French courts seems to have conformed to the Rastelli case-law (see Cass. Comm. 10 May 2012, n. 09-12642).

593 Pursuant to article L. 621-2 Cod. Comm (by virtue of the remit of article L. 640-1 Cod. Comm.) « *peut être étendue à une ou plusieurs personnes en cas de confusion de leur patrimoine avec celui du débiteur* […] *le tribunal ayant ouvert la procédure initiale reste compétent* ».

594 *Rastelli*, at [38].

595 *Rastelli*, at [24].

to apply the consolidation of insolvency proceedings to a separate legal entity are « *in general difficult to ascertain by third parties* » (596).

A third profile that is worth of mention is the 'mobile' COMI phenomenon (597). The indication of the time at which the COMI must be identified is of paramount importance as it raise delicate issues of fair balance between the fundamental freedoms of establishment and of movement of the debtor, on the one side, and the principles of protection of the creditors, legal certainty and foreseeability and avoidance of forum shopping on the other (598). Against this background, it is settled case-law that - for the purposes of jurisdiction and the determination of the *lex concursus* applicable to insolvency proceedings - the location of the COMI must be assessed at the time when the request for the opening insolvency proceedings is lodged, irrespective of whether the debtor has subsequently transferred the COMI elsewhere before the judgement opening of insolvency proceedings is handed down by the court originally seised. This principle was clearly established in *Staubitz-Schreiber* (599), where the Court held that the court of the Member State within the territory of which the debtor's COMI is situated at the time when the request to open insolvency proceedings is lodged « *retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened* » (600). The reasons underlying the Court's decision are the very objectives pursued by the EIR: a COMI shift after the seizure of the

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596 *Rastelli*, at [37] - [39].

597 On the 'mobile COMI' phenomenon see, *inter alia*, H. EIDENMÜLLER, 'Abuse of Law in the Context of European Insolvency Law', in *European Company and Financial Law Review*, 2009.

598 Articles 45 and 48 TFUE. It bears noticing that the concept of COMI has common features with that of 'real-seat', which is relevant for determining the law applicable in respect of (i) a company with registered office in a Member State different than that in which the same company has an unregistered branch intended to carry on all its economic activity in the host State (ECJ, 9 March 1999, Case C-212/97, *Centros Ltd v Erhvervsog Selskabsstyrelsen*, ECLI:EU:C:1999:126, ECJ, 30 September 2001, Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*, ECLI:EU:C:2003:512) or (ii) a company incorporated under the law of that Member State which has transferred its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation (ECJ, 16 December 2008, Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723). The concept of COMI differs, however, from that of 'real seat', in that the former also considers the place where strategic decisions are taken and the management of the company. According to an author, that the COMI standard as it is currently applied does not accord with the freedom of establishment. W. G. RINGE, 'Forum shopping under the EU insolvency regulation', in *European Business Organization Law Review*, 2008, p. 26.

599 ECJ, 17 January 2006, Case C-1/04, *Susanne Staubitz-Schreiber*, ECLI:EU:C:2006:39. Among others see L. CARBALLO PIÑEIRO, 'Jurisprudencia española y comunitaria de Derecho internacional privado', in *Revista española de Derecho Internacional*, 2006, p. 497-501; J.-P. SORTAIS, 'Entreprises en difficulté', un *Revue de jurisprudence commerciale*, 2006, p. 245-246; M. MONTANARI, 'La perpetuatio iurisdictionis nel sistema del regolamento comunitario sulle procedure d´insolvenza', in *Int'l Lis*, 2006, p. 20. J.-L. VALLENS, 'Le règlement communautaire sur les procédures d'insolvabilité et le déménagement du débiteur', in *Revue des sociétés*, 2006, p. 351-360; F. KAUFF-GAZIN and L. IDOT, LAURENCE, 'Centre des intérêts principaux du débiteur', in *Europe*, 2006, p.28.

600 It must be noted that, lacking within the EIR any rule on the *lis pendens*, this does not automatically entail that the court originally seised will actually be able to hand down the first decision opening insolvency which will benefit of recognition under article 16 EIR, although the transfer of COMI to be successful requires a certain stability (the new COMI must satisfy the conditions of Recital 13 EIR, *i.e.* the conduct of the debtor's administration of interests *on a regular basis* and is a manner ascertainable by third parties. See *Shierson v. Vlieland Boddy*, [2005] EWCA Civ 974, [2005] I WLR 3966.

court to open insolvency proceedings would incentive the forum shopping, since it is likely that where it occurs during the initial stage of proceedings it would be mainly due to the debtor escaping its creditors. Also, it would run contrary to the objective of efficiency and effectiveness of the procedure, since creditors would constantly need to get hold of their debtor [601].

II.1.4. The regime of recognition and enforcement

Chapter II EIR provides a complex regulation regarding recognition and enforcement of categories of judgements rendered in the course of insolvency proceedings.

As mentioned, automatic recognition of judgements rendered in the context of insolvency proceedings represents the pivotal principle which makes an insolvency procedure universal, efficient and effective. Indeed, cross border insolvencies can be effectively conducted only if other Member States recognise the decisions (and their effects) rendered by the courts of the State where proceedings are opened, the powers of the trustees appointed in the context of such proceedings and the effects of other judgements handed down in the course of proceedings.

To this end, the Insolvency Regulation provides expressly that the recognition of judgements rendered in the context of insolvency proceedings must be based on mutual trust and therefore, requires 'no further formalities' and thus operates *ipso iure* [602]. As to the effects of the recognition, espousing the s.c. 'extension model' [603], Article 17 EIR expressly rules that (foreign) judgements must be granted in the territory of the addressed Member State the authority and the effects that they enjoy in the Member State where they are handed down, save for the exceptions set forth in Articles 5 -15 EIR [604].

Such a mechanism ensures, thus, the free circulation of judgements throughout the judicial area of the EU and the true universality of main proceedings (at least, as long as no secondary proceedings are opened). It must be said, however, that the apparent shortcoming of the mechanism of automatic recognition established by the EIR is represented by the lack of any provision regarding conflicts of jurisdiction. Indeed, reading together Articles 3(1) and 16(1) EIR one understands that the Insolvency Regulation merely establish a principle of priority [605].

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601 Whether the same reasons would prevent also a shift of COMI shortly before the lodging of a request for the opening of insolvency proceedings is debated, it being considered the EIR's general hostility towards forum shopping (apparently even where that would benefit creditors). W. G. RINGE, *op.cit.*, p. 35. As will be seen, the issue has been partially solved under the Recast Regulation (see *infra* § Chapter IV).

602 See articles 17 and 25 EIR. German scholars have argued that said provisions allow the recognition only of the procedural effects of judgements, whereas the substantive effects are produced in the addressed Member State by virtue of the conflict of law rules provided by the EIR (namely, article 4 thereof). J. AMBACH, *Reichweite und Bedeutung von Art. 25 EuInsVO*, Berlin, 2009; J. BLIZ, *Sonderinsolvenzverfahren im Internationalen Insolvenzrecht*, Berlin, 2002. In any case, it is a purely theoretical disquisition which has no practical relevance.

603 See Virgós-Schmit Report, at [153].

604 See Virgós-Schmit Report, at [143].

605 The principle of priority is confirmed by Recital 22 EIR, pursuant to which « *The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision* ». Among others, see G. MONTELLA, 'Il conflitto di giurisdizione nel regolamento CE n.

It is true that, under the scheme of the Insolvency Regulation, only one main procedure can be opened, which is ensured by anchoring the jurisdiction to the place where the COMI of the undertaking is located (as the COMI can be only one). However, the EIR does not take into account that the identification of the COMI is not always straightforward and, accordingly, more than one request for the opening insolvency proceedings may be lodged parallelly before the courts of different Member States, where the COMI is allegedly located. It merely establishes that once a judgement opening main proceedings has been rendered (and thus it benefits of automatic recognition *ipso iure*) all other Member States are prevented from opening (another) main procedure [606].

Consequently, even in constellations where the COMI is debatable, this mechanism can enhance parties (*recte* courts) to engage in a 'virtual race' to open insolvency proceedings, in order to hand down first the judgement opening insolvency proceedings, which will benefit of full and unquestioned recognition throughout the EU, pursuant to Article 16 EIR [607].

It has just been said that the provisions of the EIR refer to the recognition of 'categories' of decisions. That is because the Insolvency Regulation does not provide that insolvency proceedings as a whole must recognised [608], but it identifies various types decisions, which, depending upon their content and nature, are handed down (or may be handed down) by the court of the State opening insolvency proceedings in the course of the procedure.

More in detail, the Insolvency Regulation distinguishes among five types of 'insolvency decisions'

(i) Judgements opening insolvency proceedings [609] – the Insolvency Regulation provides, as said, that the first judgement opening insolvency proceedings, handed down by a court of a Member State having jurisdiction pursuant to Article 3 EIR [610], shall be recognised in all the other Member States. The clear identification of that type of decisions has caused a number of interpretative issues, of which it is not useful to give full account for the purposes of this study. Suffice here to recall that, while expressions such as 'judgement', 'courts' and 'insolvency proceedings' [611] are somewhat clearly

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1346/2000', in *Fallimento*, 2008, p. 1149 and S. BARIATTI, 'Il regolamento n. 1346/2000 davanti alla Corte di Giustizia: il caso Eurofood', in *Riv. dir. proc.*, 2007, p. 203.

606 See Cass., S.U., 14 April 2008, n. 9743, where the Italian Supreme Court found inadmissible the appeal challenging a decision rejecting the admission to *concordato preventivo* for lack of jurisdiction, on the ground that main insolvency proceedings had been opened in Belgium meanwhile. For French case law see also Cour de Cassation, 27 June 2006, affaire n°03-19863, in *Bulletin* 2006 IV N° 149 p. 159 (Case *Isa Daisytek SAS*). In Germany see BGH, 14 July 2008 - IX ZB 103/07, in *ZIP*, 2008, p. 2029 and LG Hamburg, 18 August 2005 – 326 T 34/05, in *ZIP*, 2005, p. 1697. See also ECJ, 14 June 2012, Case C-158/11, *Auto 24 SARL v. Jaguar Land Rover France SAS*, ECLI:EU:C:2012:351.

607 G. SCHLAEFER, 'Forum Shopping under the Regime of the European Insolvency Regulation', available at http://www.iiiglobal.org, p. 10.

608 R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 169.

609 Articles 16(1) and 16(2) EIR.

610 In anticipation of what will be explained below, the reference to the jurisdiction of the court under article 3 EIR cannot be understood as if the Regulation permitted a refusal of recognition based on a review of the jurisdiction of the court of origin.

611 For the interpretation of the concept of insolvency proceedings see *supra* in this Chapter, Section II, § II.1.2.1.2.

defined by the EIR [612], the very concept of judgement 'opening' insolvency proceedings lacked any definition and casted doubts [613]. As will be seen in Chapter V, the Recast Regulation has dispelled those doubts. Article 16 EIR provides also that judgements must have become effective in the State of the opening of proceedings. It is not entirely clear the meaning of 'effective', but arguing with article 2(f) EIR, one may reasonably assume that it is not required that judgements must be final (*i.e.* having the *res judicata* binding effects) [614].

The regime of automatic recognition of decisions opening the procedure provided by Article 16 EIR is extended [615] to other insolvency-related judgements handed down by the same court [616], by virtue of the remit of Article 25 EIR. Among these,

(ii) Judgements regarding the closure and conduct of insolvency proceedings – the content of those judgement is not defined by the EIR. Scholars have referred to them as 'any procedural issues relevant to the body of creditors' [617]. Arguing with Article 2 (c) EIR it must be assumed that the concept of judgements regarding the closure of insolvency proceedings encompasses all court decisions that

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612 Article 2 (d) and (e) EIR.

613 For instance, in the *Eurofood* case, the Court was referred to with a preliminary ruling concerning whether an English decision appointing a provisional liquidator (as such prior to the formal opening of insolvency proceedings listed in annex A) rendered before the decision formally opening of main insolvency proceedings in Italy could be regarded as a judgement opening insolvency proceedings.

614 See Virgós-Schmit Report, at [147]. R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 171.

615 From a systematic point of view, it was noted that article 16 EIR regulates separately the recognition of judgements opening insolvency proceedings because of their importance to the entire insolvency proceedings. S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, at [1].

616 It must be borne in mind that judgements within the meaning of the EIR are decisions handed down by a 'court'. Despite the broad meaning of the latter concept (see *supra* § II.1.2.1.3.), it was argued that compositions agreed upon by creditors and debtor without any involvement of judicial authority do not benefit of automatic recognition. This view contrasts with abovementioned interpretation of the concept of 'court', bolstered mainly by English courts and scholars, according to which the definition of 'court' in the Insolvency Regulation applies not merely to some organ of the State but, more widely, to any body that in that Member State is vested with the power to open insolvency proceedings. It follows that, in principle, if judgements opening insolvency proceedings (listed in Annex A) must be rendered by a 'court' to be automatically recognised, and 'court' includes also, for instance, a meeting of creditors to open creditors' voluntary arrangements, that decision should be recognised, even though no judicial confirmation is required. Such an (English) interpretation seems not entirely acceptable. Indeed, it was beyond the intentions of the European legislature when drafting the EIR to ensure the free movement of out-of-court compositions of a purely contractual nature, which (should they be inserted within Annex A) would benefit from the simplified recognition regime of article 16 EIR, likewise decisions rendered at least under the supervision of a public authority. A different interpretation could lead to consider that the broad meaning of 'court' should apply exclusively for the purposes of jurisdiction under article 3 EIR, whereas for the purposes of recognition under articles 16 and 25 EIR, the concept of court should be construed more strictly, assuming that the judgement must be approved by either the judiciary authority or any other entity, playing a similar role provided that it exercises a public authority. Arguments supporting this view may be found in the fact that in 2002, a court's confirmation of a creditor's voluntary winding-up was introduced, for the express purposes of granting that those proceedings could benefit from the extra-territorial recognition and effectiveness under the Insolvency Regulation (and *a fortiori* this reasoning should apply to creditors' voluntary arrangements). R. BORK and R. MANGANO, *op. cit.*, p. 171 and G. MOSS, I. FLETCHER, S. ISAACS, *op. cit.*, p. 73.

617 R. BORK and R. MANGANO, *op. cit.*, p. 171.

terminate the procedure, also in cases where it is closed by a composition or other measures or by reasons of the insufficiency of the assets. It is disputed whether a discharge of residual debt granted to the debtor at the end of proceedings constitutes a judgement of that kind [618].

As to the definition of judgements regarding the conduct of proceedings, these include surely the decisions appointing the trustee. Lacking any further definition, it was submitted that one may glean from Article 4(2) EIR (providing that the *lex concursus* is applicable to 'conditions for the opening of those proceedings, their conduct and their closure') to conclude that they encompass, *inter alia*, decisions concerning the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceeding, decisions concerning the lodging, verification and admission of claims, the distribution of proceeds from the realisation of assets, the ranking of claims [619].

The types of decisions *sub (i)* and *(ii)* may be all traced back to the very 'core' of insolvency proceedings, since they all represent necessary phases (or sub-proceedings) of the procedure [620].

However, Article 25 EIR refers to other proceedings, which indeed are somewhat related to insolvency proceedings, but do not constitute a phase of them, at least not in the sense of essential and characterising phases of a procedure. A first difference between those two types of decisions may be then grasped because the latter ones are merely potential in the course of the procedure.

However, Article 25 EIR refers to other proceedings, which indeed are somewhat related to insolvency proceedings, but do not constitute a phase of them, at least not in the sense of essential and characterising phases of a procedure. The difference between those two types of decisions may be then partially grasped because the latter ones are merely potential.

In particular, Article 25 EIR refers to

(iii) judgements derived directly from the insolvency proceedings and which are closely linked with them (they will be dealt with afterwards [621]).

(iv) Judgements relating to preservation measures – protective measures are automatically recognised when they are taken after the request for the opening of insolvency proceedings. It is not clear whether this means also that they must be prior to the opening of insolvency proceeding [622]. The Insolvency Regulation does not provide, in facts, for a definition of 'protective measures'. It is reasonable that,

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618 See in this sense M. BALZ, *op. cit.*, p. 503. S. RIEDEMANN, *op. cit.*, at [20].

619 S. Bariatti, 'Filling in the Gaps of EC Conflicts of Laws Instruments: the Case of Jurisdiction over Actions Related to Insolvency Proceedings', in G. VENTURINI - S. BARIATTI (a cura di), New Instruments of Private International Law, Liber Fausto Pocar, Milano, 2009, pp. 23-38

620 A. LEANDRO, *op.cit.*, p. 120.

621 See *infra* Chapter VI.

622 S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, at [35] claims that preservation measures taken after the opening of insolvency proceedings must be characterised as 'actions directly deriving from insolvency proceedings and closely linked with them', within the meaning of article 25(1) first subparagraph EIR. The distinction should be merely theoretical. Yet, it would make it more difficult to identify those decisions on protective measures (which are not even defined) if they must be also directly derived from and closely linked to insolvency.

according to the tenet of the maximisation of realisation out of the debtor's assets to the benefit of the creditors', they must be directed at sheltering the debtor's assets (623). Also, it was assumed that they must be granted on an interim basis (624) and that they must pertain to main proceedings, since no cross-border (protective) measures can be brought in the context of secondary proceedings, with the sole exception of measures under Article 18(2) EIR (that, in any case, can be exercised only after the opening of insolvency proceedings).

The Insolvency Regulation does not mention protective measures taken before the request for opening insolvency proceedings is lodged. It is disputed whether they should fall within the scope of the EIR or that of Brussels Ia , or whether they fall in a regulatory gap, governed by national rules (625). In order to avoid any kind of regulatory vacuum, it was submitted that it would be reasonable to consider that if the preventive measure is requested in the vicinity of the request for the opening of insolvency proceedings, it should be subject to the regime of the Insolvency Regulation, since they would relate to insolvency (626).

(v) 'Other' judgements – Article 25(2) EIR was conceived by the legislature as serving the purely pedagogic reasons, *i.e.* to avoid gaps between the Convention on insolvency proceedings and the Brussels Convention. It does not affect the scope of application of the Insolvency Regulation (627). It

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623 Se recital 16 and article 38 EIR. See also Virgós-Schmit Report, at [78]. It is worth of mention the decision *Danske Bank & Anor v. McFadden*, [2011] IEHC 551, in which Dunne J stated that « *although there may appear to be similarities between protection orders and preservation measures given that the overall purpose of both is the preservation of the debtor's assets* […] *an interim protection order sought by a debtor to preserve its assets from the process of execution is not a preservation measure within the meaning of Article 25(1) of the Insolvency Regulation. Quite simply, an application by a debtor for protection is not the same as an application made by a court appointed administrator for the preservation of assets in another member state to the for the benefit of the creditors* ».

624 See R. BORK and R. MANGANO, *op. cit.*, p. 176.

625 The rationale behind article 25(1) subparagraph 3 is actually the *De Cavel* case-law, where the ECJ excluded from the scope of the Brussels Convention interim orders and protective measures for they were closely connected with proprietary legal relationship between spouses resulting directly from the matrimonial relationship. The latter subject being excluded from the scope of application of the Brussels Convention, the Court found that closely connected protective measures were to be excluded as well. ECJ, 27 March 1979, Case C-143/78, *De Cavel v. De Cavel*, in ECLI:EU:C:1979:83. See also ECJ, 31 March 1982, Case C-25/81, *C.H.W. v G.J.H.*, ECLI:EU:C:1982:116. In the light of the Insolvency Exception, and in order to avoid the exclusion of protective measures insolvency-related, the draftsmen of the EIR included them within the scope of the EIR, provided that when filed between the lodging of a request for opening insolvency proceedings and the opening of the procedure, they must be surely considered as being insolvency-related.

626 T. LINNA, 'Protective measures in European cross-border insolvency proceedings', in *International Insolvency Law Review*, 2014. R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 176; M. VIRGÓS SORIANO, F. J. GARCIMARTÌN ALFÉREZ, *The European Insolvency Regulation: law and practices*, The Hague, 2004, at [391]; S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, at [30]. See on this point *infra* Chapter III, Section 2, § II.1.2.

627 Some scholars have submitted convincingly that article 25(2) EIR aims at alerting national judges (and one could add, also practitioners) in order to avoid (for, an author, 'bridge') possible loopholes between the Insolvency Regulation and the Brussels I Regulation. To the extent that, in the event that the Insolvency Regulation does not apply, the latter provision recalls to the interpreter that it is likely that the applicable regime is that one of Brussels I Regulation and not its national law. S. BARIATTI, 'Filling in the Gaps of EC Conflicts of Laws Instruments: the Case of Jurisdiction over Actions Related to Insolvency Proceedings', in G. VENTURINI - S. BARIATTI (a cura di), *New Instruments of Private International Law, Liber Fausto Pocar*, Milano, 2009, pp. 23-38; Z. CRESPI REGHIZZI, 'Reservation of Title in Insolvency Proceedings: Some Remarks in Light of

provides that 'other judgements' which are rendered in the course of insolvency proceedings but that do not fall within the abovementioned types of decisions are governed by the Brussels Convention, provided that it applies (628). Lacking any definition of 'other judgements', the Virgós-Schmit Report clarifies that these encompass judgements relating to actions on the existence or the validity under general law of a claim (e.g. a contract) or relating to its amount; actions to recover another's property the holder of which is the debtor; and, in general, actions that the debtor could have undertaken even without the opening of insolvency proceedings (629).

For present purposes, this entails that those judgements that do not qualify as directly deriving from insolvency proceedings and closely connected with them, should be recognised under the Brussels Regime, which provides for numerous additional grounds for refusal of recognition and enforcement then those set out by EIR.

Indeed, in order to ensure efficiency and effectiveness of insolvency proceedings, within the Insolvency Regulation grounds for non-recognition are reduced to the minimum necessary (630).

Unlike the more strict regime of Brussels Ia (631), Article 26 EIR provides that the only ground for the refusal (632) of the recognition of judgements is the manifest infringement of the Member States' public policy, which is defined as the « *fundamental principles or the constitutional rights and liberties of the individual* » (633). Therefore, the EIR has its own mechanism for refusing the recognition and enforcement of judgements, which is much narrower than that of Brussels Ia (634).

Public policy represents the traditional boundary that private international law rules have developed with reference to the extraterritorial effectiveness of foreign judgments (and applicable law) (635). It has generally been identified with the fundamental and highest principles and values of national law

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the German Graphics Judgment of the ECJ', in Yearbook of Private International Law, 2010 Vol. XII, pp. 587-606.

628 Nowadays reference must be made to Brussels Ia. See *infra* in this Chapter, Section 2, § II.2.1.

629 See Virgós-Schmit Report, at [197].

630 Recital 22 EIR.

631 According to Riedmann, the wording of article 26 EIR seems to exclude its applicability to decisions under article 25(1) second and third subparagraphs EIR. S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, p. 387. Indeed, it is true that article 26 EIR refers expressly only to « *insolvency proceedings opened in another Member State or* […] *a judgment handed down in the context of such proceedings* ». Nevertheless, as suggestive this interpretation may be, it lacks persuasiveness, as it would evidently contrast with the objectives of the Insolvency Regulation. Also, it may be observed that when the EIR refers to insolvency proceedings opened in another Member State it is clearly referring to any decision rendered during the entire duration of the procedure.

632 It is noted that, contrary to the Brussels Ia's test of public policy, the EIR establishes that the court *may* refuse recognition. Therefore, this seems to allude the court addressed with the recognition of a foreign judgement falling within the scope of the EIR would have discretion on whether to recognise it or not.

633 Article 16 EIR.

634 Z. FABOK, 'Grounds for Refusal of Recognition of (Quasi-) Annex Judgements in the Recast European Insolvency Regulation', in *International insolvency law review*, 2017.

635 See F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Torino, 2015, p. 290.

(636). Although public policy is defined by national laws, it must be borne in mind that, due to the commitment to certain fundamental policies both at international and at European level, the national laws of the Member States must be considered as being informed also to those principles (for instance, the ECHR and the Treaties of the European Union) (637).

The operation of the test of public policy has always been left to the appreciation of each national system that has shaped its content in the light of its founding principles and values.

Within the European Judicial Area, although the Member States have retained that 'reserved domain', the Community law, along with the ECJ case-law (638), has severely limited the possibility that the decisions handed down by the courts of one Member Stat cannot produce their effects in the others Member States on the ground of public policy, since this would frustrate the free circulation of judgements (and the legal situations assessed therein) and it would ultimately frustrate the very principle of mutual trust (639).

The erosion of the applicability of national public policy has basically followed two paths.

Firstly, the ECJ has established that the refusal of recognition for a foreign judgment on the ground of public policy is justified only if the judgement is *manifestly* contrary to the public policy of the national legal order. Therefore, public policy cannot be invoked, for instance, simply because the court of origin applied a different rule of law (including EU law (640)) from that which would have been applicable in the court addressed (641).

Secondly, the ECJ has constantly scrutinised the consistency of the limit of national public policy where invoked as a ground for non-recognition with regard to the objectives of the European judicial area. Besides, it is unanimously understood that the interpretation of the public policy exception developed with regard to the Brussels Ia Regulation and its predecessors (642) applies also to the identical exception provided by the EIR.

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636 ECJ, 23 October 2014, Case C-302/13, *flyLAL-Lithuanian Airlines*, EU:C:2014:2319 at [40] «*Recourse to the public-policy clause in Article 34(1) of Regulation No 44/2001 may therefore be envisaged only where recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental principle*».

637 Cass. 21 January 2013, n. 1302

638 Since a Community act provides public policy as a ground for refusal of recognition of judgements in the Insolvency Regulation, the ECJ has the ultimate jurisdiction for the (autonomous) interpretation of that limit, regardless of its interpretation made by national courts.

639 See O. FERACI, *L'ordine pubblico nel diritto dell'unione europea*, Milano, 2012. B. NASCIMBENE, 'Riconoscimento di sentenza straniera e "ordine pubblico europeo"', in *Riv. dir. internaz. priv. e proc.,* 2002, p. 659 e ss e L. S. ROSSI, 'L'incidenza dei principi del diritto comunitario sul diritto internazionale privato: dalla "comunitarizzazione" alla "costituzionalizzazione"', in *Riv. dir. internaz. priv. e proc.*, 2004, p. 63 e ss.

640 ECJ, 16 July 2015, Case C-681/13, *Diageo Brands BV v. Simiramida-04 EOOD*, ECLI:EU:C:2015:471, at [50], the Court states that « *the public-policy clause would apply only where that error of law means that the recognition of the judgment concerned in the State in which recognition is sought would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State* ».

641 ECJ, 28 March 2000, Case C-7/98, *Dieter Krombach v. André Bamberski*, ECLI:EU:C:2000:164.

642 See *infra* in this Section, at § II.2.3.

In this context, the Court has stressed on many occasions that public policy must be interpreted restrictively as an exception to the principle of automatic recognition of foreign judgments, based on the mutual trust of Member States (643).

Within the broader concept of public policy, a distinction can be drawn between procedural public policy, *i.e.* the violation of fundamental procedural principles of (supranational and) national law and substantive public policy, *i.e.* the violation of fundamental principles of substantive law.

As to procedural public policy, it may be invoked in the event that one of the parties has not been put in the condition to participate to proceedings, in violation of his rights of due process. That may occur, for instance, whenever the document which institutes the proceedings or with an equivalent document was not served in due time to allow the party to arrange his defence (s.c. 'default judgement') (644), unless it is proven that the defendant could have commenced proceedings in the Member State of origin to have the judgment set aside, and did not do so (645). More in general, the operation of procedural public policy should be justified whenever it is necessary to involve the parties in procedural activities that are fundamental to the exercise of the rights of defence.

However, with regard to insolvency proceedings, that are comprised of several sub-proceedings, it must be noted that they involve a number of parties, with different (and potentially conflicting) interests. Therefore, it is not always obvious whether the lack of involvement of one party in a certain phase of proceedings constitutes an impairment of his right to be heard (646). While it is commonly understood that the debtor must be heard, it was found that the circumstance that secured creditors are not heard does not constitute an infringement of public policy, whereas it is cleared whether the provisional liquidator has the right to be heard before the opening of insolvency proceedings in another Member State (647).

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643 In the context of the Brussels Convention, the ECJ has held that, since it constitutes an obstacle to the achievement of one of the fundamental aims of that Convention, namely to facilitate the free movement of judgments, the recourse to the public policy clause contained in article 27(1) Brussels Convention is reserved for exceptional cases. ECJ, 28 March 2000, Case C-7/98, *Dieter Krombach v. André Bamberski*, ECLI:EU:C:2000:164, at [19] and [21]. With respect to the strict interpretation of the public policy test within the EIR see ECJ, 21 January 2010, Case C- 444/07, *MG Probud Gdynia sp. z o.o.*, ECLI:EU:C:2010:24, at [34] and ECJ, 2 May 2008, Case C-341/04, *Eurofood IFSC Ltd.* ECLI:EU:C:2006:281, at [62].

644 ECJ, 16 June 1982, Case C-166/80, *Peter Klomps v. Karl Michel*, Case C-166/80, ECLI:EU:C:1981:137, at [14]–[21], ECJ, 10 October 1996, Case C-78/95, *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, ECLI:EU:C:1996:380; ECJ, 11 June 1985, Case 49/84, *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, ECLI:EU:C:1985:252.

645 ECJ, 28 April 2009, Case C-240/07, *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, ECJ, 4 February 1988, Case C-145/86, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECLI:EU:C:1988:61, ECJ 14 December 2006, Case C-283/05, *ASML Netherlands BV v. Semiconductor Industry Services GmbH (SEMIS),* ECLI:EU:C:2006:787.

646 See also *Eurofood*, at [62] where the court states that « *In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency* ».

647 See Lietuvos apeliacinis teismas, 7 May 2012, [2012], EIRCR(A) 295. See also Cour de Cassation 27 June 2006, which found that does not entail a violation of public policy the violation of article L. 621-1 Cod. Com.,

It must be borne in mind that procedural public policy may not be invoked to circumvent the prohibition to revise the jurisdiction of the court *a quo*, even though the latter court took jurisdiction on manifestly incorrect grounds (648).

As far as substantive public order is concerned, the issue is much more complicated since it is more difficult to find common principles within national legal systems since the concept of public policy is intrinsically influenced by the national political, cultural, social and religious context and may vary in each Member State. The case-law is rather vague when defining *when* the public policy's exception may be invoked, as the Court's decisions contribute more to a negative definition of the limits of the test of public policy.

Recently the Italian Supreme Court has found that the infringement of the centralised system for the verification of insolvency claims set forth by Articles 93 l. fall. (under which the verification of the lodged credits and rights in rem *vis à vis* the debtor must be undertaken before the *forum concursus*) does not constitute a violation of public policy (649).While the recognition regime is directly regulated by the EIR, as to the enforcement of judgement Article 25(1) EIR remit to the Brussels Regime on enforcement (650), with the exception of Article 34(2) thereof. This entails that, again, the only ground for the refusal of enforcement is the infringement of the public policy (and not the other grounds provided for judgements concerning civil and commercial matters). However, as far as enforcement is concerned also domestic grounds for refusal of the enforcement may be invoked, provided that they are not incompatible with the EIR's application.

To conclude on this point, it must be highlighted that that under the coexistence between the EIR and Brussels I, judgements to be enforced were subject to the procedure of exequatur, which, as will be seen afterwards, has been abolished by Brussels Ia . It follows that insolvency judgements handed down in the context of insolvency proceedings instituted after the entry into force of the latter regulation (10 January 2015) benefit of the abolition of the exequatur as well, since the remit made by Article 25(1) EIR must be referred to the new Article 32 Brussels Ia (651).

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which provides that a representative of the *comité d'entreprise* must be heard before the opening of a *sauveguarde*. For the necessary inclusion of the creditors in an individual action for the determination of an individual credit see ECJ, 17 March 2005, Case C-294/02, *Commission v AMI Semiconductor Belgium and others*, ECLI:EU:C:2005:172, analysed in more detail *infra* Chapter V.

648 On some occasions however the deception or maneuvers to shift the COMI were considered to violate public policy.

649 Cass., 15 April 2019, n. 10540, in *Redazione Giuffré*, 2019.

650 It must be recalled that the Brussels regime pertains only to the profile of the authorisation to the enforcement of foreign judgements, the concrete forms of enforcement being left to national laws.

651 When dealing with the mutual interplay between the Brussels Regime and the Insolvency Regulation it must be borne in mind that it also concerns an 'inter-temporal' dimension, due to the coexistence, on the one side, of the Brussels Convention, the Brussels I Regulation and the Brussels Ia Regulation. On the other side, the Insolvency Regulation was recast in 2015. All in all, the succession of the abovementioned instruments of the Brussels Regime did not entail a great problem, or at least it was easily solved by the ECJ, since as of the *Alpenblume* case (ECJ, 2 July 2009, Case C-111/08, *SCT Industri AB I likvidation v. Alpenblume AB*, ECLI ECLI:EU:C:2009:419), invoking Recital 19 Brussels I, the ECJ has constantly confirmed the equivalence between the provisions of the Brussel I Regulation and those of the Brussels Convention, before, and between

II.2. The regime of civil and commercial matters: the 'Brussels Regime' and the Lugano Convention

It has already been explained that, originally, the goal of simplification of formalities governing the reciprocal recognition and enforcement of judgements, as under Article 220 EC Treaty, was intended to be achieved by means of a single convention, covering the whole field of civil and commercial law, providing a general regime for the free circulation of judgements, with no exclusions or limitation as to its substantive scope.

It has also been said that, after a short time, that project has proved to be overly ambitious. Some matters, although in principle of a civil and commercial nature, in fact, were not included into the Brussels Convention's scope, for they were subject to too divergent regimes across the Member States or were understood as requiring an *ad hoc* regime. Insolvency was one of those.

The two instruments, however, retained a close interrelation. The continue interplay between the Brussels Convention and the Insolvency Regulation emerges not only from the fact the Brussels Convention, excludes 'bankruptcy, winding up, compositions, judicial arrangements and analogous proceedings' with the specific purpose to entrust their regulation upon a complementary instrument. It must also be acknowledged that that the rules on enforcement provided by the Brussels Ia Regulation is extended to that of insolvency proceedings, by means of the 'fall back provision' of Article 25 EIR [652].

That makes necessary to briefly examine the scope of application and some specific provisions of the Brussels Regulation, as that will allow to better focus afterwards on the issue of the boundaries and the mutual interplay between the two instruments [653].

II.2.1. From the Brussels Convention to the Brussels Ia Regulation

When compared to the Bankruptcy Project, the process of drawing up a convention on jurisdiction, recognition and enforcement concerning civil and commercial matters reveals significantly faster.

Briefly recalled, a first text was adopted by the six founding Member States of the European Economic Community on 27 September 1968 and entered into force on 1 February 1973. Over the

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Brussels I and Brussels Ia . It is rather uncontroversial that in the scheme established by the Brussels Regime, also considering their identical wording, Article 1(2)(b) Brussels I and Brussels Ia has the same position and performs the same role as Article 1(2)(2) Brussels Convention. Moreover, it was made clear on several occasions that the interpretation provided by the Court in respect of the provisions of the Brussels Convention applies to the provisions of the subsequent texts. (Apparently, such clarification was deemed as of much relevance for some scholars, since a literal interpretation of the text was leading to 'some hesitations'. J.-L. VALLENS, 'La reconnaissance et l'execution des décisions rendues dans une proceédure collective sont soumises au règlement général du 22 décembre 2000 qui remplace la Convention de Bruxelles de 1968', in *RTD Com.,* 2010 p. 212). Note that the moment in time of the seisure of the court for the purposes of determining the application *ratione temporis* of the Brussels Ia Regulation must be made pursuant to the *lex fori* (see the Italian Cass., SS. UU., 27 semptember 2006, n. 20887, in *Riv. dir. int. proc.*, p. 759).

652 See B. HESS, in B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, p. 28.

653 See *infra* in this Chapter, Section 3.

years, the original text was amended on several occasions by the instruments on the accession of the new Member States [654] (1978 [655], 1981[656], 1989 [657] and 1993 [658]).

The Brussels Convention provided a set of uniform rules within the Community on two main areas of private international law, namely jurisdiction and mutual recognition and enforcement of judgements.

In 2001, the amendments brought by the Treaty of Amsterdam to the institutional framework of the European Community entailed the change of the legal nature of the Brussels Convention to a regulation. Accordingly, in March 2002, the Regulation EC 44/2001 (the 'Brussels I Regulation' [659]) superseded the Brussels Convention.

The new instrument substantially reflected both the 'double' scheme, and the material and personal scope of the Brussels Convention. Besides, at the same time remarkable amendments were made for the progressive extension and a more detailed implementation of the abovementioned principle of mutual recognition, resulting into further simplification and acceleration in the Community area of the procedures for recognition and enforcement of judgements.

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654 The possibility of extending the Brussels Convention to the new Member States of the EEC was duly considered. Accordingly, Article 63 provided that « *The Contracting States recognize that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last paragraph of Article 220 of the Treaty establishing the European Economic Community. The necessary adjustments may be the subject of a special convention between the Contracting States of the one part and the new Member States of the other part* ». See on the historic evolution of the Brussels Convention S.M. CARBONE, M. FRIGO, L. FUMAGALLI, *Diritto procedurale civile e commerciale comunitario*, Milano, 2004, p. 3 and ff.

655 Denmark, Ireland and the United Kingdom joined the European Community in 1973. See the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Contents, in *OJ*, C. 24, 29 August 1994. Article 4(2) of said act provided that « *The new Member States undertake to accede to the conventions provided for in Article 220 of the EC Treaty and to those that are inseparable from the attainment of the objectives of the EC Treaty, and also to the protocols on the interpretation of those conventions by the Court of Justice, signed by the present Member States and to this end they undertake to enter into negotiations with the present Member States in order to make the necessary adjustments thereto* ». Accordingly, on 9 October 1978 the Member States signed the 'Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice', in *OJ*, C. 59/71 of 5 March 1979. The Convention was accompanied by an explanatory report edited by P. SCHLOSSER (hereafter, the 'Schlosser Report').

656 Greece became the 10th Member State of the European Community in January 1981. It became party to the Brussels Convention under the terms of the convention signed in Luxembourg on 25 October 1982, in *OJ*, L. 388/1, 31 December 1982, The Convention was accompanied by an explanatory report edited by D.I. EVRIGENIS and K.D. KERAMEUS (hereafter, the 'Evrigenis-Kerameus Report').

657 Spain and Portugal joined the European Community in January 1986. They became a party to the Brussels Convention under the convention signed in San Sebastian on 26 May 1989, in *OJ*, L. 285, 3 October 1989. The Convention was accompanied by an explanatory report edited by M. DE ALMEIDA CRUZ, M. DESANTES REAL and P. JENARD (hereafter, the 'Almeida - Desantes Real - Janard Report').

658 Austria, Finland and Sweden joined the European Community in January 1993. They became a party to the Brussels Convention under the convention published in *OJ*, C 15/1 of 29 November 1996.

659 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ*, L. 12, 16 January 2001,

It is worthy of notice that, during the years of the application of the Brussels I Regulation, the consolidation of the European international private law framework was enacted [660].

In this context, the Brussels I Regulation was unanimously understood as a regulatory catalyst of the European civil procedure system. Actually, it played the role of a matrix for the elaboration of EU legislation in particular areas of law in relation to which it was deemed appropriate to adopt a specific EU framework. In this respect, the Brussels Regulation was regarded as the seed for the development of many other EU private international law instruments in civil and commercial matters.

It was precisely due to its role of 'cornerstone' of the policy of judicial cooperation in civil and commercial matters, that, under Article 73 thereof, the Commission launched a survey on the implementation of the Brussels I Regulation, which resulted in the report to the European Parliament, the Council and the Economic and Social Committee in 2009 and the Green Paper on the Brussels I Regulation [661].

Based on these preparatory documents and largely recalling their contents, on 12 December 2012, the Brussels I Regulation was repealed by Regulation (EU) 1215/2012, which entered into force on 10 January 2015 (the 'Brussels Ia Regulation' [662]). Despite a more limited scope than the Commission's ambitious proposal [663], the new Brussels Ia Regulation indeed streamlines the circulation of judgments on civil and commercial matters within the EU Judicial Area, introducing innovations of particular importance. In particular, the relevant amendments may be summarised as follows.

Firstly, the Brussels Ia Regulation expands the scope of application of the rules relating to jurisdiction. Secondly, it allows under certain conditions that a court designated by a choice of forum agreement proceeds to determine the dispute, even where proceedings are first commenced before the courts of another Member State. Thirdly, provisions have been introduced providing a limited *lis pendens* and related actions rules *vis-à-vis* third countries. In this respect, the Brussels Ia Regulation also broadens the scope of the provisions relating to consumers and employment contracts entered into with third countries defendants. Finally, it has abolished *exequatur* procedures, further simplifying the mutual recognition and enforcement of judgments.

Although both Brussels I Regulation and Brussels Ia Regulation differ in significant aspects from the Brussels Convention, it is important to notice that some key features in their structure and substance have remained unchanged from the original wording.

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660 See *infra* in this Chapter, Section 3, § III.1.

661 See on the evolution of the Brussels Regulation, *ex multis,* S. M. CARBONE, CHIARA TUO, *L'evoluzione della disciplina dello spazio giudiziario europeo e il suo ambito di applicazione*, Torino, 2016.

662 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, in *OJ*, L. 351, 20 December 2012.

663 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)', COM(2010) 748 final.

Accordingly, in the light of the continuity which must be ensured between Brussels Convention, Brussels I Regulation and Brussels Ia Regulation, in principle the case-law solutions and the *travaux preparatoires* relating to the former regulatory Convention must be regarded as still operating in relation to the corresponding provisions of the latter Regulations (of course, in so far as those provisions reproduce those of the Brussels Convention or the Brussels I Regulation).

For the purposes of this work, when addressing the relevant features of the regime on civil and commercial matters, herein reference is made to the text of the Brussels Ia Regulation currently in force or in general to the Brussels Regime, highlighting differences from its predecessors when necessary.

II.2.2. The objectives of the Brussels Ia Regulation

The objectives of the Brussels Ia Regulation are illustrated in its recitals. As was the case with regard to the EIR, the brief analysis of those objectives proves to be relevant when considering that, since the provisions of the regulations must be given an autonomous, community-wide interpretation, the Court arrives at that autonomous interpretation mainly by reference to the objectives and scheme of the regulation (purposive interpretation) (664).

(a) free circulation of judgement - The ultimate objective and a key criterion for the interpretation of Brussels Ia is securing the free circulation of judgements (665). That objective is the very basis of the judicial cooperation in civil matters provided by Article 65 EC Treaty and its ratio lies with the principle of mutual trust in the legal systems of the Member States.

The achievement of this objective entails three consequences as to the interpretation of Brussels Ia ' s provisions. First, the rules on jurisdiction should be interpreted by discouraging the multiplication of grounds for jurisdiction going beyond the cases expressly envisaged by the Regulation (666). By the same token, grounds for challenging recognition and enforcement should be narrowly construed. Third, rules on *lis pendens* should be interpreted broadly, as to avoid as much as possible any risk of irreconcilable judgements which would hinder the free circulation of judgements (667).

(b) Protection of the defendant and weaker parties - the jurisdictional rules of Brussels Ia must be based on uniform and fair connecting factors, in order to ensure that in principle the respondent is put in the condition to defend himself before the courts of his home State (668). Only in few cases the

664 The autonomous interpretation of concepts used within EU regulations will be dealt with afterwards.

665 Recitals 1, 4, 6, 26 and 27 Brussels Ia.

666 As noted by authoritative scholars, one must understand cautiously the 'boilerplate admonition verbally favouring a restrictive interpretation' of the special jurisdiction grounds. Since article 4 Brussels Iashould not lead to think that it sets forth a principle which may be derogated on grounds of absolute necessity, a too narrow approach towards the head of jurisdiction under articles 7 thereof would be very unfortunate if it is established at the expenses of the overall coherence of the Regulation. See R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 114.

667 A. DICKINSON, E. LEIN, *The Brussels I Regulation Recast*, Oxford, 2015, p. 23.

668 Recitals 14, 15 and 18 Brussels Ia.

Brussels I bis Regulation provides that it is possible to look at different connecting factors than the general rule of the defendant's domicile where the subject matter of the dispute proves to be more closely related to a different *forum* or in consideration of the free choice of the parties, where allowed. However, the protection of the defendant entails that those provisions must be construed narrowly and should avoid interpretations leading to affirm a *forum actoris*.

Mandatory jurisdictional grounds are also envisaged in order to better ensure the protection of certain weaker parties - namely consumers, employees and insured parties – that can only be sued before the courts of their domicile.

(c) legal certainty - provisions establishing jurisdictional grounds in particular should be 'highly predictable'. Parties should be put in the condition to rely as much as possible on the provisions of the Regulation, which should provide the greatest possible foreseeability and certainty of their application [669]. It follows that Brussels Ia excludes the operation of other (exorbitant) jurisdictional grounds, likewise the doctrine of *forum non conveniens*. It was noted by an author that, while in the past legal certainty was considered as the other side of the legal protection of persons, in recent years it has gained the value of free-standing principle [670].

II.2.3. The material scope

Article 1 is determinative for defining the scope of application of the Brussels Ia Regulation: it triggers the application of the rules provided therein and sets out the boundaries between the field of 'civil and commercial matters' and other branches of law subject to other pieces of EU legislation, treaties, conventions or (residually) to the domestic rules of the Member States.

Article 1(1) provides that the Brussels Regime applies

« […] *in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)* ».

At the outset, it bears noticing that the determination of the scope of application of the Brussels Ia is split into two different parts: the first sentence of Article 1(1) defines the scope of application of the Brussels Regulation in 'positive' terms, whereas the second sentence specifies what does not fall within the notion of 'civil and commercial matters'.

669 Recitals 15 and 16 Brussels Ia.

670 A. DICKINSON, 'Legal certainty and the Brussels Convention – Too much of a Good Thing?', in P. DE VAREILLES-SOMMIÈRES (ed), *Forum shopping in the European Judicial Area*, Oxford, 2007, pp. 116-123. It was also submitted that, it being an extremely wide concept, legal certainty could be used as an argument for opposing conclusions. A more specific definition of legal certainty (at least as far as the point in time at which it must be considered) seems to be provided by the amendments on *lis pendens*, which, by giving relevance to a prior exclusive choice-of-forum agreement, seems to suggest that legal certainty should be referred to the moment of the business transaction's planning, rather than at a later post-dispute stage. See A. DICKINSON, E. LEIN, *The Brussels I Regulation Recast*, Oxford, 2015, p. 23.

It is provided that the Regulation applies to 'civil and commercial matters whatever the nature of the court or tribunal'. However, by adopting an approach which was deemed to be pragmatic [671], the fundamental notion of 'civil and commercial matters' is not defined either by the Brussels Ia Regulation or by its predecessors, nor solutions for the classification of that notion are provided therein, by indicating the law under which the expression should be intended [672].

Some help in identifying what is to be considered civil and commercial matters may be gleaned from the preamble to the Regulation. Recital 10 Brussels Ia (previously Recital 7 Brussels I) states that the scope of the Brussels Regulation must cover *all the main* civil and commercial matters apart from certain well-defined matters [673]. Also, the specification that the Regulation applies to actions and judgements 'whatever the nature of the court or tribunal', makes it plain that the concept 'civil and commercial matters' should not be classified as such according to the qualification of the courts seised of proceedings that handed down the judgement in the domestic system. As such, the material scope of Brussels Ia is not limited to claims brought before and judgements rendered by civil courts, since it covers also those disputes brought before administrative and criminal courts. It is also acknowledged that it is irrelevant whether proceedings are contentious or non-contentious, the Regulation covering them both [674].

Those general guidelines being provided, no other further indication is supplied in the text of the Brussels Ia Regulation to determine the actual content of the notion 'civil and commercial matters'.

In one of the first decisions rendered on the Brussels Convention, the ECJ held that, order to ensure, as far as possible, that the rights and obligations which derive from the Brussels Ia Regulation are equally and uniformly applied across the Member States, the concept of civil and commercial matters' included in Article 1(1) of the [Brussels Ia Regulation] should not be interpreted as a mere reference to the internal law of a Member State. That notion must be regarded as an autonomous concept to

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671 The Schlosser Report welcomed and deemed adequate the fact that the (then) Brussels Convention dispensed with a specific definition of 'civil and commercial matters'. Schlosser Report, p. 13.

672 The Jenard Report stresses that in doing so the draftsmen of the Convention have followed the common practice of other international treaties (likewise the Benelux Treaty of 24 November 1961 and the Preliminary Draft Convention adopted by the Special Commission of the Hague Conference on private international law, tenth session).

673 The new Recital 10 of the Brussels Ia Regulation further specifies that, in particular maintenance obligations are excluded from its scope of application, following the adoption of Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in *OJ* L7/1 . That addition witnesses the abovementioned proliferation of EU instruments of private international law within the European Union. That process is reflected in the Brussels Ia Regulation by explicitly adding new exclusions (such as that one of Article 1(2)(e), mentioned by Recital 10, regarding maintenance obligations), or listing some exclusions under a separate letter (Article 1(2)(f), addressing will and successions, whose regime is now covered by Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and of creation of a European Certificate of succession, in *OJ* 201/107 (the 'Regulation (EU) 650/2012 on succession and wills').

674 See in this sense Jenard Report, p. 9, « *The Convention also applies irrespective of whether the proceedings are contentious or non-contentious* ».

be interpreted by reference, first, to the objectives and scheme of that regulation and, second, to the general principles which stem from the corpus of the national legal systems [675].

The concept is therefore independent and is not determined by reference to any specific national legal order. Accordingly, its meaning should neither be sought in the law of the Member State of the court seised nor even in the law of the State, whether a Member State or not, governing the substance of the action. The relevance of this principle with reference to the interface between the Brussels Regime and the EIR will be addressed afterwards.

The rationale underpinning the first paragraph of Article 1 is to clarify that the Brussels Ia Regulation does not apply to what, in Latin law systems, is labelled as public law [676] (it was noted that, in this contest, commercial matters are to be considered as a *species* of civil matters [677]).

Indeed, the second part of Article 1(1) Brussels Ia purports that revenues, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta *iure imperii* [678]) are excluded from the scope of the Brussels Ia Regulation [679].

For the purposes set out in this study, it is not useful to dwell on the extensive (and difficult to systematise) jurisprudence on that topic. Suffice here to say that, when faced with the interpretation of Article 1(1), the ECJ - rather than defining the scope of the Brussels Regime in positive terms - concerned itself mostly with the identification of those situations that are excluded therefrom (and it could not be differently, as the preliminary question referred to the concerned whether a certain action or judgement falls within the scope of application of the Brussels Regime).

Briefly recalled, according to the Court's settled case-law, in order to determine whether a claim (or a judgement) falls within the concept of civil matters for the purposes of Article 1(1) Brussels Ia it is necessary to identify *(i)* the elements which characterise the nature of the legal relationship between

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675 ECJ, 14 October 1976, Case C-29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol*, ECLI:EU:C:1976:137. And, more recently, in ECJ, 9 March 2017, Case C-551/15, *Pula Parking*, EU:C:2017:193, at [33].

676 The same definition is also used in the European Enforcement Order Regulation for uncontested claims (Regulation EC No 805/2004) and the European Order for Payment Procedure Regulation (Regulation EC no 1896/2006, in which 'civil and commercial matters' are defined via the exclusion of acta *iure imperii*. The basic concept should be construed in such a way as to allow the same definition in all these parallel instruments. B. Hess, T. Pfeiffer, P. Schlosser, *cit.*, at [66].

677 A. DICKINSON, E. LEIN, *The Brussels I Regulation Recast*, Oxford, 2015, p. 62.

678 Incidentally it may be observed that the addition of the wording 'acta iure imperii' into Art 1(1) Brussels Ia Regulation, was made in the recasting process in order to embed therein the ECJ jurisprudence concerning State immunity.

679 Since the distinction between private law and public law was well known among the six founding Member States signing the Brussels Convention of 1968, the original wording of Article 1(1) was unanimously regarded as excluding from the scope of application of the Brussels Convention matters relating to public policy. Following the accession of the United Kingdom and Ireland to the European Communities in 1975 - to the legal systems of which the traditional features of public law are unknown - a second sentence was added to the original formulation of Article 1(1) Brussels Convention, declaring that '*revenue, customs or administrative matters*' were excluded from the material scope of the Convention. The inclusion of those expressions was not intended to further reduce the scope of Article 1(1) of the Brussels Convention, envisaging only a purely declaratory clarification, according to which those public law matters are not 'civil' for the purposes of the Convention. See Schlosser Report, at [24].

the parties to the dispute and *(ii)* to examine the basis and the detailed rules governing the exercise of the action [680].

As to the first condition, the ECJ seems prone to disregard the s.c. 'organic criterion', not being determinative whether a public authority is party to the proceedings [681]. Instead, by adopting a functional test [682], what has to be ascertained is whether the public authority acts exercising « *powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals* » [683]. As to the second criterion, it was found that the ECJ seems to mistrust a formalistic approach based on the mere qualification of the action, which may stem from ordinary rules of private law (for instance, liability, compensation, restitution), focusing instead on the legal relationship, public or private, underlying the case [684].

While Article 1(1) provides for a horizontal demarcation of the Brussels Regime's scope of application, specifying what falls outside of the field of civil and commercial matters, Article 1(2) proceeds with a vertical distinction, excluding from its sphere some matters that, albeit raising questions of civil and commercial nature, if included would have entailed giving a positive definition of the scope of the Brussels Regulation [685].

Article 1(2) reads

« *This Regulation shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons,*

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680 Among the most recent cases see ECJ, 18 February 2918, Case C-597/17, *BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v. Gradbeništvo Korana d.o.o.*, ECLI:EU:C:2019:162 at [48]; ECJ, 11 April 2013, *Sapir and Others*, C-645/11, EU:C:2013:228, at [32] and [34]; ECJ, 12 September 2013, *Sunico and Others*, C-49/12, EU:C:2013:545, at [35]. G. VAN CALSTER, 'BUAK. The concept of 'court' (Article 267 TFEU), 'civil and commercial', and the social security exception in the Brussels I Recast', in *gavclaw.com*, argued that the formula to determine what is a civil and commercial matter for the purposes of Article 1(1) Brussels Iais still unclear. Some cases exclude some legal actions by reason either of the legal relationships between the parties to the action *or* of the subject matter of the action. On the contrary, other decisions seem to focus firstly on the legal relationship between the parties to the dispute, but (also) secondly on the basis and the detailed rules governing the bringing of the action.

681 As noted by French scholars, since public authorities may have the right to choose whether in carrying out their functions they wish to use a method of 'sovereign act' or merely to conclude a private transaction, relying solely on this criterion would be likely to extend inappropriately the scope of the public law exception with regard to State bodies acting as mere traders. See H. MUIR WATT and E. PATAUT, 'Les actes iure imperii et le règlement Brussels 1', in *Revue critique du droit international privé*, 2008, p. 61.

682 A. DICKINSON, E. LEIN, *The Brussels I Regulation Recast*, Oxford, 2015, p. 63.

683 ECJ, 15 November 2018, Case C-308/17, *Hellenische Republik v Leo Kuhn*, ECLI:EU:C:2018:911; ECJ, 23 October 2014, Case C-302/13, *flyLAL-Lithuanian Airlines*, EU:C:2014:2319, at [31]; ECJ, 1 October 2002, Case C-167/00, *Verein für Konsumenteninformation v. Karl Heinz Henkel*, ECLI:EU:C:2002:555, at [25], ECJ, 15 May 2003, Case 266/2001, *Préservatrice foncière TIARD SA v Staat der Nederlanden*, ECLI:EU:C:2003:282, at [30]; ECJ, 16 December 1980, Case C-814/79 *Netherlands State v Reinhold Rüffer*, ECLI:EU:C:1980:291, at [8]; ECJ, 21 April 1993, Case C-172/91, *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, ECLI:EU:C:1993:144, at [20].

684 P. ROGERSON, 'under Article 1', in *Brussels I Regulation, European Commentaries on Private International Law*, Sellier, 2007, p. 51 et s.

685 Jenard Report, p. 10.

judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration; (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (f) wills and succession, including maintenance obligations arising by reason of death ».

As stated by the explanatory reports to the Brussels Convention, apart from reasons of celerity in elaborating the text, the rationale underlying these exclusions was twofold.

On the one hand, some issues were the subject matter of other international instruments (for instance, arbitration, which is governed by the New York Convention of 1958). On the other hand, some topics were governed among the Member States by domestic and private international law rules divergent to such an extent that it was not felt possible to provide for uniform rules in those fields[686].

For what matters here, Article 1(2)(b) Brussels Ia carves out from its scope of operation the field of insolvency.

Such an exclusion was envisaged since the very first draft of the Brussels Convention of 1968 and was subsequently reproduced in identical terms in the subsequent amendments to which the Brussels Convention was subject due to the accession of new Member States, and then in the Brussels I Regulation.

As already explained, the *rationale* underlying the choice of the working party here was the acknowledgement that insolvency is a field of law with such particular characteristics that it required the adoption of a specific convention [(687)].

It is worth of notice that, in explaining the meaning to be given to the expression 'faillites, concordats et autres procedures analogues' [(688)], the Jenard Report [(689)] used the same definition put forward by the explanatory report to the Preliminary Draft Convention as it stood in 1970. Both the Jenard Report [(690)] and the Lemontey Report [(691)] define the scope of the Insolvency Exception and of the Preliminary Draft Convention respectively as concerning proceedings that « *according to the various laws*

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686 The current text of Article 1(2) Brussels Ia Regulation mirrors the developments within the legislative framework of the European Union, whose attention towards instruments dealing with specific matters have increased over the years. It now explicitly excludes from the scope of application of the Brussels I bis Regulation those new fields that have become the subject matter of separate European instruments since 2001. Therefore, amendments to the numbering of paragraphs and lettering the subparagraphs of the second paragraph were necessary.

687 See Jenard Report, p. 9.

688 Originally, the wording of art. 1(2)(2) Brussels Convention in the version approved by the six Member States in 1986 was coherent in the different linguistic versions of the provision (in French, it read 'faillites, concordats et autres procedures analogues'; in Italian, 'fallimenti, concordati e altre procedure analoghe'; in German 'Konkurse, Vergleiche und ähnliche Verfahre'; in Dutch 'het faillissement, akkoorden en andere soortgelijke procedures'). As it will be explained further in this paragraph, the accession of the United Kingdom and Ireland raised some concern with that wording, which lead to a different formulation of the English version of that provision.

689 P. JENARD, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968, in *Official Journal,* C. 59, 5 March 1979. Also published in *Bulletin of the European Communities Supplement*, 12/79.

690 See Jenard Report at pp. 9-10.

691 See *supra*, Section 1, §§ I.2 and I.3.

of the Contracting Parties relating to debtors who have declared themselves unable to meet their liabilities, which involve the intervention of the courts culminating in the compulsory liquidation of the assets in the interest of the general body of creditors of the person, or at least in supervision by the courts ».

Also, it is important to note that the Jenard Report addressed the relationship between the Brussels Convention and the (then) Preliminary Draft Convention in terms of mutual exclusiveness, specifying that

- out-of-court settlements [692], which are grounded on the intentions of the parties to restructure the distress of the undertaking, were governed by the Brussels Convention, since they are of purely contractual nature;
- proceedings not involving organised and collective proceedings (likewise the French *déconfiture civile*) were also included in the scope of the Brussels Convention;
- proceedings relating to a bankruptcy were not necessarily excluded from the Convention. Therefore, as the Report specified, only proceedings arising directly from the bankruptcy, as exhaustively listed in the Preliminary Draft Convention, were excluded.

After ten years, following the accession of Denmark, Ireland and the United Kingdom, the Schlosser Report justified the exclusion of Article 1(2)(2) Brussels Convention by referring again to the pending negotiations of the (at that time) Draft Convention.

It was submitted again that the two conventions were intended to dovetail almost completely with each other. To this aim,

« *efforts are being made* […] *to enumerate in detail all the principal and secondary proceedings* [693] *involved and so to eliminate any problems of interpretation* […] *The basic types of proceedings that are subject to bankruptcy law* […] *there are only a very few examples of proceedings of this kind* […]. *A list enumerating the proceedings according to the types of proceedings and the States concerned is reproduced in Annex A to this report. The enumeration in Article 17 of the Draft Convention cannot before that convention has come into force be used for the interpretation of Article 1(2)(2) of the* [Brussels Convention]. *Article 17 mentions the kind of proceedings especially closely connected with bankruptcy where the courts of the State where the bankruptcy proceedings are opened are to have exclusive jurisdiction. It is not desirable at this stage to prescribe this list, or even an amended list, as binding* » [694].

As emerges from the Schlosser Report, as long as the Draft Convention had not come into force, the application of Article 1(2) (2) of the 1968 Convention remained difficult, since its precise scope seemed to necessarily be construed on the basis of the convention on insolvency.

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692 The Jenard Report refers to '*concordat amiable*', p. 10.

693 It must be noted that it is not entirely clear what is meant in the Schlosser Report with 'secondary proceedings'. Since the Draft Convention was still inspired to the principle of unity (and universalism) of insolvency proceedings, that expression cannot be understood as referring to secondary territorial proceedings. Therefore, one may only assume that by 'secondary proceedings' the Schlosser Report addresses those insolvency-related individual proceedings that were listed in Article 17 of the Draft Convention (and to which the Schlosser Report further refers to).

694 Schlosser Report, at [53]

The accession to the European Community of States of common law system entailed formulating the English version of the Insolvency Exception in different terms. That was due to the fact that in those Member States the insolvency of companies was dealt with in a fundamentally different way, mainly through winding-up, which is not a special bankruptcy procedure, but a legal concept which can take different forms and serve different purposes. Therefore, the formula 'faillite, concordats et autres procédures analogues' could not match the insolvency proceedings provided in Common-law systems. In the light of said divergence, it was decided to draft only the English version of Article 1(2)(2) in different terms in order to include also common law winding-up [695] within the notion of bankruptcy for the purposes of the Brussels Convention (whereas it was not deemed necessary amending the other versions).

Nine years passed and, as was seen, Phase I of the Bankruptcy Project reached a state of deadlock. The negotiations on the Draft Convention, which until that moment had been a crucial reference for interpreting the Insolvency Exception were discreetly abandoned, due to the criticisms and the resistance on the part of several Member States.

That notwithstanding, the Evrigenis-Kerameus Report still mentioned the Insolvency Exception. Of course, it did not provide for any guideline as to its interpretation or its relationship with any hypothetical Convention on insolvency proceedings (as nothing in the text of Article 1(2)(2) Brussels Convention was amended), limiting itself to state that « *these matters had to be excluded given that the Member States of the Community intended, and still intend, to draft a separate Community bankruptcy convention* » [696].

Lacking any further development of the Insolvency Project, it is not surprising that the following Almeida-Desantes Real-Jenard Report (that, significantly, among its authors envisaged also the same author of the first report on the text of the Brussels Convention of 1968) did not even mention the relation of the Insolvency Exception with the Insolvency Convention.

In the light of the above, the reasons put forward in the first two explanatory reports as regards the exclusion of bankruptcy from the scope of the Brussels Convention were founded on the fact that at that time the (Preliminary) Draft Convention together with the Brussels Convention established a

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695 The Schlosser Report highlighted that the broad term 'winding up' was regarded as a compromise solution. As explained by the Schlosser Report, there are three forms of winding-up: (i) compulsory winding-up by the court, (ii) voluntary winding-up and (iii) voluntary winding-up subject to the supervision of the court. Only the first involves the intervention of the court. It was agreed that voluntary winding-up and winding-up subject to the supervision of the court could not equate insolvency proceedings within the meaning of the Insolvency Exception. Therefore, they were included in the scope of the Brussels Convention. As to winding-up by the court, its inclusion *tout court* within the Insolvency Exception raised some concern. Since it may be opened on the ground of several circumstances, of which insolvency is only one, the working party decided that the only alternative was to ascertain the determining factor in the winding-up in each particular case. Accordingly, in case a winding-up in the United Kingdom or Ireland was based on a ground other than the insolvency of the company, the court concerned with recognition and enforcement in another Contracting State would have to examine whether the company was not insolvent. Only if it believed that the company was solvent, the Brussels Convention would have applied. See Schlosser Report at [57].

696 See the Evrigenis-Kerameus Report, at [34].

'closed system' in which the two conventions fit perfectly together (apart from the exclusion *ratione personae* of certain specific categories).

II.2.4. Few rudimental notions on the rules of jurisdiction, and recognition and enforcement under the Brussels Ia Regulation

It goes beyond the scope of this research to analyse in further detail the Brussels Ia Regulation [697]. Nevertheless, before concluding this section on the regime on civil and commercial matters, it is worth providing few minimal hints on the regimes of jurisdiction and recognition and enforcement under the Brussels Ia Regulation, as they will be recalled elsewhere in the course of the present work.

II.2.4.1. Jurisdiction at a glance

The rules on jurisdiction are set out in Chapter II Brussels Ia , headed 'jurisdiction', that, in turn, is divided into ten sections devoted respectively to general provision, special jurisdiction, jurisdiction relating to insurance, jurisdiction over consumer contracts, jurisdiction over individual contracts of employment, exclusive jurisdiction, prorogation of jurisdiction, examination as to jurisdiction and admissibility, *lis pendens* and related actions and provisional, including protective, measures.

The Brussels Ia system provides for a fixed hierarchy of fora where there is a general forum - always applicable, except in cases of exclusive jurisdiction - and a series of special jurisdictions which may derogate from the general principle, in case of specific subject matters that reveal a stronger connection to another forum than to the defendant's domicile.

For present purposes, suffice here to say that the general rule of jurisdiction, provided by Article 4 Brussels Ia , is that the courts of the Member State in which the defendant is domiciled have jurisdiction to hear the dispute, regardless of the defendant's nationality (principle of the *actor sequitur forum rei*). That being a rule establishing only international jurisdiction, the territorial allocation of competence among the courts of the relevant Member State is deferred to the national rules on venues. Article 6 Brussels Ia specifies that in the event that the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State.

The definition of domicile is provided by Articles 62 and 63 Brussels Ia . The former deals with the domicile of individuals and refers to the different national systems. The latter provides for a substantial definition of the domicile of companies or other legal entities (corresponding to the place where it has its statutory seat, central administration, or principal place of business).

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[697] On the Brussels Ia Regulation see for literature, *ex multis* E. LEIN, A. DICKINSON, *The Brussels I Regulation Recast*, Oxford, 2015. U. MAGNUS and P. MANKOWSKI, *Brussels Ibis Regulation, Munich*, 2015. F. MOSCONI and C. CAMPIGLIO, *Lezioni di diritto private e proessuale*, Torino, 2017. T. HARTLEY, *Civil Jurisdiction and Judgments in Europe*, Oxford, 2013; E. GUINCHARD, *Le nouveau règlement Bruxelles I bis: Règlement n°1215/2012 du 12 décembre concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commercial*e, Bruxelles, 2014.

Exceptions to the rule of the defendant's forum are provided in Articles 7-9 Brussels Ia , pursuant to which heads of special jurisdiction exist besides the general principle of the defendant's forum.
Among others, reference should be made here to Article 7(1), reading that
« *A person domiciled in a Member State may be sued in another Member State:*
(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided ».
Also, it could be also worth recalling that special jurisdiction exists pursuant to Article 7(2)
« *in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur* ».
For the sake of completeness, it must also be mentioned that Article 22 Brussels Ia governs those cases in which the courts of a Member State have jurisdiction regardless of the domicile of the parties to the action. That specific regime of jurisdiction applies then to socially and economically weaker parties domiciled within a Member State. The protection of those weaker parties is ensured through the provision that they must be sued only in their home State. At the same time, as set forth by Articles 11(1) and 18(2) Brussels Ia insured persons and consumers may bring an action also in the State where they are domiciled [698].
Finally, Article 25 Brussels Ia provides that, under certain conditions, also the autonomy of the parties may warrant a different connecting factor, by virtue of choice-of-courts agreements.
From the above considerations it emerges, that, differently from the Insolvency Regulation (which is based on the exclusive forum of the debtor's COMI), the jurisdictional regime of the Brussels Ia Regulation (alike its predecessors) provides for a plurality of fora which may be seised.

II.2.4.2. The rules on recognition and enforcement

Recognition and enforcement are governed in Chapter III of the Brussels Ia Regulation.
As a rule of thumb, judgments given (and judicial settlements approved) by a court or a tribunal of a Member State, provided that the subject matter of the judgement falls within the scope of Brussels Ia [699], shall be

(i) recognised in any other Member State without any special procedure being required, and, when appropriate, it must be enforced;

(ii) enforceable in any other Member State without any declaration of enforceability being required, under the proviso that they are enforceable in the State of origin.

698 Whereas employees are not given the same possibility under Article 22(1).
699 ECJ, 4 February 1988, Case 145/86, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECLI:EU:C:1988:61.

The notion of 'judgement' is defined by Article 2(a) EIR as any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. Besides, pursuant to Article 2(b) Brussel Ia , a 'court settlements' is 'a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings' [700].

It is important that, for the purpose of recognition and enforcement, a judgement must be rendered by a 'court or a tribunal of a Member State'.

As mentioned above, one of the most significant innovations brought by the recast of Brussels I lies with the abolition of the *exequatur* (*i.e.* the civil-law procedure under which it is necessary to obtain a judicial order granting the permission to enforce a foreign judgement).

Under the current regime, therefore, the judgement creditor is not requested anymore to obtain an enforcement order. He must only serve the judgement - that needs in any case to be enforceable under the Member State of origin [701] - along with the certificate provided by Article 35 on the party against whom enforcement is sought, before the first enforcement is commenced.

To the protection of the judgement debtor, however, still stands the possibility to challenge the enforcement if one of the grounds for refusal specified in Article 45 is established [702].

As under the EIR, the basic principles informing the provision of recognition and enforcement under Brussel Ia are the prohibition of the *révision au fond* [703] and that the court addressed is not entitled to decide for itself whether the court of origin had jurisdiction under Brussel Ia.

That being said, grounds for refusal of the recognition or enforcement of a judgment are listed in Article 45 Brussel Ia, although other grounds of refusal which are not among, but which result from other provisions of the Regulation [704].

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700 ECJ, 2 June 1994, Case C-414/92, *Solo Kleinmotoren GmbH v Emilio Boch*, ECLI:EU:C:1994:22.

701 ECJ, 13 October 2011, Case C-139/10, *Prism Investments BV v. Jaap Anne van der Meer*, ECLI:EU:C:2011:653.

702 Under article 45 Brussels Ia recognition could be denied when (i) it would be manifestly contrary to public policy (*ordre public*) in the Member State addressed; (ii) the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (iii) the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed; (iv) the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; (v) that the judgment conflicts with the special jurisdictional provisions on insurance, consumers or employees in Sections 3, 4 or 5 of Chapter II of Brussels Ia (protective jurisdiction) where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or (vi) that the judgment conflicts with the provisions on exclusive jurisdiction in Section 6 of Chapter II of Brussels Ia .

703 Art. 52 Brussels Ia reads « *Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed* ».

704 Among others, it is disputed whether the fact that the judgment falls outside the material scope of the Regulation (to be instead governed by another EU Regulation) may be regarded as a ground for refusal of recognition (see *infra* Chapter V).

The different grounds can be traced back to two main concerns (and accordingly they can be grouped into two categories): on the one hand, the need for a harmonious and coordinated free circulation of judgements within the European judicial area and the need to protect the fundamental values of the national legal systems (in terms of both substance and procedure), on the other.

Starting from the latter, it has already been said that free circulation of judgement is one of the pillars in the scheme of the Brussels Regulation, as a measure pursuing the objective of maintaining and developing an area of freedom, security and justice. In this regard, the risk of irreconcilable judgements must be seen as undermining the objective of creating a common judicial area in which a given legal situation should be heard and decided by a single national court, whose decision is intended to have the same effects throughout the European Union. The rules on jurisdiction that were dealt with in the previous paragraph respond precisely to this exigence.

However, the rules on judicial cooperation in civil matters have not completely removed the possibility that two courts from different Member States are seised with the same dispute. Irreconcilable judgements may be rendered, for instance, in case of malfunctioning of the mechanism for resolving cases of *lis pendens* and related action (provided under Section 9 Brussels Ia) since coordination is still based on spontaneous cooperation left to the impulse of the interested party.

For this reason, Article 45(iv) and (v) Brussels Ia provides for a systemic 'valve', avoiding that recognition (or enforcement) is granted to a judgement that is irreconcilable with another judgement handed down between the same parties either by the courts of the Member State addressed or in another Member State [705].

The second 'category' of grounds for refusal of recognition may be all related to the universal principle of 'public policy', which was extensively dealt with above in relation to the Insolvency Regulation [706].

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705 Because 'local conflicts' (*i.e.* a foreign judgement which contrasts with a judgement rendered by the courts of the Member State where recognition is sought) are regarded as more serious, the conditions for non-recognition in this case are more stringent. Indeed, refusal of recognition depends exclusively upon the fact that the two judgements are rendered between the same parties, irrespectively of which one was handed down first. In case of 'external contrast' (*i.e.* a foreign judgement for which recognition is sought contrasts with a judgement that was not handed down by the courts of the addressed Member State) the condition for refusal of recognition are more loosened. The provision requires that the two judgements involve the same cause of action and the same parties, and that the decision for which recognition is sought had been given after the other decision.

706 See *supra* at § Section II, § II.1.4. It may be added here that Brussels Ia provides for a specific ground which may be regarded as relating to the concept of public procedural policy. It is provided that foreign judgments are not recognisable if the defendant has not been out in the condition to participate to proceedings, for the document which instituted the proceedings or with an equivalent document was not served in sufficient time to a party arrange his defence (s.c. 'default judgement'. See ECJ, 28 March 2000, Case C- C-7/98, *Dieter Krombach v. André Bamberski*, ECLI:EU:C:2000:164). Unless defendant could have commenced proceedings in the Member State of origin to have the judgment set aside, and did not do so (ECJ, 16 June 1982, Case C-166/80, *Peter Klomps v .Karl Michel*, Case C-166/80, ECLI:EU:C:1981:137, at [14]–[21], ECJ, 10 October 1996, Case C-78/95, *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, ECLI:EU:C:1996:380; ECJ, 11 June 1985, Case 49/84, *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, ECLI:EU:C:1985:252)

Eventually, it may be observed that as far as recognition and enforcement of a court settlement is concerned (which reflects a 'collective' dimension much more similar to that one of insolvency proceedings, rather than the adversarial structure claimant v. defendant of judgements) it may be refused on the sole ground that such enforcement is manifestly contrary to public policy in the Member State addressed, as happens for judgements under the EIR [707].

II.2.3. The Lugano Convention

As part of the legislative framework, it is worth to briefly mention also the Lugano Convention, which has reflected the evolution of the Brussels Convention.

In order to extend to the Member States of EFTA the judicial cooperation established with the Brussels Convention, on 1988 a substantially identical convention was signed between the (then) sixteen Member States of the Community and the six EFTA States [708].

In 2007, following the replacement of the Brussels Convention by the Brussels I Regulation, a new convention was signed between the (then) European Community and the EFTA States, thus aligning the Lugano Convention with the new Regulation (the 'Lugano Convention') [709]. However, the following revisions brought by the Brussels Ia Regulation have not been adopted within the EFTA (therefore the Lugano Convention still reflects the provisions of Brussels I).

The fact that in 2007 the EC was a signatory party to the Lugano Convention [710], marked the significant consequence that the courts of the Member States could refer to the ECJ for preliminary rulings on the Lugano Convention, as it became a part of the *acquis communautaire* [711]. With the further possibility of extending to the rules of the latter the previous interpretation given by the ECJ with respect to the corresponding rules of the Brussels Convention with identical wording. Acknowledging the need for uniform interpretation of the convention also on the part of the non-EU contracting States (*i.e.* Iceland, Norway, Switzerland) and Denmark [712], protocol 2 to the Lugano Convention provided that

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707 See *supra* Section II, § II.1.4.

708 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 16 September 1988, *Official Journal*, 1988, L. 319.

709 Y. DONZALLAZ, *La Convention du Lugano du 16 septembre 1988 concernant la compétence judiciaire ed l'exécution des décisions en matière civile et commerciale*, Berne, 1996; F. DASSER, P. OBERHAMMER, *Kommentar zum Lugano-Ubereinkommen*, Bern, 2008; D. MAVROMATI, R. RODRIGUEZ, 'The revised Lugano Convention from a swiss perspective', in *Eur. Bus. law. Rev.*, 2009, pp. 579-590.

710 Under the convention signed on 1988, the EC was not a contracting party. Because of that it was precluded to extend to that Convention the centralised interpretative jurisdiction of the ECJ. Yet, a protocol on the uniform interpretation provided that the courts of each Contracting State should, when applying and interpreting the provisions of the convention, pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention.

711 See Opinion 1/03, ECLI:EU:C:2006:81; [2006] ECR I-1145.

712 On the position of Denmark as regards EU acts falling within the scope of Title IV EC Treaty see *supra* Section II § II.1.2.3. The Lugano Convention was separately ratified by Denmark on 24 September 2009.

« *Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention rendered by the courts of the States* […] *by the Court of Justice of the European Communities* ».

It is important to note that the courts of the EFTA States have no obligation to conform their decisions to the interpretation provided by the ECJ on the Lugano Convention and the Brussels Convention, since the protocol only requires that they must be taken into due account. In this respect, it bears observing that whenever the interpretation of Brussels Ia is evidently influenced by a systematic consideration of European law as a whole, the courts of the EFTA States may deviate from the ECJ's case-law, as they are not bound by other European instruments (713).

Therefore, when the Court's judgements refer to the mutual interplay between the EIR and the Brussels Regime the EFTA courts are substantially allowed to depart from the interpretation bolstered therein.

In this respect it may be observed that on several occasions, the Federal Swiss courts and Norwegian courts had decided on the exception of Article 1(2)(2) Lugano Convention (whose wording is identical to the Insolvency Exception of Brussels Ia), generally conforming with the *Gourdain* case-law (714).

SECTION 3

THE BOUNDARIES BETWEEN THE INSOLVENCY REGULATION AND THE BRUSSELS REGULATION: OUTLINE OF THE PROBLEM

CONTENTS: III.1. The European framework of private international law - III.2. The issue of characterisation of European conflict of law rules - III.3. The boundaries between the Brussels Regime and the EIR: outline of the problem - III.4. The 'collective dimension' of the problem - III.1.1. The systematic interpretation of the scopes of the Insolvency Regulation and the Brussels Ia Regulation: a truly coextended area? – III.4.2. The role of Annex A as an additional obstacle to dovetailing.

713 That position was recently expressed by the Swiss Federal Court, which held that « *pour assurer une interprétation aussi uniforme que possible de la CL, il y a lieu de tenir compte de la jurisprudence rendue au sujet de ce traité dans les autres États contractants, ainsi que de la jurisprudence de la CJCE et des tribunaux des États membres de l'Union européenne relative aux dispositions analogues de la Convention de Bruxelles de 1968 et du Règlement n° 44/2001. Mais l'interprétation de la CL ne saurait dépendre, même indirectement, du sens donné par la jurisprudence et la doctrine européennes au Règlement n° 1346/2000, dès lors que la Suisse n'est pas liée par ce dernier texte, qui traite de questions qu'elle n'a précisément pas voulu régler dans la CL* ». See Bundesgericht, 15 December 2004, BGE 131 III 227 S. 235, available at https://www.bger.ch.

714 See *infra* § Chapter V. *Contra* B. HESS, 'The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit', in *MPILux Research Paper*, 2018.

After having reconstructed, albeit in summary, the genesis and main characteristics of the two normative instruments providing the legal framework for the issues of interest here, it is now necessary to shift the attention to some general questions of EU law, that are useful to grasp some additional profiles that represent a pivotal stepping stone for the present study.

III.1. The European framework of private international law

Following the Treaty of Amsterdam, the process of comunitarisation led to the outburst of legislative activity in the field of international procedural law.

Under the new competences of Articles 61 and 65 EC Treaty, based on the objective of creating a space of freedom security and justice, two different 'generations' of Community instruments may be distinguished. The first one aims at guaranteeing cross-border cooperation in civil matters, without any ambition to provide for uniform procedures at a Community level or harmonization of national procedures. Those regulations are grounded upon the old paradigm of the exequatur proceedings and, as such, they must be intended as traditional private international law instruments. The Brussels Ia Regulation and the Insolvency Regulation are comprised in that first group (715).

Under the Hague Program of 2004 (716), the European Union has also implemented a different kind of instruments, which provide for a separate and comprehensive procedure in specific fields (717).

It follows that from 2002 onwards, the European Union faced the rapid emergence of a common European framework of private international law (718).

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715 Further instruments of the first generation are Regulation (EC) No 1347/2000 since replaced by Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, in *Official Journal* L.338/1, 2003 (the 'Regulation (EC) 2201/2003 on matrimonial matters'); Regulation (EC) No. 1348/2000 on the service of documents, in *Official Journal,* L.160/37, 2000, and Regulation (EC) No. 1206/2001 on the taking of evidence abroad, in *Official Journal*, L.174/1, 2001. More recently were enacted the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in *Official Journal* L.7/1, 2009 (the 'Regulation (EC) 4/2009 on maintenance obligations'); Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, in *Official Journal*, L.181/4, 2013; Council Regulation (EU) No 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, in *Official Journal*, L.183, 2016; Council Regulation (EU) No 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, in *Official Journal*, L. 183, 2016.

716 The Hague Programme: strengthening freedom, security and justice in the European Union of the Council, in *Official Journal*, C. 53/1, 2005.

717 Those regulations of 'second generation' are, *inter alia*, Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims, in *Official Journal*, L.143/15, 2004; Regulation (EC) No 1896/2006 creating a European order for payment procedure, in *Official Journal*, L.399/1, 2006; Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, in *Official Journal*, L.199/1, 2007; Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in *Official Journal*, L.201/107, 2012. See B. HESS, T, PFEIFFER, P. SCHLOSSER, *Report on the Application of Regulation Brussels I in the Member States*, 2007, at [63] and [64].

718 For literature on this subject see R. LUZZATTO, 'Riflessioni sulla cd. comunitarizzazione del diritto internazionale privato', in G. VENTURINI, S. BARIATTI (eds.), *Nuovi strumenti del diritto internazionale privato. Liber*

The introduction of new instruments brought up the need for their coherent and uniform interpretation by the ECJ and national judges. The European regulations must be considered as instruments of integration of the European procedural law, aiming at implementing a comprehensive policy of the European Judicial Area (719).

In this context, the creation of a Community framework of international private law is not without consequences on the role of the Brussels Ia Regulation, whose significance and functions have evolved against this changing background.

The Brussels Convention being the unique instrument of judicial cooperation, at the outset it served as a traditional instrument of private international law, loosely related with other Community acts, providing a system of comprehensive rules on jurisdiction and recognition.

Under this perspective, its primary function was the coordination of national proceedings and, therefore, its scope of application was constructed according to a vertical demarcation between the EU law and the application of the national laws in the fields that were excluded therefrom, via the exceptions provided by its Article 1(2).

It is noteworthy that the subject matters excluded from the general applicability of Brussels I were interpreted rather extensively by the ECJ despite a lack of a uniform EU regime (720), so that the national laws of the Member States still had a wide array of application in those areas (721).

The appearance of other instruments dealing with private international law issues in other fields of law (namely, those excluded from Brussels I) has overturned that scenario.

Under the new European policy, the role of the Brussels I Regulation has significantly changed.

Firstly, some scholars have (arguably) maintained that, while its task of coordination of national procedures still stands, the introduction of new regulations ended-up in reducing the functions of Brussels I, which against that changing scenario was to be considered as playing a residual role, especially with reference to the free movement of titles, limited to those cases where a new more specialised regulation proved to be incomplete or not applicable (722).

Fausto Pocar, Milano, 2009, p. 613 ff.; K. BOELE-WOELKI -R. H. VAN OOIK, 'The Communitarization of Private International Law', in *Yearbook Priv. Int. Law*, 2002, p. 1 ff.; M. FALLON, P. LAGARDE, S. POILLOT PERUZZETTO, *Quelle architecture pour un code européen de droit international privé*?, Bruxelles, 2011, F. POCAR, 'La comunitarizzazione del diritto internazionale privato: una "European conflict of laws revolution?", in *Riv. dir. int. priv. proc.,* 2000, p. 873 ss. M. WELLER, 'Mutual trust: in search of the future of European Union private international law', in *Journal of Private International Law*, 2015, p. 64 ss.

719 See B. HESS, T, PFEIFFER, P. SCHLOSSER, Report on the Application of Regulation Brussels I in the Member States, 2007, p. 27 quoting among others ECJ, 8 November 2005, Case C-443/03, *Götz Leffler v. Berlin Chemie* AG, ECLI:EU:C:2005:665, at [45].

720 See for instance, ECJ, 22 February 1979, Case C-133/78, *Henry Gourdain v. Franz Nadler* ECLI:EU:C:1979:49 and ECJ, 2 July 2009, Case C-111/08, *SCT Industri AB I likvidation v. Alpenblume AB*, ECLI ECLI:EU:C:2009:419, ECJ, 27 March 1979, Case C-143/78, *De Cavel v. De Cavel*, in ECLI:EU:C:1979:83.

721 A. DICKINSON, E. LEIN, *op. cit.*, p. 68.

722 B. HESS, in B. HESS T, PFEIFFER, P. SCHLOSSER, *Report on the Application of Regulation Brussels I in the Member States*, 2007, p. 65, who states that the Brussels Regulation's practical importance « *is reducing, as it is supplemented by specialised instruments, which shall further simplify cross-border proceedings, especially the free movement of titles in Europe* ».

The idea that the practical importance of the Brussels I Regulation was reduced as a result of the enactment of supplementing regulations, however, seems to be somewhat contradicted by the fact that the ECJ jurisprudence does not seem to have interpreted its scope of application extensively (so to divert from national law rules the regulation of the field excluded from it). Instead, it construed rather broadly the exceptions set forth by Article 1(2) thereof.

The new instruments, then, are to be considered as complementary of the system designed by Brussels I, so that each instrument should fit harmoniously into its own *niche*.

Secondly, under a different perspective, the importance of Brussels I has increased since many of the provisions set out by the parallel regulations refer directly to it. As an example, in addition to Article 25 EIR (that extends the Brussels I's regime of recognition to insolvency proceedings [723], Article 6 of Regulation (EC) No. 1896/2006 creating a European order for payment procedure may be recalled here, as it provides that its jurisdictional regime should be determined in accordance with the relevant rules of European law, in particular Brussels I.

Those 'fall back-provisions' [724] demonstrate that the Brussels I Regulation has been taken as a term of reference for the drafting of the new instruments and this emphasises its role as a determinative instrument in the European legal space.

Thirdly, the benchmark-role of the Brussels Regime emerges also with reference to the characterisation of some concepts used therein. When used also in other regulations, the definitions provided by Brussels I are regarded as providing a term of comparison for the interpretation of the other provisions, if not uniformly interpreted across the fields of the European procedural rules.

In that constellation, the purpose of Article 1(2) Brussels I shifted from the abovementioned vertical demarcation to a horizontal delimitation between different EU instruments [725]. Indeed, the construction of the exceptions provided therein should not be regarded anymore as referring to national laws, but primarily as deferring to the other EU Regulations now uniformly disciplining those fields that were excluded from the substantive scope of Brussels I.

It bears observing that in recent years, probably due to the abovementioned coexistence of different instruments, the Court seems to have changed its attitude towards the construction of the exceptions of Article 1(2) Brussels I (and Brussels Ia).

The new trend that seems to be gaining ground is that of a greater proneness to interpret the general scope of the Brussels I Regulation broadly, whereas the exceptions thereto should be construed narrowly [726].

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723 See *supra* Chapter II, Section 2, § II.2.4.2.

724 B. HESS, T, PFEIFFER, P. SCHLOSSER, *op. cit.*, pp. 29-30.

725 A. DICKINSON, E. LEIN, *op. cit.*, p. 68

726 In a recent case concerning the exclusion of 'rights in property arising out of a matrimonial relationship' under article 1(2)(a) Brussels I Regulation, ECJ, 6 June 2019, Case C-361/18, Ágnes Weil v. Géza Gulácsi, ECLI:EU:C:2019:473, at [43] it was held that « *In that regard, it must be borne in mind that the exclusion in Article 1(2)(a) of Regulation No 44/2001 is an exception which, as such, must be strictly interpreted. In relying on the objective of*

That would entail that the ECJ broad interpretation of the exclusions delimiting the scope of application of Brussels I has to be applied cautiously, when originated from the period before the enactment of the parallel other regulation filling in the exception [727].

In the light of the above, when considered together, the different EU instruments adopted in the last decades (should) form a nucleus of a uniform framework of rules of private international law [728]. Thereby, the success of the policy of judicial cooperation in civil matters depends mainly upon the cohesion of those different instruments and on their systematic interpretation, which should ideally draw seamless dividing lines between Brussels I and the other relevant regulations, leaving no room for national laws.

Yet, the set of instruments does not cover all kinds of civil and commercial matters, or they have not been enacted in a fully coordinated and systematic way. Gaps and overlaps between these various instruments and the Brussels I Regulation thus require careful consideration.

III.2. The issue of characterisation of European conflict of law rules

The considerations made in the previous paragraph highlight the fundamental relevance of the differentiation between scopes of application of the different European instruments.

That brings up the need to investigate the problem of characterisation of legal terms within the framework of EU international private law (*i.e.* determining the legal rule under which the facts of one given claim are to be subsumed [729]).

Regulation No 44/2001 of maintaining and developing an area of freedom, security and justice by facilitating the free movement of judgments, the Court has held that the exclusions from the scope of that regulation are exceptions which, like all exceptions, must be strictly interpreted ». As to the social security exception of article 1(2)(c), ECJ, 18 February 2918, Case C-597/17, *BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v. Gradbeništvo Korana d.o.o.*, ECLI:EU:C:2019:162 at [66] found that « *Exclusions from the scope of that regulation, provided for in Article 1(2) thereof, are exceptions which must be strictly interpreted* ». This trend seems to be imposing also in national courts. In a case brought before relating the High Court to the exclusion of wills and succession matters, in *Sana Hassib Sabbagh v. Wael Said Khoury et al.*, [2014] EWHC 3233 (Comm), Carr DBE J submitted that where Brussels I excludes or provides exceptions to the general rule that all civil and commercial matters are subject to its provisions, they must be construed strictly and not given an interpretation broader than is required by their objectives. Therefore, by way of analogy the *German Graphics* judgement (see *infra* Chapter III, Section 1, § I.3.2.) was applied (« *I am not persuaded that the statements in German Graphics are not of more general application than simply in the insolvency context* », at [257]).

727 A. DICKINSON, E. LEIN, *op. cit.*, p. 68.

728 In fact, in this regard, it was suggested to introduce a code of Community private international law. In June 2013 upon request of the Committee of legal affairs, the European Added Value Unit of the Directorate for Impact Assessment and European Added Value (a body within the Directorate General for Internal Policies of the General Secretariat of the European Parliament) released a report assessing the perspective of having a European code on private International Law (CONE 3/2013). Also, it was proposed to create a 'Rome 0 Regulation', disciplining some common issues common to the different specific instruments on conflict of law rules. See S. LEIBLE – H. UNBERATH (eds.), *Brauchen wir eine Rom 0-Verordnung*?, Munich, 2013 and M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (dir.), *Quelle architecture pour un Code européen de droit international privé ?*, Bruxelles, 2011.

729 Batiffol defines characterisation as « *Le problème de conflit des qualifications est celui de savoir selon quelle loi le juge doit qualifier l'objet du litige pour déterminer la loi qui lui est applicable quand les différentes lois en conflit adoptent des qualifications différentes* », H. BATIFOLL, *Traité élémentaire de droit international privé*, Paris, 1980, p. 476. Characterisation was also defined as the problem of « *determining which juridical concept or category is appropriate in*

In national laws, where traditionally the issue is regarded as related to a matter of interpretation of conflict of law rules, the problem focuses on the choice of law governing the characterisation (730). Briefly explained, four main theoretical approached have been developed:

(a) the first approach is based on the assumption that private international law rules are national rules (731) of a (purportedly) complete legal system, in which every legal concept used in a conflict of law rule finds its correspondent in the substantive law. Accordingly, the *lex fori* (and its domestic interpretation) is considered as better suited to interpret the meaning of those legal terms (even if it may then lead to the application of foreign law) (732);

(b) under a second interpretation, the characterisation of a legal concept must be made through the *lex causae*. Definitions and expressions used within conflict of law rules, then, are to be considered as referring to their correspondents in the foreign law. Accordingly, one must first identify the foreign law applicable through the national international private law and subsequently characterise the notion in the light of the legal system of that State (733);

(c) the third (minority) approach rejects both the application of the *lex fori* and of the *lex cause* and submits that the characterisation should be grounded on the comparative analysis of the various legal systems (734);

(d) finally, it is worth mentioning the Anglo-Saxon s.c. 'jurisdictional approach', which does not actually require the interpretation of legal notions, but only verifies the existence of the conditions for the validity of the jurisdiction and, in that case, the national law applies automatically (735).

Characterisation in European private international law has been addressed by scholars only recently (736). However, it was not prompted up by the development of European private international law in

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any given case » in L. COLLINS, C. G. J. MORSE, D. MCCLEAN CBE QC., A. BRIGGS, J. HARRIS, J. HILL and C. MCLACHLAN, *Dicey, Morris & Collins*, *The Conflict of Laws*, II, London, 2002, p. 671.

730 See N. BOSCHIERO, 'Il problema delle qualificazioni', in F. PRETE (eds.), *Atti notarili nel diritto comunitario e internazionale*, Milano-Assagofiori, 2011, p. 61. V. ALLAROUSSE, 'A Comparative Approach to the Conflict of Characterization in Private International Law', in *Case W. Res. J. Int'l L.*, 1991.

731 Among supporter of the theory of the *lex fori*, some authors believe that the rules of conflict, even if linked to the national law, have their own autonomy, also in terms of interpretation, if for no other reason than the different task performed in the two contexts (theory of autonomous characterisation).

732 The development of this doctrine is owed to F. KAHN, 'Gesetzeskollisionen, Ein Beitrag zur Lehre des internationalen Privatrechts', in *Abhandlungen IPR*, 1928, 1, p. 1-23; D. ANZILOTTI, 'Corso di lezioni di diritto internazionale', 1918, in *Corsi di diritto internazionale privato e processuale*, Padova, 1996, R. AGO, *Teoria del diritto internazionale privato*, Padova, 1934.

733 The theory based on the *lex causae* was first elaborated by French scholars. F. DESPAGNET, *De conflits de lois relatifs à la qualifications des rapports juridiques*, in *JDIP*, 1898, p. 253. WOLFF M., *Private International Law*, Oxford, 1950, 146 ss., 154 ss. It has always been objected against this theory that chategorisation represents a necessary *prius* than the identification to the foreign law. Without a preliminar characteristation it would not be even possible to identify the relevant conflict rule and therefore the applicable law.

734 E. RABEL, 'Il problema della qualificazione', in *Riv. dir. intern. priv. proc.*, 1932, p. 97.

735 See L. COLLINS, C. G. J. MORSE, D. MCCLEAN CBE QC., A. BRIGGS, J. HARRIS, J. HILL and C. MCLACHLAN, *Dicey, Morris & Collins*, *The Conflict of Laws*, II, London, 2002,

736 R. BARATTA, 'The process of characterization in the EC conflict of laws: suggesting a flexible approach', in *Yearbook of Private International Law*, VI, 2004 e S. BARIATTI, 'Qualificazione ed interpretazione nel diritto internazionale privato comunitario: prime riflessioni,' in *Riv. dir. internaz. Priv. e proc.*, 2006, p. 361; ID.,

the last decade. Actually, the ECJ was faced with the interpretation of legal terms ever since its very foundation.

In the European judicial context, it is not possible to perform the characterisation either through the *lex fori* or the *lex causae*. As to the former, intuitively it cannot operate (at least not as traditionally understood) due to the lack of an EU substantive law, capable of acting as a *lex fori Europearum*. The latter would prove to be difficult and little practicable. In particular when the EC rule is *erga omnes* the *lex cause* could lead to the application of the law of a non-EU State to categories and acts that were designed to be applied among Member States.

It seems thus fair to maintain that the characterisation method used in the context of the EU system takes on its specific features that significantly differentiate it from that applied under national laws.

Although there is no specific European legal framework concerning interpretation, some authors have submitted convincingly that there is room to argue that 'European' principles of interpretation have been progressively developed.

In this respect, it may be observed incidentally that in interpreting European acts, the ECJ applies (indirectly) the Vienna convention on treaties of 1969. Indeed, the general principles laid down in Articles 31-33 thereof may be traced in the Court's case-law, especially when interpreting some concepts and legal categories used as connecting factors in the Brussels Regulation [737].

Moving from that very jurisprudence, and in particular from the *CLIFT* judgement [738] (which is considered a milestone decision as far as the interpretation of European law is concerned) it is possible to identify a number of interpretative aids suggested by the ECJ, which can be summarised as follows.

Bearing in mind that the European Union is a multilanguage community, the first principle consists in comparing (to a reasonable extent [739]) the different language versions of the same text and in preferring a non-excessive textual interpretation.

'Characterisation', in J. BASEDOW, G. RÜHL, F. FERRARI and P. DE MIGUEL ASENSIO (eds.), *Encyclopedia of Private International law*, 2017, p. 358–365. The late interest of legal doctrine on this issue is probably due to the fact that the Community legislature has intervened only in recent years directly on conflicts of applicable law.

737 In this respect it must be observed that the Vienna convention on treaties cannot be applied directly to regulations, because they are not international treaties (but European law). Nevertheless, it may be given indirect relevance, since the Vienna convention was surely applicable to the interpretation of the Brussels Convention, which was an international treaty. See S. BARIATTI, *L'interpretazione delle convenzioni internazionali di diritto uniforme*, Padoa, 1986. See also G. VAN CALSTER, 'The EU's Tower of Babel - The Interpretation of Multilingual Texts by the European Court of Justice', in *Yearbook of European Law*, 1997.

738 ECJ, 6 October 1982, Case C-283/81, *CLIFT srl in liquidazione, lanificio di Gavalrdo S.p.A. et al. V. Ministry of health*, ECLI:EU:C:1982:335, at [18] - [20].

739 See the opinion of the Advocate General Jacobs delivered on 10 July 1997 (ECLI:EU:C:1997:352) relating to ECJ, 20 November 1997, Case C-338/95, *Wiener S.I. GmbH v Hauptzollamt Emmerich*, ECLI:EU:C:1997:552. At [65] he claims that « *comparing all versions would involve in many cases a disproportionate effort on the part of the national courts; moreover reference to all the language versions of Community provisions is a method which appears rarely to be 'applied by the Court of Justice itself, although it is far better placed to do so than the national courts. In fact the very existence of many language versions is a further reason for not adopting an excessively literal approach to the interpretation of Community provisions and for putting greater weight on the context and general scheme of the provisions and on their object and purpose* ».

As the Court stated, « *it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions* ».

For instance, for what matters here, the linguistic versions of Article 1(2)(b) Brussels Ia Regulation are not entirely in accord with one another [740], so that, pursuant to that principle, a comparison - albeit not determinative - should be made between them [741].

The second principle acknowledges that, even when the linguistic versions are all consistent, European acts use concepts and judicial notions in their own peculiar meaning, which are detached from any reference to national laws. Therefore, as a rule of thumb, the meaning of a concept used in a Community act must be construed autonomously, taking into consideration that it would not necessarily correspond to the meaning of the same concept within national laws. Such an autonomous meaning should be derived from the objectives and the schemes of the act in which the concept is used, relevance being given also to the European law as a whole, its objectives and its state of evolution at the date on which the provision concerned is to be applied [742].

The aim of the autonomous interpretation method is to dissociate European law as much as possible from national rules and their interpretation, reinforcing the idea of European law as an independent system and not as a mere sum of the Member State's legal traditions. Naturally, an autonomous interpretation also guarantees the uniform application of EU rules throughout the Member States.

However, an autonomous interpretation is not always feasible, since it requires a sufficient degree of common basic principles across Member States. In this regard, the ECJ has often used the abovementioned comparative method, gleaning the meaning of a term from a comparison of the general principles stemming from the *corpus* of national legal systems. That method did not prove to be always efficient, but where common principles existed, albeit germinal or incomplete, it made possible to identify an autonomous meaning, irrespective of any isolated discrepancy [743].

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740 See *supra* in this Chapter, Section 2, § II.2.3.

741 Recently the issue of the discrepancies of several language versions of the Insolvency Regulation was raised in the *Tarragó* case (ECJ, 6 June 2018, Case C-250/17, *Virgílio Tarragó da Silveira contro Massa Insolvente da Espírito Santo Financial Group SA*, ECLI:EU:C:2018:398).

742 The 'golden rule' of autonomous interpretation was uttered by the ECJ in a multitude of cases. For what matters here, see ECJ, 22 February 1979, Case C-133/78, *Henry Gourdain v. Franz Nadler* ECLI:EU:C:1979:49. See also, *ex plurimis* ECJ, 14 October 1976, Case C-29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol*, ECLI:EU:C:1976:134; ECJ, 6 October 1976, Case C-14/76, *De Bloos/Bouyer*, in ECLI:EU:C:1976:134; ECJ, 30 November 1976, Case C-21/76, *Handelskwerkerij G. J. Bier BV v. Mines de Potasse d'Alsace SA*, ECLI:EU:C:1976:166; ECJ, 22 November 1977, Case C-43/77, *Industrial Diamonds Supplies v. Luigi Riva*, ECLI:EU:C:1977:188; ECJ, 21 June 1978, Case C-150/77, *Bertrand v. Paul Ott KG*, ECLI:EU:C:1978:137; ECJ, 22 November 1978, Case C-33/78, *Somafer SA v. Saar- Ferngas AG*, ECLI:EU:C:1978:205.

743 In this context, then, one could look at the common basic principles across Member States (interpreted in the light of the objectives and the schemes of the Community act concerned) as a basis for a *lex fori ommunautaire,* thus approaching and adapting the *lex fori* method to the specific purposes of EU law. See S. BARIATTI, 'Qualificazione ed interpretazione nel diritto internazionale privato comunitario: prime riflessioni,' in *Riv. dir. internaz. Priv. e proc.*, 2006, p. 371.

A third principle relies on the material definitions of a specific concept directly provided by the act in which it is contained. One example that has already been mentioned is Article 2 EIR, where the Insolvency Regulation provides for specific definitions for the purposes of the EIR of the terms 'liquidator', 'court', 'judgement'.

Finally, whenever the construction of an autonomous interpretation is not possible, and no definitions are provided within the act using a certain concept, a fourth principle consists of interpreting said concept in the light of national systems (744) (in particular by reference either to the substantive notions of the *lex fori*, or the choice of law rules, or even directly identifying the material law of a specific Member State (745)).

At this point, what matters to be assessed here, as this profile will emerge more than once in the present work, is whether the interpretation given to a certain concept used in one European act could be transplanted into another act using the same concept.

In this respect, one should consider that, like in any national legal system, legal concepts may have different meanings, depending upon the schemes and objectives of the acts containing it. In principle, the more a certain meaning is specific to the relevant act, the less it could be transposed in a different context.

That being said, it is understood that, under settled case-law, the autonomous interpretation is highly recommended 'or even mandatory' (746) when a concept defines the scope of application of an act. In that case, any reference to the *lex fori* or any other domestic law would hinder the uniformity of application of the act itself across the Member States.

Such a consideration does not contradict the assumption that a legal concept may have different meanings in different contexts. Indeed, the general meaning of a concept may well be reduced by way of 'except for' clauses.

Pushing the reasoning one step further, if a concept used to define the scope of application of an act should be construed autonomously, in order to ensure its coherent application, is it possible also to argue that the meaning of a legal concept having the same demarcation function could be transposed

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744 For instance, in ECJ, 6 October 1976, Case C-12/76, *Industrie Tessili italiana Como v. Dumlop AG*, the Court underlined the divergencies between the national laws of the Member States and refused to give an autonomous interpretation to the concept of 'place of performance' of contractual obligations, mentioned by article 5(1) of the Brussels Convention. Given the absence (at that time) of any uniform applicable law, the ECJ stated that «*The* [Brussels] *Convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Member State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought* […] *Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the Treaty. In any event it should be stressed that the interpretation of the said words and concepts for the purpose of the Convention does not prejudge the question of the substantive rule applicable to the particular case* » (at [10]-[11]).

745 S. BARIATTI, 'Qualificazione ed interpretazione nel diritto internazionale privato comunitario: prime riflessioni,' in *Riv. dir. internaz. Priv. e proc.*, 2006, p. 368.

746 *IBID.*, p. 371.

by way of analogy to different but similar expressions used to define the scope of application of another community act ?

III.3. The boundaries between the Brussels Regime and the EIR: outline of the problem

As explained, the progressive implementation of a European Judicial Area entails that, ideally, each piece of European law should find its place within the common framework of EU private international law (747), leaving no empty spaces between one another.

It is important to make a clarification on this point. When it comes to regulatory loopholes between regulations (or more in general between European legislative acts), one may refer to *lacunae* that have been intentionally created by the European legislature for reasons of legislative policy expediency (for instance, the discrepancies among national laws) or to unintentional creeps (or overlaps) between EU instruments, deriving from the fact that, despite the intentions, two regimes result in practice to be neither completely uniform nor comprehensive, for manifest systematic deficiencies arising out of the modalities of the development of the field of judicial cooperation (748).

In addition, problems may arise for ambiguity or lack of clarity in the formulation of the rules, which may lead to a wrong interpretation a on the part of practitioners and national courts.

Bearing this in mind, what needs to be assessed here is whether in practice the scope of application of the Brussels Ia Regulation (749) and the EIR perfectly mirror one another, so that the relationship between them can be considered as of dovetailing, yet acknowledging henceforth that certain specific aspects have been deliberately excluded from the respective domains (750).

In this respect, the boundaries between the Insolvency Regulation and the Brussels Ia Regulation may be addressed under two different angles.

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747 In fact, in this regard, it was suggested to introduce a code of Community private international law. In June 2013 upon request of the Committee of legal affairs, the European Added Value Unit of the Directorate for Impact Assessment and European Added Value (a body within the Directorate General for Internal Policies of the General Secretariat of the European Parliament) released a report assessing the perspective of having a European code on private International Law (CONE 3/2013). Also, it was proposed to creating a 'Rome 0 Regulation', disciplining some common issues common to the different specific instruments on conflict of law rules. See S. LEIBLE – H. UNBERATH (eds.), *Brauchen wir eine Rom 0-Verordnung*?, Munich, 2013 and M. FALLON, P. LAGARDE, S. POILLOT-PERUZZETTO (dir.), *Quelle architecture pour un Code européen de droit international privé ?*, Bruxelles, 2011.

748 See T. KRUGER, 'The Disorderly Infiltration of EU Law in Civil Procedure', in *Netherlands International Law Review*, 2016.

749 Note that I refer here to the Brussels Ia Regulation since it does not change in substance the scope of application of the Brussels I Regulation (nor that one of the Brussels Convention).

750 Reference here is made in particular to the exclusion under article 1(2) EIR to insolvency proceedings concerning insurance undertakings, credit institution, investment undertakings holding funds or securities for third parties and collective investment undertakings (See *supra,* Section II, § II.1.2.2.). In this respect, it must be noted that the two Directives disciplining the cross-border insolvencies of credit institution and the other insurance undertakings form, together with the Insolvency Regulation, what was defined as a 'hermeneutic circle', within which rules should be construed and interpreted harmoniously. See on this point, B. WESSEL, 'The hermeneutic circle of European Insolvency law', in E.H. HONDIUS, J.J. BRINKHOF, M. DE COCK BUNING (eds.), *Contracten international (Opstellenbundel aangeboden aan prof.mr. F. Willem Grosheide)*, The Hague, 2006, p. 351.

Under a first perspective, the investigation focuses on the mutual interaction between the Insolvency Exception of Article 1(2)(b) Brussels Ia and Article 1(1) and Annex A EIR. This profile is referred to as the 'collective dimension' of the problem, since essentially it aims at acknowledging whether there are insolvency collective proceedings (*i.e.* proceedings regarded as a whole complex procedure comprising different phases and sub-proceedings) that are excluded from the scope of application of both the Insolvency Regulation and the Brussels Ia Regulation.

A different (yet closely intertwined) profile relates, then, to what is labelled here as the 'individual dimension', which addresses the interpretation of the rules on jurisdiction set forth by Article 3 EIR in connection with Article 1(2)(b) Brussels Ia [751]. Although the latter profile represents the main focus of this research, it is essentially intertwined with the 'collective' dimension.

III.3.1. The 'collective dimension' of the problem

As was noted above in the outline of the Brussels Ia Regulation, originally the scopes of the two instruments dealing with civil and commercial matters, on the one side, and insolvency proceedings, on the other, perfectly dovetailed [752], as also witnessed by the express choice of terminological consistency [753].

The Jenard and the Schlosser Reports demonstrate clearly that the boundaries set forth by Article 1(2)(2) Brussels Convention were expressly interpreted by reference to the parallel text proposed by the working group elaborating the insolvency convention, as they stood at the time of the publication of the Reports [754].

Each other's existence evidently determined their respective scopes: the Preliminary Draft Convention and the Draft Convention were intended to apply to those (traditional) collective

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751 See *infra* in this Chapter, Section 4.

752 With the aforementioned exception of the intentional lacuna regarding insolvency proceedings of special categories of undertakings.

753 See Schlosser Report, at [53] « *Consequently, the preliminary draft Convention on bankruptcy, which was first drawn up in 1970, submitted in an amended form in 1975, deliberately adopted the principal terms 'bankruptcy', 'compositions' and 'analogous proceedings' in the provisions concerning its scope in the same way as they were used in the 1968 Convention* ».

754 It must be recalled that regarding 'proceedings relating to bankruptcy' the Jenard Report stated that '*a complete list of the proceedings involved will be given in the bankruptcy convention of the European Economic Community* [at that time, the Preliminary Draft Convention]'. See Jenard Report, p. 2, fn 2. Even more explicit is the reference to the Draft Convention made by the Schlosser Report, that included in a separate annex the list of collective proceedings mentioned by the Draft Convention and refrained from prescribing the list of insolvency-related actions provided therein as binding, only because '*further amendments may well have to be made during the discussions on the Convention on bankruptcy* [*i.e.* the Draft Convention]. *To prescribe a binding list would cause confusion, even though the list to be included in the Protocol to the Convention on bankruptcy will, after the latter's entry into force prevail over the 1968 Convention*'. See Schlosser Report, at [54]. *Contra* G. van Calster who doubts that the Jenard Report referred to the two conventions as dovetailing. G. VAN CALSTER, 'COMIng and here to stay. The Review of the European Insolvency Regulation', 2016, published in papers.ssrn.com (last access: March 2018). The Schlosses Report stated that the Insolvency Exception referred to proceedings that '*depending on the system of law involved, are based on the suspension of payments, the insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purpose either of compulsory and collective liquidation of the assets*'. Schlosser Report, at [54].

insolvency proceedings exhaustively listed in the Annexes thereto [755], which were, accordingly, excluded from the scope of application of the Brussels Convention via the Insolvency Exception.
The material scope and scheme of the Insolvency Regulation, however, partially differed from those of the Preliminary Draft Convention and Draft Convention. That is confirmed tritely by the fact that insolvency proceedings listed by the six founding Member States in Annexes A and B EIR were partially different and more numerous than those originally included in the Protocol to the *avant projets*.
Therefore, leaving aside for the moment the 'individual' dimension, one could reasonably doubt as to whether, in practice, the originally conceived complementarity between the two instruments shall be established with reference to the new material scope of the Insolvency Regulation or, on the contrary, regulatory loopholes or overlaps occur.
Three interpretations are *in thesi* possible:

(i) A first approach may be that of considering up to date the interpretation of the Insolvency Exception as provided under the Jenard and Schlosser Reports [756]. It could be argued that, in the light of the continuity between the Brussels Convention and the Brussels I and Ia Regulations, when interpreting Article 1(2)(b) of the latter Regulations it should be possible to rely on the commentaries accompanying the text of 1968, since the wording remained identical. Also, one could observe that the definition of those *traveaux préparatorires* corresponds exactly to the autonomous interpretation provided by the ECJ in the *Gourdain* judgement.
Under this view, one should consider that only *(i)* collective and (organised) proceedings that, under the various laws of the Member State, *(ii)* relate to insolvent undertakings, *(iii)* involve the intervention of the courts and *(iv)* culminate (exclusively) in the compulsory liquidation of the assets in the interest of the general body of creditors are encompassed by Article 1(2)(2) Brussels Ia. Therefore, only those proceedings would be excluded from the notion of 'civil and commercial matters'.
Such reading, when compared to the material scope of the Insolvency Regulation, as described above, reveals, however, some inconsistencies. Indeed, the EIR neither prescribes that insolvency proceedings necessarily involve a court (but, as explained, the judicial involvement in insolvency proceedings seems to be a sort of implicit condition [757]), nor it provides that insolvency proceedings pursue only the compulsory liquidation of the insolvent debtor's assets, as rehabilitation proceedings are also covered by it [758].

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755 The Insolvency Exception also excluded individual insolvency-related actions closely related to those insolvency proceedings, listed in Articles 15 and 17 respectively of the Preliminary Insolvency Convention and the Draft Convention. I will deal with the individual dimension of the boundaries between the two regulations in the following Section 4.

756 That definition, as will be seen *infra* in Chapter III, Section I, at § I.1., also corresponds to the autonomous definition provided by the ECJ in the *Gourdain* judgement.

757 See *supra* Section II, § II.1.2.1.2.

758 See *supra* Section II, § II.1.2.1.

As a consequence, should one adhere to this view, the scope of the Brussels Regulation may overlap with regard to those collective proceedings that, although based on the insolvency of the debtor, entailing his divestment and the appointment of a liquidator, do not involve a judicial intervention and have rehabilitation purposes [759]. For instance, under this construction, the Spanish *suspensión de pagos* and the *amministrazione controllata* would be covered by both the EIR and the Brussels Regime, as they have rehabilitation purposes.

This interpretation cannot naturally be shared. Firstly, because the reasons underlying the substantive definition of insolvency proceedings provided in the explanatory Reports (and by the ECJ) can hardly be related anymore to the Brussels I and Brussels Ia Regulations, since it was based on a profoundly different regulatory environment, in which most of the jurisdictions focused on classic liquidation proceedings. Secondly, because, as said, one must be cautiously apply the ECJ jurisprudence relating to the scope of the exceptions to the Brussels Regime when it originates from a period before the enactment of the respective gap-filling regulation, since at that time also the EU legal framework was significantly different.

(iii) A second approach seems to suggest that the scope of the Insolvency Exception (and the expressions mentioned therein) should be regarded as a 'fixed' one, to be read independently and autonomously from the definitions provided by the Insolvency Regulation [760]. Under this perspective, the formula '*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*' would be broadly intended as generally referring to multiparty proceedings in which insolvency is a part of the picture, untied from the descriptive conditions set forth by Article 1(1) EIR.

Besides, Article 1(1) EIR would provide for independent criteria for insolvency proceedings to be encompassed within its material scope. That view takes into account (*recte* assumes) that regulatory gaps may occur between the material scopes of the two instruments, which would not be necessarily intended as 'communicating vessels', for they would not cover a coextended area.

Under that view, the meaning of the Insolvency Exception would be then broader than the scope of application of the EIR: those proceedings excluded from the scope of the latter (failing to fulfil *all* the conditions set forth by Article 1(1) thereof) would likely not be covered by Brussels I, since many

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759 Albeit referring to Annex Actions, the respondent (Deko Marty) in the *Seagon* case seems to have indirectly bolstered that interpretation. As referred by Advocate General, the respondent claimed that the broad interpretation of the Insolvency Exception uttered in the *Gourdain* judgement was justified, since at that time there was only one Community instrument in the field and accordingly no risk of *overlapping*. See *infra* at § Chapter III, Section I, at § I.2.

760 See T. LINNA, 'Cross-Border Debt Adjustment – Open Questions in European Insolvency Proceedings', in *Int. Insolv. Rev.*, 2014, 23, pp. 20-39. In this respect, it is significant that this author claims that changing the scope of the Insolvency Regulation does not affect the borderline between the scope of the Brussels Regime and the Insolvency Regulation, since «*the scope of the Brussels I Regulation remains unchanged even if new forms of insolvency proceedings are included in the scope of the EIR. What happens is that a regulatory lacuna* […] *will be at least partially filled* ». See T. LINNA, 'Actio Pauliana – "Actio Europensis"? Some Cross-Border Insolvency Issues', in *Journal of Private international law*, 2014, p. 72.

of them could still be considered as falling within the general concepts of 'bankruptcy', 'winding-up', 'composition', 'judicial arrangements' and 'analogous proceedings', for the mere fact that they involve the material insolvency of the undertaking. Accordingly, those 'orphan' proceedings would be governed by national laws, thus casting serious problems as to the recognition of decisions arising out of those proceedings.

Although supported by authoritative scholars (761), from a systematic point of view, such interpretation does not seem entirely acceptable.

First, it denies *ab initio* the idea of a coherent Community framework of international private law.

Second, it overlooks the prescription of the ECJ that the scope of the Insolvency Exception must be construed autonomously. Although the material definition of 'insolvency proceedings' provided in the *Gourdain* judgement results antiquate, as it was based on a different legal context, this cannot override the methodological precepts uttered therein, which still stands with reference to the exclusion of Article 1(2)(b) of Brussels Ia. Therefore, having regard to the scope and objectives of the Brussels Regime and the general principles stemming from the *corpus* of the national legal systems, it emerges that *rationale* underlying that exclusion was that of excluding from the regime on civil and commercial matters truly collective proceedings, *i.e.* proceedings dealing with common pool problems (762). That conclusion is also upheld by the *traveaux préparatoires* where it is clearly indicated that it was beyond the intentions of the legislature to exclude situations somewhat dealing with the material insolvency of the debtor, where they do not involve a statutory response to the collective dimension (within its specific meaning) of insolvency (763). Symmetrically, that was also the rationale underpinning the four cumulative conditions provided by Article 1(1) EIR. Also, it must be considered that, for the reasons explained above (764), it is only the English version that seems to allude to such a broad scope of the Insolvency Exception, the other linguistic versions mentioning exclusively 'faillite', 'concordats' and 'procedures analogues'. The wording used in one language version of a provision of EU law, therefore, cannot serve as the sole basis for the interpretation of that provision. The interpretation under discussion would give priority to the English version of the Insolvency Exception over the other language versions, neglecting the very reasons for the exclusions of insolvency proceedings from the material scope of the Brussels Regime (765).

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761 Among others, see T. LINNA, '*Actio pauliana – "Actio Europensis"?* Some cross-border insolvency issues', in *Journal of Private International Law*, 2014.

762 See *supra* Preface.

763 It bears recalling here that the Jenard Report affirmed expressly that proceedings not involving *organised* and *collective* proceedings were included in the scope of the Brussels Convention, along with out-of-court proceedings aimed at restructuring the distress of the undertaking, being the latter of a contractual nature. See Jenard Report, pp. 10-11.

764 See *supra* Chapter, Section 2, § II.2.3.

765 Therefore, it would lack persuasiveness to argue that proceedings which cannot be associated to 'faillites' and 'concordats' (such as judicial arrangements) would then fall within the general category of 'procedures analogues'.

(iv) Under a third perspective, accepted by the majority of scholars [766], the material scope of the Insolvency Exception should be (re)interpreted in accordance with the (new) definition of insolvency proceedings given by the Insolvency Regulation [767]. This would entail that one should first ascertain what is covered by the definition of 'insolvency proceedings' under Article 1(1) EIR and, then, accordingly assume *a contrario* that everything that results excluded therefrom falls within the scope of application of Brussels I. The formula of the Insolvency Exception should be, then, interpreted as meaning that only collective proceedings, based on the insolvency of the debtor and entailing his divestment and the appointment of a liquidator are excluded from the scope of Brussels I [768].

Such a view brings the consequence that, insolvency *lato sensu* being in any case a branch of civil and commercial matters, proceedings excluded from the Insolvency Regulation (mainly out-of-court settlements and renegotiations of private and commercial debts, which are of a purely contractual nature) should be regarded as encompassed in the (broad) scope of Article 1(1) Brussels Ia.

III.3.2. The systematic interpretation of the scopes of the Insolvency Regulation and the Brussels Ia Regulation: a truly coextended area?

The third approach described above seems to be the more correct one in the light of the ideal coherence within the common framework of Community law [769].

It would respect the autonomous interpretation of the Insolvency Exception bolstered by the Court in the *Gourdain* judgement, resolving the shortcoming of the substantive definition of insolvency proceedings maintained therein not reflecting the evolutions that the legal framework underwent during forty years of negotiations of the Insolvency Project. Also, it would preserve the original intention that the two instruments should slot one into another (at least in theory) without leaving

766 M. VIRGÓS SORIANO and F. J. GARCIMARTÌN ALFÉREZ, *Comentario al reglamento europeo de insolvencia*, Madrid, 2003, p. 61; M. VIRGÓS SORIANO, F. J. GARCIMARTÌN ALFÉREZ, *The European Insolvency Regulation*: law and practices, The Hague, 2004, pp. 55-56. L. COLLINS, C. G. J. MORSE, D. MCCLEAN CBE QC., A. BRIGGS, J. HARRIS, J. HILL and C. MCLACHLAN, *Dicey, Morris & Collins*, *The Conflict of Laws*, II, London, 2006, pp. 1430-1431. P. ROGERSON, 'under Article 1', in *Brussels I Regulation, European Commentaries on Private International Law*, Sellier, 2007, p. 65; B. HESS, in B. HESS, P. OBERHAMMER, T. PFEIFFER, A. PIEKENBROCK, C. SEAGON, *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings (European Insolvency Law-Heidelberg-Luxembourg-Vienna Report)*, Munch 2014, p. 92, fn. 231. G.C. GIORGINI, *Méthodes conflictuelles et règles matérielles dans l'application des "nouveaux instruments" de règlement de la faillite international*, Paris, 2006, p. 293 ss. L. SCIPIONE, 'Procedure concorsuali di insolvenza nella disciplina comunitaria e prospettive di riforma', in S. BONFATTI AND G. FALCONE (eds.), *La "riforma urgente" del diritto fallimentare e le banche*, Milano, 2003, p. 286.

767 In *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) Briggs J at [47] stated that although, at the time of the Schlosser Report, what is now the Insolvency Regulation was still under discussion as a planned Convention, « *nothing which occurred thereafter appear*[ed] […] *to have been intended to detract from the plan that the bankruptcy exclusion should exclude from the Judgments Regulation nothing more, and nothing less, than what was included within the scope of the Insolvency Regulation* ».

768 Partially different conclusions have been reached with regard to the interplay between the Recast Regulation and Brussels Ia. See *infra* Chapter IV, § IV.2.1.3.

769 See *above* Section 3, § III.1.

any *lacunae* between them [770]. Arguments supporting this view may be found also in the Virgós-Schmit Report, where it states that

> « *to avoid unjustifiable loopholes between the two Conventions* […] *the exclusion of insolvency proceedings as provided in Article 1(2) of the 1968 Brussels Convention should be interpreted in accordance with the definition of insolvency proceedings given by the Convention on insolvency proceedings and the criteria incorporated in Article 25 thereof* » [771].

Should that construction prove to be accurate, it would ultimately allow answering in the affirmative to the question raised above concerning the legal transplant of the autonomous interpretation of a provision delimiting the scope of an act to a provision of another act which has the same function. The Insolvency Exception would prove that not only the autonomous interpretation of 'delimitation provisions' is mandatory, but that, under specific conditions, it could be pushed to the point that also provisions with different wording may have the same autonomous meaning.

However, irrespective of whether the second and the third approach is supported, it has been noted that, even assuming that the Brussels Ia Regulation would be applicable to proceedings that do not fall within the definition of 'insolvency proceedings', the provisions set forth therein might not be suitable for those proceedings that - albeit excluded by the scope of the EIR - are to a certain extent 'quasi-collective' [772] (*i.e.* multiparty) and refer to situations involving the material insolvency of the debtor.

In principle, the Brussels Ia Regulation should apply to proceedings irrespective of whether they are contentious or non-contentious [773]. Therefore, one could claim that, as far as quasi-collective proceedings for debt restructuring are concerned, the jurisdiction could be determined under the rules provided therein and, notably, the general *forum* of the defendant's domicile (Article 4 Brussels Ia and Article 2 Brussels I), the alternative *fora* for matters relating to contracts (Article 7(1) Brussels Ia and 5(1) Brussels I) or, less persuasively, the exclusive *forum* for the validity of the constitution, the nullity or the dissolution of companies and other entities (Article 24(2) Brussels Ia and 22(2) Brussels I). Also, recognition and enforcement could be granted to those proceedings either in the case that a court formally approves them (in this case the applicable provision would be that of Article 34 Brussels Ia and 32 Brussels I, since the approval of the court would fall within the definition of

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770 The Jenard Report states that « *proceedings arising from schemes of arrangement out of court, since the latter depend on the intention of the parties and are of purely contractual natur*e ». See Jenard Report, p. 12.

771 Virgós-Schmit Report, at [77] and [197] (see also at [49]).

772 With the term 'quasi-collective' I refer here to those proceedings which do not serve common pool problems. That label does not indicate that proceedings involve only a part of the debtor's creditors. Indeed, quasi-collective proceedings may involve all creditors and even provide for a temporary moratorium as to the individual enforcement on the part of creditors. However, as will be better explained with reference to the material scope of the Recast Regulation, those proceedings cannot match with the definition of (truly) collective proceedings. Suffice here to say that they do not meet all the requirements set forth by Article 1(1) EIR.

773 Jenard Report, p. 9.

'judgement') or, in the event that they do not involve a court's sanction, still they would be considered as 'settlements' under Article 58 Brussels Ia and 57 Brussels I.

It is equally true that, however, in practice this interpretation has shed some concerns, also among the supporters of the dovetailing theory.

Doubts have been raised on the part of some scholars that the Brussels Regime actually struggles to represent a suitable instrument for dealing with 'quasi-collective' proceedings. It was argued that, in spite of the (much more programmatic than realistic ?) declaration that the Brussels Regime is applicable also to non-contentious situations, the rules provided therein have been mainly designed with reference to classic cross-border adversarial cases, with two opposing parties connected to different Member States, *i.e.* a bilateral dispute.

That would be reflected also by the terminology used: the Brussels Regime refers mainly to 'disputes' against a 'defendant' that 'is sued', thus revealing a clear proneness to ordinary civil *actions*.

Moreover, the connecting factors provided in Brussels Ia are of a territorial nature, *i.e.* they link the parties and/or the elements of the dispute to the territory of a particular Member State [774].

Insolvency 'quasi-collective' proceedings, instead, are multi-party cases, where multiple parties, including public interests, may be potentially affected, directly or indirectly. Normally the court is not seised to decide a dispute between the debtor and the creditors, but to determine whether or not the law's conditions for granting the debt adjustment are met.

Also, the application of the exclusive *forum* for the dissolution of companies is not entirely consistent with 'quasi-collective' proceedings, since the reorganisation of debt does not entail the dissolution of the company (indeed, one could argue that it is generally the opposite, as it aims at avoiding it) [775].

In the light of the above, it bears questioning whether the Brussels Regime may apply with regard to 'quasi-collective' proceedings that are excluded from the scope of application of the EIR.

Two examples will demonstrate the above perplexities.

III.3.2.1. Schemes of arrangements

774 F. GARCIAMARTÍN, 'Brussels I Instruments: Past, Present and... Future', in *Revue critique de droit international privé,* 2018, p. 479.

775 Note, however, that in this respect the Schlosser Report stated at [59] that « *If a company established under a Continental legal system is dissolved, i.e. enters the stage of liquidation, because it has become insolvent court proceedings relating to the 'dissolution of the company' are only conceivable as disputes concerning the admissibility of, or the mode and manner of conducting, winding-up proceedings. All this is outside the scope of the 1968 Convention. On the other hand, all other proceedings intended to declare or to bring about the dissolution of a company are not the concern of the law of winding-up. It […] makes no difference if bankruptcy law questions arise as a preliminary issue. For instance, when litigation ensues as to whether a company should be dissolved, because a person who allegedly belongs to it has gone bankrupt, the dispute is not about a matter of bankruptcy law, but of a type which falls within the scope of the 1968 Convention. The Convention also applies if, in connection with the dissolution of a company not involving the courts, third parties contend in legal proceedings that, they are creditors of the company and consequently entitled to satisfaction out of assets of the company* ».

Schemes of arrangements are formal statutory proceedings set out in Section 26 (ss. 895-901) of the English Companies Act 2006 ('CA'), providing that a company [776] may reach a compromise or arrangement [777] with one or more classes of its creditors (or members) [778].

For a scheme of arrangement to be binding between the company and its creditors, it must first be approved by a meeting of the creditors concerned (specifically summoned by the court upon request of the debtor or creditors or any other subject entitled to do so under s. 896 CA). In particular, it must be agreed upon by the majority in number representing 75% in value of the creditors or class of creditors (or members or class of members, as the case may be), present and voting either in person or by proxy at the meeting summoned. Once approved, the court could then sanction the arrangement [779], which becomes binding *vis à vis* all creditors concerned at the date of the scheme, whether or not they have voted in favour of its approval (therefore, the minority of dissenting creditors are crammed down by the majority, but not all the undertaking's creditors are involved) [780].

The specific contents of the scheme are not set forth by the law, which merely establishes that they me be aimed at

- Mergers and acquisition (*i.e.* takeovers) of companies when a change of control occurs
- Restructuring, including demerging, a financially viable company or corporate groups
- Corporate rescue activity where a company is in financial distress

Because of the malleability of their content (which are left to the parties' autonomy), the speed of the procedure and their quick response to distress [781], in recent years there has been a significant increase (also on the part of non-UK companies [782]) in the recourse to English schemes of arrangement for restructuring and corporate rescue purposes [783], in order to avert the opening of liquidation insolvency proceedings.

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776 Pursuant to s. 895(2) of the Company Act 'company' shall mean, *inter alia*, a 'company liable to be wound up under the Insolvency Act 1986 (c. 45)'.

777 The concepts of arrangements and composition are interpreted broadly *Re NFU Development Trust Ltd*, [1973] 1 All ER 135, Brightman J stated that a compromise requires some settling of a dispute, while a scheme used, for instance, to affect a takeover bid is an arrangement.

778 J. PAYNE, *Schemes of Arrangement, Theory, Structure and Operation*, Cambridge, 2014, pp. 288 ss.; B. HANNIGAN, *Company Law,* Oxford, 2015, p. 759, S. MC LAUGHLIN, *Unlocking Company Law*,

779 Once sanctioned the scheme, the role of the Court is marginal or totally irrelevant, since the execution of the terms undertaken in the scheme is not subject to judicial supervision.

780 Conversely, creditors or classes of creditors whose interests are not directly or indirectly affected by the scheme, are not bound by the scheme (nor they have the right to vote and to be consulted in advance).

781 A. CARRASCO PERERA and E. TORRALBA MENDIOLA, 'UK "schemes of arrangement" are "outside the scope of the European Regulation on Insolvency proceedings. What does "outside" actually mean?', in *Gomez-Acebo&Pombo*, July, 2015, available at https://www.ga-p.com.

782 For instance, Global Investment House KSC (Kuwait), Seat Pagine Gialle S.p.A. (Italy), Vivacom (Bulgary and Netherlands), Tele Columbus GmbH (Germany), Metrovacesa SA (Spain), Rodenstock GmbH (Germany) e Icopal (USA, Denmark e France).

783 In particular, for some years now there has been a significant recourse to schemes of arrangements in the context of the restructuring of a 'syndicated bank loan', *i.e.* loans characterised by multiple lenders. In international practice this type of financing contract requires the consent of the majority of lenders to modify the terms of the financing agreement; in some cases, the unanimous approval of the lenders is necessary

The pursuit of insolvency-related objectives notwithstanding, in principle schemes of arrangements cannot be characterised *ex se* as insolvency proceedings within the meaning of the EIR, since they are governed by English company law, do not necessarily concern undertakings in a state of debt crisis [784], and technically speaking they are not collective, provided that a scheme of arrangement does not entail a ban of individual enforcement [785].

Even more significantly, they are not included in Annex A EIR, which, as will be explained, triggers the *de facto* characterisation of proceedings as insolvency-proceedings, covered by the regime of the Insolvency Regulation [786]. It follows that, being excluded from the scope of application of the Insolvency Regulation, when operating outside the United Kingdom they cannot benefit from the automatic recognition and enforcement under Articles 16 and 25 EIR. In this constellation, problems arise when a creditor brings in another Member State an action seeking, for instance, the payment of his credits as originally due, irrespective of the amending terms agreed upon under the scheme of arrangement. Should the debtor fail to recognise the judgement sanctioning the scheme of arrangement, claiming that the action is precluded by the sanctioned scheme, the creditor may obtain the satisfaction of his credit, frustrating the substantial effects of the scheme.

Such being the situation, in recent years (English) scholars and case-law are endeavouring to ensure extraterritorial effects to schemes of arrangements via the Brussels Regime, through a generous interpretation of the provisions on jurisdiction and recognition thereof [787].

However, as anticipated, the application of the Brussels Ia Regulation has not always be regarded as a suitable tool for regulating schemes of arrangements and it gave rise to a number of issues [788].

Firstly, as regards the s.c. 'scheme company' (*i.e.* the company proposing the scheme to creditors), it is highly debatable whether English courts have jurisdiction to sanction a scheme proposed by a foreign company.

Leaving aside those cases in which companies have transferred their COMI in the UK [789], English courts have developed a 'sufficient connection test', providing that the jurisdiction of English courts may be established whenever a foreign company (albeit incorporated in another Member State) is somewhat connected with the UK territory (a connection that does not necessarily entail the presence

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(generally when modifications concerns the basic economic terms of the financing, such as the amount of debt, the interest rate or the date of final repayment). The scheme can therefore be an effective instrument to restructure the debt under the financing contract, modifying its terms without it being necessary, to obtain the unanimous consent provided for in the contract. In those situations, schemes of arrangement represent an appealing instrument since it allows to modify such contractual provisions, binding all parties to the contract.

784 However, the scheme can also be used in conjunction with insolvency proceedings, such as administration or liquidation, see s. 899 (c) Companies Act 2006.

785 See *supra* in this Chapter, Section 2, §§ II.1.2.1.1. and III.3.2.1.

786 See *infra* in this Chapter, Section 3, § III.3.3.

787 Contra *Re Dap Holding NV*, [2005] EWHC 2092 and *Re Primacom Holding GmbH*, [2012] EWHC 164 (Ch).

788 Contrary to the applicability of the Brussels Regime to schemes of arrangements see *La Seda de Barcelona SA,* [2010] EWHC, 1364 (Ch).

789 In this respect, on could regard schemes of arrangements as encouraging (good?) *forum shopping*.

of assets on the English territory [790]). In this respect, one of the arguments typically invoked to support the close connection is the fact that the underlying contracts between the scheme company and its creditors contain an English jurisdiction clause [791].

It bears noticing that an argument against the jurisdiction of English courts *vis à vis* foreign companies could be the very existence of the Insolvency Regulation, not in that it would be applicable to schemes of arrangements, but because it would affect (and curtail) the interpretation of section 895 CA. It was mentioned that pursuant to Section 26 CA, an English court may sanction a scheme of arrangement upon petition of a 'company', provided that it is liable to be wound-up under the Insolvency Act 1986 [792]. Under Article 3 EIR only the courts of the state where the undertaking's COMI is located are vested with the jurisdiction to open insolvency proceedings. It would follow that schemes proposed by foreign companies could not be sanctioned by English courts, as they could not be defined 'companies' for the purposes of Section 26 CA. Therefore, English courts would lack jurisdiction to open winding-up proceedings under the English Insolvency Act dated 1986, when the COMI of the company is located elsewhere outside the UK.

This objection was overcome by a number of arguments (not always entirely convincing) [793].

Secondly, whether or not the scheme company is incorporated in the UK, it is also debated whether English jurisdiction could be established on the basis of the Brussels Ia Regulation on the side of the scheme creditors.

The preliminary difficulty in applying those rules lays with the fact that, schemes of arrangement being non contentious matters, scheme creditors would barely fit in the definition of defendants

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[790] *Stocznia Gdanska SA v Latreefers Inc (No 2)*, [2001] 2 BCLC 116.

[791] The sufficient connection test was introduced in 1991 in the case *Re Real Estate Development* Co [1991] BCLC 210. Subsequently, that interpretation was pushed to the point that English courts held that the condition of sufficient connection proved to be satisfied also when the debt to be restructured is covered by an agreement subject to English law, even though there is no other link with England and Wales (*Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch)and *Re Rodenstock GmbH*, [2011] EWHC 1104 (Ch)). In *Re Apcoa Parking Holdings GmbH*, [2014] EWHC 3849 (Ch) Newey J found that English courts had jurisdiction to sanction a scheme of arrangement, even in a case where the financing contract was originally governed by German law, but it was subsequently amended, under the contractual mechanisms provided for therein, and subjected to English law, for the specific purpose of allowing the debtor to access to the procedure of the English scheme of arrangement.

[792] See s. 895(2)(b) CA. It is established practice in English jurisprudence that non-English companies can also be liquidated under the Insolvency Act 1986. In particular, Section 221 of the Insolvency Act 1986 gives the court the power to wind up unregistered companies. A foreign company is considered to be included in the category of unregistered companies. However, such companies must be dissolved, in liquidation or have ceased their activities. In this respect, English courts do not consider it necessary that the scheme company actually fulfils the grounds for winding up (otherwise schemes proposed by viable companies would always be excluded) but simply that those grounds could theoretically be applicable in the future (*Re Sovereign Marine & General Insurance Co Ltd*, [2006] EWHC 1335 (Ch)).

[793] First, by objecting that the Insolvency Regulation could not affect the interpretation of the Companies Act, since it would not be applicable in any case. Second, it was noted that the Insolvency Regulation was introduced after the rule now codified by Section 895 CA and therefore the latter should not be interpreted in the light of the subsequent European law. Also, in the (in)famous *Re Dap Holding NV*, [2005] EWHC 2092 it has been arguably stated that the COMI is transitory and, being able to change over time, it cannot exclude the jurisdiction of the English court.

within the meaning of Brussels Ia. That objection has been rejected arguing that scheme creditors could be treated as being 'sued' by the scheme company for the purposes of the domicile rule.

To avoid solving that question, it is now settled practice that English courts simply assume that Brussels Ia applies: if jurisdiction can be found according to the provisions thereof derogating to the domicile rule, it is not necessary to test that assumption (s.c. jurisdictional test, or the Brussels Ia Regulation arguendo). Generally, jurisdiction under Articles 8(1) Brussels Ia is invoked. It is submitted that whenever some [794] of the scheme creditors are domiciled within the UK territory it would be expedient [795] to hear and determine them together with non-UK domiciled creditors to avoid the risk of irreconcilable judgments resulting from separate proceedings (the s.c. 'anchor defendants' rule).

Alternatively, English courts have claimed to have jurisdiction under Article 25 Brussels Ia. In those cases, it was considered sufficient that the underlying contracts between the scheme company and the scheme creditors indicate the jurisdiction of English Courts, irrespective of the parties' domicile. Indeed, the choice-of-court agreement is regarded as an expression of the creditors' autonomy to confer jurisdiction (also for restructuring purposes) in favour of the English courts [796].

As to the extraterritorial effects of schemes of arrangements sanctioned in the UK, at the outset it bears noticing that the likelihood of their effects being enforceable in other countries is generally scrutinised at a jurisdictional stage by English courts (the s.c. 'substantial effects' test). That means that English courts, before sanctioning a scheme, generally inquiry whether it will be likely to have a

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794 It is not entirely clear whether it is sufficient that only one creditor is domiciled in the UK (*Re NEF Telecom Co BV*, [2014] BCC 417; *Re Zlomrex International Finance SA*, [2014] BCC 440 and *Re Metinvest BV*, [2016] EWHC 79 (Ch) J) or whether it is required that the number and value of the scheme creditors domiciled in England reach a certain threshold (and, if any, which one). In *Re Rodenstock GmbH*, [2011] EWHC 1104 (Ch), Briggs J deemed it sufficient that more than 50% of the value of the creditors was domiciled in England. The sufficient percentage was lower in *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 (Ch), in *Stripes Us Holdings Inc*, [2018] EWHC 3098 (Ch). Against the necessity that more than one scheme creditor should be domiciled within the UK territory, in *Re DTEK Finance plc*, [2016] EWHC 3563 (Ch), Newey J at [17] has firmly argued that article 8(1) Brussels Ia does not provide that the number of domiciled defendants determines whether it is 'expedient' to hear and determine matters together. In that case the court sanctioned the scheme even if only one creditor, holding 0.722 per cent by value of the total scheme liabilities, was domiciled in the UK. The same approach was followed in *New Look Secured Issuer and New Look Ltd*, [2019] EWHC 960 (Ch).

795 As to the condition that it must be 'expedient' for all defendants to be determined together, it is merely purported that it is expedient that all creditors (or classes of creditors) should be bound by the scheme, otherwise any creditor would be able to enforce his credit against the scheme company on the full amount of their claims, thereby frustrating the restructuring. See *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 (Ch).

796 The application of article 25 Brussels Ia raises a number of issues in case of 'asymmetric ' jurisdiction clauses (such as the standard clause proposed by the Loan Markets Association, which is extensively inserted in financial arrangements) under which one party is required to sue the other party before a specific court (typically the scheme company), whereas finance parties (*i.e.* scheme creditors) are free to bring actions against the company in other jurisdictions. The problem of asymmetric jurisdictional clauses was dealt with in *Re Van Gansewinkel Groep BV*, [2015] Bus LR 1046 (Ch), where Snowden J excluded that English jurisdiction could be based on such a clause (that was not a standard Loan Markets Association's clause). See also *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch). On the contrary, *Re Hibu Group Ltd*, [2016] EWHC 1921 (Ch), the jurisdiction of English courts was justified arguing with article 25 Brussels Ia. On the application of article 25 Brussels Iato schemes of arrangements see, *inter alia*, F. IODICE, 'Scheme of arrangement tra Raccomandazione della Commissione e riforma del regolamento sulle procedure di insolvenza', in *Fallimento*, 2015, p. 1093.

substantial effect in any foreign jurisdictions involved in or engaged by the scheme. This is because the court generally will not hand down any order which cannot produce substantial effect; thus, before sanctioning the scheme, the court will need to be question whether the scheme can achieve its purpose [797]. The established practice has been that of requiring evidence from foreign law experts to be filed with the English court sanctioning the scheme.

As said, since they are not listed in Annex A of the Insolvency Regulation it is unquestioned that Articles 16 and 25 EIR do not apply to schemes of arrangement. Therefore, in principle they should be recognised according to the Brussels Regime [798].

That notwithstanding (and here lies the real deadlock), when addressed with their recognition, the courts of the other Member States have not always recognised UK schemes of arrangements when dealing with insolvency-related situations [799]. Hence, on some occasions, recognition was also refused under Article 36 Brussels Ia (formerly Article 33 Brussels I). Either the court considered that the scheme did not fall within the material scope of application of the Brussels Regime (deeming that it was covered by the Insolvency Exception) or it deemed that the order sanctioning the scheme was regarded as not matching with the definition of judgement provided under Article 2(a) Brussels Ia [800].

It is submitted that the refusal of schemes of arrangements on both grounds [801] does not seem entirely convincing. At the outset, it is arguable that schemes of arrangement fall within the exclusion of Article 1(2)(b) Brussels Ia.

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797 See recently *New Look Secured Issuer and New Look Ltd* [2019] EWHC 960 (Ch). In the same sense also *Sompo Japan Insurance Inc v Transfercom Ltd*, [2007] EWHC 146 (Ch); *Re Rodenstock GmbH,* [2011] EWHC 1104 (Ch), *Re Magyar Telecom BV*, [2013] EWHC 3800 (Ch)

798 That was the case in the Equitable Life judgement (BGH, 15 February 2012, NJW 2012, 2113, in *NZI*, 2012, p. 425) where the German Supreme Court (albeit not expressly deciding whether such proceedings fall within the scope of the Brussels I Regulation), seems to admit in an *obiter dicta* that schemes of arrangements fall within the scope of the Brussels Regime. The refusal of recognition of the scheme of arrangement in that case, was due to the fact that the court sanctioning the scheme (involving a consumer party to an insurance contract) violated the mandatory head of jurisdiction provided Brussels I. The Landgericht of Potsdam, 2 O 501/07, also recognised a scheme of arrangement considering that the sanctioning order falls within the notion of judgement. C. PAULUS, 'Das Englische Scheme of Arrangement – ein neues Angebot auf dem europäischem Markt für außengerichtliche Restrukturierungen', in ZIP, 2011, p. 1077 quotes also Rodenstock [2011] EWHC 1104 (Ch) as a case where the scheme of arrangement was recognised under Brussels I. In the Netherlands, it seems that recognition of schemes of arrangements is granted if it is sufficiently connected to the English legal system (see B. Wessels, in http://www.bobwessels.nl).

799 L. KORTMANN and M. VEDER, 'The Uneasy Case for Schemes of Arrangement under English Law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?', in *NIBLæJ*, 2015, p. 13. A. SWIERCZOK, Recognition of English solvent schemes of arrangement in Germany, in *King's Student Law Review*, 2014, pp. 78-91.

800 See OLG Celle, 8 September 2009, in *ZIP*, 41, 2009, p. 1968, at [84]. It could be argued that, in any case, schemes of arrangement could fall within the notion of 'court settlements', see *supra* in this Chapter, Section 2, § II.2.4.2.

801 It must be remembered, however, that the refusal for the recognition of a scheme of arrangement cannot be grounded on the review of the jurisdiction of English courts. Also, the rule that the plan can be approved by a majority of creditors that is different from that one required for similar proceedings in the State where recognition is sought does not seem to enough to refuse recognition under the public policy exception.

As explained, the rationale underpinning the Insolvency Exception is that of providing for a specific regime not to *any* situation somewhat involving the material insolvency of the debtor, but to those situations where the specific provision of insolvency law comes into play [802].

These rules reflect the idea that when a state of insolvency affects a business undertaking (namely a company), *i.e.* a legal and economic entity operating on the market and establishing a plurality of complex commercial relationships, the legal system must respond to the debtor's inability to meet its obligations with specific rules (for instance, the *pari passu* principle, the ban of individual enforcement, the divestment of the debtor, the 'freeze' of the accrual of interests, the possibility to set effective and valid transactions aside) aimed at, on the one hand, maximising the satisfaction of creditors, but, on the other hand, dealing with the rights of third parties that - albeit legitimately acquired - result in an advantageous position detrimental to creditors [803].

Therefore, in those situations where the common pool problems do not trigger the particular rules of the insolvency liability regime, the Insolvency Exception should not be invoked on the mere assumption that the undertaking is materially insolvent. It follows that although schemes of arrangement deal with an insolvent company, they should not fall under the exception of Article 1(2)(b) Brussels Ia.

Besides, an order sanctioning a scheme of arrangement should be regarded as a 'judgement' under the definition provided by Article 2(a) Brussels Ia. As said, the concept of judgement must be interpreted broadly: Brussels Ia does not impose any specific requirement neither as to the form of judgements nor as to the manner in which proceedings are commenced. In this respect, it must be borne in mind that, in principle, it applies also to non-contentious proceedings, such as matters of voluntary jurisdictions [804], where proceedings are commenced with a petition to the court and parties cannot be regarded as 'defendants' (the inclusion of 'judicial settlements' makes it clear that the Brussels Ia ' regime applies also to those situations).

Moreover, when sanctioning a scheme of arrangement, the court does not simply perform a formalistic control. Instead, it takes into account several substantial profiles (such as whether the meeting of creditors voting the scheme was properly held and the majority of creditors has acted *bona fide* in supporting the scheme, whether it is likely to be recognised in other Member States). The order has also a constitutive effect towards dissenting creditors, therefore it may be also regarded as a conclusive judgement [805].

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802 See *supra* in this Chapter, Section 3, § III.3.2.

803 M. FABIANI, *Il diritto della crisi e dell'insolvenza*, Bologna, 2017, p. 4.

804 The ECJ has held in two occasions that the actual presence of a contradictory proceeding is not a prerequisite for a judgment. See ECJ, 21 May 1980, Case C-125/79, *Denilauler v. SNC Couchet Freres* ECLI:EU:C:1980:130, at [13]; ECJ, 14 October 2004, Case C-39/02, *Mærsk Olie & Gas A/S v. Firma M de Haanen W de Boer* ECLI:EU:C:2004:615, at [50].

805 L. KORTMANN and M. VEDER, 'The Uneasy Case for Schemes of Arrangement under English Law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?', in *NIBLeJ*, 2015, p. 258.

Therefore, from a conceptual and scholarly perspective it would be fair to assume that the Brussels Regime applies to schemes of arrangement.

Yet, as matters stand, it must be acknowledged that the application of the Brussels Iato schemes of arrangements (806) may prove to be problematic, since, whenever courts addressed for their sanctioning or their recognition do not support the arguments above (thus denying that schemes are covered by the material scope of the Brussels Ia Regulation) they would actually fall in a regulatory creep between the two instruments, which could frustrate the very effectiveness of the instrument (807). The fact that case-law is divergent shows that this is about a real issue under the Insolvency Regulation. As will be further explained, the Recast Regulation seems to have even sharpened the doubts, as the new wording of Recitals 7 and 9 seems actually to create the regulatory creep that, from a doctrinal point of view did not exist under the former rules.

It is unclear whether the Brexit will kill the debates about schemes of arrangement, or whether the question could be brought back through the window if the United Kingdom ratifies the Lugano Convention (which is suggested by some scholars as a possible avenue or an alignment of the UK with the current regime of European co-operation) (808).

III.3.2.2. Debt adjustment (with final relief) proceedings of individuals

In late years, the global economic crisis brought in the spotlight of European national legislature also new instruments dealing with the crisis or the material insolvency of private individuals (809). In

806 The same reasoning applies also to other works out with similar features. For instance, Rechtbank's-Gravenhage, 6 October 2010, LJN: BN9604 (available at www.rechtspraak.nl) refrained from issuing an order under Article 287a of the Dutch Bankruptcy Act deeming that the cram down mechanism of the Ditch procedure would not be recognised in other Member States under either the Insolvency Regulation or the Brussels I Regulation.

807 In this respect it is noteworthy that German courts (which, at present, appear to be the courts most concerned by the issue of the schemes' recognition) have sometimes even doubted whether schemes of arrangement could either be recognised under the German international private law rules (namely § 343 InsO). See BGH, 15 February 2012, NJW 2012, 2113, in *NZI*, 2012, p. 425. *Contra Landgericht* Rottweil, 17 May 2010, in *ZIP*, 40, 2010, p. 1964. Under this perspective, should schemes of arrangements be excluded also from the sphere of operation of domestic private international law rules, they would be *inutiliter data*, since their effects would be confined within the territory of the UK.

808 W. PRUSKO, 'The Brexit Stakes for Corporate Activity – a Restructuring & Insolvency Poerspective', in J. ARMOUR and H. EIDENMÜLLER, *Negotiating Brexit*, 2017, p. 57. A. DICKINSON, 'Close the Door on Your Way Out, Free Movement of Judgments in Civil Matters – A 'Brexit' Case Study', in *ZEuP* 2017, p. 540, B. HESS, 'The Unsuitability of the Lugano Convention to Serve as a Bridge between the UK and the EU after Brexit', in *MPILux Research Paper Series*, 2018, p. 4, who highlights that the courts of the contracting States to the Lugano Convention are not bound to conform to the ECJ case law on the Brussels Regime. The Author fears that the 'transfer' of schemes of arrangement under the Lugano Convention would eventually lead to the continued application of the 'common law approach' towards those restructuring instrument without any possible clarification on the part of the ECJ.

809 On individual debt adjustment see *inter alia* J. J. KILBORN, 'Continuity, change and innovation in emerging consumer bankruptcy systems: Belgium and Luxembourg', in American Bankruptcy Institute Law Review, 2006, p. 69; J. C VAN APELDOORN, 'The "fresh start" for individual debtors: social, moral and practical issues', in *International Insolvency Review*, 2008, p. 57, R. ANDERSON, H. DUBOIS, A. KOARK, G.LECHNER, I. RAMSAY, T. ROETHE and H. MICKLITZ, *Consumer Bankruptcy in Europe Different Paths for Debtors and Creditors*, Florence, 2001.

Europe, the 'consumers bankruptcy' is a fairly new phenomenon. Member States have progressively introduced instruments to regulate the insolvency of natural persons, either pursuing private business (for instance sole trader, self-employed persons, professionals and the like) or natural persons having general economic interests (for instance, consumers). At the time of recasting the Insolvency Regulation, 18 Member States had enacted (at a different pace) that kind of proceedings within their legal systems [810].

Alike the rules on insolvency proceedings relating to legal persons, the insolvency of individuals is also characterised by a profound diversity across legal systems.

Leaving aside the fact that some Member States have no(t yet) debt adjustment proceedings for natural persons at all, the discrepancies among national laws pertain to both the subjective profile (*i.e.* the subject that are amenable to proceedings of debt adjustment [811]) and the very nature of proceedings (some States provides that individuals, in addition to debt adjustment proceedings, may be subject to truly collective proceedings [812], while other Member States provide only proceedings aiming at the debt reorganisation of individuals).

To reach an order out of the maze deriving from the diversity across national legal system, for the purposes of this work a fundamental distinction must be acknowledged:

- some proceedings concerning individuals (regardless of whether consumers, self-employed or sole traders) meet the conditions set forth by [the original text of] article 1(1) EIR. Those proceedings are covered by the definition of 'insolvency proceedings', and *in principle* should fall within the scope of the Insolvency Regulation provided that Member States have listed them in Annex A. All in all, it must be recalled that - despite the fact that the provisions of the EIR are designed mainly having in mind the company's insolvencies, which leads to the common (erroneous) tendency to consider that it is an instrument aimed at regulating only the insolvency of legal persons - the personal scope of the Insolvency Regulation encompasses also the insolvency of individuals [813].
- some proceedings concerning individuals, lacking one of the conditions of Article 1(1) EIR, cannot be subsumed under the definition 'insolvency proceedings'. Therefore, they surely fall outside the scope of application of the Insolvency Regulation. Nevertheless, it must be assumed that those proceedings may well concern situations where the individual is materially insolvent.

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[810] The Italian *crisi da sovraindebitamento* and the French *procédures de surdettement des particuliers* are an example, but they are not listed in Annex A. See *infra* III.3.3.

[811] As noted by the Commission, some Member States have personal insolvency schemes that apply both to self-employees or sole trade and consumers. Other Member States have special schemes only for consumers and include self-employed and sole traders in company insolvencies. Other Member States have separate schemes of consumers, self-employed and sole traders.

[812] See for instance the Dutch *faillissement*. See report from the Commission to the European Parliament, the council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, COM(2012), 743.

[813] See *supra* Section 2, § II.1.2.2.

Against this background, some similarities can be noticed within the latter category. A common ideological feature is that generally the debtor obtains the adjustment of his debts under a careful monitoring of the court, that scrutinises his conduct and the reason for his indebtedness. Also, when the debtor has successfully complied with the terms of the payment schedule, he 'earns' a debt relief [814]. In this respect, it is fair to assume that those national proceedings are generally directed at reorganising the individual's debt so to ensure his financial balance [815].

Frictions relating to the boundaries between the Brussels Regulation and the Insolvency Regulation arise in respect of this category of proceedings.

Some scholars (mainly supporting third approach described above [816]) argue that, under the regime of the EIR, proceedings for individual debt adjustment would fall in a regulatory loophole. This assumption is generally based on the *Radziejewski* judgement [817].

On that occasion the Court excluded from the scope of application of both the Insolvency Regulation and the Brussels Regulation the Swedish debt relief proceedings *skuldsanering* (debt relief proceedings) submitting that the « *debt relief decisions such as those adopted by the KFM do not fall within the scope of Regulation No 1346/2000 or that of Regulation No 44/2001* » [818]

The reasoning of the Court was grounded on the fact that, pursuant to Article 62 Brussels I, the Swedish administrative public authority (the *Kronofogdemyndigheten*) when sanctioning the debt relief cannot be classified as a 'court or tribunal' within the meaning of Article 32 Brussels I, since it may be qualified as one only when acting in the context of summary proceedings concerning orders to pay (*betalningsföreläggande*) and assistance (*handräckning*).

Although such an exclusion has been based on such particular circumstances, that decision led to the generalised conclusions by some scholars that debt adjustment proceedings are either excluded from the scope of application (also) of the Brussels I Regulation or that, albeit in principle applicable, the Brussels Regime does not offer appropriate solutions to deal with them [819].

In particular, one author illustrates that approach taking as an example the Finnish debt adjusting proceedings [820].

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814 I. RAMSAY, 'Comparative Consumer bankruptcy', Durham, 2007.

815 See T. LINNA, 'Cross-Border Debt Adjustment' – Open questions in European Insolvency Proceedings, in *International Insolvency Review*, 2014, p. 22.

816 See *supra*, Section 3, § III.3.2.

817 ECJ, 8 November 2012, Case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm*, ECLI:EU:C:2012:704.

818 *Radziejewski*, at [35].

819 See *Radziejewski*, at [38], where the Court states that « *While this regulation applies in principle to action taken before a court to recover a debt, it does not apply to debt relief such as that at issue. A Swedish debt relief decision appears to be an act by an administrative body that is not, other than in the cases set out in Article 62 of the Brussels I Regulation, a 'court' within the meaning of that regulation* ». Therefore, the Court excludes the applicability of the Regulation to the Swedish debt relief because it is not a court-proceedings, instead relevant measures are taken by an administrative authority.

820 But likely, in the light of the common features, it is reasonable to maintain that also the Italian *piano da sovraindebitamento* may be taken as an example.

It is understood that the Finnish Debt Adjustment Act provides [821] that an insolvent individual (non-business) may file with district courts a request for debt adjustment, proposing a payment plan concerning *all* his creditors. The opening of the debt adjustment gives effect to the stay of enforcement and debt collection (in exceptional cases secured creditors are shielded from that effect). The plan is subject to the approval of the court (which may hear creditors or a part of them, but their acceptance of the plan is not binding on the court). During the execution of the payment plan neither the divestment of the debtor nor the appointment of a trustee takes place.

In the light of the characteristic of the Finnish debt adjustment, it was not included in Annex A EIR, since it does not meet all the requirements of Article 1(1) EIR (and therefore it is not a procedure dealing with common pool problems).

Moving from the correct assumption that the Finnish procedure cannot be governed by the Insolvency Regulation, it is submitted that when examining comprehensively the 'list' of proceedings excluded from the scope of Brussels Ia , debt adjustment proceedings falls 'obviously' within the notion of 'judicial arrangements and composition' (or, more in general, in the notion of 'analogous proceedings').

Also, the same author attempts to further support the existence of a regulatory loophole, arguing *a contrario* with the provisions of the Brussels I Regulation, demonstrating that it would not provide for an adequate set of rules. More in particular it is claimed that the Brussels Regime would not be applicable to forms of *jurisdictio volontaria*, such as debt adjusting proceedings, where the approval of the court concerns the civil rights and obligations of the debtor and the creditor, but it does not concern an adversarial matter.

As to the recognition and enforcement, it was submitted that the payment schedule is not *ex se* enforceable, but it is converted to a title of enforcement only in the event that enforcement authorities find that the (rescheduled) payments are overdue three months and still unpaid. On this ground, the applicability of the Brussels Regime of recognition and enforcement is deemed (a bit hastily) to be inapplicable.

Some of the reasons described above replicate those that militate against the applicability of the Brussels Ia Regulation to schemes of arrangement. To avoid unnecessary repetitions, reference is made to what has already been explained in the previous paragraphs [822].

However, two additional observations are necessary with regard to debt adjustment proceedings.

The first perplexity refers to the interpretation inferred from the *Radziejewski* judgement. It is contested that said ECJ's decision could be invoked to support that in principle the Brussels Regime is not applicable to debt adjustment proceedings. Indeed, the court merely stated that

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821 The Act on the Adjustment of the Debts of a Private Individuals enacted by the Finnish Parliament in December 1992 and became effective 8 February 1993 (1993/57) (*lag om skuldsanering för privatpersoner*).

822 See *supra* in this Section, § III.3.2.1.

« *while* [the Brussels I Regulation] *applies in principle to action taken before a court to recover a debt, it does not apply to debt relief such as that at issue* [i.e. the Swedish *skuldsanering*]. *A Swedish debt relief decision appears to be an act by an administrative body that is not, other than in the cases set out in Article 62 of the Brussels I Regulation, a 'court' within the meaning of that regulation* ».

Therefore, the Court neither has excluded the applicability of Brussels I to debt relief in that it is a non-adversarial proceedings (which, on the contrary, are surely encompassed within its scope of application, as witnessed by Article 58 Brussels Ia), nor it has found that it concerned a subject matter excluded from its material scope (823).

The second observation addresses the fact that, unlike schemes of arrangement, debt relief proceedings are, in principle, 'collective' within the meaning under article 1(1) EIR (*i.e.* the procedural effect of the ban of creditors' individual enforcement actions) (824). Which could at first sight make them easily comparable to the collective procedures defined in Article 1(1) EIR (in spite of the lack the divestment and of the appointment of the trustee).

However, I believe that a crucial difference between the definition of insolvency proceedings under Article 1(1) EIR and debt relief proceedings lies with the fact that the former aims primarily at the (maximisation of) the collective satisfaction of creditors, whereas the determinative reason behind the introduction in legal systems of debt adjustment proceedings is to benefit individuals with a fresh start, even when this may result in the partial detriment of creditors' rights (825).

Keeping as an example the same Finnish debt adjustment, the marked debtor-oriented purposes of proceedings emerge from a number of elements.

Firstly, only the debtor has the *locus standi* to request the debt adjustment. Secondly, the very fact that during the execution of the payment plan the debtor retains full possession and management of his assets. Thirdly, that the payment plan is subject exclusively to the approval of the court, which is not bound by the creditor's acceptance of the terms proposed by the debtor. Fourthly that the objective conditions to access the procedure involve an evaluation of the 'honest' conduct of individuals (826).

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823 As also noted by Linna herself, it is important to highlight that in *Radziejewski* the Court did not classify the debt relief of the debtor as an administrative procedure, thus excluded from the scope of application under Article 1(1) Brussels I. It must be then added that the ECJ did not even exclude that it was encompassed in the Insolvency Exception. On the contrary, it could perhaps be argued that the silence of the Court in this sense could lead to believe the opposite.

824 Collectiveness here does not simply means *lato sensu* that debt relief proceedings are multi-party proceedings, but that individual enforcement proceedings are precluded to creditors. Therefore, 'collective' here has the same autonomous meaning under article 1(1) EIR (See *supra* Section 2, § II.1.2.1.1.).

825 Incidentally it is important to note that the social and economic situation of a small entrepreneur is not necessarily much different from that of an employee. On the other side, the legal obligations of an entrepreneur towards his or her contract partners and employees and the society are so complicated that they are difficult to accommodate in the same, fairly simple debt adjustment procedure that is fit for the consumer. J. NIEMI-KIESILÄINEN AND A.S. HENRIKSON, report to debt problems in credit societies of the bureau of the European committee on legal co-operation on legal solutions of the Council of Europe, 2005.

826 Such a view seems to be confirmed also by ECHR, 20 October 2004, *Bäck v. Finland*, App. No. 37598/97 ECHR 2004-VIII, where it was stated « *a legislative framework for permitting the adjustment of private individuals' debts on certain conditions has been put in place in a number of Contracting States. It has no reason to doubt the Finnish legislature's*

Should this interpretation turn to be correct, debt relief proceedings would not be excluded from the scope of application of Brussels Ia, since they may not be equated (at least not so 'obviously') to those insolvency collective proceedings which had justified such an exclusion.

In the light of the above, it is therefore fair to maintain that the scope of the Insolvency Exception should be construed on the basis of the scope of application of the EIR and not *vice versa*. That interpretation achieves as much as possible the dovetailing of the two instruments' scope of application, it being understood that when the Brussels Regime refers to 'bankruptcy, winding-up, judicial arrangements, compositions', it does not refer to situations merely involving somehow insolvency, but to proceedings aimed at solving the 'common pool' problems.

However, it must also be acknowledged that, even under that construction, in practice a perfect dovetailing could not be achieved.

The fact that one of the requirements for proceedings to be covered by the EIR is that the procedure must be designed for situations at least involving the insolvency of the undertaking [827], excludes from the scope of application of the Insolvency Regulations those national proceedings which do pertain to 'common pool', problems (*i.e.* they do activate the statutory mechanism to address a common pool problem) but are designed exclusively for situations of distress.

This should not come as a surprise: as discussed, common pool problems surely exist when the debtor is materially insolvent. But that does not mean that national legislatures, based on consideration of economic and legislative policy expediency, deem it appropriate to anticipate the statutory response to the debtor's default to a point where the situation has not yet resulted in the material insolvency [828].

Therefore, the real regulatory gap under the regime of the EIR lies with those collective proceedings (and not with quasi-collective proceedings) triggering the national legal mechanisms against common pool problems, but that do not meet the requirements of Article 1(1) EIR (namely, the requirement that the procedure must be based on the debtor's insolvency). That is exactly the case of the French *sauveguarde* and of the Italian *amministrazione controllata*.

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judgment that there was, at the relevant time, an urgent and compelling public interest in affording debtors the possibility of seeking a debt adjustment in certain circumscribed situations. […] *The Court would not exclude the possibility that the court-ordered irrevocable extinction of a debt, as opposed to the scheduling of payments of a debt over a longer period of time […] could in some circumstances result in the placing of an excessive burden on a creditor* ». See also for Italian case-law Cass. SS.UU., 18 November 2011, n. 24215, in Redazione Giuffré, 2011 « *L'eccezionalità dell'istituto è invero riconducibile all'avvertita esigenza (già sopra richiamata) di consentire al debitore imprenditore di ripartire da zero ("fresh start"), dopo aver cancellato i debiti pregressi ("discharge"), ed è il soddisfacimento di tale esigenza, dunque, oggetto della mediazione che il legislatore ha attuato in relazione alla tutela dei principi vigenti nel nostro ordinamento, potenzialmente contrastanti. Compito dell'interprete, pertanto, è proprio quello di stabilire il punto di equilibrio individuato al riguardo dal legislatore, punto di equilibrio che non appare individuabile in quello idoneo ad evitare uno sbilanciamento del sistema in danno dei creditori, non risultando tale obiettivo né dal dato testuale della legge delega, nè dalla "ratio" dell'istituto* ». See also Trib. Bergamo, 31 March 2015, in *Il Fallimentarista*, 2015.

827 On proceedings serving 'double' purposes see *supra* Section 3, § II.1.2.1.2.

828 See on this point H. EIDENMÜLLER, 'What is an insolvency proceedings?' in *Oxford Legal Studies Research*, 2017, Paper No. 31 and S. MADAUS, 'Leaving the shadows of us bankruptcy law: a proposal to divide the realms of insolvency and restructuring law', in *Eur. Bus. Org. Law Rev.*, 2018, pp. 615–647.

Those are certainly rare cases, since it is reasonable to believe that statutory restrictions of creditor rights enforcement (under both a substantive and a procedural perspective) are called on as last resources, when ordinary enforcement measures prove to be insufficient (*i.e.* when the debtor is actually insolvent). Nevertheless, where those proceedings are excluded from the scope of application of the EIR (as they are not included in Annex A thereof) they do fall in a regulatory creep, since the Insolvency Exception aims exactly at excluding procedures dealing with common pool problems (but not to other proceedings dealing with insolvency situations *lato sensu*).

Keeping that in mind that specification, one could affirm that *tendentially*, the scope of the EIR [829] and the Brussels Regime (*recte* the Insolvency Exception) cover a coextended area. Any dovetailing that might have been intended, however, is arguably upset by the mechanism of Annexes [830].

III.3.3. The role of Annex A as an additional obstacle to dovetailing

The aforementioned picture is further complicated by the role of the Annexes within the system of the Insolvency Regulation and their relationship with the EIR's provisions disciplining its scope, the analysis of which has been deliberately omitted so far.

As mentioned above in the paragraph outlining the scope of the Insolvency Regulation, it defines a basis framework for its application through set of cumulative conditions jointly described in Articles 1 and 2 (a) - (c) EIR. At the same time, the Insolvency Regulation renounces to push for an autonomous definition of some pivotal concepts mentioned therein, so that the full effects of these provisions can only be understood when read in conjunction with Annexes A, B, and C.

The Annexes respectively contain a list of 'insolvency proceedings', 'winding-up proceedings' and 'liquidators', as provided by the laws of each Member State, thus encompassed within the scope of the Insolvency Regulation.

The Annexes have been amended several times [831], in accordance with the procedure under Article 45 EIR, providing that « *the Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexs* ».

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829 As it will be explained, this is not the case when it comes to the relationship between the Recast Regulation and the Brussels Regime (see *infra* Chapter IV).

830 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., Implementation of the New Insolvency Regulation, Baden-Baden, 2017, p. 81.

831 Amendments to the EIR were made by Council Regulation (EC) No 603/2005, in *Official Journal*, 2005, L. 100, Council Regulation (EC) No 694/2006, in *Official Journal*, 2006, L. 121; Council Regulation (EC) No 1791/2006, in *Official Journal*, 2006, L. 363; Council Regulation (EC) No 681/2007, in *Official Journal*, 2007, L. 159; Council Regulation (EC) No 788/2008, in *Official Journal*, 2008, L. 213; Implementing Regulation of the Council (EU) No 210/2010, in *Official Journal*, 2010, L. 65; Council Implementing Regulation (EU) No 583/2011, in *Official Journal*, 2011, L. 160, Council Regulation (EU) No 517/2013 in *Official Journal*, 2013, L. 158, 10.6.2013; Council Implementing Regulation (EU) No 663/2014, in *Official Journal*, 2014 L. 179; Council Implementation Regulation (EU) 2016/1792 of 29 September 2016, in *Official Journal*, 2016, L. 274.

See also the 'Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic

The underlying objective of this rule is clearly to keep the Insolvency Regulation constantly updated with changes in national legislation. Pursuant to Recital 9 EIR, the relationship between the Annexes and the text of the Insolvency Regulation (namely, Articles 1, 2(a)-(c) EIR) is a definite one: « *the insolvency proceedings to which this Regulation applies are listed in the Annexs* » [832].

Therefore, Annexes to the Insolvency Regulation must be regarded as binding lists.

As discussed, the s.c. 'closed-list system' legislative technique was uttered since the Preliminary Draft Convention (and the Istanbul Convention). In the ideal scenario where proceedings listed in Annex A fulfilled *all* the conditions of Article 1 EIR and *all* such national proceedings were comprised therein, that method was understood (as is the case today form some authors) as providing legal certainty and the sound functioning of cross-border insolvencies [833] , for it served to courts and insolvency practitioners to exactly ascertain whether the Insolvency Regulation is applicable to a specific situation without necessarily having to verify the fulfilment of the conditions set forth by Article 1 EIR [834].

Practice has, however, revealed a clash between the closed-listed system and the trust that Member States have (or also should have) in the sincere promotion of certain proceedings to Annex, since over the years several discrepancies have emerged [835].

In particular, the following (possible) discrepancies were acknowledged:

(i) from the beginning, Annex A included proceedings one could reasonably doubt that they did satisfy all the four conditions required from Article 1 EIR. This was the case, for instance, of the Italian *amministrazione controllata* under Article 187 of the (nowadays abrogated [836]) Italian Bankruptcy Code ('l.fall.'), that could be opened when the debtor would meet temporary difficulties to fulfill his obligations, and there is evidence that his business could be rehabilitated. Also, the procedure did not necessarily entail the divestment of the debtor, which, according to Article 191 l. fall. could be ordered

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of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded', in *Official Journal*, 2003, L. 236.

832 See also Virgós-SchmitReport, at [48], where it states that «*Under Article 2(a) and (c), for insolvency proceedings to be covered by the Convention the proceedings concerned must also have been expressly entered by the State concerned in the lists of proceedings in the Annexs, which form an integral part of this Convention. Only those proceedings expressly entered in the list will be considered "insolvency proceedings" as covered by the Convention and will be able to benefit from its provisions. In an area where national laws differ considerably, the lists are aimed at providing legal certainty regarding the proceedings to which the Convention may be applied* ».

833 B. Wessels, 'What is an insolvency proceeding anyway?', in *International Insolvency Law Review*, 2011, referring to Recital 4 EIR.

834 Lemontey Report, p. 10, M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 485. M. VIRGÓS SORIANO, F. J. GARCIMARTÌN ALFÉREZ, *The european Insolvency Regulation*: law and practices, The Hague, 2004, fn. 36. S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, para. 6.

835 B. WESSELS, *International Insolvency law*, 2017, [10425t].

836 On January 10, 2019, the Italian Government approved Legislative Decree No. 14 of 2019, captioned "Code of Business Distress and Insolvency" (*Codice della Crisi d'Impresa e dell'Insovenza*) which replaces large swaths of the Italian insolvency law, dating back to 1942.

by the bankruptcy court only upon request of the committee of creditors or any entitled person. Following its abolishment in 2006 [837], the *amministrazione controllata* was deleted from Annex A.

The French *sauveguarde* under Article L. 620-1 Code du Commerce, which was added to Annex A by Amending Regulation 694/2006, can be opened when the debtor, although not in suspension of payments, is experiencing insurmountable difficulties but has not yet reached the stage of cessation of payments [838]. Those proceedings as well lack the divestment condition [839].

Including the *amministrazione controllata* and the *sauveguarde* in Annex A, however, is justified under the assumption that they both deal with common pool problems. If they had not been included in Annex A, they would have fallen in a regulatory creep governed by national rules of private international laws.

Another example is the (indeed, very rarely used) German *Eigenverwaltung*, (debtor in possession proceedings, under Sec. 270 and 270(a) InsO). The lack of appointment of a trustee and of the divestment of the debtor notwithstanding, those proceedings are encompassed by Annex A, via the inclusion of the *Insolvenzverfahren* [840].

Also, it is worth of notice that it was questioned whether the English *creditors' voluntary winding-up* as governed by the proceedings seemingly fail to fulfill the criteria of Article 1(1) EIR [841].

(ii) Another discrepancy was noted with reference to national proceedings which, albeit not being listed within Annex A, fulfill the conditions set out by Article 1 EIR. It was doubtful whether those proceedings could be still be regarded as falling within the scope of the Insolvency Regulation.

Apparently [842] that was the case in 2010 of the Austrians *Sanierungsverfahren mit Eigenverwahltung* that, as of 1 July 2010, had replaced the former original *Ausgleichsverfahren*. Both proceedings met the conditions of Article 1(1) EIR but the latter, being the product of a recent reform, was not (yet) included in Annex A. Also, Austria seems not to have introduced within Annex A the *Sanierungsverfahren mit Eigenverwaltung 'unter Aufsicht eines Verwalters'* which seemingly fulfills all the conditions of Article 1 EIR.

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837 The *amministrazione controllata* was abrogated by the Legislative Decree 9 January 2006, n. 5.

838 The uncertainties concerning the applicability of the Insolvency Regulation to the *sauveguarde* were raised in T. com. Paris, 15 January 2007 (Eurotunnel), where the French court found that « *seule présence à l'Annex A s'impose au juge national qui n'a pas à contrôler la conformité de la procédure aux conditions prescrites par l'article 1er paragraphe 1 du règlement ni à saisir la CJCE d'une question préjudicielle y relative* ». D. ROBINE and F. JAULT-SESEKE, 'Affaire Eurotunnel : nouvel épisode', in *Bull. Joly Sociétés*, 4, 2007, p. 459.

839 Until the amendment of Annex A by virtue of Council Implementing Regulation (EU) No 583/2011, Litva listed exclusively pre-insolvency proceedings. Because of that, Hess refers that some concerns as to the validity of the previous versions of Annex A were raised.

840 See, B. HESS, in B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, p. 53.

841 Insolvency (Amendment) Rules 2002, SI 2002/1307, rr. 9, 12 (and the further amendments brought by SI 2003/1730 and SI 2010/686) introduced rr. 7.62, 7.62 to Insolvency Rules 1986. Currently these rules correspond to Insolvency Rules 2016, rr. 21.4, 21.5 and 21.6.

842 B. WESSELS 'What is an insolvency proceeding anyway?', in *International Insolvency Law Review*, 2011, quoting G. MUHRI and F. STORTECKY, *Das neue Insolvenzrecht*, Wien, 2010.

A similar discrepancy to that *sub* (ii) raises in connection with proceedings that, although meeting the conditions set forth by Article 1(1) EIR, are not listed in Annex A, but the liquidator appointed in the course of which would be listed in Annex C.

For instance, the Italian *amministrazione straordinaria delle grandi imprese*, introduced by the s.c. Legge Marzano [843], was not included in Annex A, but it being a *species* of procedure analogous to the *amministrazione straordinaria*, the *commissario straordinario* (the trustee appointed in the context of both proceedings) was already listed in Annex C [844].

Similarly, the Belgian *Gerechtelijke reorganisatie door een minnelijk akkoord/Réorganisation judiciaire par accord amiable* (a judicial reorganisation proceedings by way of individual agreement, regulated by Article 43 *loi sur la continuité des entreprises*) may entail under certain circumstances that in the course of proceedings an interim liquidator (*voorlopig bestuurder/administrateur provisoire*), is appointed by the court and the debtor is totally divested. Under such circumstances said proceedings seems to fulfill all the conditions set forth by Article 1(1) EIR. However, while the *administrateur provisoire* has been inserted in Annex C, the *Réorganisation judiciaire par accord amiable* has not.

Also, one may doubt on whether some sub-categories of proceedings, which could be qualified as *species* of a *genus* of proceedings, that are not listed in Annex A (but meet the conditions of Article 1 EIR) could be considered as encompassed in its scope of application because the *genus* proceedings is included therein.

Examples of that are the Italian *amministrazione straordinaria delle grandi imprese in crisi* and the French *sauveguarde financière accelerée*, which are considered as 'sub-cathergories' of the *amministrazione straordinaria* and the *sauveguarde.* According to some (perhaps over-rigid) scholars, the fact that Annex A only mentions the *amminsitrazione straordinaria* (thus omitting '*delle grandi imprese*') and the *sauveguarde* (but not '*financière accelerée*') would lead to the exclusion of those specific proceedings from the scope of application of the EIR.

Since generally those 'sub-proceedings' are the result of evolutions within insolvency national laws, more in general, it is unclear how to deal with proceedings listed in Annex A which, although initially meeting the conditions of Article 1(1) EIR, due to further national legislative reforms are redesigned in such a way that they could do not fit the above requirements anymore [845].

Doubts were (at least partially) dispelled by the intervention of the ECJ. For instance, in the *Bank Handlowy* case [846], one of the issues concerned the recognition of a decision opening *sauveguarde*

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843 Law Decree n. 347 del 2003 converted with amendments in Law n. 39/2004.

844 See S. BARIATTI, 'The Italian Amministrazione Straordinaria of Huge Undertakings and the European Insolvency Regulation', in B. Wessels and P.Omar (eds.), *The European Insolvency Regulation: An Update*, Nottingham-Paris, 2010, pp. 87-94.

845 C. PAULUS, *Europäische Insolvenzverordnung. Kommentar*, Frankfurt am Main Verlag Recht und Wirtschaft, 3rd ed., 2010, Art. 2, nr. 4.

846 ECJ, 22 November 2012, Case C-116/11, *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o.*, ECLI:EU:C:2012:739, at [33]. See also ECJ, 21 January 2010, Case C- 444/07, *MG Probud Gdynia sp. z o.o.*, ECLI:EU:C:2010:24, at [40], where it is stated that « *in so far as the insolvency proceedings*

proceedings (in France) as main proceedings in Poland, even though, albeit listed in Annex A, it does not meet all the criteria provided by Article 1 EIR. The Court established the principle that « *once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation* ». In addition, the Court held that a court seised with a request opening secondary insolvency proceedings, under Article 27 EIR, cannot examine the insolvency of the debtor in that State, since that assessment would be incompatible with the objective of efficient and effective cross-border insolvency proceedings which the Regulation seeks to achieve [847].

In the abovementioned *Radziejewski* [848] judgement, it was further specified that the Insolvency Regulation applies *only* to proceedings listed in Annex A so that proceedings excluded from the list do not fall within its scope. It is true what noted by some authors that, although in that case the Swedish debt relief procedure could not be included in Annex A, lacking the necessary characteristics, the decisive wording of the Court leaves no room to doubt that the Insolvency Regulation does not cover *all* proceedings not listed therein.

These rulings have led to a number of consequences which resolve most of the discrepancies above signaled and, while revealing a certain degree of rigidity, appear to be a viable solution to maintain the effectiveness and efficiency of the procedure.

Firstly, one must acknowledge the existence of a presumption *iuris et de iure* on the conformity of proceedings listed in Annex A and Article 1 EIR [849]. Because of that, the courts of the Member States are prevented in any case to examine whether proceedings opened in another Member State fall in the definition of insolvency proceedings within the meaning of Article 1 EIR, the only assessment to be carried out being the inclusion of the procedure concerned in Annex A. Allowing courts to continuously resort to the substantive definition in Article 1 EIR would perhaps lead to a greater flexibility. Evidently it was nevertheless considered as jeopardising the effectiveness and efficiency of proceedings, as well as legal certainty and predictability in that it would be too cumbersome for national courts (in this respect it is noteworthy it would be probably correct to believe that the national court should assess the content of foreign proceedings in light of the law of that Member State).

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opened in respect of MG Probud are listed in Annex A to the Regulation, it follows from application of Article 3 of the Regulation that the Polish courts have jurisdiction to open main insolvency proceedings and to hand down all the judgments which concern the course and closure of those proceedings ». Also in ECJ, 18 April 2013, Case C-247/12, *Meliha Veli Mustafa v. Direktor na fond 'Garantirani vzemania na rabotnitsite i sluzhitelite' kam Natsionalnia osiguritelen institut*, ECLI:EU:C:2013:256, in a case relating to the interpretation of the Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, in *Official Journal*, 2008, L. 283, the Court reaffirms that principle at [36].

847 See *Bank Handlowy*, at [72].

848 ECJ, 8 November 2012, Case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm*, ECLI:EU:C:2012:704, at [24].

849 P. NABET, 'Champ d'application', in G. CUNIBERTI, P. NABET and M. RAIMON, *Droit de l'insolvabilité. Reglèment (UE) 2015/848 du 20 mai 2015 relatif aux procedures d'insolvabiité*, LGDJ, 2017, p. 38.

Secondly, *only* proceedings listed in Annex A may benefit of the automatic recognition and the regime set out by the Insolvency Regulation, what is outside (either because newly reformed or introduced or because omitted on purpose) does not. That means that one must acknowledge that Annex A may be regarded either as being 'over-inclusive' or 'underinclusive'. Over-inclusive because it lists also proceedings that are not based on the debtor's insolvency and did not entail his divestment, as required under the base framework of Article 1 EIR. Under-inclusive because it does not list all national proceedings that satisfy those conditions [850].

Thirdly, as to the function of Article 1 EIR, the definition of insolvency proceedings provided therein is needed only for subsequent modifications of the Annexs (that is, for deciding, *inter alia*, which new proceedings qualify for inclusion in the Convention), but not for the day-to-day application of the Convention [851]. As such, Article 1(2) EIR merely serves as (residual) guideline for lawmakers to propose the inclusion of national proceedings within Annex A.

The latter consideration unveils the main drawback of this policy: since Member States are under no obligation to notify new (or reformed) proceedings to be included in Annex A EIR, that entails that they (*recte* their degree of reluctance to deprive themselves of the power to govern the effects in their territories of insolvency proceedings) act as gatekeeper as to the actual application of the Insolvency Regulation [852].

In this context, therefore, it must be concluded that the ideal dovetailing is *de facto* precluded by the mechanism set forth by Annex A: as long as the application of the Insolvency Regulation depends upon the inclusion of proceedings in Annex A at the discretion of Member States, whatever their contents may be, no dovetailing may be guaranteed[853].

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850 See S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017, p. 66.

851 M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 502.

852 To use the words of Van Calster, if Annex A is the trigger to apply the Insolvency Regulation, it is the Member States that pull it. G. VAN CALSTER, 'COMIng and here to stay. The Review of the European Insolvency Regulation', 2016, published in papers.ssrn.com (last access: March 2018).

853 Or, more recently the Croatian Law on Extraordinary Administration Proceeding of Companies of Systemic Importance for the Republic of Croatia, introduced on 6 April 2017, National Gazette (Narodne novine) No. 32/17 (the s.c. Agrokor law). Which was found as meeting all the conditions set forth by article 1(1) EIR. See D. Djuric and V. Jovanovic, "'Too big to fail?" The Agrokor case and its impact on West Balcan economies', in *Int Insolv Rev*, 2019; pp.22–43.

SECTION 4

ANNEX ACTIONS: THE INDIVIDUAL DIMENSIONS OF THE PROBLEM

CONTENTS: IV.I. The *vis attractiva concursus* in Phase I of the Bankruptcy Project - IV.2. The (lack of) provisions expressly addressing the *vis attractiva concursus* under the Insolvency Regulation - IV.3. [segue] Some (unsuccessful) attempts of scholars to find a rule on jurisdiction on Annex Actions - IV.3.1. The applicability of the rules of private international law of each Member State - IV.3.2 The interpretation of Article 3 EIR as allocating (directly or by way of analogy) jurisdiction of Annex Actions - IV.3.3. The applicability of the Brussels I Regulation - IV.3.4. The general applicability of the *lex fori concursus*

It is now possible to turn the attention on the *vis attractiva concursus*, that represents the main focus of this research.

As anticipated, the 'individual dimension' of the boundaries between the Insolvency Regulation and the Brussels Regime deals with a matter of jurisdiction.

Indeed, bearing in mind that the opening of insolvency proceedings only represents the first stage of a complex procedure, it is necessary to assess whether and to what extent the jurisdiction of the Member State opening insolvency proceedings *vis-à-vis* the debtor may hear and determine the ancillary related actions that arise in the course of that procedure.

Therefore, albeit closely intertwined with the 'collective dimension', what was labelled with the 'individual dimension', concerns a further step of demarcation between the two instruments at stake. More precisely, once ascertained that a certain type of insolvency collective proceedings falls within the scope of the EIR, the individual dimension addresses the *extension* of the jurisdictional regime provided therein with regard to traditional adversarial actions that 'escort' insolvency proceedings (listed in Annexes A), for they are directly deriving from insolvency and are closely linked to insolvency proceedings.

In this respect, it must be highlighted that the use of the bivalent English expression 'proceedings' has often led to address that issue in terms that do not seem entirely correct [854]. When faced with the question of extending the jurisdiction of the courts opening insolvency proceedings to insolvency-related matters, scholars (but also the ECJ) has generally focused their attention on whether they could be subsumed under the concept of 'analogous proceedings' [855]. However, when Article 1(2)(b) Brussels Ia mentions 'analogous proceedings' it refers exclusively to the 'collective dimension' of the problem (*i.e.* whether a particular type of collective proceedings for their specific characteristics may be perceived as analogous to 'bankruptcy, winding-up, composition, judicial arrangements' thus

854 The Italian and French versions refer instead to 'procedure analoghe' and 'autres procédures analogues', which better point out the difference between the individual and the collective dimension.

855 PAUL J. OMAR, 'The insolvency Exception in the Brussels Convention and the Definition of "Analogous Proceedings"', [2011] *International Company and Commercial Law Review*, p.172.

falling within the scope of the EIR). Instead, the *vis attractiva concursus* does not pertain to collective proceedings, but to individual actions that retain a typical adversarial structure (claimant v. respondent), which cannot, in any case, equate with the collective structure of (insolvency) analogous proceedings.

That profile is more a problem of the breadth of the scope attributed to the term 'insolvency proceedings' within the EIR, rather than *if* proceedings are encompassed within the EIR. When the primary collective proceedings are mentioned in the Annex, the legislature assumes (but do not impose to indicate) that they bring within the scope of the EIR the annex 'escorting' actions with them.

IV.1. The *vis attractiva concursus* in Phase I of the Bankruptcy Project

It was explained in the first section of this chapter that the cornerstone and the inspiring principle informing the elaboration of the *avant projets* in phase I of the Bankruptcy Project was a rigid concept of universality and unity of insolvency proceedings.

As a fundamental expression of the principle of unity [856] (*i.e.* that insolvency proceedings against the debtor must be one and have full effects throughout all Member States) both the Preliminary Draft Convention and, then, the Draft Convention included a rule specifically governing the *vis attractiva concursus* [857].

The reason bearing the introduction of that principle within the text of the envisaged convention on cross-border insolvencies was that the *vis attractiva concursus* belonged (as is the case today) to the tradition of the bankruptcy laws of some (at that time the majority) of the Contracting States. As was explained in the Chapter I, within these legal systems, the opening of insolvency proceedings is generally understood as a legal event that gives rise to specific rights and situations governed by rules that are peculiar to insolvency law. Their application, therefore, is bestowed upon the functional competence of the bankruptcy court. At the same time, it was also acknowledged that the extension of the 'attraction' towards the insolvency court's functional competence varied over national laws. Indeed, some Contracting States provided that not only actions originating from the opening of insolvency proceedings had to be decided by the bankruptcy court, but also those actions the legal foundation of which, although stemming from common civil and commercial rules, is influenced by the opening of insolvency proceedings to such an extent that it turns to be inextricably linked to it.

Therefore, among the Contracting States recognising the *vis attractiva concursus* within their legal systems, it operates with different degrees (depending on the intensity by which some actions were attracted to the bankruptcy procedure).

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856 V. COLESANTI, *op. cit.*

857 The *vis attractiva concursus* was not new in the international scene. Besides, art. 22(4) of the Benelux Treaty conferred jurisdiction on the court in which insolvency proceedings are opened to decide on *« all actions arising directly out of the bankruptcy »*.

The scope of operation of that rule within national systems is extremely opaque, in that the definition of actions to be attracted before the bankruptcy court was remarkably vague and source of uncertainties among scholars and case-law.

Against this background, it is not surprising that drafting of the rules introducing the *vis attractiva concurus* raised one of the most delicate issues in negotiations.

Nevertheless, it was understood as a rule fostering the efficiency and effectiveness of insolvency proceedings. With the specific purpose of avoiding uncertainties and divergent applications on the part of national courts, the draftsmen managed to reach an agreement on an exhaustive list of actions considered as insolvency-related that ought to be brought before the courts of the Contracting State opening insolvency proceedings.

The Lemontey report accompanying the text of the Draft Convention as amended in 1984 defined Annex Actions as « *those whose object is to determine the assets in the bankruptcy, or which concern the liabilities and their administration* ».

Looking at the type of actions listed in the respective articles of the Preliminary Draft Convention and the Draft Convention, it is fair to maintain that both texts envisaged a 'strong degree' of *vis attractiva concursus*, attracting to the courts of the Member State where insolvency proceedings were opened not only actions originating from insolvency, but also civil and commercial actions on which insolvency has some bearing.

Those actions were

(i) Actions for the liability of *de iure* or *de facto* directors (either natural or legal persons) [858];

(ii) Actions for the liability of severally liable shareholders (either natural or legal persons) [859].

It was made clear that those categories of actions encompassed all actions concerning liability made available to both the general body of creditors and the company itself where they have suffered loss or damage as a result of the management of one, several or all of its managers or directors. Such actions may include both actions for civil liability under the general law and those specially provided for under company law. They may again be those provided for under certain laws on bankruptcy,

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858 Article 12(1) Preliminary Draft Convention read « *Les juridictions de l'État contractant où a été prononcée la faillite d'une société ou personne morale sont compétentes pour connaitre des actions relatives à la responsabilité encourue du fait de leur gestion par* [tout dirigeant de droit ou de fait, apparent ou occulte]». Article 11(a) read « *the liability incurred in consequence of their direction or management by persons who have directed or managed the affairs of that firm, company or legal person to pay compensation for loss or damage suffered by the general body of creditors, or, where the law of the Contracting State in which the bankruptcy has been opened so allows, for loss or damage sustained by the company* ». Article 11(a) Draft Convention read« *The courts of the Contracting State in which the bankruptcy of a firm, company or legal person has been opened shall have exclusive jurisdiction to determine actions concerning (a) the liability incurred in consequence of their direction or management by persons who have directed or managed the affairs of that firm, company or legal person to pay compensation for loss or damage suffered by the general body of creditors, or, where the law of the Contracting State in which the bankruptcy has been opened so allows, for loss or damage sustained by the company* ».

859 Article 11(b) read « *liability for its debts by members whose joint and several liability in respect thereof is unlimited* ».

such as the so-called *action en comblement du passif social* [860]. It is important to note that those actions, relating exclusively to liability actions, under Article 67 Draft Convention were recognised pursuant to the Brussels Convention Regime.

(iii) Actions for the substantive consolidation of insolvency proceedings against severally liable shareholders [861];

(iv) Actions for the substantive consolidation of bankruptcy against directors [862].

(v) Claims as to the invalidity of transactions against the general body of creditors and payments or recoveries arising therefrom [863];

The actions comprised within that category were those *(i)* sanctioning the divestment of the debtor and accordingly the cessation of his power to dispose of his assets after the opening of insolvency proceedings; *(ii)* actions challenging certain transactions entered into by the debtor in fraud of the rights of his creditors prior to the bankruptcy: actions to set aside such transactions or 'suspect period' actions similar to them; *(iii) actions for payment or recovery arising out* actions for payment or recovery arising from them provided they are instituted against the first purchaser. The *vis attractiva concursus* operated even where the dispute concerned immovable property located in the territory of another

860 See Lemontey Report on the Draft Convention on bankruptcy, winding-up, arrangements, composition and similar proceedings, in *Bulletin of European Communities*, Supp. 2/82 (hereinafter, the 'Lemontey Report (1982)'), p. 63.

861 Article 10 Preliminary Draft Convention read « *Les juridictions de l'État contractant où a été prononcée la faillite d'une société ou personne morale comportant un ou plusieurs associés indéfiniment et solidairement responsables des dettes de la société ou de la personne morale sont compétentes pour prononcer la faillite de ces associés, lorsque la législation de cet État permet une telle décision à leur égard, quel que soit le lieu du centre des affaires personnel des associés* ». Article 11 Draft Convention related exclusively to liability actions against severally liable shareholders, but the Lemontey Report specifies that « *the idea of liability for members for the debts of the company apparently covers both the case of individual proceedings and the opening of collective proceedings: the 'joined bankruptcy' of the members is only in fact only an aspect of their legal liability for the debts of the company or firm. Such a solution is called for on the grounds of unity of the system and applicable law. In fact, only an aspect of their legal liability for the debts of the company or firm. Such a solution is cal7 led for on the grounds of unity of the system and applicable law* ».

862 Article 11 Preliminary Draft Convention read « *Les juridictions de l'État contractant où a été prononcée la faillite d'une société ou personne morale sont compétentes pour prononcer, selon les dispositions de l'article premier de l'Annex I, la faillite de* [tout dirigeant de droit ou de fait, apparent ou occulte] ». Also, article 12 Preliminary Draft Convention vested with exclusive jurisdictions the courts of the contracting State opening insolvency proceedings *vis-à-vis* a company to open insolvency proceedings against its directors that had become insolvent, following a judgement condemning him to bear all or part of the debts of the company. Unlike the Preliminary Draft Convention, the Draft Convention the substantive consolidation of insolvency proceedings *vis-à-vis* directors was neither provided by article 11 thereof, nor from article 10 of the Draft Convention, governing the particular capacity of debtor. However, the possibility to extend the jurisdiction of the Member State opening insolvency proceedings against a severally liable shareholder derived from «*the general ruled of jurisdiction in the Convention* ». See Lemontey Report (1982), p. 63.

863 Article 17(1)(2)(3) preliminary Draft Convention read « *Des inopposabilités à la masse de certains actes accomplis par le débiteur pendant la période suspecte, même si ces actes concernent des immeubles; Des demandes en payement ou en restitution fondées sur l'inopposabilité à la masse des actes mentionnés au numéro I; Des actions révocatoires des actes passes par le débiteur en fraude des droits des créanciers même prévues par des dispositions autres que la loi sur la faillite* ». Article 15(1)(2) Draft Convention read « *(1) claims as to the invalidity as against the general body of creditors of transactions carried out by the debtor before or after the opening of the bankruptcy, even if those transactions relate to immovable property;(2) claims for payment or for recovery of property which are based on the allegation that the transactions referred to in paragraph 1 are void as against the general body of creditors or on the allegation that they should be set aside where those claims are made against the party who transacted with the debtor* ».

contracting State, on the ground that the *petitum* of the action was not to ascertain whether the transaction was valid according to the general provisions of the *lex rei sitae*, but to assess whether, according to the provisions of the law of the State where insolvency proceedings were opened, the act was enforceable against the general body of creditors [(864)].

(vi) Disputes concerning the capacity or powers of the liquidator [(865)], and actions for the liability of the liquidator [(866)];

(vii) Claims against the general body of creditors in respect of movable property [(867)];

(viii) Actions brought against the spouse [(868)];

(ix) Actions relating to the admission of debts [(869)];

The *avant projets* deemed it necessary to centralise in the Member State where insolvency proceedings were opened not only the formalities regarding the lodging of credits, but also all disputes relating to contested credits (with the exceptions of fiscal debts, social security contributions and family allowances, and credits relating to employment contracts) [(870)];

(x) Disputes relating to the termination of pending contracts [(871)].

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[864] See Lemontey Report (1984), p. 67 also for some further explanations regarding the interpretation of the provision in light of the specific position of Germany.

[865] Article 17(4) read « *Des revendications relatives à la vente, par le syndic, des meubles du faille et tenant à l'observation des règles fixant les pouvoirs du syndic* ». Article 15(3)(4) Draft Convention read « *complaints concerning the capacity or powers of the liquidator, subject to the provisions of Article 33(3); (4) disputes relating to the validity of disposals by the liquidator, of the movable property of the bankrupt, which involve an allegation that there has been a breach of the rules determining the powers of the liquidator in that respect, subject to the provisions of Article 33(3)* ».

[866] Article 17(7) Preliminary Draft Convention read « *Des actions fondée sur une faute professionnelle su syndic et les contestations relatives à la reddition des comptes* ». Article 15(9) Draft Convention read « *actions based on the personal liability of the liquidator acting in his capacity as such and disputes relating to the submission of his accounts* ».

[867] Article 17(5) Preliminary Draft Convention read « *Des revendications mobilières contre la masse, sous réserve de ce qui est dit à l'article 21 paragraphe 3* ». Article 15(5) Draft Convention read « *claims against the general body of creditors in respect of movable property* ».

[868] Article 17(6) Preliminary Draft Convention read « *Des actions intentées contre le conjoint du failli, mettant en œuvre une disposition propre au droit de la faillite* ». Article 15(6) Draft Convention read « *actions brought against the spouse of the bankrupt in which a particular provision of bankruptcy law is invoked* ».

[869] Article 17(8) Preliminary Draft Convention read « *Des contestations en matière d'admission des créances à l'exception des créances fiscales ou des créances recouvrées comme en matière d'impôts, des créances en matière de sécurité sociale et des créances nées d'un contrat de travail. En ce qui concerne ces exceptions, les juridictions ou autorités normalement compétentes déterminent l'existence et le montant de la créance ainsi que l'étendue du privilège qui la garantit éventuellement* ». Article 15(7) Draft Convention read « *actions relating to the admission of debts; but this rule shall not:(a) as regards fiscal debts or debts similarly recoverable, social security debts and debts arising under a contract of employment, affect the jurisdiction of those courts and authorities which are in the ordinary way competent to determine whether a debt exists and, if so, the amount thereof, and whether it is preferential and, if so, to what extent; (b) as regards debts which are covered by general or special preferential rights over property which is subject to registration or by secured rights over property which is subject to registration, affect the jurisdiction of those courts in the Contracting State in which the property is situated which are in the ordinary way competent to determine what secured rights or general or special preferential rights exist over it* ».

[870] See Lemontey Report (1984), p. 69.

[871] Article 17(9) Preliminary Draft Convention read « *Des contestation qui ont pour objet de mettre fin aux contrats en cours en vertu d'un disposition du droit de la faillite, ò l'exclusion des contrats de travail et des baux d'immeubles* ». Article 15(8) Draft Convention read « *actions brought for the purpose of terminating current contracts under a provision of bankruptcy law, with the exception of contracts of employment and contracts relating to immovable property* ».

Briefly examining the regulation emerging from the abovementioned provisions, it bears noticing that the rule of the *vis attractiva concursus* provided in the *avant projets* revealed a peculiar nature that differentiated it (and significantly weakened its effects [872]) from the corresponding national rules.

The rules provided by the two texts entailed that the Contracting States opening the insolvency procedure would have exclusive jurisdiction over the actions specifically mentioned in the relevant articles, whereas the actions excluded would have fall within the Brussels Convention, regardless of the fact that under a certain contracting State an action was regarded as insolvency-related [873]). The fact that the *vis attractiva* was conceived as a rule of jurisdiction - thus leaving untouched national provisions allocating the functional and territorial competence between the courts of each Contracting State - significantly curtailed the typical role of that principle. The *vis attractiva concursus* was traditionally perceived as a rule pursuing the specific objective of concentrating before the bankruptcy tribunal those actions whose nature revealed - according to the various interpretation of each State - a close connection to the insolvency proceedings.

On the contrary, under the system designed by the Draft Convention and its predecessor, such a concentration was merely possible, in that it was deferred to the national laws of the Member States. It follows that the traditional features of the *vis attractiva* introduced at the international level were significantly altered.

Also, it must be pointed out that the *vis attractiva concursus* was exclusively a rule on jurisdiction: the court competent to hear the insolvency-related action would have applied the domestic rules of private international law to determine the law applicable to the action (with the significant exception of actions for the liability of directors and shareholders and actions to set a transaction aside, which under the Preliminary Draft Convention were governed by the rules of uniform law provided in Annex I thereof).

It is important to observe that while the jurisdictional regime of Annex Actions remained substantially unchanged in the texts of the Preliminary Draft Convention and Draft Convention (the latter only adjusting some aspects, mainly due to the relinquishment of the original project introducing uniform rules), the relevant rules on recognition and enforcement in the Draft Convention were significantly modified.

At the outset Article 56 of the Preliminary Draft Convention provided for a uniform regime according to which all judgements handed down by the courts of the Member State opening insolvency proceedings would be recognised *ipso iure* with no further formalities, subject only to the test of public policy.

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873 *Contra* A. LUPONE, *L'insolvenza transnazionale. Procedure concorsuali nello Stato e beni all'estero*, Padova, 1995, p. 212.

That rule did not meet the approval of the Commission. In the opinion rendered on 10 December 1981 on the proposed text [874], it was stated that

> « *Whilst in the interests of centralization the exclusive jurisdiction of the courts of the State in which a bankruptcy is opened is extended so that their jurisdiction applies, inter alia, to actions concerning the liability* […] *of their direction or management by persons who have directed or managed the affairs of a firm, company or legal person which has been declared bankrupt, judgments given in such cases are not covered by bankruptcy law within the meaning of the draft Convention, since they arise from actions whose primary aim is to establish whether the person who directed or managed the affairs of the firm or company is liable, and what damage was suffered. Such actions are not applications for the opening of a bankruptcy or winding-up, or for an arrangement, composition or analogous proceeding with a view to satisfying creditors collectively. The fact that these actions are filed in a court which has jurisdiction to adjudicate on the bankruptcy of a firm or company is understandable from the point of view of procedure, but it does not alter the legal nature of the application, even if the burden of proof is reversed* ».

In the light of the Commission's observation (which is fair to believe that had been profoundly inspired by the *Gourdain* judgement [875]), the Draft Convention expressly provided for two sets of rules on recognition and enforcement, distinguishing between judgements opening insolvency proceedings and 'other judgements. The former would have benefitted of the more favourable recognition under Article 56, whereas the latter were subject to the more stringent regime of recognition of the Brussels Convention (Article 67). Only the 'other judgements' concerning the capacity or powers of the liquidator, were equated to those opening insolvency proceedings. Therefore, the relevance of the *Gourdain* judgement was significantly curtailed, since, eventually, the characterisation of an action as insolvency-related would have been relevant exclusively for the purposes of jurisdiction, whereas the Brussels Convention would have been applicable in any case to recognition and enforcement.

The rules on the *vis attractiva concursus* met with almost unanimous opposition by scholars.

One of the criticisms raised against the mechanism designed by the *avant projets* concerned the risk of negative conflicts of jurisdiction, in that the domestic procedural rules of the Contracting State opening insolvency proceedings could not provide for grounds determining the competent court. In this respect the answers provided by the *avant projets* proved to be rather inadequate, since it was merely submitted that, due to the prevailing nature of the convention, the Contracting States would have had to provide for grounds of competence, at least subsidiary ones [876], since it would not have been possible to comply with the jurisdictional rule provided by the *vis attractiva concursus*.

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874 Commission Opinion of 10 December 1981 on the draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings (81/ 1068/EEC), in *Official Journal,* L. 391/23 of 31 December 1981.

875 A. LUPONE, *L'insolvenza transnazionale. Procedure concorsuali nello Stato e beni all'estero*, Padova, 1995.

876 It is reasonable to believe that the fact that the Working Party was chaired by Noel and Lemontey (both French) had an influence on this rule. Indeed, as noted by Lemontey, in France the problem of the possible

Also, scholars regarded sceptically the fact that the *avant projets* did not provide for the law applicable to Annex Actions, leaving it to domestic conflict of laws rules. It was pointed out that many national laws did not provide for rules on cross-border insolvencies and the mechanism provided by the proposed convention would have encouraged the development of different rules, which would have been hard to harmonise at a later stage.

IV.2. The (lack of) provisions expressly addressing the *vis attractiva concursus* in the Insolvency Regulation

As was seen in Section I above, over the years, instead of decreasing, the contrasts between Member States on the formulation of a regime on cross-border insolvency sharpened. Thus, not only was any aspiration to introduce a uniform substantive law abandoned, but the intention underlying the creation of uniform substantive rules was also increasingly eroded. Attention was mainly focused on rules governing the jurisdiction of the court opening insolvency proceedings, and the extra-territorial effects of the judgment opening insolvency proceedings.

Emblematic, in this sense, is the absolute removal of any principle that could concern, even if only indirectly, the *vis attractiva concursus* from the Istanbul Convention.

Yet, if limited to the sole Istanbul Convention, this fact should not come as a surprise. It was explained that to obtain the adhesion of as many States as possible, the text adopted by the Council of Europe had deliberately kept a low profile. If read through the lens of ensuring (only) a minimum of cooperation on some specific key issues of international bankruptcy [877], one fully understands the reason why not only the principle on the *vis attractiva concursus* but also the (upstream) rules relating to direct jurisdiction were lacking.

Instead, the absence of rules on Annex Actions in the text of the Insolvency Convention appears less justifiable, unless one understands such a *lacuna* as an intentional omission.

Indeed, in elaborating the text of 1995, the draftsmen resumed and considered also the principles enshrined in the Preliminary Draft Convention and the Draft Convention, including (as is assumable [878]) also the *vis attractiva concursus* expressly provided therein. Therefore, it does seem reasonable to consider the absence of rules on the jurisdiction of Annex Actions as forgetfulness of the legislature

absence of a rule on the competence of national courts was perceived as of no relevance (or, at least, a very limited one) since the Tribunal de Paris would have had in any case a subsidiary competence to decide any given action (« *pour nous, il n'y aura pas de difficultés, du moins sur le plan théorique, c'est le Tribunal de Paris qui généralement s'estime compétent, lorsqu'aucun tribunal français n'estime de l'être* ». However, the issue was considered determinative by scholars of the other contracting States, who objected to the (perhaps too hasty) solution suggested by Lemontey that « *Tous les Etats ne connaissent cependant pas le bonheur et e malheur de la centralization française* ». In this respect, then, it was suggested that, in case the *lex fori* of the Contracting State opening the procedure did not provide for a venue to hear and determine an insolvency-related action, the bankruptcy court would be vested with subsidiary competence, irrespective of the fact that the State concerned recognised the *vis attractiva concursus* within its national system.

877 See *supra*.

878 M. BALTZ, *op. cit.*, p. [595].

(or an 'unintentional' oversight, as some authors define it [879]). It seems more reasonable rather to believe that the lack of rules on the *vis attractiva concursus* is attributable to a precise choice of legislative policy. Unequivocal arguments supporting this reasoning are found in the Virgós-Schmit Report, which partially unravels the doubts on the lack of the *vis attractiva* in the text of the Convention.

It was submitted that « *although the projection of this principle in the international domain is controversial, the 1982 Community Draft Convention contained a provision in Article 15 which, according to the Lemontey Report, was inspired by the 'vis attractiva' theory. This Article conferred on the courts of the State of the opening of insolvency proceedings jurisdiction over a wide series of actions resulting from the insolvency. Neither this precept nor this philosophy has been adopted in this Convention* » [880].

The Insolvency Regulation reflecting *verbatim* the text of 1995, the sole rule explicitly disciplining jurisdiction was Article 3 EIR, which, as seen, concerned exclusively the jurisdiction to open insolvency proceedings.

Therefore, an express rule allocating jurisdiction on Annex Actions lacked completely.

Nevertheless, the Insolvency Regulation did not seem to ignore the issue of Annex Actions, for it expressly mentioned 'actions directly deriving from bankruptcy and closely related to bankruptcy proceedings' in two provisions.

Recital 6 EIR provided that

> « *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* ».

Article 25(i), second subparagraph EIR provided that

> « […] *judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court* [shall be recognised with no further formalities. Such judgments shall be enforced in accordance with […] the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters] ».

As the Virgós Schmit explains, the reason underlying these articles lie with the *Gourdain* judgement [881], rendered twenty years before the adoption of the Insolvency Regulation, in which the ECJ interpreted the scope of the Brussels Convention as excluding not only (liquidation [882])

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879 S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, P. DE CESARI, *op. cit.*

880 See Repot Virgós-Schmit, at [77].

881 ECJ, 22 February 1979, Case C-133/78, *Henry Gourdain v. Franz Nadler*, ECLI:EU:C:1979:49.

882 It was explained above that in the *Gourdain* case the Court seems to adhere to a 'traditional' (yet, antiquate) interpretation, according to which the concept of insolvency indicates exclusively liquidation proceedings, aiming at the realisation of the debtor's assets in the interest of the body of creditors (see *supra* in this Chapter, Section 3, § II.1.2.1.2.

insolvency proceedings but also 'action directly deriving from insolvency and closely connected to insolvency proceedings'.

It may be observed, incidentally, that in elaborating the regime on the recognition of Annex Actions, neither the draftsmen of the Insolvency Convention nor the working group 'adjusting' its provision for the enactment of the EIR [883], took into consideration the solution proposed by the Draft Convention. By providing a uniform regime for judgements opening insolvency proceedings and judgements concerning Annex Actions (as was provided by the Preliminary Draft Convention), it was clear that, in the intention of the legislature, both judgements, 'deserved' to be subject to the more favourable regime of recognition provided by the EIR.

Besides, other provisions dealt with (at least partially, since they addressed the different profile of the applicable law) one kind of Annex Actions, namely actions to set transactions aside.

Indeed, under Article 4(2)(m) EIR the *lex fori concursus* governed « *the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors* ».

By way of exception, however, the *lex fori concursus* was not applicable when it was proven that the detrimental act was subject to the law of a Member State other than that of the State of the opening of proceedings, and that law did not provide for any means of challenging that act in the relevant case (Article 13 EIR) [884].

Finally, Article 18(2) EIR vested the trustee appointed in secondary proceedings with the power to « *in any Member States* […] *bring any action to set aside which is in the interests of the creditors* ».

It follows form the foregoing that, as stated by the Virgós-Schmit Report, the Insolvency Regulation's «*silence* [on the *vis attractiva*] *is only partial on the matter*», since - although the sole provision on jurisdiction was Article 3 EIR - several other provisions indirectly on the topic could be somewhat traced in the text of the Insolvency Regulation.

5.2.4. [segue] *Some (unsuccesful) attempts of scholars to find a rule on jurisdiction on Annex Actions*

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883 It was mentioned that the text of the EIR registered minimal changes with respect to the text of the Insolvency Convention. As stated by Garciamartín, the « *existence* [of the Insolvency Regulation] *is likely due to the fact that it was negotiated in a institutional, political and economic environment significantly different from the current one* […] *It is difficult to resist the temptation to rewrite the whole text but this may jeopardize the success of the project, whilst triggering a Pandora's box effect* ». F. GARCIAMARTÍN, 'The review of the EU insolvency Regulation: some general considerations and two selected issues (hybrid procedures and netting arrangements) ', in L. LENNARTS and F. GARCIAMARTÍN, *The review of the EU insolvency Regulation: some proposals for amendment*, Report of the Netherlands association for comparative and international insolvency law, 2011, p. 27.

884 Also, the concerns regarding this type of action and the risk of infringements of the *par condicio creditorum* principle were expressed by a reference in each of the conflict of laws rules provided in Articles 5, 6 and 7 EIR, specifying that the application of a law different from the *lex fori concursus* did not preclude actions seeking the voidness, voidability or unenforceability of legal acts detrimental to all the creditors that the trustee could bring with regard to rights *in rem* on properties located abroad, to set-off, or properties sold under a reservation of title clause. J.L. VALLENS, 'Nullités de la période suspecte : l'action relève de la compétence de l'Etat où la procédure collective a été ouverte', in *Recueil Dalloz*, 2009, p. 1311

The ambiguities of the Insolvency Regulation described above gave rise to a lively debate among scholars (and lead to uncertainties in the national case-law of Member States) on how to interpret the Insolvency Regulation to find a criterion (if any) establishing the jurisdiction on Annex Actions.
Four different approaches were suggested by scholars and just as many were adopted by national case-law.

IV.2.1. The applicability of the rules of private international law of each Member State

A first (and a major) proposal submits that the jurisdiction to hear and determine Annex Actions was excluded from both the Brussels I Regulation and the Insolvency Regulation (885).
Scholars supporting this view moved from the consideration (confirmed, *inter alia,* by the Virgós-Schmit Report) that the sole provision within the Insolvency Regulation addressing the jurisdiction concerned exclusively the opening of insolvency proceedings (886).
The assumption underpinning that view was that the silence of the EIR on the jurisdiction of Annex Actions was due to an intentional omission of the legislature, which could only lead one to acknowledge the absence of a uniform ground for the jurisdiction of insolvency-related actions (887).
Indeed, on the basis of the assumption that, pursuant to the teachings of the *Gourdain* judgement, Annex Actions cannot fall within the material scope of application of the Brussels I Regulation, scholars have purported that the lack of an express rule on this matter in the text of the Insolvency Regulation entailed that the rules of private international law of the Member State whose courts were seised under Article 3 EIR applied to determine the jurisdiction on the insolvency related action.
Considering the heterogeneous solutions as to the determination of jurisdiction under the unilateral rules of each Member State, this solution made it impossible to standardise direct jurisdiction on

885 See the Italian Cass., 7 February 2007, n. 2692, in *Fallimento*, 2007, 629; Cass. SS.UU., 14 April 2008, n. 9745, in *Dir. comm. int.*, 2008, 477 ss. « *la disciplina comunitaria regola la competenza internazionale [...] decisioni di apertura, di svolgimento e di chiusura delle procedure concorsuali, ma nulla prevede in merito alla giurisdizione per le azioni ancillari* » (action to set a transaction aside). See also Cass., 4 August 2006, n. 17706, in *Guida al diritto*, 2006, p. 42; Cass. SS.UU. 13 December 2002, n. 17912, in *Giust. civ. Mass.*, 2002, p. 2196 and Cass. SS.UU., 26 June 2001, n. 8745, in *Giust. civ. Mass.*, 2001, p. 1273. In the German case-law, OLG Munchen, 23 April 2008, 5 U 2983/07, in *IPRsps*, 2008, No. 227 applied the rules of private international law (and namely Art. 23 ZPO), to an avoidance claim pursuant to Article 135(1) No 2 InsO. However, the Insolvency Regulation was not yet applicable to the case at stake. See also, in Sweden, court Hovrätten for Övre Norrlamd, 15 January 2008, O 749-07 (RH 2008:9), in *BeckRS*, 2008.

886 F. CORSINI, 'Revocatoria fallimentare e giurisdizione nelle fonti comunitarie: la parola passa alla corte di giustizia', in *Riv. dir. internaz. priv. e proc.*, 2008, p. 429. P. DE CESARI, 'La revocatoria fallimentare tra diritto interno e diritto comunitario', in *Riv. dir. internaz. priv. e proc.*, 2008, p. 1001; Id., 'La disciplina della giurisdizione in tema di azione revocatoria fallimentare', in P. DE CESARI e M. FRIGESSI DI RATTALMA, *La tutela transnazionale del credito*, Torino, 2007, p. 107. M. DE CRISTOFARO, 'Nuovo coordinamento delle giurisdizioni in Europa', in *Int'l Lis*, 2002, p. 89; L. FUMAGALLI, 'Atti pregiudizievoli tra sostanza e processo: quale legge regolatrice per la revocatoria fallimentare', in *Int'Lis*, 2007, p. 71. V. SANGIOVANNI, 'L'azione revocatoria internazionale fra giurisdizione e legge applicabile', in *Fallimento*, 2007, p. 935. M. MONTANARI, 'Giurisdizione italiana in tema di revocatoria dei pagamenti tra «vecchia» e «nuova» amministrazione straordinaria delle grandi imprese insolventi', in *Corriere giur.*, 2002, p. 765.

887 I. QUEIROLO, *Le procedure d'insolvenza nella disciplina comunitaria*, Turin, 2007, p. 231 and ff.

Annex Actions across the Member States of the European Union, accepting the risk of negative conflicts of jurisdiction.

IV.2.2. The interpretation of Article 3 EIR as allocating (directly or by way of analogy) jurisdiction of Annex Actions

Under a different approach, the Insolvency Regulation was deemed as setting forth a ground for the jurisdiction on Annex Action (888). The starting point of this interpretation the assumption that the two instruments must be construed as dovetailing.

Under this view, the Insolvency Regulation enshrined - in both Recital 6 and Article 25(i) second subparagraph - the criterion put forward by the *Gourdain* judgement to identify the boundaries between the (at that time) Brussels Convention and the Insolvency Regulation. It was submitted that the fact that on that occasion - as will be further explained below (889) - the ECJ excluded from the material sphere of action of the Brussels Convention also actions directly deriving from insolvency and closely connected with insolvency proceedings, would entail (rather axiomatically) that those actions were to be included in the scope of the Insolvency Regulation (890).

Moving from this key assumption, scholars supporting this first view have drawn two slightly different conclusions.

On the one hand, some authors - admitting the absence of an express jurisdictional ground for Annex Action - argued that the lack of provisions disciplining the *vis attractiva concursus* would be attributable to an 'unintentional' regulatory oversight of the draftsmen, which would allow to resort to analogy in order to fill-in the regulatory gap. Therefore, it was suggested that the ground for jurisdiction provided by Article 3 EIR for the opening of insolvency proceedings would be applicable also to Annex Actions (891).

On the other hand, a more radical construction denied the existence of any *lacuna*, thus excluding the necessity to use an analogous interpretation. It was submitted that Article 3 EIR should be broadly

888 M. VIRGÓS SORIANO, 'The 1995 European Community Convention on Insolvency Proceedings: an insider's view', in *Forum Internationale*, 1998, 25, pp. 1 and ff.; M. VIRGÓS SORIANO, F. J. GARCIMARTÌN ALFÉREZ, *The european Insolvency Regulation*: law and practices, The Hague, 2004, pp. 55-56; J. HAUBOLD, 'Europäisches Zivilverfahrensrecht und Ansprüche im Zusammenhang mit Insolvenzverfahren -Zur Abgrenzung zwischen Europäischer Insolvenzverordnung und EuGVO, EuGVÜ und LugÜ', in *IPRax* 2000, pp. 375-384; A. ESPINELLA MENÉNDEZ, *Procedimientos de insolvencia y grupos multinacionales de sociedades*, Navarra, 2006, p. pp. 70-78; B. CAMPUZANO DIAZ, *Aspectos internacionales de Derecho Concursal*, Murcia, 2004, pp. 136-138; C. WILLEMER, *Vis attractiva concursus und die Europäische Insolvenzverordnung*, Tubingen, 2006, pp. 57-59. L. CARBALLO PIÑEIRO, 'La vis attractiva concursus nel diritto concorsuale europeo', in *Il diritto fallimentare e delle società commerciali,* Padova*,* 2010, 3-4, p. 361. S.M. CARBONE, 'Azione revocatoria: esercizio della giurisdizione e legge applicabile', in *Dir. Comm. Internaz.*, 2004, p. 32. G. MOSS, I. FLETCHER, S. ISAACS, *The EC Insolvency Regulation on Insolvency Proceedings*, Oxford, 2007, p. 171-172.

889 See *infra* Chapter III, Section 1, § I.1.

890 The Virgós Schmit Report states at [77] that « *Logically, to avoid unjustifiable loopholes between the two Conventions, these actions are now subject to the Convention on insolvency proceedings and to its rules of jurisdiction* ».

891 S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, at [25].

interpreted as a rule allocating directly to the courts of the debtor's COMI a generalised jurisdiction on insolvency-related matters (892). As such, only apparently the scope of said provision would be limited to decisions opening insolvency proceedings since the jurisdictional rule established therein should also be extended to hear and determine Annex Actions (893).

The reasons underlying both constructions are essentially of systematic nature: at the outset, as far as recognition and enforcement were concerned, Article 25(1) second subparagraph EIR, read in conjunction with Article 25(2) EIR, provided for a system of 'communicating vessels', according to which decisions excluded from the Brussels Convention (for being directly deriving from insolvency and closely connected with insolvency proceedings) would fall under the Insolvency Regulation and *vice versa*.

It was maintained that, should the Regulation be interpreted as failing to provide grounds for the jurisdiction of those actions, there would be an apparent asymmetry between the rules on jurisdiction and those governing recognition and enforcement, which were understood to be as necessarily parallel (894).

Also, it was assumed that the possibility to lodge insolvency-related actions before different courts would have seriously jeopardised the (modified) universal effects and the efficiency of insolvency proceedings (895). Therefore, under that view, it would have been consistent with the scheme and objectives of the Insolvency Regulation to centralise all possible claims arising from insolvency proceedings before the jurisdiction of the State where insolvency proceedings are opened and whose law applies.

This interpretation of Article 3 EIR (whether by analogy or direct interpretation) would find literal (albeit weak) confirmation in the wording of Recital 6, which apparently relates 'judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings' to the profile of the 'jurisdiction on opening insolvency proceedings' rather than to the different question of recognition, which is addressed in a subsequent and separate part of the sentence within the same Recital 6 EIR (896).

A further argument paving the way for this interpretation of Article 3 EIR considered the abovementioned Article 2(d) EIR (897), submitting that since it provides that the 'courts' (and in the French version of the EIR, the 'jurisdictions') of a Member State were empowered to open insolvency proceedings and to take decisions 'in the course of such proceedings', it should be extensively

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892 See *Oakley c. Ultra Vehicle Design & Anor* [2005] EWHC 872 (Ch), at [34] and [ff].

893 See F. CORSINI, *Profili transnazionali dell'azione revocatoria fallimentare,* Torino, 2010, p. 33.

894 M. VIRGÓS SORIANO and F. J. GARCIMARTÌN ALFÉREZ, *Comentario al reglamento europeo de insolvencia*, Madrid, 2003, p. 63; M. VIRGÓS SORIANO, F. J. GARCIMARTÌN ALFÉREZ, *The european Insolvency Regulation*: *law and practices*, The Hague, 2004, p. 57.

895 C. WILLEMER, *Vis attractiva concursus und die Europäische Insolvenzordung*, Hambourg, 2006, p. 91.

896 A. LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sull'insolvenza*, Bari, 2008, p. 125.

897 See *supra* in this Chapter, Section 2, at § II.1.2.1.4.

interpreted as vesting that (specific) court with the power to deal with all decisions handed down during insolvency proceedings, including those on Annex Actions [898].

While certainly consistent with the objectives of the Insolvency Regulation, this approach has been the subject of much criticism, since it was not adequately reflected in the text of the EIR [899].

It has been objected, first, that the reference to Recital 6 EIR would be inadequate since, in principle, it could not represent a solid ground for interpreting the Insolvency Regulation in that it addressed the principle of proportionality [900]. Moreover, that Recital made even more manifest the absence of appropriate provisions within the text of the Insolvency Regulation concerning the jurisdiction of Annex Actions [901]. Finally, with regard to the above statement, according to which the wording of the Recital 6 EIR could entail an implicit confirmation on the existence of a ground for the jurisdiction of Annex Actions, one could observe that the text thereof mentions 'judgements' and not 'actions', thus hindering that argument.

Secondly, it was also objected that Article 2(d) merely provided for a list of definitions, from which it would be incorrect to derive applicable rules of law. Therefore, it would have been rather arguable to infer from a definition that courts of the debtor's COMI would be vested with the jurisdiction on Annex Actions [902]. Even more significantly, it was found that the also the systematic interpretation inferred from Article 25 EIR was not convincing. Indeed, the purported necessary parallelism between the rules on jurisdiction and recognition (assumed by the supporters of the interpretation under discussion) seems to be contradicted by the Insolvency Regulation itself [903].

It was observed, that, while it is true that the Insolvency Regulation sets forth an indirect ground of jurisdiction for judgements concerning the course and the closure of insolvency proceedings, the same does not necessarily hold for judgements provided under Article 25(1) second subparagraph. Article 25(1) first subparagraph EIR, in fact, provides that those decisions handed down by the courts having jurisdiction under Article 3 EIR are automatically recognised via Article 16 EIR. On the contrary, by specifying that judgements deriving directly from insolvency and closely connected with

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898 See L. SCIPIONE, 'Procedure concorsuali di insolvenza nella disciplina comunitaria e prospettive di riforma', in S. BONFATTI AND G. FALCONE (eds.), *La "riforma urgente" del diritto fallimentare e le banche*, Milano, 2003, p. 277 and ff.

899 A. LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sull'insolvenza*, Bari, 2008, p. 125, F. CORSINI, *op. cit.*, p. 18. P. DE CESARI, *op. cit.*,

900 It bears noticing that as a general rule of interpretation, in cases of inconsistencies, the text of articles prevails over that of recitals in Community legislation. See, for instance, ECJ, 9 February 1995, Case C-412/93, *Société d'importation Édouard Leclerc-Siplec contro TF1 Publicité SA e M6 Publicité SA*, ECLI:EU:C:1995:26.

901 L. PANZANI, 'Azione revocatoria nei confronti dello straniero e giurisdizione del giudice che h dichiarato il fallimento secondo il diritto comunitario. Note minime a seguito della decisone del Bundesgerichtsof del 21 giugno 2007', in *Il Fallimento*, 4, 2008, p. 397.

902 S. BARIATTI, 'Filling in the Gaps of EC Conflicts of Laws Instruments: the Case of Jurisdiction over Actions Related to Insolvency Proceedings', in G. VENTURINI - S. BARIATTI (a cura di), *New Instruments of Private International Law, Liber Fausto Pocar*, Milano, 2009, pp. 23-38; F. CORSINI, *op. cit.,* p. 20.

903 Leandro notices that such a parallelism results to be contradicted by the mere fact that the EIR does not provide for a regime on insolvency-related actions. A. LEANDRO, *op. cit.*, p. 19.

insolvency proceedings are recognised even when 'handed down by another court', the Insolvency Regulation seems to allude to the possibility that the jurisdiction over those kind of action may lie with the courts of a Member State different that those ones of the State where insolvency proceedings are opened (904). In this respect, it was also noted that the strived-for-synchronisation between the rules on jurisdiction and that on recognition and enforcement should not be considered as an indefectible condition of a regime of international private law, since it may well occur that the two may be related, but one does not follow from the other. It was correctly submitted that the very Brussels I Regulation allow for an asymmetry between the two set of rules, where it states that a judgement rendered against a respondent whose domicile is not located within the EU benefits of automatic recognition for the mere fact of being handed down by a court of a Member State (905).
Eventually, such a construction was perceived as clashing with Article 18 EIR, which vested the trustee appointed in the context of insolvency proceedings to exercise its powers in the other Member States 906.

IV.2.3. The applicability of the Brussels I Regulation

A minority interpretation submitted that the jurisdiction of Annex Actions should have been subjected to the rules the Brussels I Regulation (907).
Moving from the assumption that insolvency is a branch of civil and commercial law, it was maintained that the relationship between the Brussels I Regulation and the Insolvency Regulation should be constructed as that one between *lex generalis* and *lex specialis*, and, as regards insolvency related-actions, between the two instruments, exists a graduated relationship.
As such, by overruling what stated by the ECJ in the *Gourdain* judgement, the scope of the Insolvency Regulation should be narrowly interpreted as encompassing exclusively collective insolvency proceedings, while Annex Actions should be subject to the regime of civil and commercial matters.

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904 F. CORSINI, *op. cit.*, p. 31. *Contra* D. ROBINE, 'Les actions connexes', in F. JAULT-SESEKE, D. ROBINE, *Le nouveau règlement insolvabilité: quelle évolutions?*, p. 65.

905 S. BARIATTI, *op. cit.,* p. 33.

906 See Cass., 4 August 2006, n. 17706, in *Guida al diritto*, 2006, p. 42; For literature, E. RICCI, 'Le procedure locali previste dal Regolamento CE n. 1346/2000', in *Giur comm.*, 2004, I, p. 912.

907 O. BERNER, L. KLÖHN, 'Insolvenzantragsplicht, Qualification und Niederlassungsfreiheit', in *ZIP*, 2007, p. 110; W. LÜKE, 'Europaïhes Zivilverfahrensrecht – das Problem der Abstimmung zwischen EuInsundü EuGVü', in GEIMER R. (ed.), *Wege zur Globalisierung des Rechts. Festschrift für R. A. Schütze zum 65. Geburstag*, Munich, 1999, pp. 481-482, S. REINHART, 'Art. 3 EuInsVo', in H-P. KIRCHHOF, H-J. LWOWSKI, R. STÜRNER, Münchener Kommentar zur Insolvenzordnung, Munich, 2003, p. 873, C. THOLE, in *ZIP,* 2006, pp. 1386-1387; F. Mélin, Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité, Bruylant, Bruxelles, p. 291. For Dutch case law see District Court of Utrecht, 26 July 2006, LJN: AY5201, in *JOR* 2006/278 (*Conrads v. Insolvency of Gold Zack AG*) where the court excluded the applicability of the EIR on the ground that avoidance actions were not mentioned either in Annex A or in Annex C thereof. For English case-law, see *Re Hayward*, [1997] Ch 45 (action for the restitution of an asset owned by the debtor) *Ashrust v. Pollard*, [2001] Ch 595 (property action brought by the trustee to ascertain the ownership of the debtor over an asset held by a third-party); *UBS AG (formerly Swiss Bank Corp) v. OMNI Holding AG (in liquidation)*, [2000] All. ER (Comm.) 42 (Ch) (action seeking the declaration of the voidness of a contract entered into between the debtor and some banks before the opening of insolvency proceedings).

That being said, two different applications of that interpretation were uttered.

The first one submitted that, in the light of Article 25(1) second subparagraph EIR, the regime of jurisdiction should be kept separated from that of recognition and enforcement. The regime of the Insolvency Regulation would be applicable to the recognition and judgements handed down in relation to Annex Actions, but the jurisdiction would be allocated in accordance with the provisions of the Brussels Regime [908].

According to some other scholars, forcing the text of Article 25 EIR, the Brussels I Regulation was applicable as a whole [909], *i.e.* as regards to both the rules of jurisdiction and the recognition and enforcement of Annex Actions [910].

Such an approach too was considered as not convincing. Firstly, because the Gourdain Formula being embedded within the text of the Insolvency Regulation, the applicability of those principles within the context of the EIR was considered as not questionable.

Also, it was observed that the application of the Brussels Regulation would have hindered the synchronisation between *forum* and *ius* to which the Insolvency Regulation tended to.

Indeed, despite the conferral of the jurisdiction on Annex Actions with the court of the defendant's domicile, the seised court would still have to apply in any event the *lex fori concursus*, for instance, to actions to set a transaction aside under Article 4(2)(m) EIR. That would have led to further problems in practice, when, under the conditions set forth by Article 13 EIR, the *lex causae* should prevail over the *lex fori concursus*.

IV.2.4. The general applicability of the *lex fori concursus*

The fourth approach, which excludes the applicability of the Brussels I Regulation, acknowledges that the Insolvency Regulation does not provide directly for a uniform criterion in relation to the issue of the *vis attractiva concursus*. However, that would not mean that it did not offer solutions. It was submitted that the Member States would have been free to define their own jurisdiction of Annex Actions according to the *lex fori concursus* [911].

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908 C. THOLE, 'Die internationale Zuständigkeit für insolvenzrechtliche Anfechtungsklagen', in *ZIP*, 2006, pp. 1383-1384.

909 S. REINHART, 'Under Article 25', in H-P. KIRCHHOF, H-J. LWOWSKI, R. STÜRNER, *Münchener Kommentar zur Insolvenzordnung: InsO*, vol. 1, Munich, 2003.

910 It is understood that this approach was followed by OLG Frankfurt, 26 January 2006 – 15 U 200/5, in ZIP, 2006 and OLG Bremen, 25 September 1997, in *RIW,* 1998, p. 63. Such a construction is arguable since it clearly overlooks the provisions of the Insolvency Regulation for the sake of striving to maintain the synchronization between the regime of jurisdiction and the regime of recognition and enforcement in the application of the Brussels I Regulation. See K. PANNEN, 'Under Article 3', in K. PANNEN (ed.), *European Insolvency Regulation*, at [15].

911 M. FABIANI, 'La comunitarizzazione della revocatoria transnazionale come tentativo di abbandono di criteri di collegamento fondati sull'approccio dogmatico', in *Fallimento*, 2004, p. 380. V. PROTO, 'Gli atti pregiudizievoli nelle procedure di insolvenza transnazionali: giurisdizione e legge applicabile', in *Fallimento*, 2009, p. 480. E. CONSALVI, 'Brevi considerazioni in materia di giurisdizione e legge applicabile alla revocatoria fallimentare intracomunitaria', in www.judicium.it. M.V. BENEDETTELLI, '«Centro degli interessi principali» del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera', in *Riv. dir. internaz.*

The supporters of this view found the main arguments in support of this interpretation in Article 4(2)(m) EIR, pursuant to which the *lex fori concursus* determines the rules relating to the voidness, voidability and unenforceability of legal acts detrimental to all creditors and in Recital 23 EIR, providing that *lex fori concurus* governs 'all the effects of the insolvency proceedings, both procedural and substantive' [912]. Those provisions read jointly led some scholars to propose that the *lex fori concursus* also governed the procedural aspects of actions to set a detrimental act aside and the like, including the jurisdiction. It would follow that, should the *lex concursus* of the Member State opening insolvency proceedings be inspired by the principle of the *vis attractiva concursus,* then the actions mentioned in Article 4(2)(m) EIR should be brought before the courts (of the Member State?) opening insolvency proceedings, it being irrelevant the different regulation provided by another Member State whose courts were (erroneously) seised. As to legal system not embracing the philosophy of the *vis attractiva concursus*, the *lex fori concursus* would determine the different court competent to hear and determine the insolvency-related actions. In other words, the jurisdictional ground of another Member State would apply to Annex Actions, if in the Member State whose courts were seised according to Article 3 EIR the *lex fori concursus* failed to impose the exclusive (or 'functional') jurisdiction of Annex Actions [913].

Against this interpretation, however, militated several arguments.

First, it was objected that Article 4(2)(d) EIR addresses exclusively the applicable law and does not pertain to the different profile of the jurisdiction on the actions mentioned therein [914].

Second, it was submitted that the scope of said prevision encompassed exclusively one genre of Annex Actions (*i.e.* actions to set a transaction aside), but nothing seems to suggest that such a solution could be extended to other type of actions [915].

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priv. e proc., 2004, p. 499. M. FARINA, 'La via attractiva concursus nel Regolamento comunitario sulle procedure di insolvenza', in *Fallimento*, 2009, p. 670.

912 It bears noticing that whenever the Insolvency Regulation refers to the law of a Member State, this indicates the substantive law of the relevant Member State, thus excluding its rules of international private law. Recital 23 EIR states that « *This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law*». In the light of the above, scholars are almost unanimous in deeming the doctrine of *renvoi* not to have been embedded into the EIR. The exclusion of the recourse to *renvoi* is based on the idea that in a regulation such as the Insolvency Regulation, which embodies uniform conflict rules, a reference to the choice of law rules in force in each Member State would significantly hinder the very objectives of harmonization behind the Regulation. In support of the above, it may be observed that the same applies also, under express provision, in the Regulation (EC) 593/2008 of 17 June 2008 (s.c. Rome I Regulation). See G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, p. 73. B. ARMELI, *Le procedure d'insolvenza nella disciplina europea*, Milano, 2016, p. 21). However, many authors supporting the applicability of the *lex fori concursus* seems (erroneously) to understand the reference to the law of the Member State opening the insolvency proceedings as encompassing also the international private rules of that legal system.

913 E. CONSALVI, 'Brevi considerazioni in materia di giurisdizione e legge applicabile alla revocatoria fallimentare intracomunitaria', in *www.judicium.it*.

914 However, this contra-argument seems to be weak in the light of the abovementioned Recital 23 EIR.

915 S. BARIATTI, *op. cit.* Actually, one could reach the same conclusion of the general applicability of the *lex fori concursus* arguing as follows. If the effects of the decisions concerning the opening, course and closure of insolvency proceedings are automatically recognised under Articles 16 and 25(1) first subparagraph EIR and

Third, the general application of the *lex fori concursus* would suffer a significant exception pursuant to Article 13 EIR, pursuant to which, under certain circumstances, the law of another Member State would apply instead of the law of the Member State in the territory of which insolvency proceedings are opened (916). As consequence, the reference to the general applicability of the *lex fori concursus* would be weakened. It is noteworthy that, as argued by an Italian scholar, those arguments may be overcome by observing that the applicability of the *lex fori concursus* could be also be grounded on the principle of the general applicability of the *lex fori*, which serves as method of coordination between legal systems (917).

such an automatic recognition applies also to insolvency-related actions via Article 25(1) second subparagraph EIR, the fact that the effects of the first group of decisions is governed by the *lex fori concursus*, as per Article 17 EIR should lead to the conclusion that also the effects of the second ones are to be governed by the same law. Assuming that the *lex fori concursus* applies to both substantial and procedural aspect, pursuant to Recital 23 EIR, one may submit that also the jurisdiction on insolvency related actions would be subjected to the *lex for concursus*.

916 A. Leandro, *op. cit.*

917 See P. PICONE, 'Il metodo dell'applicazione generalizzata della lex fori', in P. PICONE, *La riforma italiana del diritto internazionale privato*, Padova, 1998, p. 371.

CHAPTER III

THE ECJ CASE-LAW ON ANNEX ACTIONS

CONTENTS: SECTION 1: The outline of the cases - SECTION 2: Some interim conclusions on the ECJ's case-law

The previous chapter addressed the issue of the *vis attractiva concursus* in general terms, within the framework of the Insolvency Regulation. The following two conclusions were drawn.

First, the provisions of the Insolvency Regulation do not provide any handhold useful for identifying a rule to allocate the jurisdiction over Annex Actions to the courts of the Member State where insolvency proceedings have been opened. On this basis, it has been suggested that the issue relating to the interplay and the mutual relationship between the Brussels I Regulation and the Insolvency Regulation – both governing the allocation of jurisdiction among Member States – remains unsolved under the latter Regulation.

Second, the Insolvency Regulation lacks any definition as to the concept of Annex Action, although the expression 'action directly deriving from insolvency and closely linked to insolvency proceedings' is mentioned in both Recital 6 and Article 25(1) second subparagraph EIR.

To search for answers to these unresolved issues, the present Chapter deals with the ECJ case law on Annex Actions and attempts to identify a common thread in the maze of decisions handed down on this point. An analysis of the solutions provided by the European case-law is of paramount importance for the purposes of this work.

Indeed, in the topic at issue, the Court has played a decisive role. As the following pages will demonstrate in greater detail, it is clear that, over the years, the ECJ has carved out its own, supplemental function of assistance to - and sometimes even substitution of - the European legislature, intervening where the latter's actions were deemed timid or inadequate, under both a strictly technical and a legislative policy point of view [(918)].

In the absence of substantive EU insolvency law, it appears form an analysis of the case law that, despite systematically relying on the conditions set forth by the Gourdain Formula, the ECJ does not push an autonomous interpretation of the concept of Annex Action and defers largely to national insolvency laws (which, as was seen in Chapter I, acknowledge the principle of *vis attractiva* to varying

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[918] P. DE CESARI AND G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa, Il regolamento (UE) 2015/848 relativo alle procedure di insolvenza*, Torino, 2017, p. 11. G. MONTELLA, 'La prevedibilità della competenza internazionali sulle azioni che derivano dal fallimento secondo il regolamento n. 1346: un valore difficile da attuare e non conveniente da imporre', in *Fallimento*, 2014, p. 638. E. FRASCAROLI SANTI, 'Note a margine di una pronuncia innovativa sulla problematica ripartizione della competenza tra giudici della procedura principale e i giudici della procedura secondaria, riguardo alle azioni connesse. Limiti applicativi del Regolamento n. 44/2001', in *Dir. Fall.*, 2015, p. 603.

degrees) [919]. As the Court itself has stated in one of its decision, it has mainly concerned itself with determining, on each occasion, whether the national action at issue had derived from insolvency law or from other rules [920].

This approach has significant impact over the structure of this chapter.

Appropriate space has been given to providing a detailed analysis of the facts of each decision, as well as of the reasoning of the Court, since, for each of them, the ECJ analysed the specific characteristics of the action and then allocated it within the scope of either the Brussels Regulation or the Insolvency Regulation.

However, since it is not possible to successfully classify the Court's decisions on the basis of the nature of the actions considered, given that each case referred to a specific and different action, among all the possible criteria [921], I considered it most appropriate to analyse them individually and eventually try to summarise the principles handed down therein.

It bears noting that each of the Court's decisions has been explored under the lens of three major questions.

The first concerns whether the Court addressed the mutual relationship between the Insolvency Regulation and the Insolvency Exception of the Brussels Regulation (and, if so, in what terms). Do the two instruments dovetail, or may some regulatory gaps occur between the set of rules provided therein?

Second, it was essential to identify whether, in interpreting the expression 'actions directly deriving and strictly linked to insolvency proceedings', the Court always understood the Gourdain Formula in the same way, providing for a consistent reading of the condition(s) laid down therein. What is the specific meaning of the expressions 'derive directly from' insolvency proceedings and 'closely linked to' them? Must these two expressions be read as a hendiadys (*i.e.* a single condition), or does each

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919 G. VAN CALSTER, *European Private International law*, Hart Publishing, 2016, p. 42; M. MONTANARI, 'La sottrazione al Reg. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int'l Lis*, 2012,who stated « *The specification of what is, exactly, to be understood as "actions arising directly from the insolvency proceedings and are closely connected with them", in conformity with the legal reality, is a task that the courts of Kirchberg have not deemed it possible to delegate to the interpreters, charging themselves, on the contrary, to define it in the first place.* [La specificazione in termini aderenti alla realtà normativa di che cosa, esattamente, si debba intendere per "azioni che derivano direttamente dalla procedura d'insolvenza e in essa si inseriscono strettamente (ovvero le sono strettamente connesse)", è compito che i giudici del Kirchberg non hanno ritenuto di poter delegare agli interpreti, assumendosene, viceversa, il carico in prima persona] ».

920 ECJ, 4 September 2014, Case C-157/13, *Nickel & Goeldner Spedition GmbH v. "Kintra" UAB*, ECLI:EU:C:2014:2145. See also ECJ, 18 September 2019, Case C-47/18, *Skarb Państwa Rzeczypospolitej Polskiej – Generalny Dyrektor Dróg Krajowych i Autostrad v. Stephan Riel*, ECLI:EU:C:2019:754, at [35].

921 For instance, one could classify decisions on the basis of whether they concern the jurisdiction or the recognition and enforcement over Annex Actions, as did C. LEGROS, 'Les actions annexes', in F. JAULT-SESEKE, D. ROBINE, *Le droit européen des procedures d'insolvabilité à la croisée des chemins*, Paris, p. 119. Also, one could distinguish the ECJ decisions on the basis of whether actions o judgements have been characterised by the Court as falling within the scope of the Brussels Regime or the Insolvency Regulation. Other criteria of classification could take into account whether the trustee is acting on behalf of the creditors or the divested debtor, or whether the claimant is a creditor or the trustee, the purpose of the action, or its effects, or, again, its legal foundation.

expression represent an autonomous and independent condition of a twofold test? And, if this is the case, are the two conditions cumulative or alternative?

Finally, the analysis explores whether the application of the formula reveals a uniform approach by the Court.

As described in greater detail in the concluding Section of this Chapter, the current European case-law reveals a wavering orientation on the part of the ECJ, which does not (yet) allow to trace a unanimous direction, or a precise and shared guideline on these points.

SECTION 1

THE OUTLINE OF THE CASES

CONTENTS: I.1. The Gourdain v. Nadler case - I.2. The Seagon Deko Marty case - I.3. Two (opposite) cases decided immediately after Deko Marty: Alpenblume and German Graphics - I.3.1. The Alpenblume case - I.3.2. The German Graphics case - I.4. The Schmid case - I.5. The F-Tex SIA case - I.6. The Nickel&Goeldner case - I.7. The H v. H.K. case - I.8. The Nortel case - I.9. The Tünkers France case - I.10. The Valach case - I.11. The Wiemer&Trachte case - I.12. The NK case - I.13. The Riel case - I.14. A pending case: the Tiger case

I.1. The Gourdain v. Nadler case

The first judgment on Annex Actions was handed down by the ECJ on 22 February 1979 in the contentious action between Henry Gourdain v. Franz Nadler and represents the cornerstone of this study [922].

Not only does this decision mark the first time that the notion of 'action deriving and closely connected with insolvency proceedings' formally - and for some authors even 'arrogantly' [923] -made its debut in the European case-law scene (albeit limited to the scope of application *ratione materiae* of the Brussels Convention), but it also expresses principles that have been adopted as milestones and have shaped all the following decisions of the ECJ on the topic.

Yet, before turning specifically to the analysis of the *Gourdain* case, it is worth recalling at the outset

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922 ECJ, 22 February 1979, Case C-133/78, *Henry Gourdain v. Franz Nadler*, ECLI:EU:C:1979:49. Among others, the decision was commented by G.E. RENÉ, in *Gaz. Pal.*, 1979, I, *Jur.*, pp. 208-209;J.L. BISMUTH, in *Revue des sociétés*, 1980, pp. 529-542; J. LEMONTEY, in *Revue critique de droit international privé*, 1979, pp. 661-668; T. HARTLEY, 'Scope of the Convention: Bankruptcy, Winding-up and Analogous Proceedings', in *European Law Review*, in 1979 pp. 482-484; J. GRUBER, 'Sind französische Urteile über die Haftung von Gesellschaftsorganen im Konkurs nach dem EuGVÜ anerkennungsfähig?', in *Europäisches Wirtschafts- & Steuerrecht*, 1994 pp. 190-192; A.E. ANTON and P.R. BEAUMONT, in *The Scots Law Times*, 1984, p. 18; H. VERHEUL, 'The EEC Convention on Jurisdiction and Judgments of 27 September in Dutch Legal Practice', in *Netherlands International Law Review*, 1981, p. 71; C. GAVALDA, in *Recueil Dalloz Sirey*, 1982, Jur, p. 602-603.

923 M. MONTANARI, 'La sottrazione al Reg. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int'l Lis*, 2012, 3, 127; H. VERHEUL, 'The EEC Convention on Jurisdiction and Judgments of 27 September in Dutch Legal Practice', in *Netherlands International Law Review*, 1981, p. 71.

that, in 1979, when the ECJ handed down the decision under discussion, the Insolvency Regulation was far from being adopted. Indeed, the ECJ decided the case during Phase I of the Insolvency Project, in the context of which the Preliminary Draft Convention was still under discussion. It follows that, as will be discussed, at that time the question of the allocation of the jurisdiction could not yet amount to an issue of demarcation between the two conventions, it being limited to the framework of the Brussels Convention.

On 7 March 1974, the *Tribunal de Commerce* of Paris, assessed the state of *cessation des paiements* and opened proceedings for the *liquidation des biens* of the French company Fromme France Manutention (hereinafter, 'FFM'), a subsidiary of the German company Fromme Forderanlagen GmbH (which had also been declared insolvent under the German laws). The appointed liquidator, Mr. Gourdain, brought an action *en comblement du passif social* before the *Tribunal de Commerce*, seeking an order forcing Mr. Nadler (in his quality of *de facto* director of the French subsidiary) to pay the social debts of FFM, as provided by Article 99 of law n. 563/1967 [924].

The order was eventually granted by the Court of Appeal of Paris on 15 March 1976. Then, pursuant to Article 31 of the Brussels Convention, the liquidator seised the *Landgericht* of Limburg, to obtain the enforcement of the order issued by the French Court of Appeal in the Republic of Germany, where Mr. Nadler was domiciled.

Although enforcement was initially granted at the first instance by the *Landgericht*, upon appeal by Mr. Nadler, the Frankfurt *Oberlandesgericht* (the Court of Appeal) set it aside on the ground that the order issued by the French court (whose legal basis was not assimilable to any provision under German law) was to be regarded as a decision related to insolvency proceedings, thus falling under the exclusion of Art. 1(2)(2) Brussels Convention, pursuant to which *analogous proceedings* do not fall under the scope *ratione materiae* of the Convention itself. Therefore, the *Oberlandesgericht* found that the order could not benefit from the regime of recognition set forth by the Brussels Convention.

The decision of the *Oberlandesgericht* was appealed by Mr. Gourdain before the *Bundesgerichtshof* (the German Supreme Court), which referred, in turn, to the ECJ for a preliminary ruling on the interpretation of the Insolvency Exception.

The ECJ held that

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924 Law no. 67-563 of 13 July 1967 *sur le règlement judiciaire, la liquidation des biens, la faillite personnelle et les banqueroutes*. Under article 99, « *Lorsque le règlement judiciaire ou la liquidation des biens d'une personne morale fait apparaître une insuffisance d'actif, le tribunal peut décider, à la requête du syndic, ou même d'office, que les dettes sociales seront supportées, en tout ou en partie, avec ou sans solidarité, par tous les dirigeants sociaux, de droit ou de fait, apparents ou occultes, rémunérés ou non, ou par certains d'entre eux* […] *Pour dégager leur responsabilité [personnelle], les dirigeants impliqués doivent faire la preuve qu'ils ont apporté à la gestion des affaires sociales toute l'activité et la diligence nécessaires* [Where the règlement judiciaire or la liquidation des biens of a legal person reveals an insufficiency of assets, the court may decide, at the request of the trustee, or even ex officio, that the social debts shall be borne, in whole or in part, individuallyor jointly, by all the company directors, de jure or de facto, apparent or hidden, whether paid or not, or by some of them [...] To release them from [personal] liability, the directors involved must prove that they have carried out all the necessary activity and acted diligently in the management of corporate affairs] ». For a detailed analysis of the action regulated by article 99 of the law 67-563, see *supra* Chapter I, 1.4.2.2.

« *a decision such as a French civil court on Article 99 of the French Law No 67-563 of 15 July 1967, ordering the de facto manager of a legal person to pay a certain sum into the asset of a company must be considered as given in the context of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons or analogous proceedings within the meaning of subparagraph 2 of the second paragraph of Article 1 of the Convention* » [925].

Indeed, before assessing the above question, the ECJ held, as a preliminary matter and a methodological premise, that, as far as the interpretation of Article 1 Brussels Convention was concerned, the terms mentioned therein should be interpreted as autonomous concepts, in order to grant as much as possible the equal interpretation and uniform application of the rights and obligations arising out of the Brussels Convention across the Member States.

As autonomous definitions, then, the terms used by the Brussels Convention should be read in the light of the objectives of the Convention, on the one hand, and of the general principles common to all the Member States, on the other.

Having made this fundamental choice as to the interpretation of the wording of the Brussels Convention [926], in order to contextualise such a general principle within the wording of the Insolvency Exception, the Court - evidently recalling the Jenard and Schlosser Reports [927] - maintained that the terms mentioned therein (*i.e.* 'bankruptcy, proceedings relating to the winding up, […] judicial arrangements and analogous proceedings') were to be interpreted as referring to those collective proceedings

« *According to the various laws of the Contracting Parties relating to debtors who have declared themselves unable to meet their liabilities* […] *which involve the intervention of the courts culminating in the compulsory liquidation of the assets in the interest of the general body of creditors of the person* […] *or at least in supervision by the courts* » [928].

That being said, with reference to (individual) insolvency-related actions, the ECJ inferred (probably

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925 Gourdain, at [6].

926 As correctly pointed out by Advocate General Reischl, given that such an autonomous interpretation applied to the notions of 'civil and commercial matters', demarcating the scope of the Brussels Convention, then logically it could be applicable also to the other concepts specifying the exceptions to the scope of the Convention. Indeed, in the interest of a uniform application of the Convention the latter expressions must also be given a uniform definition. See the Opinion of the Advocate General, delivered on 22 February 1979, ECLI:EU:C:1979:33, p. 749.

927 With reference to the Insolvency Exception, the Jenard Report stated that for the purposes of the Brussels Convention 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons judicial arrangements compositions and analogous proceedings' should be regarded as those « *proceedings, which, depending on the system of law involved, are based on the suspension of payments and the insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purposes either of compulsory and collective liquidation of assets or simplification of supervision* ». See Jenard Report, p. 12.

928 Gourdain, at [4].

relying again on the Jenard Report [929]) that not all actions were to be excluded from the scope of the Brussels Convention, but rather only those ones deriving directly from and closely connected with insolvency proceedings, as interpreted above [930].

Therefore, following the reasoning of the ECJ, not only the Insolvency Exception applied to the 'hard core' of collective proceedings mentioned therein (*i.e.* bankruptcy, compositions, judicial arrangements and analogous [collective] proceedings), but it encompassed also individual insolvency-related actions, provided that they derive directly and are closely linked to insolvency proceedings.

To this effect, the ECJ stated that it was determinative to ascertain whether the legal basis of a national (individual) action stemmed from « *the law relating to bankruptcy* […] *as interpreted for the purpose of the* [Brussels] *Convention* » [931].

In order to assess specifically whether the French action *en comblement du passif* fulfilled the abovementioned criterion, the ECJ gave weight to the following features of the action, described by the referring court.

(i) from a purely formal standpoint, the statutory provisions governing the action *en comblement du passif* are part of the French insolvency law;

(ii) as to national competence, the Tribunal de Commerce (which is the Court before which insolvency proceedings are opened) has the exclusive jurisdiction to hear the claim, which is attracted to it by virtue of the principle of the *vis attractiva concursus*;

(iii) only the insolvency trustee is entitled to bring the action *en comblement du passif* on behalf and in the interest of the general body of creditors, since its purpose is to restore the estate from the damage suffered as a consequence of the detrimental acts performed by negligent directors (such as an increase of liabilities and shortage of assets). Therefore, it is the general body of creditors that ultimately stands to benefit from the action, for its proceeds must revert to the estate.

(iv) Although the cause of action of the claim stems from the general rules on the liability of directors, the *action en comblement du passif* reveals some insolvency specific features (such as a different regime governing the limitation period and the burden of proof), which entail a deviation from the typical legal scheme of ordinary civil liability actions against directors.

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929 The Jenard Report addressed the issue of 'proceedings relating to a bankruptcy' at p. 12, maintaining that these « *are not necessarily excluded from the Convention. Only proceedings arising directly from the bankruptcy and hence falling within the scope of the* [drafted] *bankruptcy convention of the EEC are excluded from the scope of the convention » The reason for such a thin explanation concerning a matter that appeared to demand a more in-depth answer by the Report, is to be found in the further specification of footnote 2 of the Report, pursuant to which « A complete list of the proceedings involved will be given in the Bankruptcy Convention of the European Economic Community* ». It is reasonable to assume that the Jenard Report did not linger on the issue of insolvency related actions because, at the time, the Convention on bankruptcy was expected to be concluded imminently. See also J. LEMONTEY, in *Revue critique de droit international privé*, 1979 p. 663.

930 The Advocate General argued that, as such, these individual actions are inextricably linked to insolvency proceedings to such an extent that they are to be regarded as essential part of bankruptcy or winding-up proceedings. See the opinion of the Advocate General, p. 752.

931 Gourdain, at [4].

(v) the court can decide to 'extend' the insolvency proceedings also *vis à vis* those directors who have been held liable for part or all of the liabilities of the company, therefore piercing the corporate veil to proceed against its directors and their assets.

It seems that it is mainly from this latter circumstance, in particular, that the Court has concluded that the legal basis of an action *en comblement du passif* - whose purpose is eventually to overcome the separate personhood of the company and proceed against its directors - « *is based solely on the provisions of the law of bankruptcy and winding-up as interpreted for the purpose of the Convention* » [932]. Therefore, the ECJ concluded that the French *action en comblement du passif* was excluded from the material scope of the Brussels Convention.

I.2. The Seagon Deko Marty case

Following its seminal decision rendered in the *Gourdain* case, the issue of Annex Actions was not brought in the spotlight of the ECJ for thirty years. Such a long silence of the Court should by no means be attributed to a lack of interest in the question at stake. Instead, it is reasonable to infer that it was due to the delays in the adoption of a Community instrument governing cross-border insolvencies [933] and to the fact that the Insolvency Regulation, although signed in 2000, came into force in 2002. For this reason, the practical problems arising out of the application of the regime provided therein only emerged a few years after its entry into force and initially focused primarily on the interpretation of the fundamental principle of the COMI [934].

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932 *Gourdain*, at [6].

933 See *supra* Chapter II, Section I.

934 See the case-law mentioned in Chapter II, Section II, § II.1.3.

That being cleared, in 2009 the ECJ came back on the subject-matter of Annex Actions for the first time, in the context of a German action to set a transaction aside under §129 InsO[935].

The facts of the case were quite simple. On March 14, 2002, Frick Teppichboden GmbH (hereinafter, 'Frick'), a company incorporated in Germany, paid EUR 50.000 to the Belgian company Deko Marty Belgium NV ('Deko Marty').

Despite the latter being a company incorporated in Belgium, the sum was credited to the bank account held by Deko Marty with the KBC Bank in Dusseldorf (Germany).

The following day, Frick filed an application before the Marburg *Amtsgericht* (the German local court competent to open insolvency proceedings) to commence insolvency proceedings. Proceedings being opened on June 1, 2002, Mr. Christopher Seagon was appointed as liquidator.

Later, Mr. Seagon brought an action against Deko Marty before the Marbourg *Landgericht* (the German local ordinary civil and commercial court), in order to have the aforementioned payment set aside, seeking an order that Deko Marty returned the sum received by Frick.

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935 ECJ, 12 February 2009, Case C-339/07, *Christopher Seagon v. Deko Marty Belgium NV*, ECLI:EU:C:2009:83, also published in *Riv. dir internaz. Priv. e proc.*, 2009, p. 493. For literature, see, *ex multis*, F. CORSINI, 'Revocatoria fallimentare e giurisdizione nelle fonti comunitarie: la parola passa alla Corte di giustizia', in Rivista di diritto internazionale private e processuale, 2008, p. 429; A. CASTAGNOLA, 'Regolamento CE 1346/2000 e vis attractiva concursus: verso un'universalità meno limitata?' in *Rivista di dir. proc.*, 2010, p. 925; M. FARINA, 'La vis attractiva concursus nel Regolamento comunitario sulle procedure di insolvenza', in *Fallimento*, 6, 2009, p. 667; L. PANZANI, 'Azione revocatoria nei confronti dello straniero e giurisdizione del giudice che ha dichiarato il fallimento secondo il diritto comunitario. Note minime a seguito della decisione del Bundesgerichtshof del 21 giugno 2007', in *Fallimento*, 2008, p. 394; A. LEANDRO, 'La giurisdizione sulle revocatorie fallimentari: riflessioni sulla sentenza Deko Marty', in *Il Diritto dell'Unione Europea*, 3, 2009, p. 607-629; J.-L. VALLENS, 'Nullité de la periode suspecte: l'action relative de la competence de l'Etat où la procédure collective a été ouverte', in *Recueil Dalloz*, 2009, p. 1311; F. DIALTI, 'Giurisdizione in materia di azione revocatoria fallimentare comunitaria', in *Diritto del Commercio internazionale*, 2, 2009, p. 441; L. IDOT, 'Etendue de la competence du juge de la faillite', in *Europe*, 4, 2009, comm. 175; P. EHRET, 'La CJCE instaure le principe « vis attractiva concursus » concernant les actions révocatoires au niveau communautaire', in *Revue des procedures collectives*, 7, 2009; T. MASTRULLO, 'Actions révocatoires' in *Revue des procedures collectives*, 6, 2009, comm. 152. P. OBERHAMMER, 'Europäisches Insolvenzrecht: EuGH Seagon /Deko Marty Belgium und die Folgen', in P. APATHY, R. BOLLENBERGER, P. BYDLINSKI, G. IRO, E. KARNER AND M. KAROLLUS (eds), *Festschrift für Helmut Koziol zum 70. Geburtstag*, Jan Sramek Verlag, 2010, p. 1239; A. LEANDRO, 'Effet utile of the Regulation No. 1346 and Vis Attractiva Concursus: Some Remarks on the Deko Marty Judgment', in *Yearbook of private international law*, 2009, pp. 469-480; C. PASINI, 'Giurisdizione in tema di revocatoria fallimentare transnazionale: la Corte di Giustizia colma il vuoto normativo', in *Riv. Trim.dir. e proc. Civ.*, 2010, p. 303; P. DE CESARI - G. MONTELLA, 'Una vis attractiva comunitaria sulla revocatoria fallimentare?', in *Foro italiano*, 2009, IV, p. 398 ss.; F. CORSINI, 'La Corte di giustizia 'inventa' una (dimezzata) vis attractiva concursus internazionale', in *Int'l Lis*, 2009, p. 65; C. WILLEMER, 'Die internationale Zuständigkeit für Insolvenzanfechtungsklagen', in *RIW*, 2009, p. 669; F. MÉLIN, 'Détermination, sur le plan communautaire, de la juridiction compétente en matière d'« actions révocatoires »', in *JCP E*, 19, 2009, p. 1482; C. NOURISSAT, 'Étendue de la compétence de la juridiction d'ouverture de la procédure d'insolvabilité', in *Procédures*, 5, 2009, comm. 150. V. SANGIOVANNI in *Fallimento*, 2008, p. 394. See also L. PANZANI, 'Azione revocatoria nei confronti dello straniero e giurisdizione del giudice che ha dichiarato il fallimento secondo il diritto comunitario. Note minime a seguito della decisione del Bundesgerichtshof del 21 giugno 2007', in *Fallimento*, 2008, p. 394.

Without considering the merits of the case [936], however, the *Landgericht* dismissed the claim of the trustee and declared it inadmissible, on the ground that the German courts lacked international jurisdiction to hear an action to set a transaction aside if the defendant is domiciled in another Member State (in the case at stake, in Belgium) [937].

The decision of the court of first instance was subsequently confirmed by the Frankfurt *Oberlandesgericht* (the German regional court), according to which the action brought by Mr. Seagon fell in the scope of the Brussels I Regulation and as such, pursuant to the general rule of the forum of the defendant's domicile, it should have been brought before the Belgian courts [938].

Such conclusion was based on the assumption that the Insolvency Regulation was not applicable to actions to set a payment aside. It was the *Oberlandesgericht*' s view that the provision of Art. 3(1) EIR, whilst providing for a regime on the jurisdiction of the Member States to open insolvency proceedings, lacked any indication as to the jurisdiction of Annex Action.

However, it was submitted that such a lack within the Insolvency Regulation did not entail a *lacunae legis* (which in any case, would have been contrary to the judicial system of the European Union), for the applicable provisions were to be found in the Brussels I Regulation.

The *Oberlandesgericht* thus bolstered up a restrictive interpretation of the Insolvency Exception.

Moving from the objectives and the wide scope of the Brussels I Regulation, as expressed in Recitals 1 and 7 thereof [939], the German Court of Appeal inferred, in facts, that the expression '*konkurse*' utilised in the Insolvency Exception should be interpreted restrictively, as encompassing only collective proceedings, therefore excluding from its scope all other individual actions. It was claimed that the defendant's right to be heard has to be preserved, regardless of the circumstance that said

936 As reported in the opinion of the Advocate General, the *Landgericht* considered separately the claim on the admissibility of the action and the merits of the action. See Opinion of the Advocate General Ruiz-Jarabo Colomer, delivered on 16 October 2008, ECLI:EU:C:2008:575, at [9].

937 LG Marburg, 2 August 2005, 2 0 209/0.

938 OLG Frankfurt, 26 January 2006, 15 U 200/05.

939 Pursuant to Recital 1 and 7 Brussels I Regulation « *the scope of this Regulation must cover all the main civil and commercial matters* » in order to progressively establish and foster « *an area of freedom, security and justice* ».

actions were brought in the context of collective proceedings [940]. By the same token, the *Oberlandsgericht* deemed that the jurisdiction of German courts was to be dismissed also on the ground of the German code of civil procedure. In that constellation, the *Oberlandsgericht* found that the German court had no jurisdiction to decide over the action brought by Mr. Seagon against Deko Marty, for it was the court of Belgium to be seised.

Against the decision of the Court of Appeal, the trustee lodged an appeal before the *Bundesgerichtsof* (the German Supreme Court), alleging that Art. 3(1) EIR did establish a rule on the jurisdiction of Annex Actions. Moreover, according to the insolvency trustee, the German courts were to be regarded as competent also under the German principle of the *international Notzuständigkeit* (literally the 'international emergency jurisdiction'), provided that, in any event, should a judgement be rendered by the Belgian courts, it would not be recognised in Germany.

By order dated 21 June 2007, the Supreme Court referred to the ECJ for a preliminary ruling.

The *Bundesgerichtsof* referred the following questions:

> « *Do the courts of the Member state within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation (EC) no 1346/2000 in respect of an action in the context the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?*
>
> *If the first question is to be answered in the negative: Does an action in the context of insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation (EC) No 44/2001?* ».

Essentially, the question to be solved by the ECJ consisted in determining whether an individual action (in the case at hand, an action to set a transaction aside) brought in the context of insolvency proceedings must be deemed to be an essential part of the insolvency procedure by virtue of its connection with the latter and, as such, whether the action is covered by the Insolvency Regulation.

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[940] In its order dated 21 June 2007, the *Bundesgerichtsof* referred that « *Das Berufungsgericht hält das Landgericht Marburg für den erhobenen Rückgewähranspruch aus Insolvenzanfechtung nicht für zuständig. Nach den Vorschriften der EuGVVO sei ein Gerichtsstand im Inland nicht begründet. Die Bestimmung des Art. 1 Abs. 2 lit. b EuGVVO, wonach die Verordnung auf Kon- kurse, Vergleiche und ähnliche Verfahren nicht anzuwenden ist, beziehe sich nicht auf die Insolvenzanfechtung. Im Hinblick auf das in den Erwägungsgrün- den zum Ausdruck gekommene Regelungsziel der EuGVVO, eine umfassende Rechtsvereinheitlichung auf dem Gebiet der Zivil- und Handelsstreitigkeiten herbeizuführen, seien die enumerativ aufgezählten Ausnahmetatbestände eng auszulegen. Der Begriff "Konkurse" erfasse deshalb nur insolvenzrechtliche Sammelverfahren, nicht aber die als kontradiktorisches Parteiverfahren ausges- taltete Insolvenzanfechtung, auch wenn diese in engem und unmittelbarem Zu- sammenhang mit dem Insolvenzverfahren stehe* [The Court of Appeal does not consider the Regional Court of Marburg to be competent for the action to set a transaction aside arising from the opening of insolvency proceedings. According to the provisions of the Brussels Regulation, the jurisdiction of Germany is not justified. The provision of Art. 1 (2) (b) Brussels Regulation, according to which the Regulation is not applicable to bankruptcies, arrangements and analogous proceedings, does not refer to the avoidance actions. Having regard to the regulatory objective of the Brussels Regulation expressed in the Recital 7, i.e. to attain the objective of free movement of judgments in civil and commercial matters, the exceptions listed [in article 1(2)(b)] must be interpreted narrowly. The term 'insolvency' therefore only covers collective insolvency proceedings under insolvency law, but not insolvency avoidance actions, which are designed as adversarial party proceedings, even if they are closely and directly related to the insolvency proceedings] ». See BGH, 21 June 2007, in *ZIP/Zeitschrifts fur Wirtschaftsrecht*, 2007, p. 1415.

By relying on rather thin arguments, with a one-page decision rendered on February 12, 2009, the ECJ answered to the above questions stating that Article 3(1) EIR should be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings are opened have jurisdiction to decide an action to set a transaction aside that is brought against a person whose registered office is in another Member State.

The Court first concerned itself with the nature of an action to set a transaction aside under § 129 *et seq.* InsO [941]. Under such provision, in the context of insolvency proceedings, the appointed trustee may challenge those transactions undertaken by the debtor before the opening of insolvency proceedings, the effects of which are detrimental to creditors.

As a consequence, the Court highlighted that *(i)* only the trustee may bring such an action in the event of insolvency, by virtue of the powers vested upon him by national insolvency law and *(ii)* the objective of the action is solely that of protecting the interests of the general body of creditors.

Secondly, the Court stressed that, pursuant to the *Gourdain* case-law (rendered before the entry into force of the EIR), an action similar to an action to set a transaction aside was deemed as one not falling within the scope of the Brussels Convention, provided it derives directly from insolvency or winding up and that it is closely connected with the proceedings for the *liquidation des biens* or the *règlement judiciaire*.

The Court added that the Gourdain Formula was subsequently embedded in Recital 6 EIR, delimiting the scope of the Insolvency Regulation [942].

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941 Under § 129 InsO « *Rechtshandlungen, die vor der Eröffnung des Insolvenzverfahrens vorgenommen worden sind und die Insolvenzgläubiger benachteiligen, kann der Insolvenzverwalter nach Maßgabe der §§ 130 bis 146 anfechten. Eine Unterlassung steht einer Rechtshandlung gleich.* [Legal acts undertaken prior to commencement of insolvency proceedings which are prejudicial to the insolvency creditors may be avoided by the insolvency administrator in accordance with sections 130 to 146. An omission is deemed to be equivalent to a legal act] »

942 Recital 6 reads « *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* ». In his opinion, the Advocate General maintained that Recital 6 revealed unequivocally « *the uncertainties of the institutions with regard to the issue of jurisdiction and actions in the context of the proceedings* » but demonstrated also « *the intention of the council to resolve the difficulties inherent in cases such as the present one* » and « *in laying down the procedural rules governing actions in the context of an insolvency to set a transaction aside is clear* ». Also, the fact that « *two regulations exist side by side strengthens the principle of the absence of lacunae* ». See Opinion of the Advocate General General, at [50] and [53].

Moving from these grounds, the ECJ interpreted Article 3(1) EIR as meaning that it provides also for a rule on the jurisdiction over Annex Action [943].

The ECJ specified that such an interpretation took into account the intentions of the legislature, as well as the need to preserve the objectives of the Insolvency Regulation, namely the efficiency and effectiveness of cross-border insolvency proceedings (expressed in Recitals 2 and 8 EIR) [944].

In bolstering such a teleological interpretation, the Court called, although incidentally, on the doctrine of the *effet utile*, which reveals the muscular approach adopted towards the issue of the *vis attractiva concursus*.

Moreover, it was submitted that vesting the courts of the Member State where insolvency proceedings are opened with the jurisdiction over Annex Action would also foster the proper functioning of the internal market, preventing the risk of forum shopping (Recital 4) [945].

Eventually, the Court highlighted that such an interpretation of Article 3 EIR was also supported by the second subparagraph art. 25(1), which

> « *allows the possibility for courts of a Member States within the territory of which insolvency proceedings have been opened, pursuant to Art. 3(1) of that regulation, also to hear and determine an action of the type at issue in the main proceedings* » [946].

With respect to the latter provision, with the undisguised intention to justify the principle of the *vis attractiva*, the ECJ clarified that

> « *the words 'even if they were handed down by another court', at the end of the last sentence of the second subparagraph of Art.25(1) of regulation No 1346/2000, do 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. Those substantive jurisdictions, which does not necessarily have to be the court which opened the insolvency proceedings, which is provided for in Article 16 of the Regulation No 1346/2000* » [947].

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943 It seems that the ECJ partially relied on the arguments submitted by the Advocate General, according to whom « *there is a pitfall with regard to interpretation which calls for an analysis of Art. 3(1)* » since it « *contains a general rule of jurisdiction based on the jurisdiction of the State within the territory of which the centre of a debtor's main interests is situated* » (See opinion of the Advocate General, at [43]). However, the Advocate General submitted that since Article 4(2)(m) and 25(1) second subparagraph EIR lay down, the former, rules on the law applicable and, the latter, rules on the recognition of judgments with regard to actions to set a transaction aside, the intention of the Council in laying down the procedural rules governing those actions in the context of insolvency proceedings was clear. This assertion was supported also by reasons of legislative policy and by the model of universality underlying the Insolvency Regulation, which, as the Advocate General maintained, would be distorted if actions to set a transaction aside were excluded from the scope of Insolvency Regulation. From the above, the Advocate General concluded that « *the joint interpretation of Regulation No 44/2001 and No 1346/2000 in the light of the Gourdain case-law leads me to agree that an action in the context of an insolvency to set a transaction aside does not come under the general provisions of jurisdiction. Accordingly, a connection must be found in the provisions of Regulation No 1346/2000, and specifically in Art. 3(1)* ». See Opinion of the Advocate General, at [58].

944 See also the opinion of the Advocate General, at [59]-[61].

945 *Seagon*, at [60].

946 *Seagon*, at [26].

947 *Seagon*, at [27].

One question that remained unsolved was the nature of the *vis attractiva.* Although in its opinion the Advocate General expressly opted for the relatively exclusive nature of the jurisdiction of Annex Actions (on the ground that, under Article 18(2) EIR, 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* ») the ECJ did not take position on this point.

I.3. Two (opposite) cases decided immediately after Deko Marty: Alpenblume and German Graphics

Few months following the Deko Marty decision, The CJUE was referred to two preliminary ruling concerning Annex Actions and rendered two decisions which, in anticipation of what will be explained afterwards, reveal a contradictory approach.

I.3.1. The Alpenblume case

The first decision, dated July 2009, concerned an action brought by a company returned *in bonis* for the recovery of the ownership of shares sold by the trustee in the context of insolvency proceedings, which was regarded as falling within the scope of the Insolvency Exception [948].

Briefly explained, the facts of the case were the following. In the context of insolvency proceedings opened in 1993 against SCT Industri AB ('SCT Industri'), the appointed trustee sold to the Swedish company Alpenblume AB ('Alpenblume') a stake representing 47% of the share capital of Scaniahof Ferienwohnungen GmbH a company incorporated under Austrian law (hereinafter, 'Scaniahof'), held by SCT Industri. Accordingly, Alpenblume was registered in Austria as the legitimate owner of the shares of Scaniahof. Following the closure of proceedings in 1997 with no remaining assets, in 2002 the *Malmö tingsrätt* (the Swedish district court) ordered the liquidation of SCT Industri.

At that point, SCT Industri (returned *in bonis*) lodged an action against the target company (Scaniahof) in Austria, seeking an award condemning Scaniahof to register SCT Industri (instead of Alpenblume)

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948 ECJ, 2 July 2009, Case C-111/08, *SCT Industri AB I likvidation v. Alpenblume AB*, ECLI ECLI:EU:C:2009:419. Among commenting scholars see M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int'Lis*, 2012, p. 127; P. MANKOWSKI, 'Enger Zusammenhang' zwischen Zivilklage und Konkursverfahren – Anerkennung von Entscheidungen eines anderen Mitgliedstaats', in *Neue Zeitschrift für das Recht des Insolvenz und Sanierung*, 2009, p. 570; P. OBERHAMMER, 'Im Holz sind Wege: euGH SCT./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit b. EuGVVO, in *IPRax*, 2010, p. 317-324; F. CORSINI, 'Le azioni (indirettamente) derivanti dal fallimento tra regolamento n. 44 del 2001 e regolamento n. 1346 del 2000', in *Riv. trim. dir. e proc. civ.*, 2010, p. 1079; A. PIEKENBROCK, 'Europäische Anerkennung einer Klärung von Vorgängen im Umfeld eines (nicht von der EuInsVO erfassten) Insolvenzverfahrens', in *KTS Zeitschrift für Insolvenzrecht*, 2009, pp. 539-547. G. MEUSBURGER-HAMMERER, 'EuGH verneint die Anwendung der EuGVVO auf insolvenznahe Verfahren', in *European Law Reporter*, 2010 pp. 19-23; G. Rossolillo, in *L'osservatorio comunitario - Obbl. e Contr.*, 10, 2009 p. 853. C. NOURISSAT, 'Nouvelle précision sur le champ d'application matériel des règlements communautaires à propos de l'insolvabilité', in *Procédures*, 2009, comm. 314; L. IDOT, 'Exclusion de la faillite', in *Europe*, 2009, comm. 388; TH. MASTRULLO, 'Champ d'application du règlement n° 44/2001 : exclusion des décisions rendues en matière de faillite', in *Rev. proc. coll.*, 2009, comm. 153. REMO CAPONI, 'Il regolamento comunitario sulle procedure di insolvenza', *Foro it.*, Vol. 125, n. 11, pp. 219-228.

as the legitimate owner of the shares previously transferred by the trustee during insolvency proceedings.

The Austrian Court upheld the claim of SCT Industri, on the ground that, in the absence of a convention on the mutual recognition of insolvency proceedings (for the Insolvency Regulation was not yet applicable *ratione termporis*), the trustee of proceedings opened in another Member State (in the case at hand, Sweden) had no power to legitimately dispose of the goods of the debtor in Austria (*i.e.* a State other than that one where insolvency proceedings were opened). Therefore, the Austrian Court found that the transfer of shares made by the trustee was to be regarded as void.

Alpenblume, that appeared as an intervener ('*Nebenintervenientin*') in the dispute between SCT Industri and Schaniof, brought before the *Oberster Gerichtshof* (Supreme Court, Austria an '*außerordentliche Revision*' (an exceptional appeal on a point of law) against the award issued by the Austrian court). However, the appeal was dismissed.

In August 2004, then, Alpenblume commenced new proceedings in Sweden against SCT Industri seeking that SCT Industri adopted all measures necessary in order to grant that Alpenblume should be registered as the legitimate owner of the shares of Scaniahof. SCT Industri contested the claimant's argument on the ground that, pursuant to the decision rendered in Austria, the claim was inadmissible.

The question concerning the admissibility of the claim was eventually brought before the *Högsta domstolen* (the Swedish Supreme Court), which referred the question to the ECJ.

Specifically, the question submitted from the *Högsta domstolen* was whether

> « *the exclusion under Article 1(2)(b) of* Regulation [No 44/2001] [was] *to be interpreted as meaning that it covers a decision given by a court in one Member State (A) regarding registration of ownership of shares in a company having its registered office in Member State A, the shares having been transferred by the liquidator of a company having its registered office in another Member State (B), where the court based its decision on the fact that, in the absence of an international agreement on the mutual recognition of insolvency proceedings, Member State A does not recognise the liquidator's powers to dispose of property situated in Member State A?* » [949].

In dealing with the question submitted, the ECJ preliminary observed that the Insolvency Regulation was not applicable, since the proceedings opened against SCT Industry had been opened in 1993 (and pursuant to its Article 43 the Regulation was applicable to proceedings opened from 31st May 2002).

Thus, as stated by the Court, eventually the issue revolved around determining whether an action as that one commenced by SCT Industri before the Austrian courts against Schaniof (*recte* the judgement handed down by the latter court) was to be regarded as 'deriving directly from the insolvency proceedings and closely linked with it', thus excluded from the scope of the Brussels I Regulation.

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[949] *Alpenblume*, at [16].

In order to decide over this point, after recalling the Gourdain Formula, the ECJ stated that for the purposes of ascertaining whether an action is to be considered as Annex Actions (and, therefore, excluded from the material scope of the Brussels I Regulation) « *it is the closeness of the link, in the sense of the Gourdain case-law, between a court action such as that at issue in the main proceedings and the insolvency proceedings that is decisive* » [950].

Rather hastily, the Court found that, in the case at stake, the link was particularly close and broadly interpreted the Gourdain Formula, for the following three reasons.

First, the ECJ submitted that the transfer of the shares of Schanioff and the subsequent action for their restitution, were the direct and inextricable result of the exercise of the powers that the trustee (defined as a body of the procedure who intervenes only after insolvency proceedings have been opened) derives from the provisions of national law governing insolvency proceedings [951].

Second, it was purported that the price of the share transfer made by the liquidator increased the bankruptcy estate of SCT Industri [952].

Third, the Court submitted that the judgment declaring the transfer of shares void (the recognition of which was sought before the Swedish courts) concerned specifically and exclusively the abovementioned exercise of the trustee's powers and, namely, his power to dispose of the debtor's assets located in Austria [953].

On these grounds the Court deemed the decision rendered by the Austrian court as excluded from the material scope of the Brussels I Regulation (and therefore, although the Insolvency Regulation was not applicable *ratione temporis* in the case at stake, it was regarded as an Annex Action).

I.3.2. The German Graphics case

The second decision, rendered in September 2010, regarded the recognition of a judgement (obtained by the vendor *in bonis*) within the context of insolvency proceedings opened against the purchaser in

950 *Alpenblume*, at [25].

951 *Alpenblume*, at [28].

952 *Alpenblume*, at [29].

953 *Alpenblume*, at [30].

another Member State [954].

The facts of the case in a nutshell. The German company German Graphics Graphische Maschinen GmbH ('German Graphics') sold some machinery to the Dutch company Holland Binding BV ('Holland Binding'). The parties agreed on a reservation of title clause to be included in the purchase agreement.

On 1 November 2006, the *Rechtbank Utrecht* (the Dutch local court) opened involuntary liquidation proceedings *vis à vis* Holland Binding (*i.e.* the purchaser) and appointed Ms. van der Schee as trustee. In a few days immediately after the opening of proceedings, on 5 December 2006, the *Landgericht Braunschweig* (the German local court) granted the vendor German Grapichs, under the clause of reservation of title mentioned above, an order for protective measures with regard to a certain number of the sold machines, situated at the premises of Holland Binding in the Netherlands (*i.e.* the Member State opening insolvency proceedings).

By order dated 19 December 2006, the *voorzieningenrechter te Utrecht* (the Dutch local court for interim measures) declared enforceable in the Netherlands the order granted by the German *Landgericht*, pursuant to Art. 25(2) EIR.

Upon appeal of the trustee, the *Rechtbank* of Utrecht set the order aside. German Graphics, then, appealed to *The Hoge Raad* (the Dutch Supreme Court), that in turn referred the case to the ECJ, for a preliminary ruling.

With decision rendered on 10 September 2009, not only the ECJ examined whether a recovery action grounded on a reservation clause should be considered as Annex Action, but it also expressed a significant stance on the mutual interplay between the scopes of the Brussels I Regulation and the

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954 ECJ, 10 September 2009, Case C-292/08, *German Graphics Graphische Maschinen GmbH*, ECLI:EU:C:2009:544. The decision was commented, among scholars, by M. BRINKMAN, 'Der Aussonderungsstreit im internationalem Insolvenzrecht – Zur Abgrenzung zwischen EuGVVO und AuInsVO', in *Praxis des internationalen Privat- und Verfahrensrechts*, 2010, p. 324; J.D. LÜTTRINGHAUS, J. WEBER, 'Aussonderungsklagen an der Sxhnittstelle von EuGVVO und EuInsVO', in *RIW*, 2010, p. 45; A. PIEKENBROCK, 'Klagen eines Eigentumsvorbehaltsverkäufers bei ausländischem Konkurs des Käufers', in *KTS Zeitschrift für Insolvenzrecht*, 2010, pp. 208-215; P. MANKOWSKI, 'Insolvenznahe Verfahren und Sicherung eines Eigentumsvorbehalts im Grenzbereich zwischen EuInsVO und EuGVVO' in *Neue Zeitschift fur Insolvenzrecht*, 2008, p. 604; F. DIALTI, 'Giurisdizione in materia di azione del venditore fondata su riserva di proprietà nei confronti che versa in situazione di fallimento', in *Diritto del commercio internazionale*, 2010, p. 202. J.L. VALLENS, 'Pour la CJCE, l'action en revindication ne s'insère pas dans la procédure collective', in *Recueil Dalloz*, 2009, p. 2782; ID., 'La reconnaissance et l'exécution des décisions rendues dans une procédure collective sont soumises au règlement général du 22 décembre 2000 qui remplace la Convention de Bruxelles de 1968', in *RTD Com.*, 2010 p. 212. P. COURBE et F. JAULT-SESEKE, in *Dalloz*, 2010, p. 1585; R. DAMMANN et S. MILLET, in *Rev. Lamy dr. civ.*, 2010, p. 31. F. JAULT-SESEKE, 'Conflit de juridictions. Les règles communautaires' in *Recueil Dalloz*, 2010, p. 1593-1598. L. IDOT, 'Clause de réserve de propriété', in *Europe*, 2009, comm. n. 390, p. 31. M.V. POLAK, 'Nederlandse jurisprudentie', in *Uitspraken in burgerlijke en strafzaken*, 2010, 541. C. MICHAILIDOU, *Efarmoges Astikou Dikaiou*, 2009, pp.1132-1134. E. KININI, 'Efarmogi tou Kan. 44/2001 epi agogis apochorismou tou politi kata tou ofeileti agorasti se periptosi agoras me epifylaxi kyriotitas', in *Epitheorisi Politikis Dikonomias*, 2009, pp. 820-822. Z. CRESPI REGHIZZI, 'Reservation of Title in Insolvency Proceedings: Some Remarks in Light of the German Graphics Judgment of the ECJ', in *Yearbook of Private International Law*, 2010 Vol. XII pp. 587-606., p. 2782. F. MÉLIN, in *LEDEN*, 2009, p. 7. C. NOURISSAT, in *Procédures*, 2009, comm. 360. T. MASTRULLO, O. FRANCO 'L'action en revendication après l'arrêt German Graphics : prospectives françaises et européennes', in *Rev. proc. coll.,* 2010, édude 28.

EIR.

As to the first question, the Dutch Supreme Court asked the ECJ to interpret the wording of Article 25(2) EIR, since it states that the recognition of judgements other than those mentioned in Article 25(1) thereof shall be governed by the Brussels Convention 'provided that that Convention is applicable' [955]. With reference to this provision, the ECJ explained that it relates to judgements which, in principle, are not covered by the Insolvency Regulation. In particular, the Court specified that, between the decisions encompassed by Article 25(2) EIR, « *some will not come within the scope of application of either Regulation No 1346/2000 or of Regulation No 44/2001* » [956]. And for this reason, the ECJ explained that « *the application of Regulation No 44/2001 to a judgment within the meaning of that provision is subject to the condition that that judgment fall within the material scope of Regulation No 44/2001* » [957].

The rather cryptic and concise reasoning of the ECJ did not explicit the reasons behind such provision. At this stage, it is only possible to infer that, following that interpretation, Article 25(2) EIR shall not be regarded as extending the scope of the Insolvency Regulation.

By the second and third questions, the *Hoge Raad* asked whether an action brought by the vendor *in bonis* upon a reservation of title clause against the purchaser should be considered as falling within the scope of Brussels I Regulation, in case *(i)* insolvency proceedings of the purchaser has been opened and *(ii)* the assets which the reservation of title clause refers to are located within the territory of the Member State where insolvency proceedings are opened.

Also, the *Hoge Raad*, asked whether Articles 7(1) and 4(2)(b) EIR play any role in the context of such interpretation.

Having clarified that, when interpreting the Gourdain Formula no relevance should be given to the abovementioned rules, since they both refer to the different profile of the applicable law [958], the ECJ resolved the referred questions by stating that the action for the recovery of property filed by the seller upon a reservation of title clause (and the recognition of the corresponding decision) shall be governed by the Brussels I Regulation.

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955 The question referred by the Hoge Raad to the ECJ reads « *Must Article 25(2) of* [Regulation No 1346/2000] *be interpreted as meaning that the words "provided that that Convention* [namely Regulation No 44/2001] *is applicable*" *featuring in that provision imply that, before it can be concluded that the recognition and enforcement provisions of [Regulation No 44/2001] are applicable to judgments other than those referred to in Article 25(1) of [Regulation No 1346/2000], it is first necessary to determine whether, pursuant to Article 1(2)(b) of the [Regulation No 44/2001], such judgments fall outside the material scope of that regulation?* ». German Graphics, at [13].

956 *German Graphics,* at [17].

957 *German Graphics*, at [17].

958 More in particular, as to article 7(1) EIR, the ECJ stated that it « *constitutes a substantive rule intended to protect the seller with respect to assets which are situated outside the Member State of opening of insolvency proceedings* » (see German Graphics, at [35]). Moreover, in the case at stake, as pointed out by the ECJ, the provision of Article 7(1) EIR was not applicable, since « *German Graphics' assets were situated, at the time of the opening of insolvency proceedings, in the Netherlands, that is to say, in the Member State of the opening of those proceedings* ». As to the possible influence of article 4(2)(b) EIR on the determination of the jurisdiction of Annex Actions, the ECJ held that such provision « *only constitutes a rule intended to prevent conflicts of law by providing that the law of the State of opening of the insolvency proceedings is to apply in order to determine* » (see *German Graphics*, at [36]-[37]).

Preliminarily, the ECJ pointed out that the scope of the Brussels I Regulation must be interpreted broadly, whereas the Insolvency Regulation's one narrowly. To uphold this conclusion, the ECJ referred to Recitals 2, 7 and 15 of the Brussels I Regulation, maintaining that the intention underpinning said provisions is to grant a broad definition of the notion of civil and commercial matters. Conversely, the wording of Recital 6 EIR would imply that the scope of the Insolvency Regulation should not be interpreted broadly.

Thereafter, recalling the Gourdain Formula, the Court clarified that « *it is therefore the closeness of the link between [the] action and the insolvency proceedings [in the meaning specified in the Gourdain case] that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 is applicable* » [959].

Although the reasoning of the decision partially echoed the interpretation adopted in the *Alpenube* case, the ECJ reached a diametrically opposed conclusion and interpreted the Gourdain Formula restrictively.

Indeed, in assessing whether the legal basis of the recovery action in the case at stake stemmed from insolvency law, the ECJ highlighted that the action brought before the *Landgericht* (*i.e.* the German court originally seised by German Graphics) concerned exclusively the ownership of the machines covered by the reservation of title clause. Such a claim was regarded as *(i)* not deriving from insolvency law, and *(ii)* neither implying the opening of insolvency proceedings, *(iii)* nor requiring the involvement of the trustee.

The Court then added that « *In those circumstances, the mere fact that the liquidator is a party to the proceedings is not sufficient to classify the* [action] » [960] as deriving directly from and closely linked to insolvency proceedings, for « *that link is neither sufficiently direct nor sufficiently close to exclude the application of Regulation No 44/2001* » [961].

In light of the above, the ECJ ruled that an action [962] brought against the debtor within the context of insolvency proceedings for the recovery of the assets owned by the vendor *in bonis* by virtue of a reservation of title clause, falls within the scope of Brussels I Regulation. As a consequence, such an action cannot be deemed as an Annex Action for the purposes of the Insolvency Regulation.

I.4. The Schmid case

In the Schmid case, the ECJ established that the principle of *vis attractiva consursus* under Art. 3(1) EIR

959 *German Graphics*, at [30].

960 *German Graphics*, at [29].

961 *German Graphics*, at [33].

962 In the case at stake, anticipated through protective measures.

is also applicable *vis à vis* defendants whose domicile is located in a third country [963].

In a nutshell, Ms. Hertel, resident in Switzerland, was summoned to appear before the German courts by Mr. Schmid, the trustee appointed in the context of insolvency proceedings opened against Ms. Aletta Zimmermann. In particular, the trustee brought an action to set a transaction aside under the German InsO., seeking an order that Ms. Hertel returned the sums received by Ms. Zimmermann before the opening of the procedure, as they formed part of the debtor's estate.

The action was dismissed by both the *Landgericht* and the *Oberlandsgericht*, on the basis that German courts lacked international jurisdiction over the defendant, since her residence was in a third country, also considering that liquidation proceedings had no other cross-border connections than those to Switzerland. Upon appeal by the liquidator, the *Bundesgerichtshof* stayed proceedings and referred to the ECJ for a preliminary ruling.

Ultimately, the doubts of the referring court concerned whether the *vis attractiva concursus*, set forth by the ECJ in the *Seagon* judgement with specific reference to an action to set a transaction aside against a defendant domiciled in a Member State, could also apply *vis à vis* a defendant domiciled in third States.

The referring court argued that under Article 3(1) EIR, the jurisdiction of the Member State is established exclusively on the ground that the COMI of the debtor is located within its territory. The *Bundesgerichtshof* submitted that, for the Regulation to apply, the presence of a cross-border element is also necessary, it being unclear, however, whether it must relate to another Member State or whether a mere connection with third countries was sufficient [964].

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963 ECJ, 16 January 2014, Case C-328/12, *Ralph Schmid v. Lilly Hertel*, ECLI:EU:C:2014:6. Among many commentators, see G. MONTELLA, 'La prevedibilità della competenza internazionale sulle azioni che derivano dal fallimento secondo il regolamento n. 1346: un valore difficile da attuare e non conveniente da imporre', in *Fallimento*, 2014, p. 638; B. LAUKEMANN, 'Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 January 2014, Case C-328/12 – Schmid/Hertel', in *International Insolvency Law Review*, 2014, 2, p. 101. C. G. PAULUS, 'Zuständigkeit der Gerichte des Eröffnungsstaats für Insolvenzanfechtungsklage gegen einen Anfechtungsgegner' in *EU-Drittstaat („Schmid"), in Entscheidungen zum Wirtschaftsrecht*, 2014, pp. 85-86; D. BUREAU, 'Compétence en cas d'action révocatoire dans une procédure d'insolvabilité', in *Revue critique de droit international privé*, 2014, pp. 675-679; L. IDOT, 'Champ d'application territorial du règlement', in *Europe*, 2014, Comm. n. 3, p. 36. P. SCHULZ, 'Insolvenzrecht: Internationale Zuständigkeit für Anfechtungsklage gegen in Drittstaat ansässigen Anfechtungsgegner', in *Europäische Zeitschrift für Wirtschaftsrecht*, 2014, pp. 264-265 F. MÉLIN, 'Champ d'application dans l'espace du règlement relatif aux procédures d'insolvabilité', in *La Semaine Juridique*, 2014, pp. 388-390. S. RIEDEMANN, 'Zuständigkeit der Gerichte des Eröffnungsstaats für Insolvenzanfechtungklage gegen einen Anfechtungsgegner in EU-Drittstaat („Schmid")', in Entscheidungen zum Wirtschaftsrecht, 2013, pp. 773-774. T. LINNA, 'Oikeustapauskommentti: EU-tuomioistuimen tuomio C-328/12 Ralph Schmid v. Lilly Hertel (16.1.2014)', in *Defensor Legis*, 2015, 3, pp. 603-606; ID., 'European Court of Justice, 16 April 2015 C-557/13, Hermann Lutz v Elke Bäuerle. European Court of Justice, 16 January 2014 - C-328/12, Ralph Schmid v Lilly Hertel', in *Tidskrift Utgiven av Juridiska föreningen i Finland*, 2015, 4, pp. 358-368; F. JAULT-SESEKE, D. ROBINE, 'L'application du règlement « insolvabilité » dans les relations avec un Etat tiers', in *Dalloz*, 2014,pp. 915-919; M.LAAZOUZI, 'Cour de justice, 1re ch., 16 janvier 2014, Schmid, aff. C-328/12, ECLI:EU:C:2014:6', in *Jurisprudence de la CJUE 2014*, Bruxelles, 2014, p. 812-814; P. KINDLER, 'Insolvenzanfechtungsklage gegen einen in einem Drittstaat ansässigen Beklagten am Gerichtsstand des Hauptinsolvenzverfahrens', in *Recht der internationalen Wirtschaft*, 2014, pp. 137-138.

964 On this point see *supra* Chapter II, Section II, § II.1.2.3.

The ECJ bolstered up a broad interpretation of the territorial application of the Insolvency Regulation and found that the *vis attractiva concursus* under Art. 3(1) EIR also applied to Annex Actions brought against defendants domiciled in a third state. The decision of the Court was based on the following reasons.

Firstly, it was the Court's view that a literal interpretation of the Regulation leads to the conclusion that the jurisdiction of the Member State of the COMI does not require connecting factors limited to the territory of the European Union. Nothing in Article 1 and Annex A EIR suggests that the cross-border element must necessarily involve a Member State. Moreover, also Recital 14 EIR was interpreted as confirming the lack of distinction between purely European situations and truly international ones. As a consequence, it was submitted that the wording of those provisions does not seem to limit the application of the Insolvency Regulation to proceedings that involve a cross-border element exclusively within the territory of Member States [965].

Secondly, the Court stressed that, although a number of provisions of the Insolvency Regulation do require the presence of cross-border elements concerning the territory or the legal system of at least two Member States (e.g. Article 5(1) EIR relating to rights *in rem* or a number of provisions of Chapter III EIR), other provisions (for instance, Articles 6 and 14 EIR) do not specify such circumstance.

Thirdly, reasons in support of the broad territorial application of the Insolvency Regulation were further found by the ECJ in Article 44(3)(a) EIR. Under this provision, the Regulation is not applicable in any Member State, « *to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that Member State with one or more third countries before the entry into force of the Regulation* » [966]. The ECJ purported that such a clarification would be superfluous if the Insolvency Regulation did not apply to claims involving a Member State and a third country.

To further support that reasoning, the Court highlighted that a teleological interpretation would lead to the same conclusion as well. Indeed, the objectives of proper functioning of the internal market and the efficiency and effectiveness of cross-border insolvency proceedings – as expressed in Recital 2, 4, 6, 8 and 12 EIR – « *encompass not solely relations between Member States but, by their nature and in accordance with their wording, any cross-border situation* » [967].

Therefore, as also submitted by the Advocate General in his opinion [968], the Court considered it unnecessary to demonstrate a cross-border element involving two or more Member States to apply the Insolvency Regulation [969].

Additionally, the Court emphasised that Article 3(1) EIR, read in the light of Recital 8 EIR, lays down

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965 See also the opinion of Advocate General Sharpston, delivered on 10 September 2013, ECLI:EU:C:2013:540, at [25].

966 *Schmid*, at [23].

967 *Schmid*, at [25].

968 See the opinion of the Advocate General, at [31].

969 *Schmid*, at [29].

a rule on the jurisdiction, with a view to promote foreseeability and legal certainty as to insolvency and liquidation proceedings. The Court submitted that at the very early stage of the request to open insolvency proceedings, the existence of any cross-border element might be unknown.

Relying on the opinion of the Advocate General [970], the Court then observed that

> « *However,* [the] *determination of the court which has jurisdiction cannot be postponed until such time as the locations of various aspects of the proceedings in addition to the centre of the debtor's main interests, such as the residence of a potential defendant to an ancillary action, are known. To wait for knowledge of these matters would frustrate the objectives of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects* » [971].

On the basis of this additional argument, the Court confirmed that Article 3(1) EIR could not, as a rule of thumb, depend on the existence of a cross-border link involving another Member State [972].

Against these premises, the Court recalled that, under the *Seagon* case-law, Article 3(1) EIR must be interpreted as conferring the jurisdiction over Annex Actions to the courts of the Member State in the territory of which insolvency proceedings are opened. However, the ECJ continued, mere fact that on that occasion such a principle was established with reference to an action to set a transaction aside against a defendant domiciled in a Member State, could not entail that such a « *jurisdiction is immediately ruled out where the defendant is established in a third country, given that the Court was not called upon to decide that question* » [973].

The above conclusions appeared to be also confirmed in the light of the beforementioned objectives underlying Article 3(1) EIR.

Eventually, the ECJ rejected both arguments submitted by the German Government. The latter claimed that the extension of the EIR's jurisdictional regime towards third countries would eventually put the defendant in a weak position, since he could be summoned before a foreign court, in a State different than that of his domicile. Second, it was argued that the courts of a third country would be under no obligation at all to recognise or enforce a judgment delivered by a court having jurisdiction pursuant to an EU instrument.

As to the first argument, the Court emphasised that the *vis attractiva concursus* aims at creating a procedural framework which is foreseeable and certain as regards insolvency proceedings, according to Recital 8 EIR. Also, it was recalled that one of the objectives of the Insolvency Regulation being the avoidance of forum shopping, the jurisdictional rule set forth by the *Seagon* case law would prevent

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970 Opinion of the Advocate General, at [29].

971 *Schmid*, at [28], explicitly mentioning ECJ, 17 January 2006, Case C-1/04, *Susanne Staubitz-Schreiber*, ECLI:EU:C:2006:39.

972 See also the Opinion of the Advocate General, at [25], where he submitted that « *The jurisdiction rule in Article 3(1) has been labelled the 'cornerstone' of the system established by the Regulation. It provides that the courts of the Member State in which the centre of the debtor's main interests is located have jurisdiction to open insolvency proceedings. Thus, under the Regulation, the centre of the debtor's main interests plays the pivotal role in determining jurisdiction* ».

973 *Schmid*, at [32].

that parties transfer assets from one Member State to another or choose a particular forum, seeking a more favourable legal position.

On those assumptions, the ECJ found that, whenever entering into a transaction with the debtor, a third party (including a creditor) may well foresee which court would have jurisdiction to hear an action to set that transaction aside. In the light of the foregoing, the Court inferred that the pursuit of the objectives set forth by the Insolvency Regulation should prevail over the concern that the defendant is diverted from the natural forum of his home country.

As to the second argument submitted by the German Government, that a judgement rendered against a third State defendant would be *inutiliter data*, as it would not be recognised nor enforced in that State, the Court attempted to justify its decision (arguably) maintaining that the fact that the Insolvency Regulation cannot bind third countries, would not preclude in any case the establishment of a rule on jurisdiction (974). Also, it was hastily maintained that it would still have been possible, in any case, to obtain the recognition and enforcement of a judgment delivered *vis-à-vis* a defendant domiciled in a third country under the terms of a bilateral conventions, if any. Eventually, and more convincingly, the Court observed that the trustee may be interested in obtaining the enforcement of that judgement in other Member States under Article 25 EIR, whenever a part of the third country defendant's assets are located in the territory of one of those Member States.

I.5. The F-Tex SIA case

On April 19, 2012, the ECJ ruled that

« *An action brought against a third party by an applicant acting on the basis of an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside that the liquidator derives from the national law applicable to those proceedings is covered by the concept of civil and commercial matters within the meaning of that provision* » (975).

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974 The same argument may be found in the opinion of the Advocate General (at [38]) according to whom « *So far as recognition and enforcement are concerned, I note first that those provisions can be read separately from the provision on the allocation of jurisdiction* ».

975 ECJ, 9 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB Jadecloud-Vilma*, ECLI:EU:C:2012:215. For literature see, *inter alia*, M. MENJUCQ, 'La cession de l'action révocatoire rompt le lien direct avec la procédure d'insolvabilité du débiteur', in *Faillites internationals - JCP G*, 2012, p. 1053, n. 10. T. MASTRULLO, 'L'action exercée par le cessionnaire du droit de révocation que le syndic tire de la lex concursus relève de la matière « civile et commerciale » au sens du règlement « Bruxelles I »', in *Rev. proc. coll.*, 2012, comm. 184; M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int'Lis*, 2012, p. 127; P. DE CESARI, 'Azioni collegate e strettamente connesse ad una procedura di insolvenza: una nuova nozione europea autonoma' in *Il Fallimentarista*, 23 July 2012. P. DE CESARI, G. MONTELLA, 'La revocatoria fallimentare in bilico tra il Reg. n. 1346/2000 e quello n. 44/2001. Osservazioni a Corte di giustizia 19 aprile 2012', in *Fallimento*, 2012, p. 1008. M. BRINKMANN, in *Entscheidungen zum Wirtschaftsrecht*, 2012 p.383-384; B. SUJECKI, 'uGVVO/EuInsVO: Internationale Zuständigkeit für insolvenzrechtliches Annexverfahren', in *Europäische Zeitschrift für Wirtschaftsrecht*, 2012, p.430 C. KOLLER, 'Neues zum Abgrenzungsenigma EuGVVO/EuInsVO', in *Ecolex*, 2012, p.693-695. A. ESPINIELLA MENÉNDEZ, 'Competencia judicial internacional - Sentencia del Tribunal de Justicia de la Unión Europea (Sala Primera), de 19 de abril de 2012, asunto C-213/10, F-Tex SIA c. Jadecloud Vilma', in *Revista española de Derecho Internacional*, 2012, p.224-227, F. RAVIDÀ, 'Sull'applicabilità del reg. CE 44/2001 alle azioni revocatorie', in

This conclusion, in itself quite cryptic, can be better understood in the light of the facts of the case.
In January 2005, the *Landgericht Duisburg* opened insolvency proceedings against NPLC, a company with registered office in Germany.
The appointed trustee assigned all the debtor's claims against third parties to F-Tex SIA, the sole NPCL's creditor, 'F-Tex'). F-Tex and the IP agreed that the assignee was not bound to enforce the transferred claims, but, in the event that he did so, he would have to pay a percentage of the proceeds accrued from the (successful) actions.
Among the transferred claims was included the action to set a transaction aside *vis à vis* Lietuvos-Anglijos UAB Jadecloud Vilma, a company incorporated under Lithuanian laws ('UAB Jadecloud Vilma'). Indeed, before the opening of insolvency proceedings, between February and June 2009, NPLC (materially insolvent), made some payments to UAB Jadecloud Vilma.
On the basis of the aforementioned assignment, then, F-Tex filed a petition against UAB Jadecloud Vilma, seeking the reimbursement of the sums received by NPLC. The action was brought before the *Vilniaus apygardos teismas* (the Lithuanian regional court), for it was the court of the defendant's domicile, pursuant to Article 2 Brussels Regulation.
However, in August 2009, the Lithuanian Court dismissed the claim of F-Tex, declining its jurisdiction. The Lithuanian court held that the action to set the payment aside brought by the assignee was to be considered as an Annex Action and, therefore, the jurisdiction over the case brought by F-Tex should have fallen on German courts, *i.e.* the courts of the Member State in the territory of which insolvency proceedings were opened against NLCP.
On the basis of that decision, under Article 3(1) EIR, F-Tex commenced a parallel claim against Jadecloud Vilma in Germany, before the *Landgericht Duisburg* (*i.e.*, the ordinary civil local court competent to hear the action pursuant the German code of civil procedure). By decision dated 25 November 2009, the latter court, however, found that the action brought by F-Tex against Jadecloud-Vilma did not come within its jurisdiction, on the ground that, *inter alia*, the defendant's domicile was not in Germany (thereby revealing that the German court considered the action brought by F-Tex a common civil and commercial action, and not an Annex Action).
Meanwhile, upon appeal of F-Tex, on 5 November 2009, the *Lietuvos apeliacinis teismas* (the Lithuanian Court of Appeal) reversed the decision of the *Vilniaus apygardos teismas* and referred the case back to the court of first instance.
The *Vilniaus apygardos teismas* ruled that the principle of *vis attractiva concursus* provided for in Article 3(1) EIR did not entail exclusive jurisdiction. Therefore, taking into account the facts of the case, the action brought by F-Tex might come within the jurisdiction of the Member State where the defendant had registered office or domicile pursuant to the Brussels Regime (thus in the case of UAB Jadecloud

Rivista di diritto processuale, 2013, p.765-772, M.V POLAK, 'Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken', 2012, n. 309.

Vilma, in Lithuania). UAB Jadecloud Vilma challenged the decision of the *Vilniaus apygardos teisma*s before the *Lietuvos Aukščiausiasis Teismas* (the Lithuanian Supreme Court), which referred two articulated questions to the ECJ [976].

The ECJ, however, decided exclusively over one question concerning whether, in light of the Gourdain and the Seagon case-law, an action to set a transaction aside brought in another Member State should be classified as an ordinary civil and commercial action, provided that *(i)* it is brought by the third party to whom the claim was assigned by the trustee and *(ii)* the enforcement of the claim would not result in a detriment to other creditors, since in that particular case the assignee was the sole creditor of the debtor.

As a premise, the ECJ ruled (for the first time expressly) that the scopes of the Brussels Regulation and of the Insolvency Regulation must be interpreted as dovetailing. The ECJ frounded its statement on the explanatory works of the Brussels Convention (namely, the Jenard Report and the Schlosser Report) according to which the matters referred to by the Insolvency exception were to be covered by a separate Convention. As such, the two (at that time) Conventions were conceived as complementary.

That being clarified, the Court concerned itself with delimiting the scope of the two instruments.

In this respect, the Court again mentioned the Gourdain Formula (as lastly interpreted in the *Alpenblume* and the *German Graphics* cases), stating that

> « *Using again the criterion that an action is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and is closely connected with proceedings for realising the assets or for judicial supervision, the Court stated that it is the closeness of the link, in the sense of the case law deriving from Gourdain, between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether that exclusion is applicable* » [977].

Therefore, by recalling the Seagon case, the Court reminded that « *it is exactly the criterion defined in*

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976 The questions raised by the *Vilniaus apygardos teismas* read « *1. Having regard to the judgments of the Court of Justice in [Case 133/78] Gourdain [[1979] ECR 733] and in [Case C-339/07] Seagon [2009] ECR I-767], do Article 3(1) of Regulation No 1346/2000 and Article 1(2)(b) of Regulation No 44/2001 have to be interpreted in such a way that: (a) a national court hearing insolvency proceedings has exclusive jurisdiction to hear an actio Pauliana which derives directly from the insolvency proceedings or is closely connected with them, and exceptions to such jurisdiction can be founded only on other provisions of Regulation No 1346/2000; (b) an actio Pauliana by the sole creditor of an undertaking in respect of which insolvency proceedings have been initiated in one Member State, that: -is brought in another Member State, - arises from a right of claim against third parties assigned to him by the liquidator on the basis of an agreement for consideration, restricting in that way the extent of the liquidator's claims in the first Member State, and - does not give rise to a danger for other possible creditors, is to be classified as a civil and commercial matter under Article 1(1) of Regulation No 44/2001? 2. Does an applicant's right to a judicial remedy, which is recognised by the Court of Justice as a general principle of European Union law and which is guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, have to be understood and interpreted in such a way that: (a) the national courts having jurisdiction to hear an actio Pauliana (depending upon its connection with the insolvency proceedings) either under Article 3(1) of Regulation No 1346/2000 or under Article 2(1) of Regulation No 44/2001 cannot both decline jurisdiction; (b) where a court of one Member State has decided to leave an actio Pauliana unheard for want of jurisdiction, a court of another Member State, seeking to safeguard the applicant's right to a court, has the right to find of its own motion that it itself has jurisdiction, regardless of the fact that according to the provisions of European Union law concerning the determination of international jurisdiction it cannot so decide?* ».

977 *F-Tex*, at [23].

Gourdain that is used by recital 6 in the preamble to Regulation No 1346/2000 in order to delimit the purpose of the Regulation » and, therefore, taking into account the legislature's intention and the effectiveness of the Insolvency Regulation, Article 3(1) EIR should be interpreted as conferring also « *international jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected with them* » [978] to the courts of the Member State in the territory of which insolvency proceedings were opened.

In light of the above, the ECJ drew four conclusions in terms of general interpretation.

Firstly, that the Brussels I Regulation and the Insolvency Regulation must be interpreted as dovetailing.

Secondly, that Article 1(2)(b) of the Brussels I Regulation excludes from its scope only certain well-defined matters, and, in particular, actions deriving directly from insolvency proceedings and closely connected with them.

Thirdly and accordingly, that only actions which derive directly from insolvency proceedings and are closely connected with them are covered by Insolvency Regulation.

Finally, for the first time, the ECJ affirms that the Gourdain Formula entails a 'dual criterion'.

By applying the Gourdain Formula, as interpreted above, with reference to the action brought by F-Tex, the Court observed that it was necessary to address «*The links between the action in the main proceedings, on the one hand, and the insolvency of the debtor and the insolvency proceedings, on the other hand* ».

As to the first profile, the Court specified that in principle «*the origin and content of the action brought by the assignee are, in essence, the same as those of an action to set a transaction aside brought by the liquidator* » [979].

As a rule of thumb, an action to set a transaction aside under § 129 InsO, can be brought only by the trustee, with the sole purpose of protecting the interests of the general body of creditors. Therefore, when exercised by the trustee, as it occurred in the *Seagon* decision, such an action has to be deemed as Annex Action.

However, given the fact that under German law, an action to set a transaction aside may be assigned to a third party by the trustee, provided that such an assignation benefits the general body of creditors, the Court concerned itself in determining whether, once acquired by the assignee, the right underlying the action retains a direct link and a close connection to insolvency proceedings (*i.e.* the second profile mentioned by the Court).

In this respect the ECJ stressed several features of the action brought by the assignee contradicting its characterisation as Annex Action.

Indeed, unlike in the *Seagon* case, the claimant F-Tex was not acting as a body of proceedings, not being the trustee of NLCP's proceedings, but in its capacity as assignee of an action (and of the right underlying such an action).

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978 *F-Tex*, at [27].

979 *F-Tex*, at [30].

Also, contrarily to what happened for the *Alpenblume* case [980], the action commenced by F-Tex did not relate to the validity of the assignment granted by the trustee or to the latter's power (and specifically to the power of assigning the right to have a transaction set aside).

On these grounds, the Court pinpointed that, under the assignation of the action to set a transaction aside, the exercise of the right acquired by an assignee is subject to rules different from those applicable to insolvency proceedings.

Moreover, unlike the trustee, who is legally bound to exercise its powers in the interests of the creditors, the assignee can arbitrarily decide whether to enforce the claim that he has acquired. For the same reason, the assignee acts in his own interest, for he personally benefits from the proceeds of the action.

The Courts underlined, also, that the law applicable to the insolvency proceedings, as well as the closure of the insolvency proceedings have no effect on the prerogative of the assignee to commence the action.

Eventually, the Court addressed the fact that F-Tex agreed to pay the trustee a percentage of the proceeds possibly deriving from the claim assigned, ruling that « *it* [was] *merely a method of payment. Such a contractual stipulation* [was] *within the power of the parties as it* [was] *not disputed that the liquidator and the assignee could freely choose to express* [whether] *the assignee* [would have to pay] *in the form of a fixed sum or a percentage of any sums recovered* » [981].

In light of the above, the ECJ considered that, once assigned to a third party, the action to set a transaction aside does not retain a close connection with insolvency proceedings.

Therefore, the Court added that there was no need to rule on the existence of the second criterion of the direct link between that action and the debtor's insolvency.

In conclusion, the ECJ ruled that the action brought by F-Tex, acting as assignee of the right to set a transaction aside, was not covered by Article 3(1) EIR and, symmetrically, that it did not concern bankruptcy or winding-up for the purposes of the Insolvency Exception Article 1(2)(b) of the Brussels I Regulation.

I.6. The Nickel&Goeldner case

A similar reasoning to that one adopted in *F-Tex* was also used by the Court in the following decision

980 See *supra* in this Chapter, Section I, § I.3.1.

981 *F-Tex*, at [45].

rendered on the 4 September 2014 [982].

On that occasion, the IP appointed within the context of collective proceedings opened *vis à vis* the Lithuanian company Kintra filed a petition for the opening insolvency proceedings (the *Vilniaus apygardos teismas*) seeking an order that Nickel&Goeldner Spedition (a company incorporated in Germany, 'Nickel') paid its debts arising out of a contract of carriage of goods entered into between Kintra and Nickel.

It is understood that pursuant to the trustee, the jurisdiction of the *Vilniaus apygardos teismas* was grounded on Art. 14(3) of the Lithuanian insolvency law. Nickel contested the jurisdiction of the Lithuanian courts, on the basis that the dispute fell within the scope of either Article 31 of the CMR [983] or the Brussels I Regulation.

The Lithuanian court of first instance upheld the claim brought by the trustee, also considering that it had jurisdiction, pursuant to the Lithuanian law but, even more correctly, under Article 3(1) of the Insolvency Regulation, since the action brought by the trustee was to be deemed as an Annex Action. Upon appeal of Nickel, the *Lietuvos apeliacinis teismas* (The Court of Appeal of Lithuania) confirmed the jurisdiction of the judge of first instance. Eventually, the dispute was brought before the *Lietuvos Aukščiausiasis Teismas* (the Supreme Court), which referred the question to the ECJ.

In essence, the doubts raised by the referring court concerned whether an action for the payment of a debt arising out of an agreement for the provision of services brought by the trustee of insolvency proceedings opened in one Member State and directed against the recipient of those services, established in another Member State fell within the scope of the Brussels I Regulation or of the

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982 ECJ, 4 September 2014, Case C-157/13, *Nickel & Goeldner Spedition GmbH v. "Kintra" UAB*, EU:C:2014:2145. The decision was commented by L. STRIKWERDA, 'Nederlandse jurisprudentie; Uitspraken' in *burgerlijke en strafzaken*, 2015, 11, pp. 1059-1061; J. M. FONTANELLAS MORELL, 'Competencia judicial internacional - Acción de reclamación de un crédito dimanante de un transporte internacional ejercitada por el síndico de una empresa en liquidación - Delimitación entre el ámbito material de aplicación del Reglamento 44/2001 y el Reglamento 1346/2000 - Relación entre el Reglamento 44/2001 y los Convenios sobre "materias particulares" - Aplicación del Convenio CMR: compatibilidad de sus reglas de competencia judicial con los principios que inspiran la cooperación judicial europea en materia civil y mercantil', in *Revista española de Derecho Internacional*, 2015, p. 241-245; C. THOLE, 'Die Abgrenzung von EuGVVO und EuInsVO bei Annexklagen des Insolvenzverwalters und das Verhältnis zu Art. 31 CMR', in *Praxis des internationalen Privatund Verfahrensrechts*, 2015, pp. 396-401; L. GALANTI, 'Il problematico inquadramento delle "azioni strumentali" ad una procedura di insolvenza transfrontaliera: ambito di applicazione del regolamento (Ce) n. 1346/2000 alla luce della riforma attuata con il Regolamento (Ue) n. 848/2015', in *Dir. Fallim.*, 2016, p. 149; M. LAAZOUZI, 'Cour de justice, 1re ch., 4 septembre 2014, Nickel & Goeldner, aff. C-157/13, ECLI:EU:C:2014:2145', in *Jurisprudence de la CJUE 2014*, 2014, pp. 849-851 (FR). TH. MASTRULLO, in *Rev. proc. coll.*, 2015, comm. 90; A. MARMISSE-D'ABBADIE D'ARRAST, in *RTD com.*, 2015, p. 180, obs.; C. LEGROS, in *Rev. crit. DIP*, 2015, p. 207. L. IDOT, 'Domaine d'application et exception relative aux « faillites »', in *Europe*, 11, 2014, comm. 503.

983 The Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978.

Insolvency Regulation [984].

The wording of the question referred to the ECJ revealed that the *Lietuvos Aukščiausiasis Teismas* considered that the action brought by the trustee of Kintra was an Annex Action - akin to an *action pauliana* – since the trustee was acting in the interests of the body of creditors, seeking to restore the insolvency estate.

The first part of the ruling refers to the interplay between the two regulation. Again, the Court retraced the preparatory documents of the Brussels Convention, submitting that the Brussels I Regulation and the Insolvency Regulation must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum [985].

With the further significant specification with respect to the previous *F-Tex* case that

> « *actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the scope of that regulation* […] *fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001* » [986].

The Court stressed once again the fact that, in the light of Recital 7 Brussels Regulation and of Recital 6 EIR, the former should be considered as broad in its scope, whilst the latter should not be broadly interpreted [987].

By applying these general principles, the ECJ recalled the Gourdain Formula, ruling that « *only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of Regulation No 44/2001* » [988]. The Court, once more, expressly interpreted the Gourdain Formula as a double test.

Then, the Court instructed how its earlier case-law (*i.e. Gourdain*, *Seagon*, *German Graphics* and *F-Tex*) needed to be applied.

Indeed, starting from the interpretation of its precedents the ECJ slightly rephrased the Gourdain Formula, concluding that

> « *the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined*

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984 For the sake of completeness, it has to be reminded that the Lietuvos Aukščiausiasis Teismas has asked to the ECJ two more questions. In particular, the Lithuanian Supreme court wanted the Court to clarify the reciprocal interaction between the CMR and the Insolvency Regulation or the Brussels I Regulation. More in particular, the additional questions were (i) in case the right underlying the action « *has arisen prior to the opening of insolvency proceedings in respect of the applicant, Article 44(3)(a) of Regulation No 1346/2000 must be relied upon and this regulation is inapplicable because jurisdiction over the case is established in accordance with Article 31 of the [CMR] as provisions of a specialised convention? and (iii) in case the action was found to be covered by the Brussels Regulation, "the dispute under consideration falls within the scope of Regulation No 44/2001* […] *if the legal rules in Article 31(1) of the [CMR] do not run counter to the fundamental objectives of Regulation No 44/2001, do not lead to results which are less favourable for achieving sound operation of the internal market and are sufficiently clear and precise?* ».

985 *Nickel&Goeldner*, at [21], referring expressly to *F-Tex*.

986 *Nickel&Goeldner*, at [23].

987 *Nickel&Goeldner*, at [22], referring expressly to *German Graphics*.

988 *Nickel&Goeldner*, at [23], referring expressly to *F-Tex* and the case-law mentioned therein.

whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings » [989].

Focusing on the first part of the test, *i.e.* whether the right underlying the action derives directly from insolvency, the ECJ found that the action brought by the trustee was an action for the payment of a debt arising out of the provisions of a contract for carriage. However, such an action « *could have been brought* [by Kintra] *itself before its divestment by the opening of insolvency proceedings* » [990].

Thus,

«*The fact that, after the opening of insolvency proceedings* […] *the action for payment is taken by the insolvency administrator appointed in the course of those proceedings and that the latter acts in the interest of the creditors does not substantially amend the nature of the debt relied on which continues to be subject, in terms of the substance of the matter, to the rules of law which remain unchanged* » [991].

The Court then addressed the second criterion of the test (*i.e.* the closeness of the procedural link between the action and proceedings), ruling that its assessment was unnecessary, it being acknowledged that the first condition was not fulfilled [992].

In light of the above, the Court ruled that

« *that an action for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and taken against a service recipient established in another Member State comes under the concept of 'civil and commercial matters' within the meaning of* [Article 1(1) of the Brussels I Regulation] ».

I.7. The H v. H.K. case

Of particular relevance for the purposes of this work is, then, the *H. v. H.K.* case, decided by the ECJ on December 4, 2014 [993].

Briefly explained, H., acting as liquidator in insolvency proceedings opened against the German company G.T. GmbH ('GT'), commenced an action *vis à vis* H.K., the managing director of GT, domiciled in Switzerland.

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989 *Nickel&Goeldner*, at [27].

990 *Nickel&Goeldner*, at [26].

991 *Nickel&Goeldner*, at [28].

992 In particular the Court held that « *with[out] it being necessary to examine whether the action is closely connected with the insolvency proceedings, it must be held that that action is not covered by Article 3(1) of Regulation No 1346/2000 and, following the same reasoning, that it does not concern bankruptcy or winding-up for the purposes of Article 1(2)(b) of Regulation No 44/200* ». *Nickel&Goeldnr*, at [31].

993 ECJ, 4 December 2014, Case C-295/13, *H. v. H.K.*, ECLI:EU:C:2014:2410. See, among others, S. BAERT, 'CJUE : compétence de juridiction pour une action dirigée contre le gérant, domicilié en Suisse, d'une société allemande en difficulté' in *LegalNews*, 15 April 2015; D. BUREAU, 'Procédure d'insolvabilité : mise en place d'une action contre un défenseur domicilié dans un État tiers', in *Rev. crit. DIP*, 2015, p. 462; F. JAULT-SESEKE et D. ROBINE, 'Champ d'application du règlement insolvabilité (29 mai 2000) : entre répétitions et precisions', in *Bullettin Joly des Sociétés*, 2015, 2, p. 95. L. D'AVOUT – S. BOLLÉE, in *Dalloz*, 2015, p. 2031; M. MENJUCQ, in *Rev. proc. coll.*, 2015, 5, p. 41; R. DAMMANN et A. RAPP, in *BJE* 2015, 3, p. 139; C. NOURISSAT, *in Gaz. Pal.* 2015, n. 121-125, p. 17. L. IDOT, in *Europe* 2015, 2, p. 46,

The trustee grounded his claim on the alleged circumstance that H.K. had made some payments to one of its subsidiaries, after the company became insolvent, in violation of § 64 GmbHG.

Under this provision, as illustrated, the managing directors are obliged to reimburse to the company payments made after the company is declared insolvent or after it has been established that its liabilities exceed its assets, unless those payments are compatible with the care to be expected of a prudent businessman [994].

The *Landgericht Darmstadt* doubted as to whether an action based on § 64 GmbHG could fall under the scope of Art. 3(1) EIR and referred the question to the ECJ.

The referring court asked whether the action at stake could be regarded as an Annex Action and, if such, whether German courts had jurisdiction to decide, it being considered that the director was domiciled in a third state [995].

As to the first question, the ECJ considered that an action under § 64 GmbHG fell under Article 3(1) EIR. The reasoning followed here by the Court partially differed from the path drew in the previous case-law [996].

Referring directly to the principle ruled in *Seagon*, the Court recalled preliminarily that Article 3(1) EIR establishes the *vis attractiva concursus* and that such a principle grounded, *inter alia*, on the objective of the effectiveness of the Insolvency Regulation.

Subsequently, the ECJ specified that, in its precedents, in assessing whether actions derive directly from insolvency proceedings and are closely connected with them, the Court

> « *has taken into account, first, the fact that the various types of actions* […] *were brought in connection with insolvency proceedings. Secondly, the Court concerned itself above all with determining on each occasion whether*

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994 See *supra* Chapter 1, § I.5.3.

995 Namely, the questions referred by the Landgericht were: « *1) Do the courts of the Member State in the territory of which insolvency proceedings regarding the debtor's assets have been opened have jurisdiction to hear and determine an action brought by the liquidator in the insolvency proceedings against the managing director of the debtor for reimbursement of payments which were made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets? 2) Do the courts of the Member State in the territory of which insolvency proceedings regarding the debtor's assets have been opened have jurisdiction to hear and determine an action brought by the liquidator in the insolvency proceedings against the managing director of the debtor for reimbursement of payments which were made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets, if the managing director is not domiciled in another Member State* [...] *but in a contracting party to the Lugano II Convention? 3) Does the action referred to in question 1 above fall under Article 3(1) of Regulation No 1346/2000? 4) If the action referred to in question 1 above does not fall under Article 3(1) of Regulation No 1346/2000 and/or the jurisdiction of the court in that regard does not extend to a managing director who is domiciled in a contracting party to the Lugano II Convention: does the case concern bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions or analogous proceedings within the meaning of Article 1(2)(b) of the Lugano II Convention? 5) (a) If question 4 is to be answered in the affirmative: Does the court of the Member State in which the debtor has its registered office have jurisdiction, in accordance with Article 5(1)(a) of the Lugano II Convention, in relation to an action of the kind referred to in question 1 above? (i) With regard to that action, is the defendant being sued in a matter relating to a contract within the meaning of Article 5(1)(a) of the Lugano II Convention? (ii) With regard to that action, is the defendant being sued in a matter relating to a contract for services within the meaning of Article 5(1)(b) of the Lugano II Convention? (b) In relation to the action referred to in question 1 above, is the defendant being sued in a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Lugano II Convention?* ».

996 It is assumable that the different reasoning followed by the ECJ, in this case, was due to the formulation of the questions by the referring court since here reference was made to the Insolvency Regulation and not to the Brussels I Regulation.

the action at issue derived from insolvency law or from other rules » [997].

Following this reasoning, as far as the action under § 64 GmbHG at issue was concerned, the ECJ ruled first, that « *it had been brought in connection with insolvency proceedings* » [998].

It is unclear what the ECJ meant when using the expression 'brought in connection'. However, in light of the wording used by the Court, it is inferable that it refers to the second condition of the Gourdain Formula, *i.e.* the fact that the action under § 64 GmbHG had been commenced in the context of insolvency proceedings.

Secondly, as to the determination of whether the action derived directly from insolvency proceedings (*i.e.* the first condition), the Court has held that

> « *the fact that theoretically the action under Article 64 may be brought even where no insolvency proceedings have been opened, does not preclude per se that such an action may be regarded as an action which derives directly from insolvency proceedings and is closely connected with them, providing that that action was actually brought in the context of insolvency proceedings* » [999].

Such an argument clearly refers to the interpretation of the Gourdain Formula as interpreted in the *Nickel&Goeldner* case, under which the right underlying the action should stem from the derogating rules specific to insolvency proceedings.

The Court specified that such a condition

> « *cannot be interpreted to the effect that an action based on a provision whose application does not require insolvency proceedings to have formally been opened, but does require the actual insolvency of the debtor, and thus on a provision which derogates from the common rules of civil and commercial law, does not derive directly from insolvency proceedings or is not closely connected with them* » [1000].

It was the Court's view that a different interpretation of Article 64 GmbHG would have entailed

> « *an artificial distinction between that action and comparable actions, such as the actions to set transactions aside at issue in the cases which gave rise to the judgments in Seagon* […] *and F-Tex* […], *on the sole ground that the action based on Paragraph 64 of the GmbHG could theoretically be brought even if there were no insolvency proceedings. Such an interpretation, which has no basis in the relevant provisions of Regulation No 1346/2000, cannot be accepted* » [1001].

As to the second question, the ECJ has concluded that the jurisdiction provided for by Article 3(1) of the Insolvency Regulation shall be interpreted as meaning that the courts of the Member State in which insolvency proceedings are opened have jurisdiction to hear over Annex Actions also in case the defendant is domiciled « *not in another Member State but, as is the situation in the main proceedings, in a*

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997 *H. v. H. K.,* at [18].

998 *H. v. H. K.,* at [18].

999 *H. v. H. K.*, at [20].

1000 *H. v. K.,* at [22], recalling *Schmid.*

1001 *H. v. K.,* at [24].

contracting party to the Lugano II Convention » [1002].

The Court has grounded its answer on the fact that (i) the Brussels I Regulation and the Insolvency Regulation shall be interpreted as dovetailing; (ii) that the Lugano II Convention and the Brussels Regulation, both, at Articles 1(2)(b), provide for the exclusion from their scope of "banktuptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". Therefore (iii) in the light, in particular, of the identical wording of the provisions concerned, the considerations set out with reference to the Brussels I Regulation may be transposed to the interpretation of Article 1(2)(b) of the Lugano II Convention and, in particular, that if the action falls under Article 3(1) of Regulation No 1346/2000, it is excluded from the scope of that Convention. Eventually, (iv) in the Schmid case, the ECJ had already ruled that Art. 3(1) of the Insolvency regulation applies to Annex Actions also when the defendant has its residence is not within the territory of a Member State.

The same view was taken by the Court few months later in the *Kornhaas* case, also dealing with an action under Art. 64 GmbHG although in that case the question referred related to the different profile of the applicable law[1003].

On that occasion, the ECJ held that the Action under art. 64 GmbHG

> « *derogates from the common rules of civil and commercial law, because of the insolvency of that company* […] *Furthermore, a provision such as the first sentence of Paragraph 64(2) of the GmbHG contributes to the attainment of an objective which is intrinsically linked, mutatis mutandis, to all insolvency proceedings, namely the prevention of any reduction of the assets of the insolvent estate before the insolvency proceedings are opened, so that the claims of all the company's creditors may be satisfied on equal terms* » [1004].

Therefore, the Court concluded that, alike

> « *in the judgment in H* […], the *Court's answer to the request for a preliminary ruling concerned Article 3 of Regulation No 1346/2000 and the international jurisdiction of a national court to rule on an action based on a provision of national law such as the first sentence of Paragraph 64(2) of the GmbHG, it nevertheless clearly categorised such a provision of national law as being covered by insolvency law. It follows that Paragraph 64(2) of the GmbHG must be regarded as being covered by the law applicable to insolvency proceedings and their effects, within the meaning of Article 4(1) of Regulation No 1346/2000. As such, that provision of*

[1002] *H. v. H. K.*, at [30]-[34].

[1003] ECJ, 10 December 2015, Case C-594/14, *Simona Kornhaas vs. Thomas Dithmar*, ECLI:EU:C:2015:806. On the *Kornhaas* case in literature see, among others, V. SEIBEL, 'Characterising the liability of directors of an insolvent english limited having its real seat in Germany: German Federal Court of Justice requests a preliminary ruling from the ECJU', in *Conflict of Laws.net*, 15 January 2015; P. NABET, 'Sanction du dirigeant d'une société en procédure d'insolvabilité selon le règlement (CE) n° 1346/2000 et liberté d'établissement', in *Revue critique de droit international privé*, 2016, p. 544; P. DE CESARI e G. MONTELLA, 'Osservatorio internazionale sull'insolvenza - Una pronuncia della corte di giustizia in materia di responsabilitaà degli amministratori e libertà di stabilimento', in *Fallimento*, 2016, 2, p. 241; L. BOGGIO, 'Pagamenti illeciti anteriori alla dichiarazione di insolvenza (internazionale) tra lex societatis e lex concursus: azioni restitutorie e azioni di responsabilità al bivio', in *Giur. It.*, 2016, 7, 1641.

[1004] *Korhaas*, at [16].

national law, one of the effects of which is to require, if necessary, the managing director of a company to reimburse any payments which he made on behalf of that company after it became insolvent, may, in accordance with Article 4(1) of Regulation No 1346/2000, be applied by the national court hearing the insolvency proceedings as the law of the Member State within the territory of which the insolvency proceedings are opened » [1005].

I.8. The Nortel case

With decision handed down on 11 June 2015, the Court ruled that the *vis attractiva concursus* applies also in the context of secondary proceedings.

Indeed, in the Nortel judgement [1006], the Court held that

« *Whilst the Court, until now, has acknowledged only that international jurisdiction to rule on a related action is enjoyed by the Member State whose courts have jurisdiction under Article 3(1) of Regulation No 1346/2000, Article 3(2) of that regulation must be interpreted analogously* » [1007].

The events underlying the Nortel case are quite complex, but for the purposes of this research a brief summary referring to some specific circumstances would suffice.

In the context of the financial crisis of the Nortel group - a multinational provider of technical solutions for telecommunications networks, with parent company, Nortel Network limited, located in Canada and numerous subsidiary companies also in the UK and France - several parallel insolvency proceedings were opened in 2008 in Canada, the United States and Europe.

As regards the European part of the group, in accordance with the Insolvency Regulation, main proceedings were opened in the UK by the High Court of Justice of England and Wales, Chancery Division and Mr Bloom, Mr Hudson, Mr Harris and Mr Wilkinson Hill, were appointed as joint administrators ('the joint administrators'). Upon application lodged by the joint administrators and NNSA, secondary proceedings were also opened in Yvelines (France) in respect of the subsidiary NNSA, and Mr. Rogeau was appointed as liquidator.

Within this procedural framework, three agreements were concluded. The first, relating exclusively

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1005 *Korhaas*, at [17].

1006 ECJ, 11 June 2015, Case C-649/13, *Comité d'entreprise de Nortel Networks SA and Others v Cosme Rogeau liquidator of Nortel Networks SA and Cosme Rogeau liquidator of Nortel Networks SA v Alan Robert Bloom and Others*, ECLI:EU:C:2015:384. The decision was commented, among others by E. FRASCAROLI SANTI, 'Note a margine di una pronuncia innovativa sulla problematica ripartizione della competenza tra giudici della procedura principale e i giudici della procedura secondaria, riguardo alle azioni connesse – limiti applicativi del regolamento n. 44/2001', in *Fallimento,* 2015, II, p. 603 and ff.; F. MUCCIARELLI, 'Procedure concorsuali secondarie, localizzazione dei beni del debitore e protezione di interessi locali', in *Giur. Comm.,* 2016, p. 13. B. LAUKEMANN, 'Regulatory copy and paste: The allocation of assets in cross-border insolvencies – methodological perspectives from the Nortel decision', in *Journal of Private International Law*, 2016, p. 379 and ff. D. ROBINE, *Les actions annexes*, in F. JAULT - SESEKE, D. ROBINE, *Le nouveau Règlement insolvanilité : quelles évolutions ?*, Joly éds., p. 68. G. VAN CALSTER, 'Nortel. CJEU confirms Nickel & Goeldner, and extends *Seagon* to secondary proceedings', in https://gavclaw.com (last accessed in April 2019). R. DAMMAN and M. BOCHÉ-ROBINET, 'Le volvet européen de la faillite international de Nortel', in *Recueil Dalloz,* 2015, p. 1514. C. NOURISSAT, in *Procédure*, Août 2015; L. IDOT, in *Procédure*, aout 2015; M. MENJUCQ, in *rev. proc. coll.,* 2015; V. LEGRAND, in *Lettres d'actualité des procedures collectives civiles et commerciales*, July. 2015.

1007 *Nortel*, at [32].

to the secondary proceedings, was a memorandum settling an industrial action commenced within NNSA signed between by Mr. Rogeau and the *Comité d'entreprise* (a corporate body representing the employees) of the French subsidiary. Under the terms of the memorandum, the liquidator undertook to make certain payments. Some of the payments were due immediately, while it was agreed that some others (claims for wages and salaries) were deferred to the closure of the liquidation operation, and were to be made out of funds deriving from the sale of assets, after payment of the costs resulting from continuation of NNSA's activities during the main and secondary proceedings and of the administration expenses.

The second agreement was a coordination protocol between main and secondary proceedings, under the terms of which Mr. Rogeau and the joint administrators agreed that the administration expenses would have been paid in full and in priority.

The third agreement entitled 'Interim Funding and Settlement Agreement' (IFSA) was entered into between the Canadian parent company NNL and some other subsidiaries of the Nortel Group (including NNSA). Under this agreement, the proceeds from the sale of the Nortel group's assets, wherever located, would be deposited in an escrow account and none of the parallel proceedings opened with reference to the Nortel group would be able to distribute the sums until an agreement was reached on how to distribute them.

Later on, Mr. Rogeau, requested by the *Comité d'entreprise* of NNSA, informed the latter that he was unable to meet the payments provided for in the memorandum, since, despite a positive bank balance of nearly EUR 40 millions, this would not be sufficient to comply with the obligations of the memorandum, due to the requests for payment made by the joint administrators concerning some administrative expenses arising out of the continuation of the groups's activity (which had to be paid in full and in priority, as provided for in the coordination protocol), which would have resulted in a negative balance on NNSA's bank accounts of approximately EUR 6 million.

The *Comité d'entreprise* and some former employees of NNSA brought an action against the trustee of secondary proceedings, before the Tribunal de Commerce de Versailles seeking (i) a declaration that they had an exclusive right on the percentage of proceeds from the liquidation of the assets of the Nortel group relating to NNSA and (ii) an order that Mr. Rogeau fulfilled his obligations under the memorandum and pay for the deferred payments out of the sums available on NNSA's bank account. As a consequence, Mr. Rogeau brought a counterclaim against the joint administrators as joined third parties to the same action brought before the Tribunal de Commerce of Versailles.

The joined administrators challenged the jurisdiction of the Tribunal del Commerce de Paris, alleging that the High Court of Justice of England and Wales, Chancery Division was the court having jurisdiction to hear the action. Alternatively, the joined administrators asked the French court to decline partially its jurisdiction with reference to the claim concerning assets and rights not situated in France, on the basis of Article 2(g) EIR.

In the light of the arguments raised by the joined administrators, the Tribunal de Commerce

acknowledged that before deciding over the claims brought by the claimants it was necessary to assess its jurisdiction and, to this aim, to determine the scope of the effects of the secondary proceedings and, whether such effects may extend to the debtor's assets situated outside the European Union. Therefore, the French court referred the question(s) to the ECJ for a preliminary ruling.

Essentially the referring court's questions concerned two separate profiles: (i) the allocation of international jurisdiction between the court hearing the main proceedings and the court hearing the secondary proceedings, as under Articles 3(2) and 27 EIR; and (ii) identification of the law applicable to determine the debtor's assets that fall within the scope of the effects of the secondary proceedings. What interests here is the analysis of the first part of the question, concerning the jurisdiction.

In addressing the question referred to it, the Court considered it necessary to preliminary clarify that the dispute brought by the claimants concerned various agreement entered into between, *inter alia*, insolvency trustees. Accordingly, the applicable provisions could be found either under the Brussels I Regulation (if attention was drawn to the fact that the agreements in question were civil and commercial in nature) or under the Insolvency Regulation (in the event that the focus was on the subjective side, considering that the contracting parties were bodies of insolvency proceedings).

In the light of the above, the court clarified the boundaries between the two regulations and restated that Regulations No 44/2001 and No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. With the further significant specification that

> « *actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the scope of that regulation* […] *fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001* » [1008].

Also, it was recalled that the scope of Regulation No 1346/2000 must not be interpreted broadly. The Court recurred once again to the Gourdain Formula – as interpreted in the *Nickel&Goeldnr* decision – to trace the demarcation of the scope of the Insolvency Regulation, stating that the

> « *decisive criterion for identifying the area within which an action falls not the procedural context of that action, but its legal basis. According to that approach, it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings* » [1009].

In the case at stake, the ECJ found that the rights and obligations underlying the actions at stake derived directly from insolvency proceedings, were closely connected with them and had their source

[1008] *Nortel*, at [28].

[1009] *Nortel*, at [26].

in rules specific to insolvency proceedings [1010], and in particular in Article 3(2), 27 EIR [1011]. Specifically, the Court observed that the dispute concerned the distribution of proceeds accrued out of the liquidation of NNSA's assets between main and secondary proceedings, pursuant to the provisions of the coordinating protocol, which was not intended to derogate to the provisions of the Insolvency Regulation. As such, the action was regarded as falling within the scope of the EIR.

That being clarified, the Court turned the attention to the rules on jurisdiction set forth by the Insolvency Regulation and concerned itself with determining whether the interpretation bolstered by the Court in Seagon was also applicable to secondary proceedings.

As pointed out by the Advocate General the dispute concerned operations connected with the liquidation of NNSA's assets within the secondary proceedings and involved agreements (*i.e.* the coordination protocol and the memorandum) falling in the context of the same secondary proceedings. The mere circumstance that the relationship between the parties to the dispute, as well as their right, were governed by those agreements did not call into question the legal basis for their claims.

Turning to the rules of the Insolvency Regulation governing the jurisdiction, the Court retraced the principle of the *vis attractiva concursus* laid down by its previous case law, and recalled that Article 3(1) EIR must be interpreted in the sense that the jurisdiction on Annex Actions lies with the courts of the Member State were insolvency proceedings are opened.

From those premises, the ECJ found that the scheme and the practical effects underlying that interpretation of Article 3(1) EIR might be relied upon to extend, by way of analogy, the principle of the *vis attractiva* also to the courts of the Member State in the territory of which secondary proceedings are opened, in so far as an Annex Action relates to the debtor's assets that are situated within the territory of that State.

This conclusion was put forward on the basis of Article 25 EIR, it being submitted that since Article 25(1) first subparagraph provides for an obligation of automatic recognition of decisions handed down by judges having jurisdiction under both Articles 3(1) and 3(2) EIR and Article 25(2) sets forth the recognition of 'actions directly deriving from insolvency and closely connected to insolvency proceedings', The Court argues that the latter provision must be understood as conferring at least implicitly on the courts of the Member State of the secondary proceedings jurisdiction to deliver such

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[1010] On this point the opinion of the Advocate General Mengozzi provides for more details (opinion rendered on 29 January 2015, ECLI:EU:C:2015:44). The Advocate General highlights that the purpose of the action brought by the NNSA's former employees and the *comité d'entrprise* concerned the creditors' right (and their order of payment of claims) during judicial liquidation proceedings. More in particular, the action was referred to, first, the preferential status of the deferred payment according to the Memorandum with reference to the payments requested by the joined administrators. Second, the right of secondary proceedings over a share of proceeds from the sale of the Nortel's group assets held in the escrow account. It was submitted that such claims are governed by Article L. 641-13 of the Commercial Code, which governs the order of payment of claims.

[1011] *Nortel*, at [30].

judgments [1012].

To further support this argument, it was submitted that one of the objectives pursued by Article 27 EIR is the protection of the interests of the local creditors. Since an action seeking to a declaration that some assets fall within secondary insolvency proceedings aims at protecting those interests, the Courts considered that preventing the courts of the Member State of the secondary proceedings to hear over said actions would hinder the protection of the local interests of those proceedings.

In these grounds, the Court enlarged the rules on jurisdiction of the EIR, establishing that

> « *the courts of the Member State in which secondary insolvency proceedings have been opened have jurisdiction, on the basis of Article 3(2) of* Regulation No *1346/2000, to rule on the determination of the debtor's assets falling within the scope of the effects of those proceedings* » [1013].

The Court then analyses the more specific question, concerning the exclusive or concurrent nature of the jurisdiction of the courts of the Member State where secondary proceedings are opened to rule on the determination of the debtor's assets falling within the effects of the secondary proceedings.

To answer this question, the Court focused on the practical effects pursued by Articles 3(1) and 3(2) EIR. It observed, on the one hand, that the effects of the action brought by NSSA's former employees and its *comité d'entreprise* were not limited within the context of secondary proceedings. As a matter of facts, it would necessarily have a direct impact over main proceedings since the declaration sought by the claimants (if successful) would subtract an asset from the bankruptcy estate of main proceedings. On the other hand, it was argued that the courts of the Member State in which main proceedings have been opened would also have jurisdiction to rule on related actions and therefore to determine the scope of the effects of the latter proceedings [1014].

It was also argued that conferring to the courts of the Member States of secondary proceedings

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1012 Although the decision of the court specifically refers to the Opinion of the Advocate General, it bears noticing that the reasoning of Advocate Mengozzi is enriched with further considerations (substantially borrowed by the reasoning of the Court in *Seagon*) which, however, were not embedded in the judgement. In addition to the arguments above, the Advocate General considered that Recital 6 in the preamble of the EIR « *refers without distinction to any proceedings opened under [the Insolvency Regulation] without differentiating between main, territorial or secondary proceedings* ». Moreover, reference was made (as it was done in the *Seagon* judgement) to the principles of efficiency and effectiveness of proceedings referred to in Recitals 2 and 8 EIR. Also, the Advocate General mentioned the objective under Recital 4 EIR of avoiding incentives for the parties to transfer their assets of judicial proceedings from one Member States to another seeking a more favourable legal position (forum shopping). Against the argument raised by the administrators that the key takeaway of the *Seagon* judgement is to pursue « *a centralization of jurisdiction with courts of the Member State in which the main proceedings have been opened* ». The Advocate General raises the objection that nothing in that decision would lead to the conclusion that that principle could not be extended as also to include Annex Actions connected with secondary proceedings or to argue that main proceedings take precedence over secondary proceedings. Another argument raised in the opinion concerned the objectives of foreseeability enshrined in Article 3(1) EIR, which was also argued in the *Schmid* case. Eventually, the Advocate General quotes the External Evaluation of Regulation No 1346/2000/EC on Insolvency Proceedings and the (at that time) proposal of the Insolvency Regulation Recast, in which recommendations for the codification of the *vis attractiva concursus* principle emerged, without any distinction as to its application between main and secondary or territorial proceedings. See the opinion of the Advocate General, at [32] - [33].

1013 *Nortel*, at [26].

1014 See *Nortel*, at [41]. See also the Opinion of the Advocate General at [56] - [57].

exclusive jurisdiction on the determination of the debtor's assets falling within the scope of those proceedings would deprive Article 3(1) of Regulation No 1346/2000 of its practical effect in so far as that provision confers international jurisdiction to rule on related actions.

Lacking within the Regulation any provisions governing *lis pendens* (and rejecting the applicability by analogy of the rule of priority as defined in the *Staubitz-Schreiber* case [1015] to the jurisdiction over Annex Action), the Court, then solved quite rudimentarily the risk of concurrent and irreconcilable judgements entailed by the existence of concurrent fora – of which it proves to be perfectly aware - by stating that the mechanism for automatic recognition under Article 25(1) would avoid the problem by requiring any court before which a related action has been brought to recognize an earlier judgment delivered by another court with jurisdiction under Article 3(1) or, as the case may be, Article 3(2) EIR.

On these grounds, the ECJ holds that that main and secondary proceedings have concurrent jurisdiction on this issue, thus acknowledging that concurrent jurisdiction may exist within the scope of the Insolvency Regulation [1016].

I.9. The Tünkers France case

A few months later, the ECJ decided another case characterized as being in the twilight-zone between civil and commercial law and insolvency law [1017].

Briefly explained, the dispute involved an unfair competition suit brought by the insolvency trustee of Expert Maschinenbau GmbH a company incorporated in Germany ('EM'), which had granted exclusive distribution rights to the French company Expert France ('EF'). In the context of insolvency proceedings, the trustee of EM transferred a branch of TM's business to a subsidiary of

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1015 ECJ, 17 January 2006, Case C-1/04, *Susanne Staubitz-Schreiber*, ECLI:EU:C:2006:39, where the Court stated at [27] that « *retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor's insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him* ». However, in Nortel the Court maintained that such a principle is not applicable by analogy to *lis pendens* related to Annex Actions, since that case concerned a different case, namely that of the allocation of jurisdiction to open main insolvency proceedings, and therefore to a rule on jurisdiction which, under the Insolvency Regulation, is exclusive. See *Nortel*, at [43].

1016 See also the Opinion of the Advocate General, at [58], where he states that « *any disputes concerning whether certain of the debtor's assets come under one of those sets of proceedings or the other may be brought before either one of these courts. The jurisdiction of those courts to hear and determine such disputes is therefore concurrent* ».

1017 ECJ, 9 November 2017, Case C- C-641/16, *Tünkers France, Tünkers Maschinenbau GmbH v. Expert France*, in ECLI:EU:C:2017:847. For literature see P. DE CESARI, G. MONTELLA, 'Osservatorio Internazionale sull'insolvenza - Un rinvio pregiudiziale alla corte di giustizia sulla vis attractiva europea', in *Il Fallimento*, 5, 2017, p. 613; G. VAN CALSTER, 'Tünkers France: Limiting the jurisdiction of the court of COMI in cases of unfair competition', in *www.gavclaw.com*; A. VAN HOE, 'Vis attractiva concursus and its limits', in *Corporate Finance Lab, Legal Aspects of Corporate Finance and Insolvency*, November 12, 2017; J.L. VALLENS, 'Quel est le tribunal compétent pour connaître d'une action en responsabilité pour concurrence déloyale contre le cessionnaire d'une branche d'activité ?' in *Recueil Dalloz*, 2017, p. 2357; Compétence européenne, action en responsabilité pour concurrence déloyale, in Lettre d'actualité des Procédures collectives civiles et commerciales, 11, Juin 2018, alerte 164; S. HUBER, 'Concrétisation du double critère de la vis attractiva concursus (aff. Tünkers et Valach)', in *Chronique Droit de l'UE - Droit international privé de l'Union européenne* (2017)

Tünkers Maschinenbau GmbH ('TM'). Subsequently, TM invited the clients of EF to contact it from then on to make their orders, representing itself as being the asignee of EM.
This act perceived as unfair competition, EF commenced an action against TM and Tünkers France before the Tribunal de commerce de Paris.
The defendants submitted that the dispute fell within the jurisdiction of the Amstsgericht Darmstadt (District Court, Darmstadt) as the court having opened the insolvency proceedings against EM, under Article 3(1) of the Insolvency Regulation. The Tribunal de commerce of Paris rejected such an argument and granted the application of EF. The same did the Cour d'Appel of Paris, that confirmed the decision of the judge of first instance.
Upon appeal of TM and TF, the Cour de Cassation staid the proceedings and referred to the ECJ for a preliminary ruling, asking asks specifically whether an action for unfair competition brought by the subsidiary of an insolvent company may be regarded as being an action which derives directly from the insolvency proceedings and which is closely linked to them.
Marking a return to the *F-Tex* and *Nickel&Goeldner* case-law, the ECJ referred to the need of an interpretation of the Insolvency Regulation and the Brussels I Regulation « *in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum* » [1018]. To uphold a broad interpretation of the scope of the Brussels I Regulation, the Court also mentioned again Recital 7 of the Brussels I Regulation and Recital 6 of the Insolvency Regulation [1019].
Relying on these premises, once again, the Court mentioned the Gourdain Formula, referring to is as a twofold test (as *in F-Tex* and *Nickel&Goeldner*).
As to the first condition, the direct derivation, the ECJ highlighted that « *the decisive criterion* […] *to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof* » [1020].
With reference to the right disputed in the main proceedings, the Court found that

(i) unlike the case which gave rise to the Alpenblume judgement, in which the liquidator who transferred the shares was criticised for failing to use a power he derived specifically from the provisions of national law governing collective procedures, the dispute in the main proceedings concerns the conduct of the assignee alone;

(ii) EF was acting exclusively to protect its own interests and not to protect those of the creditors in EM's insolvency proceedings;

(iii) the action was brought against TM and TF, whose conduct was subject to other rules than those applicable in the contest of insolvency proceedings;

(iv) the possible consequences of such an action could not affect TM's insolvency proceedings.

[1018] *Tünkers*, at [17].
[1019] *Tünkers*, at [18].
[1020] *Tünkers*, at [22].

As to the second condition the Court reminded that « *it is the closeness of the link between a court action and the insolvency proceedings that is decisive* » [1021].

In this respect, the ECJ underlined that, although the action for damages was directed against TM (the assignee of a part of the business in the context of insolvency proceedings), the acquired right, once it has become part of the assignee's assets, cannot retain a direct link with the debtor's insolvency.

Therefore, the Court concluded that link was neither sufficiently direct nor sufficiently close so as to exclude Regulation No 44/2001.

I.10. The Valach case

Almost simultaneously with the request for preliminary ruling for the Tünkers case, the ECJ received another request for a preliminary ruling, regarding an action for liability in tort brought against the members of a committee of creditors, because of their conduct in voting on a restructuring plan in insolvency proceedings [1022].

The facts of the case in a nutshell, Vav Invest, a company incorporated in Slovak, was subject to a restructuring plan as provided for by the Slovak law, where some creditors (namely, the banks Waldviertler Sparkasse Bank, Československá obchodná banka and Mesto Banská Bystrica) were appointed as members of the committee of creditors.

The restructuring plan being submitted by Vav Invest, the committee of creditors denied its approval to the plan, without any comprehensible reasons, therefore frustrating the restructuring of the company.

The shareholders (Mr Valach, Mrs Valachova) together with some project companies sharing a stake of Vav invest (C Europa ZV II a.s., SC Europa LV a.s., VAV Parking a.s. and others) brought an action for liability against the committee of creditors, before the *Landesgericht Krems an der Donau* (Regional Court, Krems an der Donau, Austria)[1023]. The claimants alleged that by its vote it had caused damage, on the one hand, because of the significant loss of value of the shares and, on the other hand, for the project companies, due to the threatened failure of construction projects or delay to those projects. Therefore, the committee of creditors had infringed

> « *the general duty to avoid causing damage under paragraph 415 of the Slovak Civil Code and their obligations as members of the committee of creditors under the Law on insolvency, in particular the obligation to act in the joint interest of all the creditors, and were consequently liable for the damage incurred, under paragraph 420 of*

[1021] *Tünkers*, at [29].

[1022] ECJ, 20 December 2017, Case C.649/16, *Peter Valach, Alena Valachová, SC Europa ZV II a.s., SC Europa LV a.s., VAV Parking a.s., SC Europa BB a.s., Byty A s.r.o.*, ECLI:EU:C:2017:986. L. IDOT, 'Champ d'application et exclusion des actions liées aux procédures d'insolvabilité', C. Nourissat, *Procédures*, 2018, 45, L. Idot, in *Europe*, 2, February 2018; Th. Mastrullo, *Rev. Proc. coll.*, 2018, 105.

[1023] It is not clear why the action was commenced before the Austrian courts. It is assumable that it was grounded on the basis of the Brussels Regulation.

the Slovak Civil Code » [1024].

Both the *Landesgericht Krems an der Donau* and the *Oberlandesgericht Wien* (Regional Court of Appeal, Vienna, Austria) dismissed the action on the ground of lack of international jurisdiction. It was the Courts' view that

> « *the action for liability is inextricably linked with the capacity of the defendants in the main proceedings as members of the committee of creditors and their obligations under the Law on insolvency. The action for liability thus derives directly from insolvency law and is closely linked with that law* » [1025].

As a consequence, as an action related to insolvency proceedings, it was covered by the exception in Article 1(2)(b) of the Brussels Regulation.

Upon appeal of the claimants, the case was brought before the *Oberster Gerichtshof* (Supreme Court, Austria), which, after a stay of proceedings, referred to the ECJ for a preliminary ruling.

The Court rendered its decision on 20 December 2017, soon after the Tunkes case.

It is worth noticing that, *rationae temporis*, the Valach case fell within the scope of the Brussels Ia Regulation, i.e. Regulation No. 1215/2012. Therefore, by deciding the case, the ECJ examined the controversial matter both under the Brussels I Regulation and under the Brussels Ia Regulation.

Indeed, the Court held that

> « *as stated in recital 34 of Regulation No 1215/2012, continuity should be ensured between the Brussels Convention, Regulation No 44/2001 and Regulation No 1215/2012, and also as regards the interpretation by the Court of that convention and the regulations replacing it* » [1026].

With this in mind, the ECJ recalled the (at this point well known) principle that the two regulations must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. Also, this time by relying on the new Recital 10 of the Brussels Ia Regulation and Recital 6 of the Insolvency Regulation, the Court reaffirmed the principle under which the Brussels Ia Regulation must be given a broad application of its scope, whereas the scope of the EIR must be interpreted narrowly.

The Court then interpreted the 'twofold criterion' set forth by Recital 6 (*i.e.* the Gourdain Formula) stating that

(a) with regard to the first criterion « *in order to determine whether an action derives directly from insolvency proceedings, the decisive factor applied by the Court to identify the area within which an action falls is not the procedural context of the action but its legal basis* » [1027].;

(b) with regard to the second criterion « *it is settled case-law that it is the closeness of the link between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b)*

1024 *Valach*, [15].

1025 *Valach*, [16].

1026 *Valach*, [23].

1027 *Valach*, [37].

of Regulation No 1215/2012 is applicable » [1028].

Moving to the specific case of an action for liability in tort, as to the legal basis of the action, the ECJ found that, first, « *the action aims in particular to determine whether the members of the committee of creditors* […] *infringed their duty to act in the joint interest of all the creditors* ». Indeed, the Court assessed that « *under Paragraph 127(4) of the Law on insolvency, all members of the committee of creditors are required to act in the joint interest of all the creditors, in that the task of that committee, together with the meeting of creditors, is to assess and, if appropriate, to approve, in accordance with Paragraph 133(1) of the law, the restructuring plan which must be drawn up by the insolvent debtor* » [1029].

By this token, the ECJ drew the conclusion that the obligations which form the basis of bringing an action for liability in tort against a committee of creditors originate in rules that are specific to insolvency proceedings, for it is « *the direct and inseparable consequence of the performance by the committee of creditors, a statutory body established when insolvency proceedings are opened, of the task specifically assigned to them by the provisions of national law governing such procedures* » [1030]. As to the close connection with insolvency proceedings, the Court found it sufficient to maintain (rather easily) that the analysis of the committee's obligations in the insolvency proceedings (and the compatibility of the rejection of the restructuring plan with those obligations) had a direct and close link with the course of insolvency proceedings [1031].

I.11. The Wiemer&Trachte case

On November 14, 2018 the ECJ rendered another decision concerning the dynamic aspect of the *vis attractiva concursus*. Indeed, the Wiemer&Trachte case the Court found that

> « *Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside by virtue of the debtor's insolvency which has been brought against a defendant whose registered office or habitual residence*

1028 *Valach*, [37].

1029 *Valach*, [34].

1030 *Valach*, [34].

1031 L. IDOT, 'Champ d'application et exclusion des actions liées aux procédures d'insolvabilité - droit international price de l'union', in *Europe*, 2, 2018. C. NOURRISAT, 'Portée de l'exclusion des faillites du champ du règlement « Bruxelles I *bis* »', in *Procedures*, 2, 2018, comm. 45.

is in another Member State is exclusive » [1032].

The dispute concerned the withdrawal of money from the registered Bulgarian subsidiary of Wiemer&Trachte GmbH, a company incorporated under German law, to the personal bank account of the managing director of the Bulgarian subsidiary (Mr. Tadzher) after the opening of insolvency proceedings against the German mother company.

The provisional liquidator of Wiemer brought a claim against Mr. Tadzher before the Bulgarian *Sofiyski gradski sad*, seeking an order declaring the transaction invalid (because it had occurred after the opening of insolvency proceedings) and the repayment of the sum transferred.

The respondent contested the claim of the IP, maintaining *inter alia* that the Bulgarian Court lacked jurisdiction [1033].

Both the *Sofiyski gradski sad* and the *Apelativen sad* (the Bulgarian Court of Appeal) rejected the plea of lack of jurisdiction. Moreover, it appears that, the *Varhoven kasatsionen sad* (the Supreme Court of Bulgaria) declared the appeal brought against the order made by the *Apelativen sad* (Court of Appeal) concerning the lack of jurisdiction was inadmissible, for that that order had acquired the force of *res judicata*.

Notwithstanding this (or perhaps for this reason), the *Varhoven kasatsionen sad* was seised by the trustee of Wiemer&Trachte, challenging the decision of the Court of Appeal which had overturned the decision of first instance, rejecting on the merits its claim. Upon a different argument, The IP argued that Article 24 of the Insolvency Regulation was not applicable in the case at hand and that, accordingly, Mr Tadzher could not claim to have been unaware of the opening of the insolvency proceedings concerning Wiemer&Trachte.

After a stay of proceedings, the case was referred to the ECJ for a preliminary ruling regarding, on the one hand, the exclusivity of the jurisdiction of the courts of the Member states in the territory of which insolvency proceedings are opened under Article 3 EIR, and, on the other hand, the applicability of Art. 24 of the Insolvency Regulation.

More in particular, the Bulgarian court asked whether Article 3(1) of Regulation No 1346/2000 was to be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set

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1032 ECJ, 14 November 2018, Case C-296/2017, *Wiemer&Trachte*, ECLI:EU:C:2018:902. The decision was commented, among others, by C. NOURRISSAT, in *la semaine juridique*, 5, 4 février 2019, doctr. 118; C. NOURRISSAT, 'Compétence exclusive des juridictions de l'État membre d'ouverture de la procédure d'insolvabilité', in *Procédures*, 1, Janvier 2019, comm. 13; L. IDOT, 'Portée de la compétence exclusive du for du centre des intérêts principaux', in *Europe*, 1, 2019, comm. 61; F. PETIT, 'L'action révocatoire relève de la competence exclusive de la jurisdiction ayant ouverte la proédure', in *Actualité Jurisprudentielle – Revue des procedures collectives, 1*, Janvier 2019, étude 1; R. DAMMANN - V. ROTARU, 'La consécration de la compétence exclusive du tribunal d'ouverture pour les actions annexes dans le cadre du règlement insolvabilité – Reinhard Dammann', in *Dalloz*, 2019, p. 619; P. DE CESARI - G. MONTELLA, 'Osservatorio internazionale sull'insolvenza - La corte di giustizia ribadisce la vis attractiva europea', in *Fallimento*, 2, p. 247, M. FARINA, 'La giurisdizione infracomunitaria in materia di azione revocatoria ordinaria e fallimentare in due pronunce della corte di giustizia', in *Judicium*, 1, 2019.

1033 In addition, Mr. Tadzher submitted that the transfer was subsequently fully repaid to Wiemer&Trachte.

a transaction aside by virtue of the debtor's insolvency which has been brought against a defendant whose registered office or habitual residence is in another Member State is exclusive, or whether the liquidator may also bring such an action to set aside before a court of the Member State in which the defendant has his registered office or habitual residence.

Despite the fact that the decision on the jurisdiction appeared to be yet final, and therefore its pertinence to decide the question in the main proceedings was debatable [1034], the ECJ took the occasion to clarify the exclusive nature of the *vis attractiva concursus* (thus discarding the questions pertaining to the interpretation of Article 24 of the Insolvency Regulation).

To uphold its conclusion the Court has moved from the Seagon decision.

Indeed, by relying on Recitals 2, 6 and 8 the ECJ has reaffirmed that for the purpose of determining whether or not an action falls within the scope of Article 3 the objective of the legislature, the effectiveness and efficiency of the Insolvency Regulation should be taken into account. By virtue of these principles, Article 3 thereof - albeit expressly governing only the jurisdiction for the opening of insolvency proceedings - must be interpreted as meaning that the courts of the Member State where insolvency proceedings are opened have jurisdiction also over actions directly deriving and strictly linked to insolvency proceedings (*vis attractiva concursus*).

The Court therefore has confirmed that actions to set a transaction aside fall within the notion of Annex Actions, since their proceeds aim at increasing the assets of the insolvency estate.

Turning then to the exclusive nature of the *vis attractiva concursus* (which had not been clarified in the *Seagon* decision [1035]), the ECJ stated that the possibility for more than one court to exercise jurisdiction as regards actions to set a transaction aside by virtue of insolvency brought in various Member States would undermine the pursuit of the aforementioned objectives of effectiveness and efficiency.

Therefore, the ECJ has concluded that the courts of the Member State within the territory of which insolvency proceedings have been opened, as referred to in Article 3(1) of Regulation No 1346/2000, enjoy exclusive jurisdiction to hear Annex Actions.

To anticipate any criticism, the ECJ also specifies that the exclusive nature of the *vis attractiva* could not be undermined by the principle set forth by Article 18 of the EIR.

On this point, the Court explained that Article 18(2) EIR concerns only the specific situation where the trustee is appointed in the context of proceedings covered by Article 3(2) of that Regulation and cannot apply to the trustee appointed in the context of the main insolvency procedure. Therefore, it being considered that in secondary proceedings

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1034 See the opinion of Advocate General Whal, rendered on 28 June 2018 (ECLI:EU:C:2018:515), at [21] and [22].

1035 Despite some authors submit that the exclusive nature of the *vis attractiva concursus* had been yet explained by the Court in the *Seagon* and the *Schmid* cases. See P. DE CESARI - G. MONTELLA 'Osservatorio internazionale sull'insolvenza - La corte di giustizia ribadisce la vis attractiva europea', in *Fallimento*, 2, p. 247.

« *the powers of the liquidator are territorially limited* […] *the liquidator must therefore be able to bring an action to set a transaction aside in connection with those proceedings before a court of a Member State other than the one which opened the secondary proceedings if the assets that are the subject of those proceedings were transferred, after those proceedings were opened, to another Member State* » [1036].

Moreover, the Court adds that neither Article 25(1) EIR should support a different interpretation of the jurisdiction set forth by Article 3(1) thereof, for

« *that provision merely allows for the possibility that the courts of a Member State within the territory of which insolvency proceedings have been opened pursuant to Article 3(1) of Regulation No 1346/2000 may also hear and determine an action deriving directly from those proceedings, whether that be the court which opened the insolvency proceedings under that provision, or another court of that same Member State having territorial and substantive jurisdiction* » [1037].

With this interpretation, the Court concluded that the *vis attractiva* is exclusive, thus rejecting the opposite reading - bolstered, among others, by the Commission - according to which a teleological and systematic interpretation would have led to consider the *vis attractiva concursus* as an alternative jurisdiction, mainly in order not to limit the powers of the trustee and consequently the effectiveness of insolvency proceedings.

I.12. The NK case

In the NK case, dated 6 February 2019, the ECJ decided that a Dutch tortious action brought by the trustee on behalf of the body of creditors does not represent an Annex Action [1038].

Briefly explained NK (the trustee of insolvency proceedings opened against PI, personally, and PI Gerechtsdeurwaarderskantoor BV, a company governed by Netherlands law, established by PI to run his bailiff practice, 'PI BV') has brought a s.c. Peeters Gatzen action before the *Rechtbank Maastricht* (District Court, Maastricht, Netherlands) against the Belgian bank BNP Paribas Fortis ('Fortis'). In particular, the IP was seeking an order that Fortis paid the sum transferred by PI to another bank account and subsequently withdrawn by PI.

Such an act was deemed to be detrimental to the body of creditors, in the context of insolvency proceeding of PI and PI BV, since it was a distraction to the resources destined to the satisfaction of their credits.

The *Rechtbank Maastricht* (apparently the court opening insolvency proceedings of PI and PI BV) has declared that it had jurisdiction to hear the PI's claim, pursuant to Article 3 of the Insolvency

1036 *Wiemer&Trachte*, at [40].

1037 *Wiemer&Trachte*, at [42].

1038 ECJ, 6 February 2019, C-535/17, *NK v. BNP Paribas Fortis NV*, ECLI:EU:C:2019:96. Commented by F. MÉLIN, 'Nouvelle précision sul la frontière entre le règlement Bruxelles I et le rèeglement Insolvabilité', in *Dalloz actualité*, 22 February 2019. M. FARINA, La giurisdizione infracomunitaria in materia di azione revocatoria ordinaria e fallimentare in due pronunce della Corte di Giustizia, in *Judicium*, 1, 2019, p. 138.

Regulation. Such a conclusion was subsequently upheld by an interim order issued by the *Gerechtshof 's-Hertogenbosch* (Court of Appeal, 's- Hertogenbosch, Netherlands).

However, the same *Gerechtshof 's-Hertogenbosch*, seised on appeal by Fortis for the review of the decision on the merits issued by the *Rechtbank Maastricht*, issued another interim judgment, holding that, albeit in principle it was precluded from re-examining the question of jurisdiction, the arguments put forward by Fortis - according to which the first decision of the *Gerechtshof 's-Hertogenbosch* on jurisdiction - were founded. Therefore, it authorised an interim appeal on a point of law in that respect.

Upon appeal of both parties, the *Hoge Raad der Nederlanden* referred to the ECJ for a preliminary ruling, raising doubts on whether a Peeters-Gatzen action must have been regarded as an action governed only by rules specific to insolvency proceedings, so that, as a result, that action falls outside the scope of the Brussels 1 Regulation [1039].

First, the Court recalled - according to the consolidated reasoning - that the Brussels I Regulation and the Insolvency Regulation must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum.

Second, that according to the intention expressed in the preparatory documents of the Brussels Regulation and Recital 7 thereof, the concept of 'civil and commercial matters' in Article 1(1) of the latter Regulation is to be a broad definition. As a consequence, the Brussels Regulation should be broad in its scope. On the contrary, under Recital 6 EIR, the material scope of the Insolvency Regulation should not be broadly interpreted.

Third, the Court has recalled the Gourdain Formula, as interpreted in the Nickel case, specifying that it must be understood as meaning that

> « *the decisive criterion adopted* [...] *to identify the field in which an action falls is not the procedural context* […] *but the legal basis of the action itself* […]. *According to that approach, it must be determined whether the right or obligation which forms the basis of the action has its source in the common rules of civil and commercial law or in derogating rules specific to insolvency proceedings* » [1040].

As a consequence, in exploring the structure of the Dutch law action, the ECJ highlighted a 'bundle' of seven characteristics - referring both to the conditions and the effects of the action – regarded as symptoms of the influence of collective proceedings on the legal regime of the Peeters Gatzen action. The ECJ has noted, therefore, that the Peeters Gatzen action, *(i)* although based on the general provisions of tort-law, *(ii)* is exercised in the course of insolvency proceedings *(iii)* (also) by the trustee, by virtue of his functions of administration and liquidation of the bankruptcy assets. *(iv)* The action

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[1039] The referring Court asked also whether, in case the claim concerned was considered as covered by the Insolvency Regulation, that claim should then be governed by the law of the Member State in whose territory the insolvency proceedings are opened under article 4(1) EIR, both as regards the power of the liquidator to bring that claim and as regards the substantive law applicable to that claim. Unfortunately, the Court did not have to answer to that question, since it considered that the Peeters Gatzen action is not an Annex Action.

[1040] *NK*, at [28].

aims at reconstituting the bankruptcy estate to the benefit of the creditors (and, as such, among the conditions to bring the action there must be a violation of the full guarantee represented by the assets of the debtor). Furthermore, it was acknowledged by the Court that *(v)* to rule over such an action it is not necessary to examine the individual position of each creditor. Besides, *(vi)* the third party against whom the action is brought cannot submit against the trustee the same defensive arguments that he would have raised in case the action was brought by a creditor acting individually.

The whole of these characteristics, which the ECJ has considered to be referred to the procedural context of the action, were deemed as revealing a certain degree of derogation from the general rules of tort law. It is not clear whether on the basis of these elements the Court has already concluded that the Peeters Gatzen action falls within the material scope of the Brussels Regulation.[1041].

What has been (perhaps hastily) decisive was the further circumstance that *(vii)* the action, which is aimed at ordering the third party to pay damages to creditors, « *may be brought by the creditor himself, so that the action does not fall within the exclusive competence of the liquidator, and, on the other hand, is independent of the opening of insolvency proceedings* » [(1042)]. It is therefore because of the creditors' concurrent entitlement to bring the Peeters Gatzen action that the Court has considered that such an action cannot be regarded as a direct and indissoluble consequence of collective proceedings.

The Court once again adopted a narrow interpretation of the Gourdain Formula, as it was suggested by the AG Bobek, according to whom it must be avoided an 'insolvency blackhole' [(1043)].

Indeed, the ECJ concluded that the « *action is based on the ordinary rules of civil and commercial law and not on the derogating rules specific to insolvency proceedings* » [1044].

This reply cancelled out the need for consideration of many of the issues which the AG did discuss, which will have to wait for later cases.

I.13. The Riel case

The last case decided by the ECJ dates 18 September 2019, and concerns the action brought by a creditor seeking a declaratory relief on the existence and accuracy of the credit lodged with the insolvency procedure [(1045)].

In a nutshell, on 19 June 2013 main insolvency proceedings were in Austria opened *vis-à-vis* Alpine Bau GmbHG a company registered under Austrian law operating in the field of constructions (hereinafter, 'Alpine Bau'). At a later time, secondary insolvency proceedings were opened in Poland,

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[1041] On this point, the Court limits itself to specifying, ambiguously, that the existence of a link with the insolvency proceedings was undeniable. See *NK*, at [35].

[1042] *NK*, at [36].

[1043] See the opinion of Advocate General Bobek delivered on 18 October 2018, ECLI:EU:C:2018:850, at [61].

[1044] See *NK*, at [34].

[1045] ECJ, 18 September 2019, Case C-47/18, *Skarb Pánstwa Rzeczpospolitej Polskiej — Generalny Dyrektor Dróg Krajowych i Autostrad v. Stephan Rie*l, ECLI:EU:C:2019:754. See also the opinion of Advocate General Bot, delivered on 4 April 2019, ECLI:EU:C:2019:292.

where the debtor was carrying out an important construction project, awarded - by public tendering procedure - with the Polish entity responsible for the administration of the Polish road network (*Skarb Pánstwa Rzeczpospolitej*, 'Skarb').

Skarb lodged his claims towards Alpine Bau with both the main and the secondary procedure.

Both the trustees appointed in the main and secondary predures contested the majority of the claims lodged by Skarb, concerning, *inter alia*, the damages arising out of the breach and the delayed performance of the contracts for the construction project.

In April 2015 and in October 2016, then, Skarb commenced two parallel actions respectively in Poland [1046] and in Austria seeking the declaratory relief of his claims towards Alpine Blu, asking the Austrian courts to stay the proceedings [1047], until the decision for the verification of the claims in the secondary insolvency procedure pending in Poland had acquired the force of *res judicata*. According to the claimant, in effects, the action of brought in April 2015 before the Polish court was related to the action pending before the *Sąd Rejonowy Poznań - Stare Miasto w Poznaniu* and that those actions 'with at most virtually negligible exceptions', had the same cause of action as the application for the declaration of the claim brought before the Austrian court.

The Handelsgericht Wien (the Austrian Commercial Court) dismissed the application of Skarb without ruling on its application for a stay of proceedings. Relying on such a procedural defect, Skarb appealed the decision before the Oberlandesgericht of Wien, which referred the case to the ECJ for a preliminary ruling.

The referring court asked *(i)* whether the declaratory relief sought by Skarb concerning the credits lodged with insolvency proceedings fell within the scope of the Insolvency Regulation or of the Brussels I Regulation; *(ii)* whether the rules relating to *lis pendens* laid down in Brussels I were applicable, possibly by analogy, in matters falling within the scope of the Insolvency Regulation [1048].

With regards to the first question the ECJ followed the well-established reasoning of the previous case law. After having recalled that the two regulations must be interpreted in such a way as to avoid any overlap between the rules of law laid down by those instruments and any legal vacuum [1049], the

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1046 It emerges from the opinion of the Advocate General at [31] that Skarb brought in Poland two separate actions, concerning different credits arising out of the contract with Alpine Bau, which were subsequently joined under a unique action and were pending before the *Sąd Rejonowy Poznań - Stare Miasto w Poznaniu*.

1047 The wording of the decision at [25] (and of the opinion of the Advocate General, at [31]) is ambiguous in relation to which proceedings the claimant asked the stay of the Austrian action (the parallel action for declaratory relief brought in Poland or the insolvency secondary proceedings in Poland). It is understood that Skarb, after having brought the action for the declaratory relief of its claims, asked the Austrian court to stay that very Austrian action, claiming that it was related with the action for declaratory relief brought in Poland. It is unclear the procedural strategy of Skarb. Likely, the claimant was seeking to obtaining (in the event that the Polish action was unsuccessful) a title enforceable *erga omnes* for the enforcement of his claims either outside of insolvency proceedings in Poland, or to be invoked in the Austrian main procedure.

1048 The Austrian court expressed also doubts concerning the scope of the requirements set out in article 41 EIR concerning the content of the submission of a claim by creditors established in a Member State. Such a question is of minor importance for present purposes.

1049 *Riel*, at [33].

Court declared that to determine whether an action falls under the scope of application of either the Insolvency Regulation or the Brussels 1 Regulation, the determinative criterion to ascertain whether the legal foundation of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings [1050].

In particular, the Court considered that an action for a declaration of the existence of claims provided for in Article 110 of the Austrian insolvency law, constitutes an element of Austrian insolvency legislation. According to the ECJ, that emerged specifically from the wording of that provision, which is intended to be brought in the context of insolvency proceedings, by creditors participating in those insolvency proceedings, in the event of a dispute concerning the accuracy or ranking of claims declared by those creditors. Accordingly, an action brought under Article 110 of the Austrian insolvency law was to be deemed to fall within the scope of the Insolvency Regulation, it being clearly an Annex Action [1051].

As far as the second question was concerned, as a general remark the Court considered that the absence in the Insolvency Regulation of some rules reveals the clear intention of the EU legislature to excluded certain matters from the scope of the EIR, including some profiles of a purely procedural nature.

In particular, the choice of not including within the scope of the Insolvency Regulation any provision governing the *lis pendens* is explained by the Court on the ground if the scheme of the EIR. It was the Court's opinion that, in the light of Articles 3 and 27 EIR (read together with Recitals 12, 18 and 19), the application of the rules of the brussels Regulation on the *lis pendens* would ultimately undermine the effectiveness of the Insolvency Regulation, which expressly allows that secondary proceedings may be opened parallelly to main proceedings. Moreover, the Court excluded the need to apply by way of analogy Article 28 Brussels 1, considering that the Insolvency regulation provides for sufficient mechanisms to avoid the risk of irreconcilable judgements.

In the light of the above, the Court ruled out the possibility of an application by way of analogy of Article 29 Brussels 1 to stay the action brought by Skarb.

I.14. A pending case: the Tiger case

In addition to the above decisions, it seems appropriate to briefly mention a pending request for preliminary rulings which is currently pending before the ECJ.

The fact that, despite the extensive case law developed on this point in recent years (and above examined), national judges keep on recurring to the ECJ's preliminary ruling for the interpretation of questions relating to the jurisdiction over ancillary actions clearly shows that the issue at stake cannot yet be considered as fully clarified and still creates uncertainty among national courts and legal

[1050] *Riel*, at [36], recalling explicitly *Nickel&Goeldner*, *Tünkers*, *Nortel* and *Valach.*

[1051] *Riel*, at [40].

practitioners.

On 26 July 2018, the French *Cour de Cassation* submitted to the EU Court of Justice a request for a preliminary ruling, which was registered as Case C-493/18.

On 10 May 2011 the County Court of Croydon (UK) opened insolvency proceedings *vis à vis* Mr. M.J., Dutch citizen with COMI in England, owner of some immoveable properties in France.

Before the opening of insolvency proceedings, following an order to freeze his assets obtained by a German company before the English court, Mr. M.J. signed before a French notary a deed of acknowledgement of debt by which he acknowledged that he owed a certain sum to his sister, Mrs. J for the repayment of some loans and, in order to secure her credit, Mr. M.J. registered some mortgages in favour of Mrs. J. on the immoveable properties he owned in France.

Later, Mr. J. sold the abovementioned immoveable properties to SCI Tiger, a company incorporated with its sister, the latter holding 90% of the share capital.

The appointed trustee, Mr. M.X. filed before the insolvency court of Croydon a request seeking the authorization to seize the French court to obtain (i) the declaration of unenforceability *vis à vis* the bankruptcy estate of the mortgages registered in favor of Mrs. J and the transfer of the assets SCI Tiger, since both acts entailed transactions at an undervalue, Pursuant to the Insolvency Act of 1986. Accordingly, the trustee intended to ask to the French court also (ii) the order for the reinstatement of the immoveable properties to the bankruptcy estate.

Upon authorization of the insolvency court, the trustee commenced an action against Mr. M.J, Mrs. J and SCI Triger before the Tribunal de Grande Instance of Paris, which upheld the trustee's claim, declaring that the mortgages and sales of the immoveable properties were unenforceable against the bankruptcy estate. The Court of Appeal confirmed the decision of the court of first instance.

The respondents (against Mr. M.J, Mrs. J and SCI Triger) challenged the decision of the Court of Appeal before the Cour the Cassation, claiming *inter alia* that the French court had no jurisdiction to decide over the action commenced by the trustee, pursuant to Article 3(1) EIR.

The French Supreme Court referred to the ECJ for a preliminary ruling.

The request consists of three questions, all concerning the interpretation of Regulation No. 1346/2000.

With the first question, the referring court asks whether the Insolvency Regulation covers the action brought by the trustee seeking the declaration that mortgages registered over the debtor's immovable property and their transfer to SCI Triger are ineffective against the bankruptcy estate.

The second question, which is subject to a positive answer to the first question (i.e. that the action is regarded as Annex Action) concerns the nature of the jurisdiction to decide over the action commenced by the trustee: the Cour de Cassation raises doubts as to whether such a jurisdiction lies exclusively with the courts of the Member State in which insolvency proceedings are opened (in the case at stake, UK) or, alternatively, the jurisdiction is shared between the various courts concerned.

The third question is whether the decision of the court of the Member State where proceedings are

opened authorizing the trustee to commence proceedings in the Member State where the immoveable assets are located may be regarded as a judgement in the course of insolvency proceedings as under Article 25(1) of the Regulation, and thus benefiting of automatic recognition in other Member States. The court has not yet ruled, nor has an opinion been given by the Advocate General.

SECTION 2

SOME INTERIM CONCLUSIONS ON THE ECJ'S CASE-LAW ON ANNEX ACTIONS

Contents: II.1. The approach of the ECJ towards the boundaries between Insolvency Regulation and Brussels I Regulation - II.1.1. The relationship between the Insolvency Regulation and the Brussels Regime and the lack of contradictions in the ECJ's approach - II.1.2. The ECJ approach towards the individual dimension - II.1.3. The interpretation of the material scope the Insolvency Regulation: a variable geometry? - II.2. The 'dynamic' aspect of the rules on Annex Actions: the vis attractiva concursus - II.2.1. The introduction of the vis attractiva concursus as international jurisdiction criterion - II.2.2 The exclusive or alternative nature of the vis attractiva concursus - II.2.3. The territorial extension of the vis attractiva concursus -II.2.3.1. The universal effects of the Insolvency Regulation - II.2.3.2. The actual bearing of the universal effects of the Insolvency Regulation - II.2.3.3. The universal scope of the vis attractiva - II.2.4. The vis attractiva concursus and secondary proceedings - II.3. The 'static' aspect of the rules on Annex Actions: the Gourdain Formula - II.3.1. The Gourdain Formula: a hendiadys or a twofold criterion? - II.3.2. [segue] The actual content of the Gourdain Formula - II.3.2.1. The content of the Gourdain Formula when considered as one criterion - II.3.2.2. The content of the Gourdain Formula, when considered as a twofold test - II.3.2.2.1. The (first) condition of the direct derivation - II.3.2.2.2. The (second) condition of the close connection - II.3.3. [segue] Cumulative or alternative criteria? - II.3.4. Interim conclusions on the Gourdain Formula

As anticipated in the initial paragraph of this Chapter, at this point it bears attempting to wrap up the concepts expressed by the ECJ in the cases analysed and - by deductive reasoning - trying to identify some general principles on Annex Actions that may be applicable in general.

The question is not simple, since, as the previous paragraphs immediately show, the Court's rulings on the subject-matter at stake, nowadays copious, have tackled a number of different types of actions, towards which the Court has adopted an attitude that is anything but linear, which contributes to creating uncertainties among interpreters.

A synoptic comparison of the abovementioned decisions reveals that the ECJ has followed a standard pattern in addressing the numerous issues evolving around Annex Actions.

Indeed, with the exceptions of few cases [1052], the reasoning of the Court appears to be systematically

[1052] I am referring to those cases (such as *Seagon*, *Schmid.*, *Nortel* and *Wiemer&Trachte*) in which the Court has introduced significant new elements concerning the judicial-building regime of jurisdiction over Annex Actions. It is reasonable to assume that, on those occasions, the ECJ deviated from the common pattern followed in the other decisions, the Luxembourg judges being probably more preoccupied with justifying the infusion in the scheme of the Regulation of rules lacking an actual legal basis implemented in those decisions (to the extent that some authors even refer to this activity as law-making intervention of the Court). See DE CESARI P., G.

tripartite. In the first part of the decision, the ECJ generally concerns itself with determining the relationship between the Brussels Regime and the Insolvency Regulation [1053]. In the second part, the ECJ recalls the s.c. 'Gourdain Formula' and specifies (albeit not always consistently) how to interpret its test. Eventually, in the third part of the decision, the Court proceeds to pigeonhole the national action based on its specific features, characterising it as an Annex Action (or not), as such falling under either Brussels Ia or the Insolvency Regulation.

The decisions of the Court can be gathered in two groups. The first group of 'pioneer' decisions, addressing general and fundamental issues, has established and progressively modelled the jurisdictional regime applicable to Annex Actions, thus filling the regulatory gap attributable to the European legislature.

Under a second group fall those judgements in which the ECJ has substantially interpreted its own precedents and applied (not always coherently) the principles established by the pioneering decisions. In this respect, it is perhaps not inappropriate to make a general remark, admittedly simplistic, on the *modus operandi* of the ECJ, which serves as a setting to the jurisprudence on Annex Actions. It was noted that the Court has increasingly developed the attitude to recall its precedents as if it were informing its dialogue with national judges to a kind of Anglo-Saxon 'stare decisis' [1054].

The development of a *de facto* precedent certainly does not sound new in the context of the Court' case law [1055]. Nevertheless, it bears noticing that this approach seems to have strongly influenced the attitude towards the issues evolving around Annex Actions, arguably without a specific methodological direction.

Since the very *Seagon* judgement, in which it is apparent that both the ECJ and the Advocate General were strongly averse to overruling the *Gourdain* case-law [1056], the Court has often favoured to recall

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MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il Regolamento (UE) 2015/848 relativo alle procedure d'insolvenza*, Torino, 2017.

1053 To be more specific the case-law of the Court refers, first, to the Brussels Convention and, then, to its 'successors' namely the Brussels I Regulation and the Brussels Ia Regulation. In particular, in the *Alpenblume* and *German Graphics* cases, the Court made it clear that pursuant to Recital 19 Brussels I, the interpretation provided by the Court in respect of the provisions of the Brussels Convention also applies to the provisions of the Brussels Convention. (In this sense, *inter alia*, ECJ, 23 April 2009, Case C-533/07, *Falco Privatstiftung e Thomas Rabitsch v. Gisela Weller-Lindhorst*, ECLI:EU:C:2009:257.)Apparently, such clarification was deemed as of much relevance for some scholars, since a literal interpretation of the text was leading to "some hesitations". See, J.L. VALLENS, *cit.*, p. 2783. The same Author maintained that « *La différence était importante: la Convention de Bruxelles soumettait l'exécution des décisions à un contrôle allégé mais préalable à toute mesure d'exécution effective, tandis que le règlement du 22 décembre 2000 a amélioré l'effectivité des décisions par une exécution automatique sur la simple présentation d'un certificat de la juridiction d'origine et institué un contrôle a posteriori des conditions de reconnaissance et d'exécution* ». See J.L. VALLENS, 'La reconnaissance et l'exécution des décisions rendues dans une procédure collective sont soumises au règlement général du 22 décembre 2000 qui remplace la Convention de Bruxelles de 1968', in *RTD Com.*, 2010 p. 212.

1054 M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int'l Lis*, 2012, p. 127.

1055 E. CALZOLAIO, 'Il valore di precedente delle sentenze della Corte di giustizia', in *Riv. Crit. Dir. Priv.*, 2009

1056 To the extent that the sentences of the Advocate General seem almost forced to justify the necessary adherence to the previous case law.

(almost apodictically) its precedents by means of stringing citations, rather than explaining its meaning in the light of the case in question [1057].

It seems, the, particularly pertinent to recall here what authoritative scholars have noted (albeit referring to another context): the Court has a number of standard paragraphs on its word processor, and these are slotted into judgements as so if to suggest that what is said immediately after those boilerplate clauses is consistent with or may be dictated by it. Should this impression turn to be correct, it would perhaps be worth recalling that this principle has no legal basis within the European Union and that hopefully in the next future the Court will resort to a more reasoned use of its precedents.

In the light of the intentions underpinning this Chapter, after the preliminary analysis of the interplay between the Brussels Regime and the Insolvency Regulation as dealt with by the Court [1058] this Section addresses the *vis attractiva concursus* (*i.e.* the 'dynamic' aspect of the allocation of jurisdiction on Annex Actions [1059] and, afterwards, the test of the Gourdain Formula and the uncertainties accompanying the autonomous notion of Annex Actions will be analysed (what may be regarded as the 'static' dimension of the issue [1060].

II.1. The approach of the ECJ towards the boundaries between Insolvency Regulation and Brussels I Regulation

At both Community and national level, the issue of Annex Actions raises sensitive border issues between civil and commercial law, on the one side, and insolvency law, on the other. It is almost obvious to observe, then, that the Court, whenever facing that topic, considered it appropriate to address the mutual relationship between the instruments disciplining those two fields.

From a purely descriptive point of view, in principle the relationship between the Brussels Regime and the Insolvency Regulation can be addressed under two perspectives.

The first profile has an exclusively Community dimension and concerns the more general issue - relating to the systematic consistency within the European private international law framework - of the dovetailing between two Community acts. It deals, therefore, with whether the Court considers that, at a Community level, the two regulations cover a coextended area or whether there are particular cases that, being excluded from the scope of application of the two instruments, fall in regulatory creep, their regulation being deferred to the rules of private international law of Member States.

The second profile, on the other hand, refers to a question of a substantive nature, which also arises

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1057 Referring to the *F-Tex* case, some authors have claimed that the ECJ gives to its decisions « *une tournure très inspirée des pratiques de Common law* ». Cfr. D'AVOUT, BOLLÉE, *op. cit.*, p. 2331.

1058 See *infra* § II.1.

1059 See *infra* § II.2.

1060 See *infra* § II.3.

in similar terms at a national level, and ultimately concerns whether (an to what extent) the relationship between civil and commercial law and bankruptcy law should be considered as that between *genus* and *species*. In the context of the Annex Actions (*i.e.* the individual dimension [1061]), this profile concerns, ultimately, the extension of the *vis attractiva concursus* on those individual actions that, having a hybrid character, are placed in a twilight zone civil and commercial law and bankruptcy.

II.1.1. The relationship between the Insolvency Regulation and the Brussels Regime and the lack of contradictions in the ECJ's approach

In Chapter III it was explained that the issue of the demarcation between the Brussels Regime and the Insolvency Regulation originates from the choice of removing from the scope of the Brussels Convention the field of insolvency proceedings, to be governed by a specific convention. Yet, as said, it took forty years to enact the regime on cross-border insolvencies.

It would therefore seem inevitable that, when analysing how the court dealt with the relationship between two legislative instruments, one refers only to those judgments handed down when the two regulations were actually in force.

Indeed, in the *Gourdain* case, lacking a specific regime on collective proceedings, the question of the interplay between insolvency and civil and commercial matters could not yet amount to an issue of demarcation between two conventions. Besides it was limited to the framework of the Brussels Convention and it concerned the mutual relationship between the interplay of the general scope of the Convention provided by Article 1(1) and Article 1(2)(2) thereof.

Nevertheless, it is perhaps not out of place to recall that the moment when the first judgement concerning the Insolvency Exception was handed down may be placed in limbo when the negotiations of the Preliminary Draft Project were at a very advanced stage, but no convention was yet into force.

At that time the 'phantom' of the Preliminary Draft Convention - run aground on Phase I [1062] - was hovering around, casting doubts on whether it was appropriate to give weight to it in interpreting the Brussels Convention.

Although formally it could not of course be given any relevance in the interpretation of the exception of insolvency [1063], as will be demonstrated in the next paragraph, unofficially the Preliminary Draft Convention greatly influenced the decision of the Court, at least as regards the individual dimension

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1061 The problem is not limited to the individual dimension, but also arises as regards the collective dimension. As shown, also 'hybrid' or pre-insolvency proceedings can be placed into an uncertain grey zone that raises delicate questions of demarcation between civil and commercial law and bankruptcy.

1062 See *supra* Chapter II, Section 1, § I.2.

1063 J. LEMONTEY, in *Revue critique de droit international privé*, 1979, p. 663 (who was particularly influential on this subject at that time, since he was the drafter of the Rapport accompanying the Preliminary Draft Convention) suggested that the ECJ could have followed a different method and rely on the (still provisional) text of the Preliminary Draft Convention.

(*i.e.* which individual actions should be encompassed within the Insolvency Exception).

Ultimately, even then, the ECJ was faced with the delicate interpretation of the Insolvency Exception, in such a way to avoid gaps or overlaps with what was then considered as the soon-to-be Insolvency Convention.

That emerges clearly from the Opinion of the Advocate General. In addressing the method of interpretation to be adopted towards Article 1(2)(2) of the Brussels Convention, Advocate General Reischl, while acknowledging that

« *calling in aid the* [Preliminary Draft Convention] *can therefore only be effected with the utmost caution* » [1064], at the same time, against the Commission's suggestion of a broad interpretation of the general scope of the Brussels Convention objected that it was « *at least doubtful whether it also applies to a field such as bankruptcy and winding-up which is also covered by a convention, or to be more precise by a convention in respect of which* […] *it can be assumed that preparation will be completed in the foreseeable future.* […] *it must not be forgotten that a broad interpretation of the Convention on jurisdiction and enforcement carries within it the danger of encroaching on the field within which Convention on bankruptcy is to be concluded* » [1065]

Against this background, then, it may be incidentally observed that even at a point in history when it was certainly not possible to speak of a real relationship between two pieces of legislation, virtually the legal instruments relating to civil and commercial matters and that on insolvency were considered as necessarily dovetailing.

Taking a step forward and returning to a historical moment in which two regulations in force existed, attention needs to be drawn to the ECJ's approach towards the crucial issue of the boundaries between the two instruments.

When analysing the approach of the ECJ towards the boundaries between the Insolvency Regulation and the Brussels Regime, scholars generally refer to those judgements in which the Court has laconically stated that the two Regulations are intended to dovetail.

This general statement has often been seen as an uncritical and superficial statement on the part of the Court, as concealing the loopholes that have actually emerged.

It is true that ever since the *F-Tex* judgement, the argument of dovetailing has been constantly bolstered by the ECJ, which in each subsequent occasion has restated word for word the above-mentioned mantra [irrespectively of whether it was dealing with jurisdictional rules or the regime of recognition and enforcement].

However, what is not always apparent is that on those occasions the Court was specifically dealing with the interpretation of Article 3 EIR (or Article 25(1) second subparagraph EIR) and its relation which the Insolvency Exception, which is a different and separate profile although closely connected) from that of the coherent construction of the scopes of the two instruments (*i.e.* the relationship

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[1064] See the Opinion of Advocate General Reischl, delivered on 7 February 1979, ECLI:EU:C:1979:33, at p. 751.

[1065] *Ibid.* at pp. 750-751.

between Article 1 EIR and Article 1(2)(b) Brussels Ia). In respect of the latter profile, in facts, the ECJ does expressly acknowledge the existence of regulatory gaps.

Therefore, to better understand the approach of the ECJ towards the boundaries between the two instruments, it is appropriate to keep in mind the distinction between the collective dimension and the individual dimension that was set out in Chapter III.

Only keeping in mind the distinction between these two aspects, it is possible to grasp that (assuming as a starting point the interpretation of Article 3 EIR in *Seagon*) , the ECJ's construction of the boundaries between the Insolvency Regulation and the Brussels Regime as dovetailing, with respect to the individual dimension, has not only always been consistent, but also proves correct.

II.1.2. The ECJ approach towards the individual dimension

In analysing the ECJ approach towards the individual dimension, at the outset it must be assumed that in the period spanning from 2002 to 2009, that regulatory creep actually existed, and precluded the dovetailing between the Insolvency Regulation and the Brussels I Regulation [1066].

The Court was faced with the issue of the (lack of) dovetailing in the *Seagon* case, where it did not explicitly refer to the boundaries between the two instruments (reasonably because it was actually concerned with …filling a regulatory gap). Indeed, it is unclear whether Article 3 EIR was interpreted by way of analogy (thus implicitly admitting the existence of a lacuna) or, on the contrary, if the Court shared the Advocate General's view that there were no lacunae and that Article 3(1) EIR was to be directly interpreted [1067].

Be that as it may, in that case the ECJ has taken the place of the Community legislature and interpreted Article 3 EIR in such a way as to fill in an existing regulatory gap, *de facto* introducing a new jurisdictional ground for Annex Actions (the European *vis attractiva concursus*). The ECJ's decision does not certainly escape criticism on the part of scholars, some of which have objected that on that occasion the Court went too far and proposed an interpretation, forcing the text of Article 3 EIR.

In any event, what must be acknowledged for present purposes is that ever since *Seagon*, the following case-law has consistently regarded Article 3 EIR as providing for a legal basis to the *vis attractiva concursus* for Annex Actions.

In *Seagon* the Advocate General firmly expressed a negative attitude towards the existence of gaps between the Brussels Regime and the Insolvency Regulation, stating « *the fact that the two regulations exist*

1066 The slow-pace emergence of interpretative issues concerning the EIR must undoubtedly be also attributed to the fact that arguably a genuine obligation to refer to the ECJ for preliminary rulings concerning matters dealt with in Title IV TFEU applies only to the courts of last instance (art. 234 TFEU). See on this point S. BARIATTI, 'la cooperazione giudiziaria in materia civile dal terzo pilastro dell'Unione Europea al Titolo VI del Trattato CE', in *Dir. Un. Eur.*, 2001, p. 261 and ff.

1067 The Advocate General Colomer contested Deko Marty's argument stressing that the existence of a regulatory gap may be submitted only « *if it were really the case that Article 3(1) of Regulation No 1346/2000 fails to lay down any rules on jurisdiction with regard to actions in the context of an insolvency* » but, as concluded by the Advocate General , « *there is nothing to indicate that the Community legislation on insolvency is silent on the matter* ».

side by side strengthens the principle of the absence of lacunae ».

Luckily enough, in the *German Graphics* judgement [1068], handed down few months after *Seagon*, the Court had the opportunity to make a pivotal point clear: the principle of the European *vis attractiva concursus* does not entail that *any* individual action that may arise in the course of insolvency proceedings fall either in the Brussels Regulation or in the Insolvency Regulation.

In the *German Graphics* judgement, the Court interpreting the wording 'provided that [the Brussels] Convention is applicable', stated that, in the light of Article 25(2) EIR there are judgements (and, thus actions, for the principle established in *Seagon* reinstated the parallelism between the jurisdictional and the recognition regime within the EIR) that may fall outside of the scope of both the Insolvency Regulation and the Brussels I Regulation [1069].

That means that the perfect dualism Brussels Regime - EIR exists only in connection to Annex Actions (*i.e.* actions that derive directly from insolvency proceedings and are closely connected with them).

In the light of the reasoning of the Court in the *German Graphics* case and based on Article 25 EIR, actions commenced in the course of insolvency proceedings may be then grouped as follows

(i) 'annex actions' - *i.e.* individual civil and commercial actions, that directly derive from insolvency and are closely connected to insolvency proceedings, that are covered by the Insolvency Regulation;

(ii) 'other civil and commercial actions' - *i.e.* civil and commercial actions in which insolvency is a part of the picture, but that do not derive directly from insolvency or are not closely linked to insolvency proceedings, covered by Brussels Regime, with the proviso that they do not fall in any exception thereof. That kind of actions are defined in the Virgós-Schmit Report as those actions that « *may be affected by the opening of proceedings (actively or passively)* » and encompass, for instance, actions on the validity of a contract or an action relating to the existence or the validity under general law of a claim or its amount, actions to recover another's property the holder of which is the debtor. It is reasonable to infer that the 'affection' of insolvency proceedings over the action which the Virgós-Schmit refers to is primarily represented, *inter alia*, by the fact that the *locus standi* for those actions lies with the trustee. Indeed, as an effect of the divestment of the debtor, the latter loses the capacity of being a party to legal proceedings. Therefore, irrespective of whether the trustee acts as claimant or respondent [1070], those actions must be understood as claims already existing in the legal sphere of

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1068 Actually, the *Alpenblume* judgement was rendered few months before *German Graphics*, but in that case, the issue of the mutual interplay between the two instruments did not arise, since the Insolvency Regulation was not applicable *ratione temporis*.

1069 S. BARIATTI, 'Filling in the Gaps of EC Conflicts of Laws Instruments: the Case of Jurisdiction over Actions Related to Insolvency Proceedings', *cit.*, p. 25.

1070 It must be recalled that, as a rule of thumb, creditors are precluded from initiating individual actions against the estate. Therefore, when referring to 'passive actions', the Virgós-Schmit Report seems to allude to either proceedings that are pending when insolvency proceedings are opened, in which generally the trustee substitutes the debtor (where the *lex fori concursus* allows for their continuation) or actions brought against the

the debtor, in that he could have brought them before the opening of insolvency proceedings. The bearings of the opening of insolvency proceedings also include the fact that the outcome of the action indirectly affects the body of creditors, since they may either benefit or prejudice form the diminishing or the enrichment of the estate [1071]. In anticipation of what will be explained afterwards, those two elements (*i.e.* the fact that the trustee is a party to the proceedings and that the proceeds of the action may affect the body of creditors) do not entail automatically that an action shall be considered as an Annex Action.

(iii) preservation measures - which are expressly covered by the EIR when taken after a request for the opening of insolvency proceedings [1072]. The Insolvency Regulation, however, does not mention protective measures taken before the lodgement of a request for insolvency proceedings. It is, then, disputed whether they should fall within the scope of the EIR, of Brussels Ia , or whether they fall in a regulatory gap, governed by national rules [1073]. It has been submitted that in order to avoid any kind of regulatory vacuum, it would be reasonable to consider that if the preservative measure is requested in the vicinity of the request for the opening of insolvency proceedings, it should be subject to the regime of the Insolvency Regulation, since they would relate to insolvency [1074]. Although the avoidance of regulatory gaps must be ensured, three main difficulties may be detected in encompassing those preservation measures in the EIR. Preservation measures taken before a request for the opening insolvency proceedings would be requested either by a creditor or by the debtor. In both cases, the measure cannot be considered as sought in the interest of the body of creditors. The creditor would be acting in its own interest, whereas the debtor could be acting at the

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estate by secured creditors. Indeed, as it will be explained in further detail afterwards, unlike the Italian and French insolvency law, within the system of the Insolvency Regulation secured creditors may bring actions outside the insolvency court and those actions are not regarded as Annex Actions. See *infra* Chapter V, § V.4.2.

1071 This is consistent with the *German Graphics* judgement, where the Court stated that, to characterize an Annex Action is not determinative that the trustee is a party to the insolvency proceedings.

1072 S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, at [35] claims that preservation measures taken after the opening of insolvency proceedings must be characterised as 'actions directly deriving from insolvency proceedings and closely linked with them', within the meaning of article 25(1) first subparagraph EIR. The distinction should be merely theoretical. Yet, it would make it more difficult to identify those decisions on protective measures (which are not even defined) if they must be also directly derived from and closely linked to insolvency.

1073 The rationale behind Article 25(1) subparagraph 3 is actually the *De Cavel* case-law, where the ECJ excluded from the scope of the Brussels Convention interim orders and protective measures for they were closely connected with proprietary legal relationship between spouses resulting directly from the matrimonial relationship. The latter subject being excluded from the scope of application of the Brussels Convention, the Court found that closely connected protective measures were to be excluded as well. 27 March 1979, Case C-143/78, *De Cavel v. De Cavel*, in ECLI:EU:C:1979:83. See also ECJ, 31 March 1982, Case C-25/81, *C.H.W. v G.J.H.*, ECLI:EU:C:1982:116. In the light of the Insolvency Exception, and in order to avoid the exclusion of protective measures insolvency-related, the draftsmen of the EIR included them within the scope of the EIR, provided that when filed between the lodging of a request for opening insolvency proceedings and the opening of the procedure, they must be surely considered as being insolvency-related.

1074 T. LINNA, 'Protective measures in European cross-border insolvency proceedings', in *International Insolvency Law Review*, 2014. R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 176; M. VIRGÒS SORIANO, F. J. GARCIMARTÌN ALFÉREZ, *The European Insolvency Regulation: law and practices*, The Hague, 2004, at [391]; S. RIEDEMANN, 'Under Article 25', in K. PANNEN (ed.), *European Insolvency Regulation*, at [30].

most to protect his assets to then make a composite arrangement with all creditors. Even in the latter case, the benefit for creditors would be only indirect. Second, lacking any request for opening insolvency proceedings, it would be difficult to determine whether the court ordering the protective measure has jurisdiction under article 3(1) EIR. Third, it would also be difficult to determine when an *ante-causam* protective measure is insolvency-related (a chronological criterion would be excessively discretionary). Such an assessment should be made on a case-by-case basis. In the light of the above, it is submitted that it would be preferable to apply Brussels Ia .

(iv) 'other non-civil and commercial actions' - *i.e.* individual actions in which insolvency is a part of the picture, but that do not derive directly from insolvency or are not closely linked to insolvency proceedings, not covered by the Brussels I Regulation, since either they are not 'civil and commercial' (for they involve, for instance, a public [1075] or criminal law profiles) or, albeit civil and commercial in nature, they fall in one of the (other) exceptions of Article 1(2), such as (*i.e.* the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, social security, arbitration).

An example could better clarify the above.

Assuming that in State A insolvency proceedings are opened against a severally liable shareholder of a company (or a sole trader entrepreneur, amenable to insolvency proceedings) with COMI in that Member State. In the course of proceedings, a matter of succession arises (for instance the father of the shareholder dies, leaving a will).

The *de cuius*' will is challenged for whatever reason by the brother of the shareholder, domiciled in State B. Or, again, the will infringes the right of the debtor concerning some immovables in State C. In this case, the trustee is vested with the *locus standi* to the action on behalf of the (devested) debtor, but the action may not be regarded as an Annex Action. Therefore, it falls outside the scope of the EIR. Instead, it would possibly fall under group *(ii)* above, but in the light of the exception provided by Article 1(2)(3) Brussels Ia the action would also be excluded from the scope of application of the Brussels Regime (it would probably fall within the Regulation (EU) 650/2012 on succession and

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1075 In this respect it may be worth recalling that in ECJ, ECJ, Case C-212/15, *ENEFI Energiahatékonysági Nyrt v. Direcţia Generală Regională a Finanţelor Publice Braşov* (DGRFP), ECLI:EU:C:2016:841, the Court clarified that the Insolvency Regulation (logically) does not make any distinction as to 'public law' creditors (*i.e.* tax authorities) and private law creditors.

However, possible interferences with the exceptions of the Brussels Regime somewhat emerged in the Judgment ECG, 17 November 2011, Case C 112/10, *Zaza Retail*, EU:C:2011:743, at [31] - [34]. In fact, in that judgment, the Court identified particular situations constituting exceptions in which a public authority would not fall under the notion of creditor within the meaning of Insolvency Regulation. In *Zaza Retail* the Court concluded that the Belgian Public Prosecution Service could not be classified as creditor empowered to request the opening of territorial insolvency proceedings under Article 3(4)(b) of Regulation No 1346/2000 because that authority intervened *in casu* neither as a creditor nor in the name of or on behalf of the creditors. Albeit both case do not pertain to the *vis attractiva stricto sensu*, they both demonstrate that the applicability of one or the other Regulation should be carefully analysed, because the possibility that an action brought by the trustee could fall outside of the Brussels Regulation for the *intentional* exceptions provided therein (different than the Insolvency Exception) may occur.

wills) [1076].

The relevance of this clarification is evident: although the two instruments have been conceived as ideally dovetailing (as partially it is the case, since the two Regulations shall be regarded as dovetailing with reference to judgements described under *(i)* and *(ii)* above) in *German Graphics* the ECJ acknowledges that practice could demonstrate that some (although rare) gaps may occur between the Brussels I Regulation and the Insolvency Regulation, inasmuch not every action that is brought in the course of insolvency proceedings may be characterised as [essential part] of 'insolvency proceedings' or 'civil and commercial matters', within the relevant meaning of each Regulation.

The following ECJ case-law, when dealing with individual dimension of the boundaries between the EIR and the Brussels Regime, has constantly expressed the firm conviction that the two instruments dovetail.

Such a clear stance was uttered for the first time in the *F-Tex* judgement, where, based on the preparatory documents of the Brussels Convention (and namely the Schlosser Report) the Court held that the « *matters referred to by [the insolvency] exclusion were to be covered by a separate Convention* […] *the two Conventions were intended to dovetail completely with each other, avoiding any problems of interpretation* » [1077].

Again, such an argument was reaffirmed, but slightly readjusted, in the *Nickel&Goeldner* judgement, in which the ECJ submitted that

> « *it should be noted that, relying inter alia on the preparatory documents relating to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000. Following the same reasoning, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001* » [1078].

[1076] To my knowledge, no such a type of action with cross-border elements has been decided yet. For a national case where a similar issue was decided, see App. Napoli, 12 January 2018, n. 118, in *Redazione Giuffré*, 2018. (« *La rinunzia del legittimario pretermesso all'azione di riduzione delle donazioni e delle disposizioni testamentarie lesive della sua quota di riserva può essere impugnata, a tutela delle rispettive ragioni,* […] *dal curatore del fallimento del legittimario in forza del comb. disp. degli artt. 66, comma 1, l.fall. e 524 c.c.* »).

[1077] Specifically, the ECJ recalls point 53 of the Schlosser Report.

[1078] See *Nickel&Gooeldner*, at [21]. Using the words of Justice Carr in *Sabbagh v. Khoury* [2014] EWHC 3233 (Comm), Case No: 2013 – 924, « it is common ground that the scope of the Brussels Regulation must be read so as to dovetail with other applicable relevant European legislation (such as the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations respectively), and be interpreted purposively as European legislation alongside relevant preparatory materials such as the Schlosser Report ». Also, as noted by G. Moss and I Fletcher, the Insolvency Regulation is one of a number of instruments designed to create "a European judicial area in civil matters, where citizens have a common sense of justice throughout the Union and where justice is seen as facilitating the day-to-day life of people". The significance of this acknowledgement

Ever since the *F-Tex* and the *Nickel&Goeldner* judgements, the argument of the dovetailing has been constantly bolstered by the ECJ [1079].

When faced with that standard phrase of the ECJ, the majority of scholars have found therein confirmation of the dovetailing of the two instruments [1080]. Other authors have blamed the Court of neglecting the existence of possible regulatory gaps [1081] and regarded those judgments as being in contrast with the *German Graphics* judgment [1082]. Actually, it is perhaps possible to suggest a less severe reading of the Court's decisions, which would allow to trace (at least in this respect) a certain consistency.

It is submitted that where the Courts makes a strong argument for the dovetailing it does not refer to the Brussels Regime as a whole, but specifically to the Insolvency Exception (indeed, those judgements explicitly state only that « *actions excluded under Article 1(2)(b) of Regulation No 44/2001* […] *fall within the scope of Regulation No 1346/2000* » and vice versa). In this sense it is correct to maintain

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is that when interpreting the Insolvency Regulation, its role as an instrument in a wider Community legal order has to be considered. In other words, it has to be interpreted not only consistently with superior Community law, but also consistently with, and not in isolation from, the Community measures that are intended to complement it. G. MOSS, I. FLETCHNER and S. ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, p. 24.Two authors maintained that « [on] *se constitue ainsi un opportun jeu de vases communicants: toutes les actions qui n'ont pas de rapport suffisamment étroit à la procédure d'insolvabilité sortent du domaine du règlement n° 1346/2000 et entrent automatiquement dans celui du règlement Bruxelles I (sans que puisse jouer, au sein de ce dernier, l'exception faillite)* ». Cfr. L. D'AVOUT, S. BOLLÉE, in *Dalloz*, 2012, p. 2331. Also, an author suggested that the solution adopted by the ECJ, which should be considered in light of the Court's other judgments, confirms the approach already adopted in *Seagon*. According to the latter judgement, the respective scope of the Brussels I Regulation and the EIR, both being instruments operating within the European Judicial Area, must be determined in order to enhance the cooperation between the Member States and the effectiveness of the Regulations. It entails that it is necessary to leave a minimum number of legal proceedings 'orphan' of harmonised rules on jurisdiction and recognition. (« *La solution, qui mériterait d'être méditée en contemplation des autres arrêts de la Cour, confirme en tout cas ce que nous avions annoncé ici même, à savoir que la détermination du champ d'application respectif des règlements de l'Espace judiciaire européen doit désormais s'opérer en matière de faillite dans le but de favoriser la coopération optimale des Etats membres et l'effet utile des règlements, c'est-à-dire avec le souci de laisser un minimum d'actions en justice orphelines de règles harmonisées de compétence et de reconnaissance* » See D'AVOUT, BOLLÉE, *op. cit.* p. 2331. *Dalloz* 2009, ID., p. 2384 and *Dalloz* 2010, p. 2323).

1079 See *Nortel* , at [26] where the Court states « *actions excluded under Article 1(2)(b) of Regulation No 44/2001, from the scope of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation 1346/2000 fall within the scope of Regulation No 44/2001* ». With the same wording, see also *H v. HK,* at [3]; *Tünkers France*, at [17]; *Valach*, at [24]; *Weimer Trachte*, at [29], *NK*, at [24].

1080 For literature, see A. DUTTA, *Lloyd's MCQL*, 2008, 88, 93. M. STURNER, in *IPRax*, 2005, p. 416, S. M. VIRGÒS SORIANO and F. J. GARCIMARTÌN ALFÉREZ, *Comentario al reglamento europeo de insolvencia*, Madrid, 2003, p. 61; ID., *The european Insolvency Regulation: law and practices*, The Hague, 2004, pp. 55-56; G.C. GIORGINI, *Méthodes conflictuelles et règles matérielles dans l'application des "nouveaux instruments" de règlement de la faillite international*, Paris, 2006, p. 293 ff. L. SCIPIONE, 'Procedure concorsuali di insolvenza nella disciplina comunitaria e prospettive di riforma', in S. BONFATTI AND G. FALCONE (eds.), *La "riforma urgente" del diritto fallimentare e le banche*, Milano, 2003, p. 286.

1081 A. DICKINSON, E. LEIN, *The Brussels I Regulation Recast*, Oxford, 2015, p. 32, affirmed that in so far as the ECJ suggests that the two Regulations have no 'legal vacuum', that is a patent hyperbole, given the limits on the material scope of the Insolvency Regulation.

1082 F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017, p. 78.

that, leaving aside what was said about the mechanism of Annex A [1083], the notion of 'insolvency proceedings' (*i.e.* insolvency collective proceedings within the meaning of Article 1(1) EIR and Annex Actions) dovetail with the Insolvency Exception.

When addressing from a general perspective the boundaries between the two instruments, instead, the Court seems to adopt a more cautious wording (they must be « *interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum* »), inasmuch the Court also on that occasions was well aware that not every actions brought in the course of insolvency proceedings are covered by the Brussels Regime, as expressly stated in *German Graphics*. However, not being Annex Actions, they are not in any case encompassed in the broad meaning of the concept 'insolvency proceedings'.

All in all, also at the time of the virtual coexistence between the Preliminary Draft Convention and the Brussels Convention, those gaps deriving from the exclusion of certain well-defined subject matters from the scope of the latter convention were already envisaged [1084].

The intention underpinning this specification on the part of the Court may be also considered under a pedagogic standpoint (parallel to that of Article 25(3) EIR [1085]). It may be assumed that the Court stresses the (real) dovetailing between the Insolvency Exception and Annex Actions, in order to warn practitioners that when an action somewhat involving a situation of insolvency is brought outside of proceedings (see for instance an action under § 64 GmbHG [1086]) that action is not automatically excluded from the Brussels Regime [1087].

The ECJ provided an important guideline to courts (and, in general, to interpreters): when dealing with a border-line decision, a three-step test must be undertaken. The first thing to be ascertained is whether the action (and perhaps more importantly, a judgement) is included among the decisions listed under Article 25(1) (i.e. to the extent of this study, whether it is an Annex Action or an Annex Judgement). This being ascertained, in case the action does not fall within the scope of the Insolvency Regulation, the following test step concerns whether that action is covered by the Brussels I Regulation. Otherwise, should the judgement fall outside the scope of the Brussels 1, the the

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1083 See *supra* Chapter II, Section 3, § III.3.3.

1084 Indeed, the Schlosser Report at [53] stated that « *the two Conventions were intended to dovetail almost completely with each other* ».

1085 See *supra* Chapter II, Section 2, § *II.1.4*. S. BARIATTI, 'Filling in the Gaps of EC Conflicts of Laws Instruments: the Case of Jurisdiction over Actions Related to Insolvency Proceedings', in G. VENTURINI - S. BARIATTI (eds.), *New Instruments of Private International Law, Liber Fausto Pocar*, Milan, 2009, pp. 23-38; Z. CRESPI REGHIZZI, 'Reservation of Title in Insolvency Proceedings: Some Remarks in Light of the German Graphics Judgment of the ECJ', in *Yearbook of Private International Law*, 2010 Vol. XII, p. 564; S. RIEDMANN, 'under Article 25', in K. PANNEN (ed.), *European Insolvency Law*, *cit.*, at [10808].

1086 On the characterization of an action under § 64 GmbHG as Annex Action, see *infra* Chapter V, §§ V.4.4.1.1 and V.4.4.1.2.

1087 In this sense must be read the Jenard Report, which states « *proceedings relating to a bankruptcy are not necessarily excluded from the Convention. Only proceedings arising directly from the bankruptcy and hence falling within the scope of the Bankruptcy Convention of the European Economic Community are excluded from the scope of the Convention* ».

recognition of the judgement would be governed by the national provisions on conflict of laws (third step).

From a methodological standpoint, what could be reproached to the Court is that when affirming the dovetailing between the Insolvency Exception and the Insolvency Regulation, it anchors the dovetailing to the *traveaux preparatoires* of the Brussels Convention, which submit both the dovetailing with reference to texts that never entered into force.

It would have been perhaps more appropriate to refer to the preparatory documents pertaining to that Insolvency Regulation (*i.e.* the Virgós-Schmit Report), or at least (if it was truly essential to mention the Jenard and the Schlosser Reports) to read the latter ones together with the Virgós-Schmit Report.

As it was already mentioned, the latter Report addresses the relationship between the two Regulations (*recte* the Insolvency Convention and the Brussels Convention) in several swaths.

Indeed, as regards the regime of jurisdiction under Article 3(1) of the Insolvency Convention, the Virgós-Schmit Report - while stating that the Convention contains no rule defining the limits of the rule on jurisdiction, since it did not adopt the *vis attractiva concursus* principle [1088] - submits that the Convention embeds the *Gourdain* Formula in order to avoid « *unjustifiable loopholes between the two Conventions, these actions are now subject to the Convention on insolvency proceedings and to its rules of jurisdiction* » [1089].

As regards the regime of recognition and enforcement of judgements relating to Annex Actions the Report clarifies that actions directly deriving from insolvency law and closely connected with the insolvency proceedings « *should be subject to the Convention on insolvency proceedings or, otherwise, in the overall Convention rules there might be unjustifiable gaps between the general Convention and the specific Convention* » [1090].

Also, with reference to the recognition and enforcement of 'other judgements', the Virgós-Schmit Report restates that the purpose of this provision is to « *to avoid gaps between the Convention on insolvency proceedings and the 1968 Brussels Convention* » [1091].

It is important to note that the Report states that « *The exclusion of insolvency proceedings as provided for in Article 1(2) of the 1968 Brussels Convention should be interpreted in accordance with the definition of insolvency proceedings given by the Convention on insolvency proceedings and the criteria incorporated in Article 25 thereof* » [1092].

1088 The Virgós-Schmit, however, is rather ambiguous since it submits that the Insolvency Convention and the Insolvency Exception were dovetailing, while referring to a text in which no rule on the *vis attractiva* was envisaged, thus excluding at least at a jurisdictional level, any possible dovetailing.

1089 See Virgós-Schmit Report, at [77]. It bears noticing that the same ambiguous approach is not adopted by the Report as regards provisional and protective measures, which are ancillary to main insolvency proceedings. Despite the latter ones not being mentioned in article 3(1) as well, the Report resolutely states that « *article 3(1) enables the court having jurisdiction to open main insolvency proceedings to order provisional and protective measures from the time of the request to open proceedings* ».

1090 See Virgós-Schmit Report, at [195].

1091 See Virgós-Schmit Report, at [197].

1092 See Virgós-Schmit Report, at [197].

This is crucial to understand the dovetailing between the two instruments (at least as regards the individual dimension): the scope of the Insolvency Exception set forth by the Brussels Regime depends and must be interpreted according the scope of the Insolvency Regulation. Taking a step further, this confirms that the Insolvency Exception should not be regarded as excluding all claims in which insolvency is a part of the picture, but only those situations that may be charaterised as 'insolvency proceedings' within the meaning of the EIR.

II.1.3. The material scope the Insolvency Regulation: a variable geometry?

One acknowledged that *tendentially* the Insolvency Regulation and the Insolvency Exception dovetail, it must be addressed the second profile, concerning whether (and to what extent) the relationship between civil and commercial law and bankruptcy law should be considered as that between *genus* and *species*.

In *Gourdain*, when faced with that issue for the first time, the Court had to determine ultimately if the Insolvency Exception covered exclusively the collective dimension of insolvency proceedings or whether also individual actions brought in the context of insolvency proceedings fell under the scope of the Insolvency Exception.

The consequences of that classification were determinative, in that it would entail that either the jurisdiction over such actions was to be regarded as governed by autonomous private international law rules or subject to the uniform jurisdictional criteria set forth by the Brussels Convention.

Most significantly, it would have assessed whether decisions regarding this kind of individual action could benefit from the uniform regime of recognition and enforcement handed down by the Brussels Convention or whether their circulation across the Member States was subject to the (generally more restrictive) grounds for refusal of recognition of domestic law systems [1093].

Yet, even then drawing the line between Article 1 and Article 1(2)(2) of the Brussels Convention has proven to be arduous, since that text did not provide for any clear definition neither of 'civil and commercial matters', nor of 'bankruptcy, winding-up, judicial arrangements, compositions and analogous proceedings' [1094]. Also, as said, it was doubtful whether to give weight to the Preliminary Draft Convention.

In this respect, two opposing approaches were proposed in dealing with the scope of the Insolvency Exception.

According to one proposal, since the provisions defining the general scope of the Brussels Convention were to be given a broad interpretation - inasmuch as the Convention was a general

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1093 Z. CRESPI REGHIZZI, 'Reservation of title in insolvency proceedings: some remarks in light of the German Grephics judgment of the EC'J', in *Yearbook of International Private Law*, 2010 Vol. XII p. 587-606; M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int'Lis*, 2012, p. 127.

1094 See *supra* Chapter III, Section 4, § IV.2.

agreement - it followed that, conversely, the exceptions therein should have been constructed narrowly, pursuant to the schemes and objectives of the Convention.

Under that interpretation, the ultimate objective of excluding insolvency matters from the scope of the Brussels Convention was regarded as to merely get simple centralized collective proceedings, producing effects in all Member States, therefore « *it is only to this extent that a specific solution* [was] *required* » (1095). From this perspective, such a solution would entail that the expression 'analogous proceedings' had to be narrowly interpreted, encompassing only collective insolvency proceedings.

However, since the Brussels Convention did not shed lights on the meaning of the formula provided by the Insolvency Exception, the supporters of that interpretation maintained that the scope of the Insolvency Exception should be constructed (narrowly) by relying on the provisions of the not yet binding Preliminary Draft Convention (and even on the views expressed by certain Member States in the course of negotiations!). It was submitted that only proceedings listed in Annex I thereof were to be considered as falling within the Insolvency Exception (1096).

According to another proposal, submitted by the Advocate General, it was doubtful whether the narrow interpretation proposed could be applicable to the Insolvency Exception. It was summitted that subject matter of insolvency was intended to be covered by a specific convention, whose set of rules would have been comparable to that of the Brussels Convention. Secondly, the interpretation of the Insolvency Exception was conceived in such a way to avoid gaps or overlaps with the Insolvency Convention: a broad interpretation of the general scope of the Brussels Convention would have encroached the scope of the soon-to-be convention on bankruptcy (1097). Against the

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1095 See *Gourdain*, in the preamble to the decision, summarizing the Commission's submission. The understanding of the Commission in this sense was based on some pieces of the Jenard Report and apparently on the *Eurocontrol* case. In that case, the ECJ stated that « By providing that the Convention shall apply 'whatever the nature of the court or tribunal' Article 1 shows that […] The concept in question must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems. If the interpretation of the concept is approached in this way […], certain types of judicial decision must be regarded as excluded from the area of application of the Convention, either by reason of the legal relationships between the parties to the action or of the subject-matter of the action». This interpretation was submitted also by some scholars. Among others, see J. LEMONTEY, in *Revue critique de droit international privé*, 1979, p. 663 (who was particularly influential on this subject at that time, since he was the drafter of the Rapport accompanying the Preliminary Draft Convention).

1096 Specifically, the fact that action en comblement du passif was not listed in the annex protocol (nor expressly in Art. 17) of the 1970 Avant Projet was used as an argument to submit that such an action had not been intended to be encompassed in the scope of what was then the soon-to-be Convention on bankruptcy, judicial arrangements and analogous proceedings. Under this view, should the CJE have followed this approach, it would have concluded that the action en comblement du passif was excluded from the scope of the Insolvency Exception, and, therefore, it would have been covered by the scope of the Brussels Convention. On this alternative approach, see also P. JENARD AND J. LEMONTEY, in *Cl- dr. int.*, 631, n. 29. Schlosser Report at [23]; J.L. BISMUTH, in *Revue des sociétés*, 1980, p. 535. J. LEMONTEY, in *Revue critique de droit international privé*, 1979 p. 663

1097 As suggested by the Advocate General Reischl in its opinion, « *The Commission* […] *stressed the need to give a broad interpretation to the provisions defining its scope* [of the Brussels Convention] […]. *In this connection it is to be noted,* […] *that it is at least doubtful whether it also applies to a field such as bankruptcy and winding-up which is also covered by a convention, or to be more precise by a convention in respect of which* […] *it can be assumed that preparation will be completed in the foreseeable future. In this field* […] *account has to be taken of the fact that there will in the not too distant future be a legally*

broad interpretation of the general scope of the Brussels Convention it was also objected that it should be consistent with nature of the matter, that is to say according to the subject-matter of the field to be demarcated. Therefore, it appeared to be inadequate with respect to a field such as insolvency.

Moreover, it was purported that to give weight to the Preliminary Draft Convention was undesirable, it being considered that the latter was not yet binding [1098].

In the *Gourdain* judgement, the Court have bolstered the latter interpretation, and interpreted extensively the Insolvency Exception [1099].

Excluding (at least formally) any reliance to the Preliminary Draft Convention [1100], undoubtedly because it was still under negotiations, in interpreting the Insolvency Exception, the ECJ supported an autonomous interpretation of the terms of Article 1 of the Brussels Convention, accordingly to its previous case-law [1101].

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effective set of uniform Community rules similar to the Convention on jurisdiction and enforcement. On the other hand, it must not be forgotten that a broad interpretation of the Convention on jurisdiction and enforcement carries within it the danger of encroaching on the field within which Convention on bankruptcy is to be concluded. […] *in any case it must be said, in connection with the claim that the Convention on jurisdiction and enforcement is to be given a broad interpretation, that to circumscribe its scope to this extent cannot be justified if, according to the nature of the matter, that is to say according to the subject matter of the field to be demarcated, it appears to be unwarranted* ».

1098 The Advocate General observed that « Apart from the objections in principle to invoking the Preliminary Draft of a Convention on bankruptcy and winding-up […] As far as I am concerned the conclusion that only those proceedings expressly mentioned in the Protocol annexed to the Convention on bankruptcy and winding-up can be regarded as forming part of bankruptcy and winding-up is not convincing. It is clear that only the so-called basic proceedings are for the most part mentioned there. Consequently, the question whether any particular proceedings fall within the Convention on bankruptcy and winding-up must also be deducible from other provisions, otherwise such proceedings which arise directly out of bankruptcy and winding-up and to which according to the beforementioned Jenard Report the Convention on jurisdiction and enforcement is simply not intended to apply would be governed by that Convention ». See Advocate General Opinion, in ECR 1979, pp. 750-751.

1099 It is noteworthy that the approach followed in the *Gourdain* case resembles the one adopted in the ECJ, 27 March 1979, Case C-143/78, *de Cavel v. de Cavel*, ECLI:EU:C:1979:83, p. 1055, which interpreted broadly the matrimonial matters, excluded by virtue of Art. 1(2)(1) from the scope of application of the Brussels Convention.

1100 Giving weight to the Preliminary Draft Convention would have represented an unfortunate precedent, as noted by T. HARTLEY, 'Scope of the Convention: Bankruptcy, Winding-up and Analogous Proceedings', in *European Law Review*, in 1979 p. 848, who submits that the chief importance of the *Gourdain* judgement lies in the fact that the Court adopted what may be termed a 'reasonable' interpretation of Art. 1 of the Brussels Convention, resisting the temptation to follow the line of argument put forward by the Commission and try to guess what the final terms of the Bankruptcy Convention would be.

1101 At that time, the use of autonomous concepts had been outlined, *inter alia*, in ECJ, 14 October 1976, Case C-29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol*, in *ECJ Reports*, 1976, p. 1541. See also, ECJ, 6 October 1976, Case C-14/76, *De Bloos/Bouyer*, in ECJ Reports 1976, p. 01497; ECJ, 30 November 1976, Case C-21/76, *Handelskwerkerij G. J. Bier BV v. Mines de Potasse d'Alsace SA*, in *ECJ Reports*, 1976, p. 01735; ECJ, 22 November 1977, Case C-43/77, *Industrial Diamonds Supplies v. Luigi Riva*, in *ECJ Reports*, 1977, p. 02175; ECJ, 21 June 1978, Case C-150/77, *Bertrand v. Paul Ott KG*, in *ECJ Reports*, 1978, p. 01431; ECJ, 22 November 1978, Case C-33/78, *Somafer SA v. Saar- Ferngas AG*, in *ECJ Reports*, 1978, p. 02183. It bears noticing that, at the time when the Gourdain judgement was handed down, the ECJ was taking its first steps towards what nowadays may be regarded as the specific interpretation method of Community law. At this early stage, in interpreting the Brussels Convention, the Court has adopted (although never expressly) the international principles of interpretation of international instruments set forth by arts. 31-33 of the Vienna Convention on the Law of Treaties of 23 May 1969. Despite the latter ones not being directly applicable to Regulations, since they are no international treaties but Community law, by virtue of the aforementioned application to the Brussels

The Court found that that the autonomous notion of insolvency proceedings, as enshrined in the Insolvency Exception, consisted of two components

(i) the hard-core of insolvency proceedings [1102], which, by recalling almost word for word the Jenard Report [1103], the ECJ identified in proceedings « *According to the various laws of the Contracting Parties relating to debtors who have declared themselves unable to meet their liabilities* […] *which involve the intervention of the courts culminating in the compulsory liquidation of the assets in the interest of the general body of creditors of the person* […] *or at least in supervision by the courts* » [1104].

(ii) claims (ambiguously to the concept of 'analogous proceedings') where insolvency is part of the picture [1105] and, being among those revolving around the core procedure, appear to be inextricably linked to the latter (*i.e.* provided that, as stated by the Jenard Report [1106], they derive directly form insolvency proceedings and - the Court added - they are closely linked to insolvency proceedings [1107].

Therefore, the Insolvency Exception was then broadly interpreted, since it was deemed as encompassing not only collective proceedings, but also individual actions intertwined with bankruptcy or winding-up to such an extent that were to be regarded as an essential part of bankruptcy or winding-up proceedings [1108].

The court did not simply interpret broadly the Insolvency Exception. As mentioned above, also the degree of the '*vis*' which individual proceedings are attracted to insolvency proceedings could be

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Convention, such principles are still indirectly relevant in the interpretation of the Brussels I and Brussels Ia Regulation. See U. MAGNUS, in U. MAGNUS P. MANKOWSKI, *Brussels I Regulation, European commentaries on private International law*, Munich, 2012, p. 30.

1102 « *Le noyau dur du concept est formé par les procedures originales ou faillites stricto sensu* ». See J. L. BISMUTH, *op. cit.*, p. 555. See also in the same terms the opinion of Advocate General Reischl, delivered on delivered on 7 February 1979, ECLI:EU:C:1979:33, p. 755-756).

1103 With reference to the Insolvency Exception, the Jenard Report stated that for the purposes of the Brussels Convention 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons judicial arrangements compositions and analogous proceedings' should be regarded as those « *proceedings, which, depending on the system of law involved, are based on the suspension of payments and the insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purposes either of compulsory and collective liquidation of assets or simplification of supervision* ». See Jenard Report, p. 12.

1104 *Gourdain*, at [4].

1105 A. DICKINSON, E. LEIN, *The Brussels I Regulation Recast*, Oxford, 2015, p. 69

1106 The Jenard Report addressed the issue of 'proceedings relating to a bankruptcy', maintaining that these « *are not necessarily excluded from the Convention. Only proceedings arising directly from the bankruptcy and hence falling within the scope of the* [drafted] *bankruptcy convention of the EEC are excluded from the scope of the convention* ». The reason for such a thin explanation concerning a matter that appeared to demand a more in-depth answer by the Report, is to be found in the further specification of footnote 2 of the Report, pursuant to which « *A complete list of the proceedings involved will be given in the Bankruptcy Convention of the European Economic Community* ». It is reasonable to assume that the Jenard Report did not linger on the issue of insolvency-related actions because, at the time, the Convention on bankruptcy was expected to be concluded imminently. Cfr. JENARD, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, published in the Official Journal of the European Communities, 5 March 1979, C. 59/11, p. 12. See also J. LEMONTEY, in *Revue critique de droit international privé*, 1979 p. 663.

1107 See J. L. BISMUTH, *op. cit.*, p. 555

1108 As such, these individual actions are inextricably linked to insolvency proceedings to such an extent that they are to be regarded as bankruptcy or winding-up proceedings. See the AG Opinion, in ECR, p. 752.

interpreted more or less broadly.

In this respect, it is fair to acknowledge that in *Gourdain* the Court indirectly bolstered a strong conception of the *vis attractiva concursus*. Although the Court never declared it expressly, the Insolvency Exception was interpreted to such a broad extent that the expression 'analogous proceedings' was regarded as encompassing, as the Advocate General put it, not only to

> « *rights such as those arising out of the invalidation of certain assignments and payments prior to bankruptcy* […] *which are peculiar to bankruptcy* […] *and which are therefore granted under the law of bankruptcy and winding-up and are not merely general rights modified for the purpose of bankruptcy* »

but also, to

> « *rights which, although they arise under the general law, are modified by the law of bankruptcy and winding-up to such a substantial extent as to suggest the conclusion that viewed as a whole their nature is entirely determined by the law of bankruptcy and winding-up*» [1109].

As illustrated [1110], defining the scope of the *vis attractiva concursus* is a thorny issue not only between different Member States, but within national systems as well. It addresses the fuzzy issue of the boundaries between insolvency and civil and commercial law, in that it often entails to ascertain whether and to what extent the nature of an ordinary civil and commercial action is 'transformed' from the opening of insolvency proceedings.

The approach of the ECJ to the degree of the *vis attractiva concursus* (albeit only virtual in those decisions handed down prior to the introduction of the Insolvency Regulation) has varied over time [1111].

In the *Powell Duffryn* judgement [1112] handed down when the sole Brussels Convention was into force, although specifically referred with a preliminary ruling on Article 1(1) Brussels Convention (actually, the question at stake concerned Article 17 Brussels Convention), the Court seems to have bolstered a more restrictive approach, and considered that an action brought by the insolvency trustee of an insolvent German company against a shareholder domiciled in England for the payment of the sums due by the latter in respect of an increases in capital, was covered by the Brussels Convention. Neither the ECJ nor the parties did even consider the fact that the trustee was a party of proceedings.

On the contrary, in the *Alpenblume* case, the ECJ bolstered an interpretation even broader than in the *Gourdain* case considering that a judgement concerning brought by a company *in bonis* for the recovery

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1109 See the opinion of the Advocate General, *cit.*, p. 753.

1110 See *supra* Chapter I, §§ I.2, I.3, I.4, and Chapter II, Section 4, § IV.1.

1111 The interpretation of the ECJ in the *Gourdain* case lead the commentators of that time to infer that also an *actio pauliana* commenced by the trustee in bankruptcy against a third party because of fraudulent preference would have been encompassed in the notion of Annex Actions (and therefore, at that time, would have been governed by national rules). The same would have applied to actions against the trustee. On the contrary, actions for collection of debts and actions in which the trustee acts as seller of assets under his care would have fallen within the Brussels Convention. See H. VERHEUL, 'The EEC Convention on Jurisdiction and Judgments of 27 September in Dutch Legal Practice', in *Netherlands International Law Review*, 1981 p. 71.

1112 ECJ, 10 March 1992, Case C-214/89, *Powell Duffryn plc v. Wolfgang Petereit*, ECLI:EU:C:1992:115.

of ownership of shares transferred by the trustee in the course (and yet closed) insolvency proceedings was excluded from the scope of the Brussels Convention [1113].

It is undeniable that the introduction of the Insolvency Regulation partially upset the applecart set up by the ECJ since the *Gourdain* judgement. The lack of any rule on the *vis attractiva* (whose presence in the Preliminary Draft Convention ultimately founded the ECJ's decision, albeit unofficially) raised the question that the system set out by the Insolvency Regulation did not envisaged to adopt such a jurisdictional rule [1114].

Such a change was witnessed in the *Seagon* judgement, where the defendant (Deko Marty), submitted that the introduction of new rules governing jurisdiction in the field of insolvency would entail the necessity to reflect on (and even reverse) the broad interpretation of the Insolvency Exception as hitherto supported by the ECJ [1115].

It was submitted that the interpretation of the Insolvency Exception handed down in the *Gourdain* case « *was the final link of a chain the only pendant of which was a single piece of legislation in the field concerned* ».

As it is clear at this point, the ECJ took (implicitly [1116]) a different direction. On the profile concerning the extent of the *vis attractiva*, however, the *Seagon* decision may be regarded as 'neutral', for it concerned an action to set a transaction aside, which is generally considered as stemming from the opening of insolvency proceedings [1117].

In the *German Graphics* judgement, the Court took a significant stance on the scope of the *vis attractiva*, specifying that

> « *the definition of the concept of 'civil and commercial matters' referred to in Article 1(1) of Regulation No 44/2001 and, consequently, to provide that the article should be broad in its scope* […] *Consequently, the*

1113 In that case, however, the Insolvency Regulation was not yet into force.

1114 In the Virgós-Schmit Report, it is clearly stated at [77] that «*Although the projection of this principle in the international domain is controversial, the 1982 Community Draft Convention contained a provision in Article 15 which, according to the Lemontey Report, was inspired by the "vis attractiva" theory. This Article conferred on the courts of the State of the opening of insolvency proceedings jurisdiction over a wide series of actions resulting from the insolvency. Neither this precept nor this philosophy has been adopted in this Convention. There is no provision in Article 3 of the Convention addressing this problem* ».

1115 See the opinion of the Advocate General Ruiz-Jarabo Colomer, at [52].

1116 The ECJ did not explicitly address the issue. However, it is worth of notice that the Advocate General concerned himself with the applicability of the Gourdain Formula, considering the objection raised by Deko Marty that it was conceived before the entry into force of the Insolvency Regulation. In this respect, Mr. Seagon purported that in the context of the Gourdain case, the Insolvency Exception was interpreted extensively, since, at that time, there was no risk of overlap with any other regulation, the Brussels Convention being the sole existing instrument. Therefore, it was the trustee's submission that, considering the introduction of the Insolvency Regulation in the European scene, also the interpretation of the Insolvency Exception should have been modified. Such an argument was dismissed by the Advocate General Colomer, on the basis that it could have been considered only if the Insolvency Regulation truly lacked any provision as to the jurisdiction over Annex Action. This not being the case, since on this point there was « *not a total but a partial silence* », the Advocate General stated that the Gourdain Formula was « *in good health and provides useful guidance for resolving the present proceedings. Rather than weakening the usefulness of that judgment, the adoption of Regulation No 1346/2000 increases it* ». Opinion of Advocate General Ruiz-Jarabo Colomer, at [55].

1117 As noted by Advocate General Ruiz-Jarabo Colomer, at [26] « *Despite the differences between the legal systems of the Member States, the solutions which those systems offer in respect of disposals of assets in fraud of creditors have a common genetic code* ».

scope of application of Regulation No 1346/2000 should not be broadly interpreted » [1118].

Arguments in support of that were based on the joint provisions of the Brussels I Regulation and the Insolvency Regulation.

In particular, from Recitals 2, 7 and 15 of the Brussels I Regulation [1119], the ECJ inferred that the intention of the legislature underlying those provisions is to ensure that the notion of 'civil and commercial matters' (and therefore the general scope of the Brussels Regulation), in order to foster the sound functioning of the internal market and the harmony of the system, avoiding the risk of irreconcilable judgements [1120].

Instead, the Court maintained that the scope of such Regulation should not be interpreted broadly on the basis of the wording of Recital 6 EIR, pursuant to which - arguing with the principle of proportionality - the Insolvency 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 [1121].

That clarification is of fundamental importance because it excludes that the Court has chosen to adopt a restrictive approach towards the *vis attractiva concursus*. At a practical level that entails that in the case of dubious actions, where it is not clear whether the degree of transformation of the action as an effect of the opening of insolvency proceedings is sufficient to attract it to the jurisdiction of the courts of the Member State of the insolvency proceedings, the application of the Brussels Regulation should be preferred.

The principle uttered by the ECJ in the *German Graphics* case, pursuant to which the insolvency exception shall not be given an interpretation broader than is required by its objective, was subsequently uphold in the following case law of the ECJ on Annex Actions [1122].

[1118] *German Graphics*, at [26].

[1119] Recitals 2, 7 and 15 of the Brussels I Regulation were mentioned uncritically also in the *Alpenblume* case, in the part of the decision regarding the legal framework. However, on that occasion the CJE did not supported a broad interpretation of the Brussels Regime (quite the opposite) and considered arguably very extensively the scope of application of the Insolvency Regulation.

[1120] See *German Graphics,* at [22]-[26].

[1121] Recital 6 was recalled also in the Seagon case to justify the *vis attractiva concursus* (see *supra*, Section 1 § I.2). According to some authors, however, « *arguing with the principle of proportionality, which is anchored in recital 6 EIR, does not seem to be convincing, In the context under examination, this principle purports, if need be, to delineate the competences between the European Union and the Member States, whereas it is irrelevant with respect to drawing a borderline between the Regulation' scopes of application at a horizontal level* ». Cfr. B. LAUKEMANN, 'Jurisdiction - Annex proceedings', in B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, p. 128).

[1122] It is noteworthy that some authors have maintained that the findings of the ECJ in *German Graphics* may be regarded as a general rule for all the Brussels I Regulation's exceptions. For instance, in *Sabbagh v. Khoury* [2014] EWHC 3233 (Comm), case No, 2013 - 924, in which the 'will and succession' exception was at play, the claimant maintained that the German Graphics case shows that where other Articles of the Brussels Regulation exclude or provide exceptions to this general principle, they must be construed strictly and not given an interpretation broader than is required by their objective. Such an argument was partially shared by Carr J. *Contra* See G. VAN CALSTER, 'Sabbagh v Khoury. The High Court considers the 'wills and succession' exception, (reflexive application of) the exclusive jurisdictional rule for company matters, and anchor defendants under the Jurisdiction Regulation', available at *https://gavclaw.com* (last accessed in April 2019)

In the *Nickel&Goeldnr* case, for instance, it was submitted again that

> « *recital 7 in the preamble to Regulation No 44/2001 states, the intention on the part of the EU legislature was to provide for a broad definition of the concept of 'civil and commercial matters' referred to in Article 1(1) of that regulation and, consequently, to provide that the article should be broad in its scope. By contrast, the scope of application of Regulation No 1346/2000, in accordance with recital 6 in the preamble thereto, should not be broadly interpreted* ».

Also in other occasions, albeit no explicitly reference was made to such a principle, the decisions of the Court reveal that, when faced with actions in the twilight zone between the two Regulations, the general tendency followed by the Court is to apply the general rules in civil and commercial matters extensively, rather than the rules on insolvency. This is the case, for instance, of the *F-Tex* judgement. In two recent cases, however, the Court seems to deviate from the *German Graphics* guideline and return to a more extensive interpretation [1123]. In the *H. vs. H.K.* and *Kornhaas* cases, the Court interpreted rather extensively the notion of 'action directly deriving from insolvency and closely connected with insolvency proceedings', to the extent that actions whose connection with insolvency proceedings proves to be merely occasional (*i.e.* the action did not undergo any substantial transformation attributable to the opening of insolvency proceedings) were encompassed in the scope of application of the Insolvency Regulation [(1124)].

These decisions run contrary to the restrictive interpretation advocated by the Court in the previous judgments, since the Court postulates that it does not matter that the action may not be connected with insolvency proceedings, the essential thing being that it is exercised in such proceedings.

However, the most recent decisions (such as the *Valach*, *Tünkers* and *NK* judgements [(1125)]) show a clear return to the approach previously adopted in *German Graphics* and seem to confirm the idea that, in principle, the general rule to be applied is the Brussels Regime, while the Insolvency Regulation should be regarded as the exception, thus interpreted restrictively.

To conclude on this point, it is noteworthy that, notwithstanding the fact that tendentially a general orientation towards the broad application of the Brussels Regulation may be acknowledged in the majority of the cases [(1126)], the case-law of the ECJ on the degree of the European *vis attractiva concursus* has shown an attitude that is anything but linear, which contributes to creating uncertainty among

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[1123] *Contra* F. Jault-Seseke et D. Robine, 'Action en remboursement à l'encontre du dirigeant d'une société étrangère en situation d'insolvabilité : la lex concursusest applicable', in Bullettin Joly des Sociétés, 2016, 3, V. LEGRAND, 'La juridiction saisie d'une procédure d'insolvabilité principale, est compétente pour statuer sur une action dirigée contre le gérant de la société débitrice, domicilié en Suisse', in *Lettre d'actualité des Procédures collectives civiles et commerciales*, Mars 2015, 5, alerte 79.

[1124] D. ROBINE, 'Les actions connexes', in D. ROBINE and F. JAULTS-SESEKE, *Le nuoveau Règlement insolvebilité: quelles évolutions?*, Paris, 2015, pp. 61-68.

[1125] Note that in *Valach*, at [25], the ECJ refers to Recital 10 of the Brussels Ia Regulation, which was applicable *ratione temporis*.

[1126] P. DE CESARI e G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il regolamento (UE) 2015/848 relativo alle procedure di insolvenza*, Torino, 2017, p. 80-81.

practitioners.

II.2. The 'dynamic' profile of the rules on Annex Actions: the *vis attractiva concursus*

The issue of the boundaries between the two regulations serves as a prelude to frame the central issue addressed by the Court, namely that of jurisdiction over related actions.

As was already explained, the EIR did not lay down any criteria for the attribution of jurisdiction for Annex Actions, which led scholars to struggle with finding an alternative interpretative avenue [1127].

Whether it was acknowledged as an unintentional omission by the legislature, or as an express choice of legislative policy, the inability to identify a uniform interpretation between the Member States [1128], created considerable practical difficulties, ultimately resulting in irreconcilable approaches adopted by national judges, also considering that it is anything but unusual - indeed, it could be said that the opposite is the exception - that in the context of insolvency proceedings an individual action is commenced, for instance, by the trustee.

That serious lacuna has been solved by the case-law of the Court. Indeed, starting with the *Seagon* judgement, the Court has first established and, then, with subsequent decisions, progressively outlined the principle of the European *vis attractiva concursus*.

II.2.1. The introduction of the vis attractiva concursus as international jurisdiction criterion

It is well-known that the issue of the jurisdiction to hear and determine Annex Actions was brought to the attention of the Court in 2009, in the context of the *Seagon* case, where the Court introduced within the legal framework set forth by the EIR the *vis attractiva concursus*.

It is therefore now appropriate to analyse its characteristics and the reasons that led to its introduction, refraining, here, from drawing any kind of consideration on the usefulness of that criterion.

Pursuant to Recital 15 EIR, the *vis attractiva* designates a ground for international jurisdiction, therefore a criterion that indicates the Member States the courts of which may decide over Annex Actions, substituting any national rule of private international law (if any). Instead, the territorial competence within that Member State must be established by the national law of that Member State.

First referred by the Court to an action to set a transaction aside, the *vis attractiva concursus* was unanimously understood from its very introduction as a general head of jurisdiction concerning all Annex Actions, provided that they derive directly form insolvency proceedings and are closely linked with it [1129].

1127 See *supra* Chapter III, Section 4, § IV.2.

1128 See A. LEANDRO, 'Effet utile of the Regulation No. 1346 and Vis Attractiva Concursus: Some Remarks on the Deko Marty Judgment', in *Yearbook of private international law*, 2009, pp. 469-480.

1129 This emerges clearly from the wording of the Court, an in particular at paragraphs 19-23, 26 and 27 of the decision. F. CORSINI, 'La Corte di Giustizia 'inventa' una vis attractiva (dimezzata)', in *Int'lis*, 2009. J. L. VALLENS 'Nullités de la période suspecte : l'action relève de la compétence de l'Etat où la procédure collective

Needless to be recalled here, any jurisdictional ground underlies a connecting factor, meaning a circumstance, an element which the (here, European) legislature considers as the most suitable to anchor certain disputes to the territory of a Member State, in that it expresses an attachment or a connexity of a subject matter with a legal system and accomplish the interests at stake [1130].

Unlike the jurisdictional rules encompassed in other European instruments (which - although displaying a plethora of criteria - have a well-defined scope of application, unveiling their underlying objectives and the abovementioned connection) the principle of the *vis attractiva concursus* conceals a tangle of multiple interests and legal situations, mainly due to the specifically hybrid character of bankruptcy law as both procedural and substantive, on the one hand and the fact that it results to be intertwined with many types of local substantive law such as real estate law, the law of secured credit, tax law, and labour law, all of which are relevant to insolvency cases and are strongly tied up with legal tradition of Each Member State [1131].

In order to respect the international character of the European *vis attractiva concursus*, the Court justified the anchoring of the jurisdiction for Annex Actions before the courts of the Member State opening insolvency proceedings on the basis of the *effet utile* [1132] of Article 3(1) EIR and, *lato sensu*, of the Insolvency Regulation as a whole [1133], which is identified on the basis of a purposive interpretation of the objectives enshrined in its Recitals.

First and foremost, the attraction of Annex Actions before the courts of the Member State opening insolvency proceedings is regarded as ensuring the efficiency and the effectiveness of insolvency proceedings, which is invoked as the key rationale behind the *vis attractiva concursus* not only in the ground-breaking *Seagon* case [1134], but also in other decisions where the Court has justified the

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a été ouverte', in *Recueil Dalloz*, 2009'; P. EHRET, La CJCE instaure le principe « vis attractiva concursus » concernant les actions révocatoires au niveau Communautaire, in *Revue des procédures collectives n° 2*, Mars 2009, étude 7; Z. FABOK, *the jurisdictional paradox*, NIBLeJ, 2016, p. 3

1130 F. MOSCONI, C. CAMPIGLIO, *Lezioni di diritto private e proessuale*, Torino, 2017.

1131 M. BALTZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 486.

1132 According to the *effet utile* doctrine, provisions must be interpreted with a functional approach, in order to ensure the achievement of its objectives and those of the act where it is used. In general, that principle pursues that the aim of the integration of national systems in a single area of freedom, security and justice is as effectively as possible. See U. MAGNUS, in U. MAGNUS, P. MANKOWSKI, *Brussels Ia Regulation*, Munich, 2015. at [107]. The Court expressly refers to the effet utile in *Seagon*, at [21] and in *Nortel*, at [40]. On the part of some scholars the application of the *effet utile* was deemed inappropriate to be relied upon in that case, since it comes to play when there are multiple meanings of one provision but only one interpretation would be aligned with the scope and the objective of the instrument. See F. CORSINI, *op. cit.*, 34. Other scholars, although theoretically supporting the application of the *effet utile*, do not agree with the conclusions reached by the Court. Specifically, it was submitted that if the attainment of the *effet utile* would certainly lead to pursue the objective of avoiding that the determination of the jurisdiction of Annex Action is left to the heterogeneous national laws of the Member States. Yet, it was observed that it does not lead to affirm the existence of the *vis attractiva concursus* under the Insolvency Regulation. LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sulle procedure d'insolvenza*, Bari, 2008, p. 125.

1133 M. FARINA, 'La via attractiva concursus nel Regolamento comunitario sulle procedure di insolvenza', in *Fallimento*, 2009.

1134 *Seagon*, at [21].

application of that principle [1135].

Whether the efficiency and effectiveness of proceedings should be related only to procedural aspects (*i.e.* the accelerated administration of proceedings) or also to substantial profiles (*i.e.* the maximization of the insolvency estate to the benefit of the creditors [1136]) it is not specified by the Court, which merely states that

> « *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* » [1137].

The ECJ seems to allude that that commencing proceedings in another Member State would be less efficient, more time consuming and it would also aggravate the costs of proceedings as well [1138]. Although the Advocate General [1139] and scholars generally refer to the *vis attractiva concursus* in the light of the costs and time-effectiveness of proceedings [1140], it is must be highlighter that the general efficiency and effectiveness of the procedure does not only envisage cost-saving and procedural rapidity, but it would be achieved above all by ensuring that the judges hearing the action could apply the *lex concursus* his knowledge and familiarity with the debtor's matters [1141]. Although the achievement of that effect is indeed pursued by the introduction of the *vis attractiva concursus* (at least as to avoidance actions [1142]), the latter profile, curiously, is never expressly mentioned by the Court in *Seagon* [1143].

Under this perspective, the *vis attractiva concursus* seems to assume the role of a *forum connexitatis* to the exclusive benefit of the trustee, in respect of which it remains unclear why the defendant's right to be sued in his own country should be rebutted [1144].

1135 See, for instance, *Schmid*, at [25], *H. v. H.K.*, at [17] and *Weimer Trachte*, at [36]. All other decisions implicitly mention Recital 8 EIR in the section of the decision reserved to recall the legal framework and the provisions relevant for the judgement.

1136 The bearing of the outcome of the Annex Actions on the interests of creditors seems to be the ground for the purposive interpretation of article 3(2) EIR in *Nortel*. See *infra*, Chapter III, Section 1, § I.8.

1137 *Seagon*, at [22].

1138 M. FARINA, *cit.*, p. 669.

1139 See the opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 16 October 2008, (ECLI:EU:C:2008:575), at [62] referring explicitly to the costs of the action.

1140 See A. TASHIRO, 'Vis attractiva concursus for Germany', in *Eurofenix*, 2009, p. 28.M. FARINA, *cit.*, p. 69 (ft 18) who refers to the necessary appointment of a local attorney. Apart from that (which is likely also in the case of an action brought before the courts of the Same Member State), I may add that the major costs relating to the exercise of an Annex Action in another Member State, where the local courts are likely to apply the *lex concursus* are represented by the appointment of experts who release opinions to assist the judge in the interpretation of the applicable law and costs deriving from the translation of documents.

1141 E. COSALVI, Brevi considerazioni in materia di giurisdizione e legge applicabile alla revocatoria fallimentare intracomunitaria', in www.judicium.it.

1142 See F. MÉLIN, 'Détermination, sur le plan communautaire, de la jurisdiction compétente en matère d'«actions révocatoires»', in *JCP E*, May 2009, p. 1482.

1143 A timid reference to the synchronization between *forum* and *ius* may be found in *Kornhaas*, at [17].

1144 F. MÉLIN, 'Détermination, sur le plan communautaire, de la jurisdiction compétente en matère d'«actions révocatoires»', in *JCP E*, May 2009, p. 1482. The author highlights that (albeit beneficial for the trustee) the *vis*

Moreover, the choice of anchoring the jurisdiction of Annex Actions on the basis of the efficiency and effectiveness of insolvency proceedings, leaves room to two other criticisms.

The first one focuses on the fact that, being a rule on international jurisdiction, the *vis attractiva concursus* would only partially ensure the concentration of Annex Actions before the *forum concursus*, the actual achievement of that effect being left to national rules on competence (1145). It was argued by some scholars, then, that the *vis attractiva concursus* could not be have justified on the basis of the objective purported by Recitals 2 and 8 EIR, since the achievement of that result would have been better pursued by imposing that Annex Actions ought to be brought directly before the court opening insolvency proceedings (1146). Also, an author (provocatively) observed that a full efficiency would have entailed that any claim (and not only those directly deriving from insolvency and strictly connected to proceedings) should have be attracted to the forum under Article 3 EIR (1147).

Regardless of the impracticability of the latter solutions for political reasons, the concentration of Annex Actions before the Member State of the *forum concursus* takes on relevance, from a general and much pragmatic perspective, if one reads it as directed at avoiding that the trustee must bring the action in another Member State, which would be surely more burdensome than initiate proceedings before the courts of anther court of the same Member State (1148).

The second criticism stresses that the efficient and accelerated administration of insolvency proceedings depends on a number of factual, open-ended circumstances which are contingent on every single case (the proximity of the seised court to the fact of the case and thus to the evidence, the place of enforcement of the judgement, or the efficiency of a certain legal system (1149)). In the light of that assumption, scholars have submitted the *vis attractiva concursus* may tendentially provide for a sound ground of jurisdiction only if it is regarded as an alternative forum, which could be overruled when the circumstances of the case lead to consider that, to ensure the efficiency and effectiveness of insolvency proceedings, another court would be more appropriate. This aspect will be dealt with afterwards.

The *vis attractiva concursus* is further traced back to the fundamental value of the predictability of the

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attractiva concurs proves to be detrimental for the defendant, who is sued in a Member State different from that of his home country. The violation of the defendant's due process right represented the main objection raised mainly by German scholars to the very implementation of the principle of the vis attractiva concursus.

1145 *Seagon*, at [27] (« *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* »).

1146 L. CARBALLO PINERO, La vis attractiva concursus nel diritto concorsuale europeo', in *Il diritto fallimentare e delle società commerciali*, Padova, 2010, 3-4, p. 361.

1147 L. CARBALLO PINERO, *cit.*, p. 367. She states « *Theoretically, the more actions are brought before the insolvency court, the more efficient and effective an insolvency proceeding is* ».

1148 M. FARINA, *op. cit.*, F. MÉLIN, 'Détermination, sur le plan communautaire, de la jurisdiction compétente en matère d'«actions révocatoires»', in *JCP E*, May 2009, p. 1482. The author highlights that (albeit beneficial for the trustee) the *vis attractiva concurs* proves to be detrimental for the defendant, who is sued in a Member State different from that of his home country.

1149 J. L. VALLENS, 'Nullités de la période suspecte : l'action relève de la compétence de l'Etat où la procédure collective a été ouverte', in *Dalloz*, 2009, p. 1311.

jurisdiction and of the applicable law in the field of insolvency proceedings. This principle was not expressly mentioned by the Court in the *Seagon* judgement [1150], but in the *Schmid* case [1151]. On that occasion, the Court held that « *read in the light of recital 8 in the preamble to the Regulation, Article 3(1) is intended to promote foreseeability and, therefore, legal certainty as regards bankruptcy and liquidation jurisdiction* […] [1152].

The *vis attractiva* would pursue also the objective of fostering the proper functioning of the internal market [1153]. The value of this criterion for the purposes of establishing the jurisdiction of the courts of the Member State opening the insolvency proceedings lies in the fact that the ultimate objective of the Insolvency Regulation is to establish a set of uniform rules governing cross border insolvencies. Therefore, it is almost superfluous to underline that the *vis attractiva concursus* would contribute in this respect, by establishing a uniform regime on the jurisdiction on Annex Actions.

Another (and apparently less important) reason underpinning the *vis attractiva concursus* is the objective of avoidance of *forum shopping* [1154]. As already mentioned, the Insolvency Regulation reveals an extremely hostile attitude towards the choice of most favorable venues (and insolvency regimes). The *vis attractiva concursus* would pursue that objective by avoiding that parties (most likely third parties or the creditors) might manipulate the adjudication of the action inextricably intertwined with insolvency proceedings with the view of seeking a more convenient venue. The relation between that objective and the *vis attractiva concursus* lack persuasiveness, in that it would entail that a shift of jurisdiction would automatically entail a choice of the law applicable to the action. Which is tendentially excluded by Article 4(2)(m) EIR as far as avoidance actions are concerned [1155]. As to other actions (for instance, liability actions against director) for which Article 4 EIR does not expressly impose the application of the *lex concursus*, the argument of the *forum shopping* would in any event prove to be unconvincing [1156], since even where those actions are characterised as matters of *lex societatis* under the laws of that Member State, they would be tendentially governed by uniform conflict of law rules, provided by Regulation Rome I and Rome II.

When considered together, the above reasons given by the court for the introduction of the *vis*

1150 Critical in that regard L. CARBALLO PINERO, L., 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', in *InDret*, 3, 2010, p. 11.

1151 According to Montella the reason would lie in the fact that in the *Schmid* case, the Court has anchored the principle of predictability to recital 8 EIR which, as seen, concerns only the profile of efficiency and effectiveness of cross-border insolvency proceedings. G. MONTELLA, 'La prevedibilità della competenza internazionali sulle azioni che derivano dal fallimento secondo il regolamento n. 1346: un valore difficile da attuare e non conveniente da imporre', in *Fallimento*, 2014, p. 641.

1152 *Schmid,* at [27].

1153 Recital 2 EIR.

1154 Recital 4 EIR. *Seagon*, at [23], *Schmid*, at [25].

1155 It is said 'tendentially' because the mechanism of article 13 EIR could lead to the application of a law different from the *lex fori concursus*. However, even in that case, the defendant would not have a significant maneuvre, considering that that exception would call on the application of other uniform choice of law rules (Rome I and Rome II).

1156 Sturner/Kern, LMK, 2009, at [278572]

attractiva in the regime of cross-border insolvencies, while tackling certain facets of it, do not appear to be entirely persuasive and, as seen, are open to multiple criticism.

Regrettably, the Court seems to have missed the goal in many occasions to highlight the true function of the *vis attractiva concursus*.

This emerges clearly when considering that in the only judgement where the defendant's due process right was ever brought to the attention of the Court, it hastily liquidated the issue by stating that « *harmonisation, in the European Union, of the rules governing jurisdiction over actions to set a transaction aside by virtue of insolvency contributes to the attainment of those objectives* [predictability of the jurisdiction and of the applicable law] *irrespective of whether the defendant's place of residence* […] *who may take it into account at the time when he participates, with the debtor, in an act liable to be set aside in insolvency proceedings* » [1157].

To fully understand its value, then, one must keep in mind that the very rationale of (truly) collective insolvency proceedings is the statutory response to situation of material insolvency of the debtor (*recte* to common pool problems). Within the European framework, those proceedings, once opened, affect the individual rights of enforcement of all creditors (either by mean of procedural rules or substantive changes in the creditor entitlements), tendentially regardless of the law governing the claims and or whether these creditors have agreed to the jurisdiction of the courts in the country in which the proceeding is opened [1158].

The *vis attractiva concursus* must then be understood under that perspective. It is a procedural rule aimed at creating a standard and centralised procedural framework which ensures the orderly enforcement of the creditor's insolvency specific claims according to the insolvency liability regime (generally expressed through the *pari passu* principle). Since specific types of actions (the characterisation of which must be made in accordance to the autonomous test of the Gourdain Forumla), may affect the collective interests of creditors in that sense, it is than for that very reason that the *vis attractiva* operates with regard to Annex Actions, overriding the jurisdictional rule of the defendant's domicile. Other criteria such as the rapidity and cost-effectiveness of proceedings, the proximity of the court or the *forum shopping*, considered individually, may not serve as a justification for the establishment of such an exclusive forus, to the detriment of the defendant's rights.

Once ascertained the rationale underpinning the (relative) concentration of Annex Actions before the courts of the Member State opening insolvency proceedings, it is now possible to examine the arguments used by the Court in the *Seagon* judgement to justify the introduction of the *vis attractiva* into the scheme of the Insolvency Regulation (which, as discussed, was partially silent on that issue). At the outset it must be said that the reasoning of the Court clearly reveals that, among the three doctrinal interpretations described in Chapter III above, the ECJ completely espoused the

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1157 *Schmid*, at [33] - [35].

1158 It bears noticing that the Insolvency Regulation set out a different regime for secured creditors and other particular actions. In principle, however, it must be said that the position of secured creditors, having a right for separate satisfaction, may not be equated to the heterogeneous group of preferred and unsecured creditors.

interpretation of those scholars according to whom the provisions of the Insolvency Regulation do provide for grounds to maintain that the principle of the *vis attractiva concursus* was embedded within the European regime on insolvency proceedings.

The method adopted by the Court combined elements of a purposive and literal interpretation of the text.

The Court interpreted Article 3(1) EIR in the light of Recital 6 EIR, bypassing the pitfall of Article 3 EIR (*i.e.* it does not expressly mention the jurisdiction over Annex Actions) [1159].

Without even considering the possibility to overrule the decision handed down in Gourdain [1160], the core argument of the ECJ moved exactly from the interpretation of the Insolvency Exception purported by the Court in that decision to come to the conclusion that the principle uttered therein was enshrined in Recital 6 of the Insolvency Regulation. Which made it relatively easy, then, for the Court to further maintain that Article 3(1) EIR allocates with the courts of the Member State where insolvency proceedings are opened the jurisdiction of Annex Actions.

In other words, also relying on the Opinion of the Advocate General, the Court moved from the assumption that under the Insolvency Regulation there is no *lacuna legis* concerning the *vis attractiva concursus*. Which (arguably) led the Advocate General to further consider that the interpretation of Article 3(1) EIR did not entail an interpretation by analogy, but (merely) a direct interpretation of the applicable provision [1161].

Probably aware of the systematic problems that it had generated, in both the *Seagon* and *Wiemer Trachte* judgements the Court has also attempted to maintain that the *vis attractiva concursus* does not create frictions with the scheme of the Insolvency Regulation.

In particular, interpreting Article 25(1) second subparagraph EIR the Court 'rushed' [1162] to make it clear that, by stating that judgement concerning Annex Actions are automatically recognized and enforced 'even if handed down by another judge', said provision does not entail that Annex Actions may be lodged in other Member States than that in the territory of which insolvency proceedings are opened [1163].

On the contrary, the Court maintained that wording of Article 25 EIR merely confirms that the *vis attractiva concursus* is a rule on international jurisdiction, thus leaving untouched the national rules on

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1159 See the Opinion of the Advocate general at [46].

1160 The fact that the Court refrained from overruling the Gourdain Formula is deemed correct, « *since the silence of the Insolvency Regulation could not overcome the rationale behind the Insolvency Exception set forth by Article 1 of regulation no. 44* ». See M. A. LUPOI, 'A (not so simple matter of) jurisdiction: the relationship between regulations (EU) No. 1346/2000 and No. 44/2001', R. STURNER, M. KAWANO (eds.), *Cross border insolvency, intellectual property litigation, arbitration and ordre public*, Friburg, 2011, p. 69.

1161 See the opinion of the Advocate General, at [42].

1162 P. DE CESARI, P., 'La revocatoria fallimentare tra diritto interno e diritto comunitario', in *Riv. dir. internaz. priv. e proc.,* 2008.

1163 *Seagon*, at [27]. *Wiemer Trachte*, at [42].

the allocation of competence of each Member State [1164].

Besides, while in *Seagon* the Court surprisingly does not even attempt to address the systematic problems of coordination deriving from the wording of Article 18 EIR (yet, mentioned by the Advocate General), in *Wiemer&Trachte* the Court curtails the effects of that provision to the specific context of secondary proceedings. It is the Court's view that Insolvency Regulation bestows the trustee appointed in secondary proceedings with the exceptional power to exercise avoidance actions in another Member State for he must be able to recover the assets pertaining to secondary proceedings that, after those proceedings were opened, were transferred to another Member State [1165].

Scholars have severely criticised the reasoning adopted by the Court.

More in particular, some scholars have radically contested the opportunity to recur to a purposie interpretation of Recital 6 EIR to infer a rule on jurisdiction. Indeed, it was submitted that this principle delineates, if need be, the competences between the European Union and the Member States [1166]. Instead, other authors, although in principle agreeing with arguing with Recital 6, maintain that it does provide a sound basis for interpreting the intentions of the European legislature, but in the opposite sense of highlighting the absence in the Insolvency Regulation of any express rule concerning the jurisdiction on Annex Actions [1167].

It is a shared opinion that interpretation of Article 3 EIR given by the Court in *Seagon* would run against the wording of more than one provision of the Insolvency Regulation (namely Articles 3, 18(1) and 25(1) [1168]).

In this respect, the argument according to which the introduction of the *vis attractiva* would be the result of a (mere) direct interpretation of Article 3 EIR (as suggested by the Advocate General) was regarded rather skeptically. On the contrary, as correctly pointed out by an Italian author it is

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1164 As to the arguments with Art. 25(1) subparagraph 2, the interpretation uttered by the ECJ was already purported by C. WILLEMER, *Vis attractiva concursus und die Europäisches Insolvenzordnung*, Tubingen, 2006, p. 206 and V. LORENZ, Annexverfahren bel Internationalen Insolvenzen, 2005, p. 114 ff. Contra, L. FUMAGALLI, 'Atti pregiudizievoli tra sostanza e processo: quale legge regolatrice per la revocatoria fallimentare?', in *Int'l Lis,* 2007, p. 71; F. CORSINI, 'Revocatoria fallimentare e Giurisdizione nelle Fonti comunitarie: la parola passa alla Corte di Giustizia', in *Riv. dir. internaz. priv. e proc.*, 2008, p. 429.

1165 *Wiemer&Trachte*, at [40].

1166 Cfr. B. LAUKEMANN, 'Jurisdiction – Annex proceedings', in HESS B., OBERHAMMER P. AND PFEIFFER T., Heidelberg-Luxembourg-Vienna Report, Munich, 2003. P. Oberhammer submits that the wording of Recital 6 EIR (namely the reference to 'actions directly deriving from insolvency and closely connected to insolvency proceedings' represents a clumsy oversight of the lawmaker. Also, the same author declares himself to be rather skeptical on the possibility of resorting to Recital 6 to ground the rule of the *vis attractiva concursus*, since Recitals have no binding regulatory value, ant is hard to fathom how they could give rise to positive obligations. See P. OBERHAMMER, 'Europäisches Insolvenzrecht: EuGH Seagon /Deko Marty Belgium und die Folgen', in P. APATHY, R. BOLLENBERGER, P. BYDLINSKI, G. IRO, E. KARNER and M. KAROLLUS (eds), *Festschrift für Helmut Koziol zum 70. Geburtstag*, Jan Sramek Verlag, 2010, p. 1241.

1167 L. PANZANI, 'Azione revocatoria nei confronti dello straniero e giurisdizione del giudice che h dichiarato il fallimento secondo il diritto comunitario. Note minime a seguito della decisone del Bundesgerichtsof del 21 giugno 2007', in *Il Fallimento*, 4, 2008.

1168 P. DE CESARI, *op.cit.*, p. 998.

reasonable to maintain that the Court introduced a jurisdictional rule *ex abrupto*: the Court could not have directly interpreted extensively Article 3 EIR, in that undeniably that provision does not even mention Annex Actions (if anything, it would have been more convincing to acknowledge, as regards the interpretation carried out by the Court, that it was a matter of analogy). Instead, it is reasonable to maintain that the Court introduced a jurisdictional rule *ex abrupto* [1169].

More in general, the majority of scholars believe that in the *Seagon* judgement the Court, in order to solve the problems caused by the regulatory gap concerning the jurisdiction of Annex Actions, ultimately went too far and performed an activity beyond its prerogatives, no longer limited to the interpretation of Community rules, but including in the Insolvency Regulation a rule that the legislature did not expressly mean to include in it [1170]. It was submitted that such a result should have been more appropriately pursued through a legislative intervention, under Article 46 of the Regulation [1171].

Notwithstanding the above criticisms on the methodology adopted (that, in any case, have now lost their importance in the light of the provision of Article 6 in the Recast Regulation [1172]) the Court's clarifying intervention in *Seagon* was generally welcomed, since it put an end to a perennial debate that had been generating risks of irreconcilable judgements as well as uncertainties between practitioners and national Courts [1173].

II.2.2. The exclusive or alternative nature of the vis attractiva concursus

A fundamental feature that was left unsolved for years concerned the exclusive or the alternative nature of the jurisdiction of Annex Actions.

The issue was raised from the very beginning, in the *Seagon* case, where the Advocate General specifically stated that the jurisdiction on Annex Actions should be relatively exclusive, resulting otherwise in an unjustifiable limitation of the powers of the trustee, to the detriment of creditors.

The fundamental reason against the exclusive nature of the *vis attractiva* was based on the acknowledgement that bringing an action before the courts of the Member State of main proceedings

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1169 F. CORSINI, 'Revocatoria fallimentare e Giurisdizione nelle Fonti comunitarie: la parola passa alla Corte di Giustizia', in *Riv. dir. internaz. priv. e proc.*, 2008, p. 429. The same author affirms that in principle a 'creative' interpretation on the part of the ECJ is not not completely beyond its prerogatives. However, in this context it was considered inappropriate since on that occasion the Court was not required to affirm a fundamental (interpretative) principle for the European system, but to confute a precise and conscious choice made by the lawmaker in the negotiations of the Regulation Insolvency.

1170 S. BARIATTI, 'Filling in the Gaps of EC Conflicts of Laws Instruments: the Case of Jurisdiction over Actions Related to Insolvency Proceedings', in G. VENTURINI, S. BARIATTI S. (eds.), *New Instruments of Private International Law, Liber Fausto Pocar*, Milano, 2009. F. CORSINI, *op. cit.*, 432. PASINI, 'Giurisdizione in tema di revocatoria fallimentare transnazionale. La Corte di giustizia colma il vuoto normativo', in *Riv. trim. dir. proc.* civ., 2010

1171 F. CORSINI, *op. cit.*, 432.

1172 see *infra* Chapter V, § V.4.3.1.

1173 For the debate in legal literature, see *supra* Chapter II, Section 4.

might not always be more efficient.

Therefore, it should be up to the trustee to evaluate, in the interest of all the creditors, the most suitable court where initiate the Annex Action.

According to the Advocate General's Opinion, such an argument found confirmation in the prescriptions of the abovementioned Articles 18(2) and 25(1) EIR. In spite of his articulated and well-founded reasoning, in the *Seagon* case the ECJ did not take an explicit position on the nature of the *vis attractiva concursus*. However, several parts of the decision lead scholars to understand that the Court was more prone to consider that the jurisdiction of the court of the Member State opening insolvency proceedings should be regarded as exclusive (1174).

Following the *Seagon* judgement the issue of the exclusive nature of the jurisdiction over Annex Action remained unsolved for several years. It was referred to the Court in the context of the *F-Tex* case, but the Court needed not to analyse it, for it excluded that the action fell in the scope of the Insolvency Regulation.

Whether the *vis attractiva concursus* establishes exclusive or elective jurisdiction has created a lively debate, which gave rise to great uncertainties between practitioners and national courts (1175).

According to a minority part of literature (1176), supporting the elective nature of the *vis attractiva*, it would be preferable to grant to the insolvency trustee the right to choose between, on the one side, the centralised system provided by the rule of the *vis attractiva concursus* and, on the other side, the forum of the defendant's domicile pursuant to Article 2 of the Brussels I Regulation (1177).

The supporters of this view argued that if in principle the trustee may benefit from the exclusive jurisdiction of the courts of the Member State opening insolvency proceedings (in terms, for instance, of applicable law to the Annex Action, which should be familiar to the trustee), the same does not hold true as to the recognition and enforcement of a judgement eventually rendered by the courts of the Member State of the insolvency proceedings.

The main reason invoked in support of the interpretation of the *vis attractiva* as an alternative criterion was ultimately sparing the trustee with the costs and the difficulties possibly deriving from the recognition and the enforcement of the judgement concerning an Annex Action in another Member State (1178).

1174 In particular, at [24] the Court alluded to an exclusive jurisdiction, by holding that « *the possibility for more than one court to exercise jurisdiction as regards actions to set a transaction aside by virtue of insolvency brought in various Member States would undermine the pursuit of such an objective* ».

1175 Dutch case law seems to interpret the *vis attractiva concursus* as exclusive. See in particular Rechtbank Amsterdam, 17 February 2010, in *JOR*, 2011, 155 (*Liersch v. Subway international BV*) and Gerechtshof Amsterdam, 3 November 2009, LJN: BL8405, in JOR, 2010, 244 (*Groet Houdstermaatschappij v. Conrads*)

1176 P. Oberhammer, 'Von der EuInsVO zum europäischen Insolvenzrecht', in KTS, 2009, p. 47, C. Thole, 'Die internationale Zuständigkeit für insolvenzrechtliche Anfechtungsklagen", in *Zeitschrift für Wirtschaftsrecht*, 2006, p. 1419.

1177 L. HOUALI, Le recouvrement transfrontalier des créances, in *Gaz. Pal.* 2021, February 2009, p. 23.

1178 However, such a unilateral power of the trustee may prove to infringe the objective purported by Recital 4 of the Insolvency Regulation and the objective of avoiding forum shopping provided therein. F. DIALTI,

It was maintained that the insolvency practitioner might encounter difficulties to have the judgement recognized or enforced in another Member State, where the assets of the defendant are located, since the enforcement of said judgement may turn to be manifestly contrary to the public policy exception (1179).

Other reasons militating against the exclusive nature of the *vis attractiva* were considered the fact that the trustee might necessarily bring the action directly in another Member State where the urgency of the situation so requires

A more convincing argument was that imposing an exclusive jurisdiction on Annex Actions could even lead to the adverse of encouraging the transfer of debtor's COMI, precisely with the intention of seeking a more permissive legal system (for instance, with a shorter suspect period as to actions to have a transaction set aside) (1180).

On the contrary, the majority of authors believed that bestowing the trustee with a unilateral right of choice between Article 3 EIR and the jurisdictional regime of Brussels Ia (1181) would be little persuasive, since it would eventually deteriorate the foreseeability of the competent court and relativise the values underlying the Gourdain Formula (1182). According to this view, although limiting the trustee's discretional maneuver as to the jurisdiction (1183), the reverse side of the exclusive nature of the *vis attractiva concursus* was the simplified regime of recognition of which judgement benefit.

Moreover, a compelling argument for the exclusive character of the jurisdiction over Annex Actions would be deduced from the fact that it would prevent the issue of 'torpedo actions' for negative declaratory relief (brought by, for instance, the third party benefitting of a detrimental act, or the creditor receiving a preferential payment or, the director liable for fiduciary or any other corporate duty), which also should be brought before the centralized jurisdiction at the debtor's COMI (1184).

In the recent *Wiemer Trachte* case the Court explicitly enunciated the exclusive nature of the *vis attractiva concursus*.

'Giurisdizione in materia di azione revocatoria fallimentare comunicatria', in *Dir. com. internaz.*, 2, 2009, p. 441 e ff.

1179 See in this sense J.-L. VALLENS, 'Nullités de la périodesuspecte : l'action relève de la compétence de l'Etat où la procédure collective a été ouverte', in *Dalloz*, 2009, p. 1311. The same author specifies that the public policy exception, albeit narrowly construed, may represent an obstacle and delay the enforcement sought by the trustee (« *Certes, l'exception d'ordre public est d'interpréation stricte, mais elle constitue un obstacle doté d'un effet retard aux initiatives prises par l'administrateur ou liquidateur en vue d'obtenir le retour d'un bien ou le remboursement de fonds* ».

1180 C. Thole, 'Die internationale Zuständigkeit für insolvenzrechtliche Anfechtungsklagen", in *Zeitschrift für Wirtschaftsrecht*, 2006, p. 1419.

1181 Laukemann submits that the objectives of the Insolvency Regulation would be even greatly weakened in the case all the jurisdiction rules of the Brussels I Regulation cumulatively apply as a whole.

1182 G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, at [8.228], C. PAULUS, 'under Art. 18', in C. PAULUS, *Europäische Insolvenzverordnung,* Frankfurt am Main, 2010.

1183 Yet, it must be emphasis that, as noted by a German author it is inevitably much more convenient and cost effective to pursue claims at one's home base. A. Tashiro, 'Vis attractiva concursus for Germany', in Eurofenix, Spring 2009, p. 28.

1184 See on this point C. THOLE, 'Negative Feststellungsklagen, Insolvenztorpedos und EuInsVO', in *ZIP*, 2012, p. 605 and ff.

On that occasion, the Court retraced (and rejected) all the arguments in favour of a relatively exclusive nature of the jurisdiction of Annex Actions, put forward by the scholars and from the Advocate General in *Seagon*.

Moving from Article 18(2) EIR, the Court argued that said provision operates exclusively in the context of secondary proceedings, whose effects are limited to the assets located within the territory of that Member State. Therefore, according to the Court, it is reasonable to consider that that the trustee is bestowed with the power to bring an action in another Member State exclusively with reference to such a context, in which the trustee must be able to bring an action to set a transaction aside in connection before a court of another Member State if the assets that are the subject of those proceedings were transferred, after secondary proceedings had been opened, to another Member State [1185]. The provision being limited to such a specific situation, the Court maintained that it cannot be extended to main proceedings [1186].

As regards Article 25(1) subparagraph 2, the Court recalling the interpretation provided in *Seagon*, clarified that that provision merely allows for the possibility that the courts of a Member State recognize and enforce judgements rendered as an outcome of an Annex Action, irrespectively of whether the judgement had been handed down by the court which opened insolvency proceedings, or another court of that same Member State having territorial and substantive jurisdiction.

In addition to the textual arguments above, the Court retraced the teleological arguments already raised in its previous case-law, purporting that concentrating all Annex Actions [1187] before the courts of the Member State with jurisdiction to open insolvency proceedings is consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects, referred to in Recitals 2 and 8 of the Insolvency Regulation. Moreover, it was submitted once more that according to Recital 4 EIR, it 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).

Following the view lastly uttered by the ECJ one should conclude that, irrespective of whether the trustee is claimant or defendant, Annex Actions are subject to the exclusive *vis attractiva concursus* set forth (directly or by analogy) by Article 3 EIR.

[1185] See *Wiemer&Trachte*, at [39]. See also the Opinion of the Advocate General, at [64]. In literature see G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016, at [8.228], S. RIEDMANN, 'under Art. 18', in K. PANNEN, 2007.

[1186] See *Wiemer&Trachte*, at [40]. This statement seems in contradiction with ECJ, 21 January 2010, Case C-444/07, *MG Probud Gdynia sp. z o.o.*, ECLI:EU:C:2010:24 , in which the Court held at [23]- [24] that « *The universal effect of the main insolvency proceedings also has an impact upon the liquidator's powers since, under Article 18(1) of the Regulation, the liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) of the Regulation may exercise in another Member State all the powers conferred on him, inter alia as long as no other insolvency proceedings have been opened there. It follows that only the opening of secondary insolvency proceedings is capable of restricting the universal effect of the main insolvency proceedings* ».

[1187] It is noteworthy that the Court at [33] generally referred to 'actions directly related to insolvency' and not specifically to the Formula Gourdain.

In the light of the foregoing, the ECJ has excluded any overlap between the insolvency regime and the rules of civil and commercial matters as to the jurisdiction on Annex Actions [1188]: either the Brussels I Regulation or the Insolvency Regulation is exclusively applicable.

As it will be explained in greater detail below, the *Wiemer&Trachte* judgement confirms the first appraisals on Article 6(1) of the Recast Regulation [1189]. However, as will be explained, Article 6(2) RR mitigates the limitation to the powers of the trustee arising out of said rule, providing that the trustee may bring cumulatively Annex Actions and connected civil and commercial actions before the court of the defendant's domicile [1190].

II.2.3. The territorial extension of the vis attractiva concursus

As was already explained above in Chapter III [1191], it was the prevailing opinion that the Insolvency Regulation applies to 'intra-Community' insolvencies [1192] : the situations of cross-border insolvency that fall within the scope *ratione loci* of the Insolvency Regulation would presuppose connecting elements exclusively within other Member States (as such, the EIR must was regarded as covering only intra-EU effects and intra-EU conflicts) [1193].

However, it was also submitted that, according to another reading, the regime of insolvency set forth by the EIR may be extended inasmuch as to encompass also situations where a third State is involved, by the means of (qualified) connections [1194].

The fact that the principle of the *vis attractiva concursus* outlined in *Seagon* was referred to a defendant domiciled within a Member State, rendered for a certain period the approach adopted by the Court

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1188 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. Hess, P. Oberhammer, S. Bariatti et al., *Implementation of the New Insolvency Regulation, Baden-Baden*, 2017, p. 52.

1189 See among others R. DAMMANN, 'La consécration de la compétence exclusive du tribunal d'ouverture pour les actions annexes dans le cadre du règlement insolvabilité', in *Dalloz*, 2019, p. 619.

1190 See *infra* Chapter IV, § IV.3.2.

1191 See *supra* Chapter II, Section 2, § II.1.2.3.

1192 N. NISI, 'The European insolvency regulation and the external world: the boundaries of european jurisdiction', in J.-S. BERGÉ, S. FRANCQ, M. GARDENES SANTIAGO (eds.), *Boundaries of European Private International Law: Les frontières du droit international privé européen / Las fronteras del derecho internacional privado europeo*, Brussels, 2015, p. 311-333. See also M. VIRGÒS and F. GARCIAMARTÍN, *The European Insolvency regulation: laws and practice*, The Hague, 2004, p. 21. L. DANIELE, 'Legge applicabile e diritto uniforme nel regolamento comunitario relative alle procedure di insolvenza', in *Riv. dir. int. priv. e proc.*, 2002, pp. 47-49. H.-C. DUURSMA-KEPPLINGER, D. DUURRSMA and E. CHALUPSKY, *Europaïsche insolvenzverordmung: Kommentar*, Vienna and New York, 2002; B. WESSELS, *International Insolvency Law*, Daventer, 2012, p. 358; MOSS, I. FLETCHER and S. ISAACS, *The EC Regulation on insolvency proceedings*, Oxford, 2009, p. 233.

1193 See Virgós-Schmit Report, at [7], [11] and [44].

1194 See on this point, H. DUURSMA-KEPPLINGER, 'Under Art 1', in H. DUURSMA-KEPPLINGER, D. DUURSMA, E. CHALUPSKY, *EuInsVo,* Berlin, 2002, para 5. K. PANNEN, 'Under Article 1', in K. PANNEN, *EuInsVo*, Berlin, 2007, at [120] and ff. According to the well-known UK case-law addressing this issue as regards to collective proceedings, the connection with the third State needs not to be qualified. *BRAC Rent-a-Car International inc.*, [2003] EWHC (Ch) 128 e *Ci4Net*, [2004] EWHC 1941 (Ch). With reference to Annex Acrions, see F. CORSINI, 'La corte inventa una *vis attractiva concursus* 'dimezzata", *cit.*, p. 441

apparently aligned with the first interpretation [1195].

Yet, when first faced with a situation involving a defendant domiciled in a third country, the ECJ (which could well opt for an interpretation *a contrario* of the *Seagon* judgement [1196]) supported precisely the opposite approach.

In the *Schmid* and *H. v. H. K.* judgements the Court extended the *vis attractiva* established by the *Seagon* case-law to third state defendants [1197].

Therefore, Article 3(1) EIR must be interpreted as conferring to the courts of the Member State within the territory of which insolvency proceedings are opened the jurisdiction also to hear and determine an Annex Action (in the case at stake, again a German action to set a transaction aside) that is brought against a defendant whose place of residence is not within the territory of a Member State.

To reach this conclusion, however, the Court had first to concern itself with the general issue (of no minor theoretical importance) concerning the general profile of the Insolvency Regulation's territorial scope of application.

II.2.3.1. The universal effects of the Insolvency Regulation

The issues concerning the scope of the *international* character of insolvency proceedings covered by the Insolvency Regulation were expressly dealt with in the abovementioned *Schmid* judgement [1198].

The peculiarity of the facts in that case provided the Court with a fertile opportunity to clarify the aspect of the territorial boundaries of the Insolvency Regulation, since in that case the only cross-border element that emerged in the course of insolvency proceedings concerned a third country (Switzerland).

1195 Consistently with this approach, in 2007 the Italian Supreme Court deemed that Italian courts (*i.e.* the courts of the Member State opening insolvency proceedings) lacked jurisdiction with reference to an action to have a transaction set aside brought by the Italian trustee against a responded domiciled in a third state (in the case at hand, the Republic of San Marino). However, it must be also specified that the case at stake concerned insolvency proceedings opened before the entry into force of the Insolvency Regulation. *See* Cass., 7 February 2007, n. 2692, *Banca Agricola commerciale della Repubblica di San marino v. Fallimento Mirone*, in *Foro*, 2007, p. 2815 and ff.

1196 F. JAULT-SESEKE and D. ROBINE, 'L'application du règlement « insolvabilité » dans les relations avec un Etat tiers', in *Dalloz*, 2014, p. 916.

1197 B. LAUKEMANN, 'Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 January 2014, Case C-328/12 – Schmid/Hertel', in International Insolvency Law Review, 2014, p. 103.

1198 Incidentally, it is worth mentioning that a similar question was brought in the (reunited) cases *Landgericht* Essen, 25 November 2010, 43 O 129/09, in *BeckRS*, 2011, 06041 and *Landgericht* Essen, 30 September 2010, 43 O 129/09, in *BeckRS* 2011, 06042. In those cases, the question revolved around determining whether the courts of the Member State where insolvency proceedings were opened had jurisdiction under Art. 3(1) EIR to hear an action to set a transaction aside against a defendant domiciled in a third state, in the event that the action was brought together with an action concerning the capital maintenance of the company. However, the Landgericht Essen decided to withdraw the preliminary proceedings before the ECJ. See ECJ, 7 May 2012, Case C-494/10, *Dr. Biner Bähr als Insolvenzverwalter über das Vermögen der Hertie GmbH vs. HIDD Hamburg-Bramfeld B.V. 1*, ECLI:EU:C:2012:275, in *BeckRS* 2012, 80987.

Many authors [1199] equate the situation of the *Schmid* case, *mutatis mutandis*, with that of the leading case *Owusu* rendered by the ECJ in the context of the Brussels Convention [1200], in which the Court interpreted the head of jurisdiction of Article 2 thereof as mandatory even in situations involving also third-states defendants.

In line with that decision, the Court held that the jurisdictional rule set forth by Article 3(1) EIR must apply with reference to insolvency proceedings opened in a Member State whose sole cross-border connection pertains to third counties [1201].

To reach that conclusion, the Court initially resorted to a (questionable [1202]) *a contrario* literal interpretation of some provisions of the Insolvency Regulation. Briefly recalling the norms that were deemed as relevant, the ECJ took into consideration Recital 14, Article 1 and Annex A, and Articles 5, 6 and 14 EIR [1203], from which it inferred that nothing in the Insolvency Regulation imposes the connecting factor needs to concern another Member State.

Ultimately, the interpretation of the Court resulted very poorly persuasive.

At a closer look, the first block of provisions (namely Recital 14, Article 1 and Annex A EIR) could hardly lead to the conclusion that the territorial scope of the Insolvency Regulation must be extended to third states. Indeed, Recital 14 merely states that the EIR applies only to proceedings where the centre of the debtor's main interests is located in the Community. The Court's attempt to draw some conclusion therefrom was correctly viewed by scholars as a pure tautology, for the anchoring to the EU regime on insolvency proceedings to the mere presence of the COMI of the debtor within the EU rather than providing an answer to the problem is nothing less than the core of the problem itself [1204].

1199 The comparison with the *Owusu* case law was purported first of all in the opinion of Advocate General Sharpston, delivered on 10 September 2013, ECLI:EU:C:2013:540, at [41]. See also D. BUREAU, 'Compétence en cas d'action révocatoire dans une procédure d'insolvabilité', in *Rev. crit. Droit international privé*, 2014, p. 672. *Contra* B. LAUKEMENN, *op. cit.*, p. 104, who argues that the ECJ did not share the analogy with the Owusu case, since in that case the Court had to decide a case in which the element of 'internationality' was a qualified one, for the dispute involved also EU defendants. On the contrary, in *Schmid*, the dispute brought to the attention of the Court concerned a 'simple' foreign connection. On the difference between those two situations, see *supra* Chapter II, Section 2, § II.1.2.3. For a comparison with the Owusu case prior to the Schmid case, see S. BARIATTI, 'L'applicazione del regolamento (CE) n. 1346/2000 nella giurisprudenza' in *riv. dir. Proc.,* 2005, p. 673.

1200 ECJ, 1 March 2005, Case C-281/02, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, ECLI:EU:C:2005:120, where the Court established that the English doctrine of the *forum non conveniens* was not applicable in the context of the Brussels Regime, notwithstanding the fact that one of the defendants were not domiciled within EU (in that case, they were domiciled in Jamaica).

1201 Schmid, at [29], « A*pplication of Article 3(1) of the Regulation cannot therefore, as a general rule, depend on the existence of a cross-border link involving another Member State* ».

1202 Particularly critical about the reasoning implied by the court M. MENJUCQ, 'Un élargissement du champ d'application essentiellement procédural', in Rev. proc. coll., 2015, p. 1, fn. 9; J.-L. VALLENS, 'Action en nullité : la CJUE étend la compétence du tribunal au-delà des frontières de l'Union européenne, in Rev. proc. coll. 2014.

1203 See for greater detail § *II.2.1* of this Chapter.

1204 D. BUREAU, 'Compétence en cas d'action révocatoire dans une procédure d'insolvabilité', in *Rev. crit. droit international privé*, 2014, p. 674.

As to Article 1 and Annex A EIR, it is difficult to understand how any convincing conclusion may be drawn from the fact that the provisions disciplining the material scope of the Insolvency Regulation are silent on its territorial scope.

The further arguments bolstered up by the Court relating to Articles 5, 6 and 14 EIR raise some perplexities as well.

The Court submitted that some provisions of the EIR require a connection between two Member States (as is the case, *inter alia*, of Article 5 EIR) while others do not (for instance, Articles 6 and 14 EIR). Because of that, the Court deduces that there would be no restrictions in applying the latter provisions (and *a fortiori* the Insolvency Regulation) to third-states defendants, at the same time hastily alluding that scope of the EIR could vary according to the provisions applicable to a given case [1205]. Such a conclusion was confirmed (and even pushed further) in the *Nortel* case, where the Court in interpreting Article 2(g) EIR even argued that « *although Article 2(g) of Regulation No 1346/2000 refers expressly only to property, rights and claims situated in a Member State, that provides no ground for inferring that that provision is not applicable if the property, right or claim in question must be regarded as situated in a third State* » [1206].

Besides, the argument based on Article 44(3)(a) EIR, seems a little more convincing, since it assumes that insolvency proceedings dealt with by the EIR may involve *also* third-country parties.

Nevertheless, arguing from here that it is applicable also in cases when *only* third states are involved seems a too far reaching general conclusion.

In support of the broad territorial application inferred from the arguments mentioned above, the ECJ attempts to resort also to a 'purposive' interpretation, moving (again) from the Recitals [1207].

Under the Court's view, a narrow interpretation of the EIR would hinder the fundamental objective of ensuring efficient and effective conduct of insolvency proceedings, which have a universal vocation, in that they include - so does the Court consider - also situations linked (only) with third states (would it be enough then one foreign creditor ?). Also, preventing its application *vis-à-vis* third states would incentive the transfer of assets in those countries, in violation of the objective of Recital

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1205 F. JAULT-SESEKE and D. ROBINE, 'L'application du règlement « insolvabilité » dans les relations avec un Etat tiers', in *Dalloz*, 2014, p. 916.

1206 See *Nortel*, at [52]. In this respect, in must be also noted that the Court in the *Nortel* judgement implicitly interpreted extensively also article 18(2) EIR, vesting the trustee appointed in the course of secondary proceedings with powers towards third states. See R. DAMMANN, 'Le volet européen de la faillite internationale de Nortel', in *Dalloz*, 2014, p. 1514.

1207 It is clear at this point that, in the context of the Insolvency Regulation, the Court has made very frequent use of a teleological interpretation of the text, also (or perhaps even more so) to decide central issues concerning its application. Many ground-breaking decisions analysed herein are essentially based on recitals, as expressions of the general objectives of the Regulation. It is therefore perhaps worth noting that the correctness of this practice is doubtful, since the objectives cannot serve as a general justification for departing to the rules enshrined (or omitted) in the text.

4 [1208].

On those assumptions, the Court ruled that the mere circumstance that the COMI of the undertaking is located within the territory of the European Union, regardless of whether proceedings are purely European or truly international, is sufficient to anchor the application of the EIR, excluding any relevance to national rules of private international law [1209].

As a closing consideration, the Court makes a specification of a markedly practical nature (but with significant consequences also from a conceptual standpoint). Recalling the decision handed down in *Staubitz-Schreiber* [1210], it was submitted that the moment for the determination of the jurisdiction (*i.e.* the identification of the COMI) coincides with the lodging of a request to open insolvency proceedings. At that very early phase of proceedings, the existence of cross border elements may be unknown. The Court thus maintained that the determination of the court having jurisdiction for questions different form the opening of insolvency proceedings (such as the jurisdiction on Annex Actions) could not be postponed to the course of proceedings, since this would hinder the objectives of foreseeability and legal certainty underlying Article 3(1) EIR.

Admittedly, it must be specified that the conclusion of the Court does not necessarily entail that national insolvencies are covered by the Insolvency Regulation.

According to some authors, the Court did not mean that no cross-border element is needed to apply the Insolvency Regulation [1211]. Under this view, purely national insolvency proceedings remain excluded from the scope of application of the EIR, as per Recitals 2 and 8 thereof.

While that theoretical assumption may clear, it does not fully grasp the practical relevance of the Court's statements.

If elements of transnationality may emerge later on in the course of proceedings, under which rule should insolvency proceedings be opened, provided that purely internal proceedings are excluded from the scope of application of the Insolvency Regulation?

To answer that question, it was submitted by some scholars that, whenever the cross-border nature of the procedure is not apparent *ab initio*, national courts should open insolvency proceedings pursuant to their national insolvency laws. Under this view, should cross-border elements emerge in

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[1208] *Schmid*, at [24]. It seems that the Court itself is well aware of the questionability of its positions, for it considers necessary to specify that the objectives of the Insolvency Regulation may be called on even if the ultimate *raison l'être* of the EIR is the proper functioning of the *internal* market.

[1209] N. NISI, 'The European insolvency regulation and the external world: the boundaries of european jurisdiction', in J.-S. BERGÉ, S. FRANCQ, M. GARDENES SANTIAGO (eds.), *Boundaries of European Private International Law: Les frontières du droit international privé européen / Las fronteras del derecho internacional privado europeo*, Brussels, 2015, p. 48.

[1210] See *supra* Chapter II, Section 2, § II.1.3.

[1211] Some authors firmly deny that the ECJ's decision in *Schmid* entails the application of the Insolvency Regulation to purely internal situations. See for instance, F. JAULT-SESEKE and D. ROBINE, 'L'application du règlement « insolvabilité » dans les relations avec un Etat tiers', in *Dalloz*, 2014, p. 916. M. MENJUCQ, 'Une jurisprudence en forme de tâche d'huile... frelatée', in *Rev. sociétés*, 2008, p. 891. In more dubitative terms, D. BUREAU, 'Compétence en cas d'action révocatoire dans une procédure d'insolvabilité', in *Rev. crit. Droit international privé*, 2014, p. 674.

a later phase of proceedings, the court should retrospectively verify that it has jurisdiction also under Article 3(1) EIR.

This solution seems viable avenue insofar as the autonomous notion of COMI [1212] corresponds substantially with the title upon which insolvency proceedings are opened under national laws (generally the effective seat of the undertaking [1213]). In those cases, it is true that the coincidence between national and European jurisdiction should be a purely formal matter. However, problems may arise with respect to those Member States where national insolvency proceedings are opened, for instance, on the basis of a more formalistic approach. In the event of irreconcilable differences, the law of the European Union should undoubtedly prevail, by virtue of the principle of the *primauté* of the European law [1214]. It follows that this theoretical construction seems little convincing and risks to running counter to the objectives of foreseeability, efficiency and effectiveness which the Insolvency Regulation aims at. The more appropriate solution, then, seems to consider that Insolvency Regulation should be deemed applicable also to purely domestic proceedings, inasmuch that the application of the EIR does not depend upon the existence of cross-border links [1215].

Supporting this interpretation, it is now custom practice in some Italian courts (for instance, the bankruptcy division of the Court of Milan) from the very early stage of the request for the opening of the insolvency proceedings to assess their jurisdiction in accordance with the European notion of the COMI and to specify in the decision opening insolvency proceedings that it is governed by the Insolvency Regulation.

II.2.3.2. The actual bearing of the universal effects of the Insolvency Regulation

Although the arguments of the Court do not seem entirely sound, it should be noted that, from a general standpoint, the question addressed in *Schmid* does not sound new. Indeed, the actual meaning of the 'international' nature of jurisdictional rules is a thorny issue which has also been raised, as mentioned above, referring to the Brussels Regime [1216].

1212 As progressively specified by the ECJ in the abovementioned decisions *Eurofood*, *Interedil* and *Rastelli*, see *supra* Chapter II, Section 2, § II.1.3.

1213 See for instance art. 9 l. fall., where the registered office is interpreted as the effective seat of the debtor.

Similarly, the *siège réel de la société*, under Article 1837 Code Civil and L. 210-3 Cod. Com. français.

1214 L.C. HENRY, 'Le champ d'application territorial du Règlement', in F. JAULT-SESEKE and D. ROBINE, *Le nouveau règlement insolvabilité: quelles évolutions?*, PARIS, 2015. P. NABET, 'Etude dur le champ d'application spatial du règlement européen sur l'insolvabilité', in *BJE*, 4, 2014, p. 67.

1215 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in Hess, Oberhammer, Bariatti et al., Implementation of the New Insolvency Regulation, Baden-Baden, 2017, p. 20. F. JAULT-SESEKE and D. ROBINE, 'L'application du règlement « insolvabilité » dans les relations avec un Etat tiers', in *Dalloz*, 2014, p. 916. For an application of the Insolvency Regulation in purely domestic proceedings see C.A. Versailles, 13 ch., 11 January 2007, RG n° 06/01087, with observation of P. NABET, in *JCP E*, 2007, p. 27; Trib. Comm. de commerce de Nanterre, proceedings closed on 30 December 2017, *SA Augros Packaging Métal*, R.G. 2006-EX0044, 7; Trib. Comm. de Beaune (8 jugements), 16 juill. 2008, in *Rev. sociétés*, 2008, p. 891.

1216 See, *ex multis*, E. PATAUT, 'Qu'est-ce qu'un litige « intracommunautaire » ? Reéflexions autour de l'article 4 du règlement Bruxelles I', in Réflexions autour de l'article 4 du Règlement Bruxelles I », in *Justice et droits fondamentaux. Études offertes à Jacques Normand*, Paris., p. 365.

Some authors deem that it would be desirable to obliviate the dichotomy between European litigation and international litigation, in order to foster a uniform application of EU instruments, curtailing as much as possible the sphere of application of heterogeneous national rules of private international law [1217].

Another part of scholars adopts a more cautious approach, that strikes a balance between the universal applicability of EU Regulations in cases where a link exists with *both* the other Member States and third States and the residual application of national laws whenever there is no further connection with another Member State [1218].

And here lies the fundamental relevance of the *Schmid* judgement, which wholly espouses the first approach (which I tend to disagree on) and unilaterally [1219] expands the EIR's jurisdictional regimes to third-states, even where there are no other connections with EU, for the sake of (not always generalisable) reasons of foreseeability and efficiency of proceedings.

That being said, beyond its dogmatic justification and the frictions that it entails with respect to the principle of mutual trust, it is necessary to dwell briefly on the actual practical relevance of the alleged applicability of the Insolvency Regulation towards third countries.

Indeed, the general statements of the ECJ lead to understanding that - at a theoretical level - the principle uttered in *Schmid*, concerns (or should concern) all the judgements (and their effects) relating to the opening, conduct and closure of insolvency proceedings in a Member State, and not only the jurisdiction over Annex Actions.

Therefore, leaving aside for a moment the question of Annex Actions - in respect of which the Schmidt judgment has undoubtedly broadened to a certain extent territorial scope of the EIR (even with the limits that will be mentioned below) -, when faced with other situations in which may emerge the need to invoke such a proclaimed universality of the Insolvency Regulation (and, therefore, exclude the application of the rules of private international law of a third State), one immediately realises that the *Schmid* judgment has more of a theoretical value than a real practical impact.

A few examples will better clarify the above.

The universal scope of the Insolvency Regulation (*recte* of its jurisdictional regime under Article 3 EIR) entails that the judgment opening insolvency proceedings in one Member State produces its effects almost automatically *vis-à-vis* the other Member States and, according to the *Schmid* judgment,

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[1217] It bears noticing that the European legislature seems to have paved the way towards this direction as regards the already mentioned Regulation (EC) 2201/2003 on matrimonial matters; Regulation (EC) 4/2009 on maintenance obligations'Regulation (EU) 650/2012 on succession and wills'

[1218] B. LEUKEMANN, in B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, at [4.2.9]. G. MONTELLA, 'La prevedibilità della competenza internazionali sulle azioni che derivano dal fallimento secondo il regolamento n. 1346: un valore difficile da attuare e non conveniente da imporre', in *Fallimento*, 2014, p. 640.

[1219] It must be highlighted that under article 49 EIR third-countries creditors are not entitled to lodge their claim with the insolvency proceedings. In that case the right to lodge a claim would be governed by the private international rules of the Member State where insolvency proceedings are opened.

also third countries.

Following the reasoning of the *Schmid* judgment, therefore, if the Insolvency Regulation also is to apply in third countries, the effect of the bar of individual enforcement actions on the part of creditors which stems from the judgement opening insolvency proceedings should (automatically) extend *vis à vis* creditors domiciled in third countries.

However, where a creditor domiciled in a third country enforces his claims against assets that the debtor has in that third country (assuming that the third country has jurisdiction under, for example, the *lex rei sitae* or a choice-of-court agreement), the trustee will not be able to invoke the opening of insolvency proceedings *sic et simpliciter* in the proceedings brought by the creditor.

The judgment opening the bankruptcy proceedings (and, therefore, its effects), in fact, do not benefit from automatic recognition in a third country, since - apart from all the theoretical statements of the *Schmid* judgment - it is not covered by the recognition regime provided for by the EIR.

The trustee must, therefore, necessarily obtain in the third State the recognition of both the judgment opening insolvency proceedings and the order justifying his powers and legal standing to act on behalf of the debtor. Such recognition is subject to the rules of private international law of the third country.

Also, if the creditor succeeds in obtaining the satisfaction of his claim on such 'third-country' assets, the liquidator will not even be able to invoke Article 20 EIR, since it is limited to the assets located in another Member State [1220].

Similarly, should the Insolvency Regulation (and therefore the insolvency proceedings) have truly universal effects, the divestment of the debtor, as an effect related to the opening of the bankruptcy, should also occur automatically for the assets that the debtor owns in a third state. Yet, even in this case, to avoid that the debtor subject to insolvency proceedings in a Member State disposes of those assets, the trustee needs to obtain the recognition in the third State of the judgment opening insolvency proceedings and the order determining his powers on the debtor's assets.

The same holds for civil and commercial actions that the trustee intends to bring in a third state, which are excluded from the rules of jurisdiction of the Insolvency Regulation, but which nevertheless require the recognition of the trustee's powers to initiate legal proceedings.

Similar reasoning could be made with respect to the effects of insolvency proceedings on current contracts entered into between the debtor and a party domiciled in a third state. In anticipation of what will be said below, actions arising from the exercise of the trustee's power to terminate a pending contract could be considered Annex Actions within the meaning of the EIR. Therefore, under the European *vis attractiva,* actions arising out of the termination of pending contracts must be brought before the courts of the State where insolvency proceedings are opened. Should the pending contract contain a choice-of-court agreement in favour of a non-EU state, to challenge the jurisdiction of the

[1220] Article 20 EIR established an obligation for a creditor to return to the trustee what he has obtained by any means, in particular through enforcement, for the satisfaction of his claim on the assets belonging to the debtor situated within the territory of *another Member State*, after the opening of proceedings.

court seised by the third-state party to the contract, the trustee would again need prior recognition of the judgment opening insolvency proceedings.

It is also worth remembering that any judgment handed down in a third country if it were to be recognised for whatever reason in an EU Member State, would be subject to the rules of private international law of that country (or specific conventions) because Article 25 EIR would not cover it.

What is important to note is that, besides the jurisdiction over Annex Actions, the actual bearing of the principle stated in the *Schmid* judgment does not have the practical value that the court's statements of principle would seek to attribute to it [1221].

To affirm that the Insolvency Regulation is applicable even when the only connecting element concerns a third country does not achieve the result - called for by some scholars - of limiting the operation of the autonomous rules of private international law of the States.

II.2.3.3. The universal scope of the *vis attractiva*

Against this background, it is clear that the question of the universal effects of insolvency proceedings is takes on relevance only when tackled in connection to Annex Actions.

Since the European *vis attractiva* is envisaged as a jurisdictional rule aimed at a (at least partial) centralisation of insolvency proceedings *lato sensu* (*i.e.* insolvency proceedings regarded as encompassing also Annex Actions) before the Member State of the COMI, it is almost superfluous to point out that, in principle, it should extend to all parties who are somewhat involved in the insolvency procedure. Indeed, the functional approach adopted by the Court entails that the definition of what should be attracted to the courts of the Member State opening insolvency proceedings does not depend on whether the creditor or, more in general, a third party is domiciled in a Member State or not.

The *rationale* underlying the universal extension of the *vis attractiva concursus* seems indeed quite logical and aligned with the reasoning purported in *Seagon* : if the *vis attractiva* is established for Annex Actions with the aim of ensuring the objectives of efficiency and effectiveness of proceedings, and the latter objectives are ultimately equated to the maximization of the collective satisfaction of the body of creditors [1222], the speed and cost-effectiveness of proceedings, it is then fair to acknowledge that it must operate either with reference of both a party domiciled in a Member State and a party domiciled

[1221] Indeed, contrary to what the *Schmid* judgment suggests, the very architecture of the Insolvency Regulation shows that most of its provisions are not intended to apply beyond the borders of the European Union. See on this point R. DAMMANN and V. BLEICHER, 'Interrogations sur les effets extraterritoriaux du règlement d'insolvabilité n° 1346/2000/CE', in *Dalloz*, 2014, p. 1708. See also Cass., SS.UU., 21 July 2015, n. 15200, in *Giust. civ. mass.*, 2015, analysed afterwards.

[1222] It is important to remember that under the EIR insolvency proceedings were substantially those traditionally aimed at the compulsory realisation of the debtor's assets to the benefit of the satisfaction of creditors. See *supra* Chapter II, Section 2, § II.1.2.1.2.

in a third country.

On those assumption, the ECJ stated on two occasions that the jurisdiction of the Member State of the COMI on Annex Actions applies also *vis-à-vis* defendants domiciled in a non-EU Member State. In the *Schmid* case such a principle was stated in relation to a German action to set a transaction aside, whereas in *H. v. H. K.* the action at stake was an action for the liability of directors, pursuant to § 64 GmbHG.

However, with reference to the specific position of third state defendants, two aspects need to be specifically addressed, which the Court has failed to sufficiently ponder.

The first concerns the effective operation of the universal scope of the *vis attractiva* against third countries. In principle, it is fair to assume that is true that the centralisation of proceedings before the courts of the COMI Member State is cost-efficient than initiating proceedings abroad, which is generally (more) costly [1223].

What is not true is that is that imposing a *vis attractiva* in relation to third states, preventing the trustee to bring proceedings in a third country, would *generally* prove to foster the efficiency and effectiveness of proceedings.

Needless to recall, third-states are not bound by the rules of the Insolvency Regulation, therefore they are under no obligation to recognise or enforce a judgement issued by the courts of a Member State, unless recognition is accorded under their rules of private international law [1224] or they have entered into a specific convention with the Member State of origin, provided that it is applicable to insolvency-related matters [1225].

When uttering the general principle of the applicability to third state defendants of the jurisdiction of

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[1223] See M. FARINA, 'La vis attractiva concursus nel Regolamento comunitario sulle procedure di insolvenza', in *Fallimento*, 2009, p. 671, fn. 17.

[1224] Admittedly generalising, it can be assumed that under the rules of private international law of the third State addressed for the recognition of an insolvency-related judgement, the *vis attractiva concursus* would likely be considered as an exorbitant jurisdictional rule of the Member State *a quo*. Also, it must be considered that in some Member States the recognition of insolvency-related judgement would not be granted at all. This is the case, for instance, of Switzerland, where insolvency matters would fall within the insolvency exception of the Lugano Convention, pursuant to the ECJ case law, to which Swiss judges must pay due attention. Also, they would neither be covered by the general rule on the recognition on civil matters (art. 25 and ff. *Bundesgesetz über das Internationale Privatrecht* of 18 December 1987, nor according article 166 and ff. of the Federal Act on Private International Law of 18 December 1987. In that case the judgement would be *inutiliter data*. See B. LAUKEMANN, 'Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 January 2014, Case C-328/12 – Schmid/Hertel', in *International Insolvency Law Review*, 2014, pp. 105-106. See also C.A. Versailles, 20 March 2008, n° 07/03957, in *Dalloz*, 2008, p. 1660 where the French courts rejected the petition of the trustee seeking an order that a swiss bank reimbursement the amount received via the French debtor's Swiss account after the proceedings had been opened, on the ground that (lacking a bilateral convention) French proceedings could have any effect on the debtor's assets located in Switzerland.

[1225] As noted by Montella, many bilateral conventions which Italy entered into with third countries do not cover insolvency-related judgements. For instance, he cites the Italo-Swiss convention of 3 January 1933, the Italo-Lebanese Convention of 10 July 1970, the Italo-Moroccan Convention of 12 February 1971; the Italo-Egyptian Convention of 3 December 1977. G. MONTELLA, 'La prevedibilità della competenza internazionali sulle azioni che derivano dal fallimento secondo il regolamento n. 1346: un valore difficile da attuare e non conveniente da imporre', in *Fallimento*, 2014, p. 640.

Article 3(1) EIR for Annex Actions, the Court was well aware of those backdrops. Yet, that did not refrain it from submitting in general terms that

> « *The fact that the provisions of the Regulation concerning recognition and enforcement of judgments delivered by the court which has opened the insolvency proceedings cannot bind third countries does not preclude the application of the rule governing jurisdiction which is laid down in Article 3(1) of the Regulation* » [1226].

Against these clear statements of the ECJ, however, militate all the arguments illustrated above, so that an uncritical interpretation of the principle established in the Schmid case-law as meaning that the jurisdiction on Annex Actions operates *a priori* against third-countries defendants would contradict the very objectives of the *vis attractiva*.

Therefore, two mitigations are conceivable to the reasoning of the Court.

The first is that of considering that the Court understands the *vis attractiva concursus* as an alternative ground of jurisdiction [1227]. Under this view, the trustee would be then free to bring proceedings within the defendant's home country, whenever, depending on the procedural strategy adopted on the basis of the particular circumstances of the case, he deems more convenient to enforce any judgment given in his favour in that State (although one should still consider the risks of negative conflict of jurisdiction). It must be said in advance, that this solution seems unfeasible since the ECJ has clearly stated that the *vis attractiva concursus* has an exclusive nature [1228].

The second solution would limit the scope of the *Schmid* case-law to those cases where the third state defendant has assets located in another EU Member State. As also pointed out by the ECJ, in that scenario, the judgement rendered by the courts of the Member State of the insolvency proceedings would benefit of the regime of automatic recognition provided by Article 25(2) second subparagraph EIR [1229]. In this respect, however it must be noted that this would entail that a (potentially default [1230]) judgement rendered against a foreign defendant (as such, in a weaker position), would be susceptible to be enforced in assets of the defendant.

This leads to consider the second profile which the Court did not pay due account of.

It was explained that the *vis attractiva concursus* generally entails the creation at a jurisdictional level of

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1226 *Schmid*, at [37].

1227 D. BUREAU, 'Compétence en cas d'action révocatoire dans une procédure d'insolvabilité', in *Rev. crit. Droit international privé*, 2014, p. 676. G. MONTELLA, 'La prevedibilità della competenza internazionali sulle azioni che derivano dal fallimento secondo il regolamento n. 1346: un valore difficile da attuare e non conveniente da imporre', in *Fallimento*, 2014, p. 645.

1228 The Recast Regulation seems to confirm the exclusive nature of the *vis attractiva* provided by Article 6 RR. However, as it will be explained in Chapter V, it is uncertain whether the *Schmid* case-law would still be applicable under the new regime.

1229 *Schmid*, at [38].

1230 Albeit the situation in which the defendant is not served in due time with the brief initiating the Annex Action or an equivalent situation that would impair his right of defence would likely to be regarded as an infringement of public policy for the refusal of the judgement in the other Member State, it bears recalling that under the EIR the regime of recognition is much more favourable than under Brussels I.

a *forum actoris* [1231] that diverts the defendant from the natural forum of his domicile, which should be duly considered through the lenses of the principle of fair trial and equality of arms (Article 6 ECHR). Assuming that the European Judicial Area is characterised by a general degree of uniformity, the European *vis attractiva concursus* exposes the third country defendant to a weaker position of EU defendants, since he would be sued in a Member State, whose laws and procedural rules would be unfamiliar to him.

One may wonder whether imposing the jurisdiction under Art. 3(1) against foreign defendants does not violate their right of due process.

In this respect, the ECJ has stated that « *that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be subject to restrictions. Such restrictions must, however, in fact correspond to the objectives of public interest pursued by the measure in question and must not constitute, with regard to the aim pursued, a disproportionate interference with the rights thus guaranteed* » [1232]

The focus of the question is then shifted as whether the *vis attractiva* presides over objectives of public interest sufficient justify a restriction to the defendant's right of defence.

It was convincingly argued that this is the case as to avoidance actions. To draw this conclusion, it must be considered that an avoidance action stems directly from insolvency proceedings and applies independently of whether the general civil law provides for mechanisms securing the insolvency liability regime [1233]. Therefore, despite the different forms that it may assumes under national law systems, its fundamental feature is that its effects apply to the whole of the assets and benefits all the creditors.

In the light of the above, since the *vis attractiva concursus* ensures from a procedural point of view (or should do so) the general body of creditors, it could be reasonably argued that it ensures the pursue of objectives of public interest.

It could be more debatable whether such public interest stands also in relation to liability actions against directors, as established by the ECJ in *H. v. H. K.*

Those actions, indeed, unlike avoidance actions, do apply irrespectively of the opening of insolvency proceedings and pursue the common civil liability regime (albeit from a purely creditor's individual standpoint). Therefore, as regards this type of actions, what must be ascertained is whether the metamorphosis that the action undergoes as an effect of the opening of insolvency proceedings affects its features to such an extent as to justify the deviation from the defendant's domicile forum.

1231 This is true in the vast majority of the cases, where the trustee is acting as claimant in the interest of the general body of creditors. It must be noted, however, that in the event that a creditor or a third party brings an Annex Action against the trustee (for instance a liability action or an action relating to the exercise of his powers) the *vis attractiva* would actually align the jurisdiction of Annex Actions with the forum of the defendant's home country, since the COMI represent the domicile of the trustee.

1232 ECJ, 17 November 2011, Case C-327/10, *Hypoteční banka a.s. v. Udo Mike Lindner*, ECLI:EU:C:2011:745, at [50]. See also ECJ, 2 April 2009, *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, Case C-394/07, ECLI:EU:C:2009:219, at [29].

1233 B. LAUKEMANN, *op.cit.*, p. 110.

Since this aspect concerns the very characterization of the concept of Annex Action, it will be dealt with afterwards.

For now, suffice here to acknowledge that according to the ECJ case-law the European *vis attractiva concursus* concerns also actions for the liability of directors *vis à vis* defendants domiciled in the EU (as per the *Gourdain* judgement) as well as against defendants domiciled in a third country (*H. v. H. K.* judgement).

As a closing consideration on this point, it bears noticing that the broad interpretation of the territorial scope of the Insolvency Regulation supported in the *Schmid* and the *H v. H.K.* cases does not contradict the principle enshrined by the Court in the decision in *German Graphics* (according to which the scope of application of the Insolvency Regulation should be interpreted restrictively [1234]. Indeed, the delineation to draw in this case is not on a horizontal level between the Brussels I Regulation and the Insolvency Regulation. The universal application of the *vis attractiva* addresses a 'vertical dimension' concerning the application of a supranational instrument (*i.e.* the Insolvency Regulation) rather than the national rules of private international law. That is to say, in other words, the issue at stake did not directly concern the boundaries between the Insolvency Regulation, as whether or not a claim is an Annex Action within according to its procedural function does obviously not relate to the location of the defendant's domicile [1235].

II.2.4. The vis attractiva concursus and secondary proceedings

After some years of sound operation and well settlement of the *vis attractiva concursus* established in *Seagon*, the ECJ 'transplanted' [1236] that principle in the context of secondary proceedings. Until the *Nortel* judgement, indeed, the allocation of the jurisdiction of Annex Actions with the courts of the Member States opening insolvency proceedings had been affirmed exclusively with regard to main proceedings [1237].

On that occasion, instead, the features of the *vis attractiva concursus* were further shaped by the ECJ, and the objective of centralising the jurisdiction with the courts of the Member States opening insolvency proceedings was extended to the scope of secondary proceedings.

The reasoning underlying such an extension was, actually, quite easy to be justified by the Court on

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1234 See *supra* in this Chapter, Section 2, § II.1.3.

1235 B. LAUKEMANN, 'Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 Januay 2014, Case C-328/12 – Schmid/Hertel', in International Insolvency Law Review, 2014, p. 102.

1236 The expression 'legal transplant' is used by B. LAUKEMANN, 'Regulatory copy and paste: the allocation of assets in cross-border insolvencies – methodological perspectives from the Nortel decision', in Journal of Private International Law, 2016, 2, p. 380. The terms, which refers to the reception of a foreign legal rule by a new legal order was coined by A. WATSON, 'Legal Transplants: An approach to Comparative Law', Athens, 1993.

1237 F. MUCCIARELLI, 'Procedure concorsuali secondarie, localizzazione dei beni del debitore e protezione di interessi locali', in *Giur. Comm.*, 2016, p. 13.

the ground (again) of the scheme and the *effet utile* of the Insolvency Regulation.

Almost syllogistically, the Court moved from the observation that Article 27 EIR provides the possibility to open secondary insolvency proceedings to the specific purpose, *inter alia*, of safeguarding the interests of the local creditors. Actions seeking a declaration that specific debtor's assets fall within the scope of secondary proceedings quite obviously affect the interests of the local creditors (since they influence the value of the local estate in which they enforce their claim) and - equally obviously - those actions are considered as Annex Actions [1238].

In the light of those arguments, the Court concluded that Annex Actions seeking to protect the interest of the local creditors should be heard and determined by the courts of the Member State of the secondary proceedings, otherwise, the *effet utile* of Article 27 EIR would be significantly weakened [1239].

From a methodological point of view, it is interesting to note that the ECJ seems to have applied by analogy its own interpretation of Article 3(1) EIR in the *Seagon* judgement to Article 3(2) EIR, as if it had an actual legal basis [1240].

Seemingly acknowledging the weakness of that *modus operandi*, the ECJ further justifies its interpretation by resorting to the well-established argument *a contrario* with Article 25(1) EIR - which may be regarded at this point as a panacea to which the ECJ recurs whenever faced with a problem concerning jurisdiction -, maintaining that since the regime of recognition relating to Annex Actions does not differentiate between judgements handed down in main and secondary proceedings, implicitly that principle should also hold as to the jurisdiction of Annex Actions [1241].

Once established that the *vis attractiva concursus* operates with reference to secondary proceedings, it seems appropriate to dwell briefly on a further consideration, which apparently the Court has left unresolved.

It is important to note that in the *Nortel* judgement Court (very correctly) did not affirm the application of the *vis attractiva* to secondary proceedings on the general assumption that an action brought by the trustee appointed in secondary proceedings secures the interests of the local creditors *sic at sempliciter*. Anticipating what will be discussed in the appropriate venues, the Gourdain Formula, as the test to assess the *vis attractiva concursus*, operates irrespectively of whether the outcome of the action affects (actively of passively) the insolvency estate, since that would improperly widen its scope, practically including any action exercised in the course of the procedure [1242].

[1238] In *Nortel*, at [29]-[30], the Court concerned itself with the preliminary question of the applicability of the Insolvency Regulation (which apparently was not contested in the national procedure nor in the written procedure before the ECJ, but was brought to the attention of the Court at the hearing).

[1239] *Nortel*, at [37].

[1240] G. VAN CALSTER, 'Nortel. CJEU confirms Nickel & Goeldner, and extends Seagon to secondary proceedings', in https://gavclaw.com (last accessed on 20 April 2018).

[1241] *Nortel*, at [34]. See also the opinion of Advocate General Mengozzi, delivered on 29 January 2015, (ECLI:EU:C:2015:44), at [32].

[1242] See *infra* in this Chapter, § II.3.4.

In its reasoning, the Court correctly made an intermediate step, preliminary assessing the fundamental profile of whether the action at stake was actually directly deriving from insolvency proceedings and closely linked with it [1243].

The action under examination in the *Nortel* case concerned specifically the allocation of the debtor's assets between main and secondary proceedings [1244]. Therefore, the demarcation between the Brussels Regime and the Insolvency Regulation was not particularly controversial in that case, since it was quite obvious that the action derived directly from insolvency proceedings and was closely linked to (both) proceedings.

However, what does not emerge clearly form the reasoning of the Court is whether the extension of the *vis attractiva consursus* to secondary proceedings may be referred also to different Annex Actions, which do not relate to the debtor's 'assets'. For the sake of clarity, it must be understood that the (problematic) concept of 'assets', within the Insolvency Regulation has a very broad meaning.

Without entering in too many details as to the whether the concept of 'assets' should be determined pursuant to an autonomous interpretation [1245] or according to the *lex causae* [1246], suffice here to say that that notion encompasses tangible and intangible properties, properties and rights ownership of or entitlement to which must be entered in a public register and claims. Therefore, when the Courts mentions actions concerning the determination of the debtor's assets, it refers to the wide range of actions concerning absolute rights (*in rem*) and relative rights (*in personam*).

That being said the question arises as to whether, apart from those actions which are referred to

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1243 It bears noticing that in *Nortel* the Court attempted to apply quite literally the Gourdain Formula as interpreted in *Nickel& Goeldnr*. However, the Court's reference to Articles 3(2) and 27 EIR does not seem entirely convincing, as they are rules on jurisdiction which do not concern the legal basis of the action (it would have been more appropriate for the Court to refer these provisions exclusively to the second part of the action before the Tribunal de Commerce, addressing the right of the claimants over the proceeds from the sale of Nortel group's asset). Actually, on this point, the arguments of the Advocate General seem much more persuasive. Indeed, Advocate General Mengozzi submitted that, as regards the rights claimed by NNSA's former employees and by the *Comité d'entreprise*, they are generally governed by article L. 641-13 of the Commercial Code, which governs the order of creditors' rights within collective proceedings. Also, it was noted that, with reference to the credit claimed by the joined administrators (i.e. administration expenses), pursuant to the coordination protocol the preferential status of such a credit was assessed on the basis of the Insolvency Act of 1986, the Regulation and the European Communication and Cooperation Guidelines for Cross-border Insolvency, published by INSOL Europe in 2007. Therefore, the Advocate General concludes that undoubtedly, although the first part of the claim was to be decided by the Tribunal de Commerce, on the basis of the Memorandum and the coordination protocol, the applicable rules would be, in any case, those specific to insolvency proceedings. See the opinion of Advocate General Mengozzi, at [25] - [27].

1244 According to B. LAUKEMANN, rationale behind Article 2(g) of the Court encompasses all rights in rem over tangible assets such as moveable or immoveable property.

1245 The profile of the law applicable to the terms of Article 2(g) EIR is not clear in the *Nortel* case.On the autonomous interpretation see B. LAUKEMANN, 'Regulatory copy and paste: the allocation of assets in cross-border insolvencies – methodological perspectives from the Nortel decision', in Journal of Private International Law, 2016, 2, p. 390. See also P. DE CESARI e G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il regolamento (UE) 2015/848 relativo alle procedure di insolvenza*, Torino, 2017, p. 101.

1246 The applicablilty of the *lex causae* seems to be supported by Advocate General Mengozzi. See also R. DAMMAN and A. RAPP, 'Une action pour faillite personnelle peut-elle être intentée dans le cadre d'une procédure secondaire d'insolvabilité ?', in *Dalloz*, 2013, p. 755.

assets in the broadest meaning of that concept, the *vis attractiva concursus* in secondary proceedings applies, for instance, to liability actions against the directors. Should the possibility to bring those actions be limited to detrimental acts performed within the territory of the Member State where the company has an establishment?

The question, under a different perspective, tackles the more general issue of the primacy of main proceedings over secondary ones and, accordingly, whether the *vis attractiva* assumes in that context a different value.

A first (maybe too simplistic) reasoning would submit that the *vis attractiva concursus* referred to secondary proceedings should be understood as perfectly mirroring the same principle in the context of main proceedings, thus applicable to every kind of Annex Actions.

Arguments upholding this view may be inferred, *inter alia*, from the fact that also in the *Seagon* judgement the Court established the jurisdiction of the courts of the Member State of the COMI with specific reference to an action to set a transaction aside. However, various swaths of that decision led scholars to confirm the general applicability of the principle also to other types of Annex Actions. Analogously, nothing in the *Nortel* decision seems to suggest that the Court wanted to limit the principle of the *vis attractiva* in secondary proceedings to action akin that one referred by the Tribunal de Commerce de Paris.

In this respect, it could be also maintained that applying the rule of the *vis attractiva concursus* in secondary proceedings only in relation to some Annex Actions, but not to others would prove arbitrary for reasons of procedural economy and the principle of the *effet utile*, in violation of the fundamental principle of equal treatment under Articles 20 and 21 of the Charter of Fundamental Rights of the European Union [1247].

Nevertheless, the answer does no seem that clear-cut, as demonstrated by the French case-law where those questions where dealt with, raising contradictory answers. For instance, in the *NOB* judgement [1248] - rendered before the *Nortel* case - the French Supreme Court set aside the judgement handed down by the Court of Appeal of Dijon against the managing director of a company subject to main proceedings in Liège (Belgium) ordering him to abstain from exercising its managing powers within the State of secondary proceedings. The *Cour de Cassation* grounded its decision on the lack of jurisdiction of the secondary proceedings in France. It was the French Supreme Court's view that the

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1247 B. LAUKEMANN, 'Regulatory copy and paste: the allocation of assets in cross-border insolvencies – methodological perspectives from the Nortel decision', in Journal of Private International Law, 2016, 2, p. 398.

1248 Cour de Cassation (com.), 22 January 2013, n. 11-17.968, commented, *ex multis*, by L. D'AVOUt, in *Rev. proc. coll.,* 2013, n. 4; TH. MASTRULLO, in *Rev. proc. coll.*, 2013, n. 2; P. Lemay, in *JPE E*, 2013, at [1218]; V. LAGRAND, in *Act. proc. coll.*, 2013, n. 4; A. RAPP and R. DAMMANN, in *Dalloz*, 2103, p. 775; F. JAULT-SESEKE and D. ROBINE, in *Rev. crit. Droit international privé*, 2014, p. 404. Trib. Nanterre, 3 ch. 24 October 2013, R.G. n. 2011F04794. M. MENJUCQ, in *Rev. proc. coll.*, 2014, n. 1, who submits that nothing in the Insolvency Regulation suggests that the powers of the trustee appointed in the context of secondary proceedings are limited (save for the presence of the debtor's assets within the territory of that Member State). *Contra* L. D'AVOUT, in *BJS*, 2014, p. 110, submitting that secondary proceedings are subject to the 'direction' of main proceedings. See also X. DELPECH, in *Dalloz* 2013, p. p. 2641

action brought against the director of the company was indeed an Annex Action [1249]. Nevertheless, the Court argued that « *the effects of secondary insolvency proceedings are limited to the debtor's assets in the territory of that Member State* [opening secondary proceedings] [les effets d'une procédure secondaire d'insolvabilité sont limités aux biens du débiteur se trouvant sur le territoire de cette dernière] ».

As noted by French scholars, the *Cour de Cassation* acknowledges an (unprecedent) monopoly of main proceedings over actions against directors on two grounds:

(i) the jurisdiction of secondary proceedings under Artcile 3(2) EIR compared to that of Artcile 3(1) EIR would be a *forum specialis* and, as such, its scope should be interpreted narrowly than that of the (universal) main insolvency proceedings (*i.e.* limited to actions concerning the assets on the territory of the Member State of the establishment);

(ii) as a corollary of that interpretation, the Gourdain Formula seems to have been adapted (and rephrased) in the light of the limited context of secondary proceedings ('actions directly deriving from *main* insolvency proceedings and closely linked with them').

That solution was greatly criticised among scholars, substantially rejecting the argument according to which secondary proceedings would be hierarchically subjected to main proceedings [1250].

The (in)famous *NOB* decision was immediately contradicted by the following case-law. Indeed, in the *Alkor* case, the French court of first instance deemed to have jurisdiction in the context of secondary proceedings to determine an action of liability against the directors of a company subject to main proceedings in Germany [1251].

Against this background, in the *Nortel* judgement, the Court seems implicitly to have uphold that latter approach, by affirming that the (exclusive) jurisdiction set forth by Articles 3(1) and (2) EIR are concurrent in respect to one another [1252].

Indeed, on the very basis of the *effet utile* (on which the extension of the *vis attractiva* to secondary proceedings was founded) the Court recognised that an action exercised in the context of secondary proceedings could affect the creditors of main proceedings [1253].

1249 In particular, the Cour de Cassation held « *on the one hand, the action seeking a restraining order against the director of the company subject to insolvency proceedings belongs to the category of actions which derive directly from main insolvency proceedings and which are closely linked with them.* [d'un côté, l'action tendant au prononcé d'une interdiction de gérer à l'encontre du dirigeant de la personne morale faisant l'objet d'une procédure d'insolvabilité appartient à la catégorie des actions qui dérivent directement de la procédure initiale et qui s'y insèrent étroitements] ». I note here that the action was based on articles L. 653-1 - L. 653-11 Cod. Comm.

1250 French scholars have strongly opposed to the interpretation purported in the NOB case, quasi-unanimously submitting that secondary proceedings are fully fledged proceedings. « *Une procédure secondaire es une procédure collective à part entire* ». See R. DAMMAN and A. RAPP, 'Une action pour faillite personnelle peut-elle être intentée dans le cadre d'une procédure secondaire d'insolvabilité ?', in *Dalloz*, 2013, p. 755. X. DELPECH, in *Dalloz*, 2013, p. 2641.

1251 Trib. Com. Of Nanterre (3e ch.), 24 October 2013, n° 2011F04794. See L. D'AVOUT, in *Dalloz* 2014, p. 1967. The same conclusion was reached in 2004, thus far before the *Nortel* judgement, by the Tribunal de Commerce of Charleroi, 14 September 2004, *SARL Bati France v. Alongi*, in *Rev. reg. droit*, 2004, p. 358.

1252 See P. DE CESARI and G. MONTELLA, *op. cit.*, p. 82.

1253 *Nortel*, at [45].

In the light of that basic assumption, the Court thus refrained from establishing the exclusive nature of the *vis attractiva concursus* in the context of secondary proceedings (but it did not either submit the prevalence of main proceedings over secondary ones).

The ECJ seems to support the view that, under the model of limited universality enshrined in the Insolvency Regulation, the unitary and centralised direction of main proceedings is not called into question by the potential existence of several secondary proceedings opened against the same debtor. Secondary proceedings limit the effects of main proceedings - and *vice versa* - but they should not affect the unity of the solutions which all procedures must follow in order to achieve the objectives of the Regulation (*i.e.* to pursue an efficient system for the management of the business crisis consistent with the sound functioning of the internal market) [1254].

While apparently establishing the equality between main and secondary proceedings, nevertheless the decision of the Court still leaves room to argue that the *vis attractiva* in secondary proceedings should be referred only to actions concerning the assets.

Furthermore, the acknowledgement that concurrent jurisdictions may exist within the scope of the Insolvency Regulation among different *fora concursus* brings up two severe consequences (ultimately impairing the very objective of the *vis attractiva concursus*, *i.e.* the effective administration of proceedings).

Firstly, the concurrent allocation of the jurisdiction on an action seeking the determination of which debtor's assets should fall in the scope of one or another procedure, would lead to the application, in respect to the same action, of different material *leges concursus* (the laws of the Member State of main proceedings or the law of the Member State of secondary proceedings, depending on the jurisdiction [1255]).

Secondly, and most importantly for present purposes, the decision to confer concurrent jurisdiction upon the courts of main proceedings and secondary proceedings over the same action entails the severe risk of *lis pendens* and, accordingly, of irreconcilable judgements [1256].

Fully aware of the practical impacts of its decision, in the *Nortel* case the Court proved to be not completely indifferent to the issue. In the lack of express provisions within the Insolvency Regulation, the Court resorted to the rudimental solution of extending by analogy the priority rule established by the *Staubitz-Schreiber* judgement in relation to Article 16 EIR - which concerns the possible *lis pendens* of requests to open insolvency proceedings - to Article 25(1) EIR and Annex Actions.

1254 A. LEANDRO, 'La giurisdizione sulle revocatorie fallimentari: riflessioni sulla sentenza Deko Marty', in *Il Diritto dell'Unione Europea*, 2009, 3, pp. 617-618.

1255 In this respect, in anticipation of what will be further explained in Chapter VI, it must also be observed that, should director's liability actions be covered by the *vis attractiva concursus* in the context of secondary proceedings, the issue would be further complicated by the fact that, as to those type of Annex Actions the synchronisation *forum concursus - ius concursus* seems not that straightforward.

1256 On this point, Laukemann argues that the Court did not generally advocate for concurrent jurisdiction over Annex Actions, but only when there are, in particular cases, reasonable grounds for assuming so.

In other words, the Court attempted to solve that *impasse* by arguing that the risk of irreconcilable judgements would be overcome by means of the obligation of automatic recognition of the first judgement.

The reasons underpinning such a rough solution are explained in the opinion of the Advocate General, who affirmed that it was not for the Court to incorporate the rule on *lis pendens* under Article 29 Brussels Ia (at that time Article 27 Brussels I) into the scheme of the Insolvency Regulation by judicial decision, invoking - rather ludicrously, considering the law-making interventions made hitherto by the Court - the institutional balance of the European Union and the decision making prerogative of the legislature [1257].

Many scholars have considered the decision of the Court unsatisfactory and herald of practical issues, since it substantially accepts the risk of irreconcilable judgements. Yet, it is generally acknowledged that the Court effectively had no alternative solutions [1258].

It is submitted here that the application by the Court of the rules on the *lis pendens* of the Brussels Regime, not only would not have infringed the institutional balance invoked by the Advocate General, but it would have proved to be the most correct solution as well.

At the outset, it must be recalled that the priority principle established in relation to judgements opening insolvency proceedings cannot be regarded as a rule serving to settle conflicts of jurisdiction [1259].

As the same Court contradictorily recalled on that occasion [1260], the principle of priority was established in a different situation, *i.e.* the parallel lodging of requests for the opening of insolvency proceedings. Therefore, the decision rendered in the *Staubitz-Schreiber* judgement was tailored on the peculiar type of judgements opening the insolvency proceedings, which, as explained, play the specific role of formally commencing a 'truly collective procedure', which is a complex procedure comprised of may phases (and judgements) and involving several interests. In this respect, the recognition of the judgement opening insolvency proceedings may be considered as the last (albeit automatic) confirmation that the courts of a Member State have the jurisdiction to administer that complex procedure.

On the contrary, judgements rendered in relation to Annex Actions - albeit hinged in the context of

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1257 See the opinion of the Advocate General Mengozzi, textually (and to some extent paradoxically) reading at [60] « *it is not for the Court to incorporate such a rule into the scheme of the regulation by judicial decision. The introduction of such a rule would in fact fall exclusive to the EU legislature* ».

1258 F. MUCCIARELLI, *op. cit.*, p. 17.

1259 F. MUCCIARELLI, *op cit*, 16. I. QUEIROLO, S. DOMINELLI, 'Gli effetti della procedura principale di insolvenza straniera sui procedimenti pendenti nel nuovo Reg. europeo 2015/848', in *Fallimento*, 2018, p. 1251. *Contra* S. BARIATTI, 'Il regolamento n. 1346/2000 davanti alla Corte di Giustizia: il caso Eurofood', in *Riv. dir. proc.*, 2007, p. 203

1260 *Nortel,* at [43] and [45]. It remains unclear why the Court first used as an argument against the exclusiveness of the jurisdiction of secondary proceedings the fact that the principle of priority was established in relation to a different situation, and then it did not similarly weigh that different context when submitting the alternative nature of the jurisdiction under article 3(1) and 3(2) EIR.

insolvency proceedings - do not share that particular function. All in all, the characterisation of an action as Annex Actions merely responds to functional reasons, but it does not amend the *procedural* structure of the action itself, which remains that of an ordinary civil and commercial proceedings.

Since an analogous interpretation may be invoked only when, lacking an applicable provision, another rule deals with comparable legal situations, it is not persuasive the juxtaposition made by the ECJ between the recognition of judgements opening insolvency proceedings and judgements relating to Annex Actions, which underpin extremely different roles in the context of insolvency proceedings.

Pushing this reasoning one step further it could be maintained that, instead, the rules governing the *lis pendens* as to civil and commercial actions seemingly is much more well suited to avoid the risk of irreconcilable judgements on Annex Actions, preventing at an earlier stage the commencement of parallel proceedings.

Another reason that militates pro this argument is the fact that differentiating the application of the *lis pendens* to actions brought in the context of same insolvency proceedings on the mere basis that one is characterised as an Annex Action (*e.g.* an action to set a transaction aside) and another does not (*e.g.* an action for separate satisfaction, such as in *German Graphics*), seems to infringe the principle of the *effet utile* and equal treatment [1261].

Moreover, by considering the scheme and the objectives of the two EU instruments, the Court could have also considered that the two regulations are intended as complementary and it would be somewhat odd that an instrument having expressly incorporated the rules of the Brussels Regime (as to the enforcement), would preclude the application of a rule seeking to foster those objectives that are common and shared by both the regulations.

Be what it may, there are reasonable grounds to fear that, in the light of the regrettable lack of provisions governing concurrent proceedings in the RR, the solution envisaged by the Court alluding to competing proceedings would lead to a race between proceedings to decide on the Annex Action at stake [1262].

However, in the light of the recent decision in the Riel case, one can only but acknowledge the stubborn belief of the ECJ that it is not possible to apply by way of analogy Article 29 Brussels Ia , the ECJ will reconsider its former position [1263].

1261 Laukemann, *op. cit.*, pp. 386-387.

1262 F. MUCCIARELLI, 'Procedure concorsuali secondarie, localizzazione dei beni del debitore e protezione degli interessi locali', in Giurisprudenza commerciale, 2016, p. 13. S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in HESS, OBERHAMMER, BARIATTI et al., Implementation of the New Insolvency Regulation, Baden-Baden, 2017, p. 101.

1263 See *Riel,* at [43]-[44], where the courts (arguably) states « *It should also be noted that, in so far as the EU legislature expressly excluded certain matters from the scope of Regulation No 1215/2012, its provisions, including those of a purely procedural nature, do not apply by analogy to those matters. Moreover, such an application would disregard the scheme of Regulation No 1346/2000 and would therefore undermine the effectiveness of the provisions of that regulation, in particular in that, in accordance with Articles 3 and 27 of that regulation, read in the light of recitals 12, 18 and 19 thereof, secondary insolvency proceedings may be opened in parallel with the main insolvency proceedings, which Article 29(1) of Regulation No 1215/2012 does not permit* ».

In the light of the above, with a view to mitigate the risk of irreconcilable judgements, it might then be worth asking whether it is not worth interpreting the *Norte*l judgment as if the Court did not advocate for the concurrent jurisdiction of both main and secondary proceedings *in general*, but only when there are, in particular cases, reasonable grounds for assuming so (*i.e.* actions dealing with the determination of assets pertaining to the secondary procedure) and excluding its applicability in other cases, such directors' liability actions.

Such a solution would not assume the 'superiority' of main proceedings over secondary proceedings [1264], but in the light of additional reasons such as, for instance, those supported by the *Cour de Cassation* in the NOB case (*inter alia*, that the courts of the Member State of main proceedings would have a more comprehensive view of and would be in a better position to adjudicate the director's conduct in managing the cross-border activities of the company, rather than the courts of the secondary proceedings, yet having jurisdiction).

II.3. The 'static' profile of the rules on Annex Actions: the Gourdain Formula

At this point of the dissertation, it bears examining what in the previous paragraphs was called the 'Gourdain Formula', a central expression and a sturdy staple for four consecutive decades in the European case-law on Annex Actions [1265].

Needless to say, by this expression the ECJ (as well as scholars) refers to the test forged in the context of the Gourdain case [1266], pursuant to which an action, to fall within the scope of the Insolvency Regulation (*recte* at that time, to fall within the Insolvency Exception of the Brussels Convention), must be 'directly deriving from insolvency and closely linked with insolvency proceedings' [1267].

It has been pointed out time and again that said expression was further enshrined in Recital 6 and Article 25 of the Insolvency Regulation. Moreover, in every decision examined in this Chapter, the ECJ mentioned the Gourdain Formula as the keystone to categorize actions falling within the scope of the Insolvency Regulation or - *a contrario* - to include them in the Brussels I Regulation. Following

1264 The argument of the *primauté* of the main procedure must be discarded at one in given the amendments as to the nature of secondary proceedings in the Recast Regulation.

1265 C. LEGROS, 'Les actions annexes', in F. JAULT-SESEKE, D. ROBINE, *Le droit européen des procedures d'insolvabilité à la croisée des chemins*, Paris, p. 117.

1266 ECJ, 22 February 1979, Case C-133/78, *Henry Gourdain v. Franz Nadler*, ECLI:EU:C:1979:49.

1267 The original wording of the decision (in French) reads «*il faut, pour que les décisions se rapportant à une faillite soient exclues du champ d'application de la conventiondérivent directement de la faillite et s'insèrent étroitement dans le cadre d'une procédure de liquidation des biens ou de règlement judiciaire*».

the teachings of the Court [1268], the concept of action 'directly deriving from insolvency and closely connected to insolvency proceedings' represents an autonomous notion [1269].

It was mentioned that, as a rule of thumb, when a provision of European law does not expressly refer to national laws of the Member States for the interpretation of its meaning and scope, the terms and notions of such provision are to be given an independent meaning, by reference to its wording, the general scheme and the objectives of the act mentioning it and the interpretation of the case-law in the field to which such provision is intended to apply [1270] .

It was also explained that, reasonably, when a provision serves the function of delimiting the scope of application of a Regulation (or any other European act) an autonomous interpretation is mandatory.

Accordingly, its interpretation is not contingent upon the classification of the specific type of action according to the *lex fori concursus* or the *lex fori processus*, but it must be understood by reference, first, to the objective and the schemes of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems [1271].

Such conclusion was bolstered by the ECJ in the *Gourdain* case with reference to the formula of the Insolvency Exception of the Brussels Convention. Indeed, the Court held that the terms mentioned in Article 1(2)(b) Brussels Convention should not be interpreted as mere references to the national laws of one or another Member States

Instead

> « *The concepts used in Article 1 must be regarded as independent concepts which must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems* » [1272].

Under this perspective, the Court highlighted that it was necessary (as the case remains) to provide for a uniform interpretation of the expressions therein.

Therefore, following the reasoning of the Court, to autonomously interpret the expressions of the

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1268 It is worth recalling that the ECJ in *Gourdain* at [3] submitted that «*The concepts used in Article 1* [of the Brussels Convention] *must be regarded as independent concepts which must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems*». It follows that also the notion of 'action directly deriving from insolvency and closely connected to insolvency proceedings' must be interpreted in the same way.

1269 P. DE CESARI, 'Azioni collegate e strettamente connesse ad una procedura di insolvenza: una nuova nozione europea autonoma', in *Il fallimentarista*, luglio 2012.

1270 S. BARIATTI, 'Qualificazione e interpretazione nel diritto internazionale privato comunitario: prime riflessioni', in *Riv. Dir. Int. priv. e proc.*, 2006, p. 361.

1271 Laukemann expresses this concept with reference to the delimitation between the scope *ratione materiae* of the Insolvency Regulation and that of the Brussels I Regulation. See B. LAUKEMANN, 'Jurisdiction – Annex Proceedings', in B. HESS, P. OBERHAMMER, T. PFEIFFER, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report*, 2014, Bloomsbury, p. 179. It follows that *a fortioti* the same principle must be applicable to the notion of Annex Action, which is the key notion to delimit the scope of the two instruments as far as the 'individual dimension' is concerned.

1272 *Gourdain*, at [3].

Insolvency Exception it was necessary to refer to the objectives and the scheme of the Convention and, then, to the general principles common to the laws of the Member States [1273].

However, despite that declaration of intent, it bears noticing the Court did not adopt either a teleological interpretation of the Convention (taking into account its objectives [1274]), nor a systematic one (which would imply examining its scheme [1275]).

As a matter of facts, to interpret the Insolvency Exception ('dissected' the essential elements of the core procedure and Annex Actions) the ECJ seems to have relied on the comparative interpretation, pursuant to which a provision is interpreted by referring to the general principles underlying national legal systems [1276]. Therefore, based on a comparative analysis the Court found that, being the *vis attractiva concursus* a common feature underlying the national system of *most* of the Member States, Annex Actions were included in the autonomous notion of 'insolvency proceedings' for the purposes of the Brussels Convention [1277].

1273 Incidentally, one may observe that this approach significantly differs from that one adopted in ECJ, 6 October 1976, Case C-12/76, *Industrie Tessili italiana Como v. Dumlop AG*, ECLI:EU:C:1976:133, in which the Court underlying divergencies between the national laws of Member States, refused to give an autonomous interpretation to the concept of 'place of performance' of contractual obligations, mentioned by Article 5(1) of the Brussels Convention. Given the absence (at that time) of any uniform applicable law, the ECJ stated at [10] – [11] that «*The* [Brussels] *Convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Member State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought* […] *Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the Treaty. In any event it should be stressed that the interpretation of the said words and concepts for the purpose of the Convention does not prejudge the question of the substantive rule applicable to the particular cas*e ».

1274 The primarily objective of the Brussels Convention, as recalled in ECJ, 6 October 1976, Case C-12/76, *Industrie Tessili Italiana Como v. Dumlop AG*, in ECJ Reports, 1976, p. 1473 is to foster the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and to strengthen the legal protection of persons therein established in the Community, pursuant to Article 220 of the Rome Treaty. As observed by P. ROGERSON in U. MAGNUS P. MANKOWSKI, Brussels I Regulation, European commentaries on private International law, Munich, 2012, p. 55, other objectives are the protection of the defendants and the weaker parties, the principle of legal certainty and, in particular, clear allocation of jurisdiction between Member States, mutual trust and confidence between Member States. It is for the ECJ to establish a hierarchy of the objectives of the Brussels Convention. However, in the Gourdain judgement, « *l'option communautaire que l'arrêt rapporté formule en termes vigoureux est indispensable* […] *et l'on regrettera, a cet égard, que la décision Gourdain/Nadler n'ait pas également invoqué* […] *ce « lien » – que l'article 220 du Traité de Rome tisse entre les deux instruments internationaux* […] *curieusement mis en avant par l'arrêt Tessili/Dunlop* […] *il n'a plus depuis lors, été formellement retenu par la plupart des décisions – dont celle ici rapportée – rendues par la Cour de Justice* ». J.L. BISMUTH, in *Revue des sociétés*, 1980, p. 535.

1275 See J.L. BISMUTH, in *Revue des sociétés*, 1980, p. 535, who states « *les méthodes téléologique et systématique étaient, conséquemment, inaptes à justifier une solution qui, parcequ'elle impose d'exclure du domaine matériel de la convention de 1968 les litiges étroitement liés à une faillite rend désormais ce derniers étrangers, et aux objectifs qui vivifient le traité de bruxelles, et au système proper à celui-ci* ».

1276 Lemontey criticised the approach bolstered by the ECJ in *Gourtain*, stating that « *s'il existe bien un jus commune europaeum de la notion de faillite auquel la Cour a fait référence, il n'en est pas de même de l'action e comblement de passif social qui* […] *n'a aucun équivalent dans les droits des autres États-membres.* […] *la Cour a dû se fonder sur le droit national de l'État d'origine, ce qui est la négation même d'une interprétation comparative* ». J. LEMONTEY, *op. cit.*, p. 664. On the comparative method see U. MAGNUS, in U. MAGNUS P. MANKOWSKI, *Brussels I Regulation, European commentaries on private International law*, Munich, 2012, p. 30. E. LEIN, *op. cit.* p. 20.

1277 In this respect it must be highlighted that the 'general principles' stemming from the corpus of the Member States' national legal systems do not require unanimity or a precise correlation to those systems. It is sufficient

A closer analysis of the case-law demonstrates, however, that the ECJ is still quite far from an accurate autonomous interpretation of the concept at hand since what an Annex Action seems to be not unanimously understood by the Kirchberg's Judges.

In particular, three main issues arise. First, it is unclear whether the wording of the Gourdain has to be considered as a hendiadys or as entailing a twofold test. On a literal basis, the use of the conjunction 'and' would suggest the presence of two distinct and separate conditions. Nevertheless, the approach adopted by the case law does not always match this logical conclusion (1278). Second, the contours of the Gourdain Formula appear somewhat blurred, since the Court did not precisely describe the actual content of the condition(s) provided therein. Eventually, should the Gourdain Formula be regarded as actually providing for two distinct criteria, it would be unclear the logical relationship between the two conditions, and whether they must be fulfilled cumulatively or alternatively.

II.3.1. The Gourdain Formula: a hendiadys or a twofold criterion?

In order to answer to the first of those questions it is necessary to retrace, once again, the first seminal decision of 1979. It was already explained that in the *Gourdain* case the ECJ interpreted broadly the Insolvency Exception of the Brussels Exception, affirming that, in addition to insolvency proceedings, it must be interpreted as including also (individual) actions directly deriving from insolvency and closely linked to insolvency proceedings (1279).

Lingering for a moment on the choice of words adopted by the Court, one may observe that if the direct derivation from insolvency was a condition already mentioned in the in the explanatory report of the Brussels Convention (1280), this does not hold true for the condition of the close connection with insolvency proceedings, which was an additional element specifically introduced by the Court on that occasion.

The Court could well have relied on the formula as already expressed in the Jenard Report and be satisfied with the criterion of direct derivation. Instead, it deemed appropriate to further specify the notion of Annex Action, by adding the new element of the close connection.

In the light of the above one may reasonably infer that those expressions were conceived by the Court as entailing two different conditions of the same principle. Yet, this conclusion does not seem to be consistent with the further argument put forward by the Court immediately after, that the

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to identify common features to a significant majority of the Member States. See U. Magnus, in U. MAGNUS P. MANKOWSKI, *cit.*, p. 30.

1278 *Polymer Vision R & D Ltd v. Sebastiaan Maarten Marie Van Dooren*, [2011] EWHC 2951 (Comm), at [53].

1279 *Gourdain*, at [4].

1280 As already mentioned, the Jenard Report submitted that "*proceedings relating to a bankruptcy* […] *are not necessarily excluded from the Convention. Only proceedings arising directly from the bankruptcy* […] *are excluded from the scope of the convention*". Cfr. P. JENARD, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, published in the Official Journal of the European Communities, 5 March 1979, C. 59/11, p. 12.

decisive criterion to be ascertained is « *whether the* [sole] *legal foundation of the action is based on the law relating to insolvency* » [1281]. Eventually the ECJ seems to bring together the two expressions and refer them both to sole criterion the legal foundation of the action.

All in all, in the first judgment establishing the Gourdain Formula, the reasoning of the Court alludes to the criterion for which an action is to be considered as directly deriving from insolvency proceedings and closely connected to insolvency proceedings as comprised of a single condition, as if it were an hendiadys.

From the *Gourdain* judgement onwards, the test of the 'directly derivation from insolvency proceedings and closely linked to them', albeit constantly recalled by the Court, was not interpreted straightforwardly.

In the *Seagon* case the Court limits itself to quote (quite tautologically) the Gourdain Formula, without specifying whether it refers to the legal basis of the action, or the procedural context thereof. Nor the characteristics of the action to set a transaction aside under Article 129 InsO, taken into consideration by the Court (*i.e.* the fact that only liquidator may bring the action and that the latter is intended to increase the insolvency estate [1282]) seem to be compelling to understand whether the Gourdain Formula is still interpreted as a hendiadys (but it is reasonable to infer so).

In *Alpenblume*, with respect to the Gourdain Formula [1283], it was expressly stated that « *it is therefore the closeness of the link - in the sense of the Gourdain case-law - between a court action such as that at issue in the main proceedings and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 is applicable*". As it will be addressed in further detail below, the ECJ seems here to have emphasised the procedural link to insolvency proceedings. Yet, the Gourdain Formula is still understood as entailing a single criterion.

Similarly, in the *German Graphics* judgement it was submitted, rephrasing word for word what previously stated in the *Alpenblume* case, that the fundamental criterion to be ascertained is the closeness of the link between a court and the insolvency proceedings. Again, the Gourdain Formula is regarded as a whole, as test encompassing a single criterion. Nevertheless, the Court makes some important specifications as regards its actual content, making it clear that what matters is the cause of action (*causa petendi*) of the action, and not the procedural context thereof [1284].

The *F-Tex* case marks a significant evolution in the interpretation of the Gourdain Formula, since, for the first time the Court refers explicitly to the Gourdain Formula as a twofold test [1285].

[1281] Gourdain, at [4].

[1282] *Seagon*, at [16].

[1283] *Alpenblume*, at [31].

[1284] Therefore, one could incidentally observe that, although the Gourdain Formula is conceptually understood by the Court in the same way (i.e. as a hendiadys), these two judgments are placed at two opposite extremes. This profile will be addressed in greater detail in the next paragraph.

[1285] *F-Tex*, at [30], where the Court states "it is therefore necessary to establish whether the action in the main proceedings, in view of the findings of the referring court, must be regarded as satisfying that dual criterion". See also, Ibid., at para. 38

Indeed, after recalling that what is decisive is the closeness of the link between the action and insolvency proceedings [1286], the ECJ specifies that « *it is therefore necessary to establish whether the action* […] *must be regarded as satisfying that dual criterion* ».

More in particular, it appears from its reasoning, that the Court understands the direct derivation from insolvency as pertaining to whether the right underlying the action is linked with the insolvency of the debtor, whilst the close connection, seems to be referred to the exercise of said right in the context of insolvency proceedings [1287]. The same approach was also adopted in the *Nickel&Goeldner* judgement, in which the Court took a significant stance on the interpretation of the Gourdain Formula (and even reworded it, with a different expression). The Court affirmed that

> « *the decisive criterion* […] *to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings* » [1288].

That wording seems to entail that the Gourdain Formula is understood again as a unique criterion, represented by the cause of action underlying the action. Nevertheless, after assessing that the action at stake was not directly deriving from the debtor's insolvency, the Court expressly stated that it deemed it superfluous to examine whether that action was closely connected with insolvency proceedings. That implies that, at least theoretically, the Court alluded that two (alternative) conditions are required for an action to be classified as Annex Action.

Ever since then, the Court continued to bolster such an interpretation in all the following decisions. Without recalling in greater detail each judgement, suffice here to note that, by adopting the very

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[1286] In *F-Tex*, at [23], the Court recalls the exact wording used in *Alpenblume* and *German Graphics*.

[1287] See *F-Tex*, at [38].

[1288] *Nickel&Goeldner*, at [27].

same reasoning, in the *H. v. H.K.* [1289], in *Tünkers* [1290], in *Valach* [1291] and in *NK* [1292] judgements the Court has always addressed the Gourdain Formula as a dual criterion.

Concluding on this point, the ECJ case-law clearly reveals that the interpretation of the Gourdain Formula has registered throughout the years an evolution. The application of the test oscillates between merging both expression into one single criterion and (as of the *F-Tex* case) distinguishing between two (cumulative or alternative) conditions.

In anticipation of what will be demonstrated afterwards, the value of the second criterion, even if (or perhaps precisely because) not easily identifiable, is debated among scholars. Suffice here to acknowledge that the tendency now followed by the Court is to consider distinctly two different conditions [1293].

II.3.2. [Segue] The actual content of the Gourdain Formula

The uncertainties highlighted above cast remarkable doubts on the determination of the core profile represented by the exact content of the proximity test required by the Gourdain Formula, which should legitimate the attraction of the action to the insolvency forum.

To give a concrete meaning to its wording, it seems appropriate to start from a literal interpretation of the Gourdain Formula and to consider if its text provides some useful indications in this sense.

To this respect, it is noteworthy the distinction made between the two expressions as emerging in

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1289 In *H. v. H.K.,* at [21] the ECJ repeated that « *in order to identify the area within which an action falls, it is necessary to determine whether the right or the obligation which forms the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings* », but eventually it analysed both the legal basis of the action under Article 64 GmbHG and the close connection.

1290 In *Tünkers*, at [22], it was submitted that « *in order to determine whether an action derives directly from insolvency proceedings, the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings* ». In this case too, the Court, however mentioned both the direct derivation of the right from the debtor's insolvency and the close connection to insolvency proceedings. See in particular at [27] and [28].

1291 In *Valach*, at [37] the Court referred to the usual wording highlighting the first condition of the test (*i.e.* the direct derivation from insolvency), stating that « *With regard to the first criterion, in order to determine whether an action derives directly from insolvency proceedings, the decisive factor applied by the Court to identify the area within which an action falls is not the procedural context of the action but its legal basis. According to that approach, it must be determined whether the right or obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings* ». Again, the Court analysed the second criterion as well (*i.e.* the close connection to insolvency proceedings).

1292 In *NK*, the Court states once more that «*The decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context 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 basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings* ». (see at [28]). It is however added at [30] that « *it is the closeness of the link between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 is applicable* ».

1293 Italian scholars tend to adhere to the latter interpretation distinguishing between two conditions. See P. DE CESARI, '*Azioni collegate e strettamente connesse ad una procedura di insolvenza: una nuova nozione europea autonoma*', in *Il Fallimentarista*, 23 July 2012; M. MONTANARI, 'La sottrazione al reg. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int'l Lis, 2012*, p. 127.

some linguistic versions of the *Gourdain* judgement: the direct derivation regards the *insolvency*, whilst the close connection is referred to insolvency *proceedings* [1294].

Accordingly, assuming that it is not a mistake of translation, it seems reasonable to preliminary infer from this specification that the direct derivation focuses on a substantive analysis of the action, whilst the close connection pertains to the analysis of the procedural context.

Moving from this basic assumption, it is apparent however, that those general criteria are too broadly formulated to specifically provide appropriate guidance on the actual content of the Gourdain Formula (and thus identify what is an Annex Action).

Therefore, it is once again necessary to resort to the interpretation of the case-law and retrace the features of the actions which the ECJ has given weight to, attempting to identifying what was considered as symptomatic either of the direct derivation from insolvency or of the close connection with insolvency proceedings.

However, as it was seen, the picture is further complicated from the fact that in some cases the ECJ has understood the Gourdain Formula as a single criterion and, in some others, as a two-pronged test. As this different interpretation certainly had an impact on the meaning given to Formula Gourdain, the two scenarios will be dealt with separately.

II.3.2.1. The content of the Gourdain Formula when considered as one criterion

Whenever it was regarded as a hendiadys, and thus as consisting of one single criterion, the reasoning of the Court reveals a more flexible approach towards the application of the Gourdain Formula. Indeed, the expression 'directly deriving from insolvency and closely connected to insolvency proceedings' is not applied rigidly. Instead, it is understood as a mere guideline, which serves the interpreter as a parameter to determine whether a 'link particularly close' between the national action and insolvency proceedings exists.

As it was mentioned above, in the Gourdain case the *action en comblement du passif* was deemed to be particularly close to insolvency proceedings on the basis of six characteristics [1295]. In particular, the Court considered that:

(i) the statutory provisions disciplining the are located in the French insolvency law;

(ii) the exclusive competence to hear the action lies with the court having opened insolvency proceedings (the *Tribunal de Commerce*);

[1294] In the Italian version the Gourdain Formula reads « *occorre che esse derivino direttamente dal fallimento e si inseriscano strettamente nell'ambito del procedimento fallimentare* ». The distinction here is extremely clear. In French « *elles dérivent directement de la faillite et s'insèrent étroitement dans le cadre d'une procédure de liquidation des biens ou de règlement judiciaire* ». In Spanish « *que sean consecuencia directa de la quiebra y se mantengan estrictamente dentro del marco de un procedimiento de liquidación de bienes o de suspensión de pagos* ». Differently, in the German version the distinction seems not present (« *wenn sie unmittelbar aus diesem Verfahren hervorgehen und sich eng innerhalb des Rahmens eines Konkurs- oder Vergleichsverfahrens in dem vorgenannten* »). It must be highlighted that in Recital 6 EIR the distinction seems to have been completely overlooked.

[1295] Or, as defined by J. LEMONTEY, *op. cit.*, p. 668, « *un faisceau de six caractéristiques* ».

(iii) The *locus standi* lies exclusively with the trustee, acting in his capacity as body of insolvency proceedings, in the interest and on behalf of the general body of creditors;

(iv) The action derogates from the general rules on liability, since (a) it creates a presumption of liability in respect of the *de iure* or *de facto* directors that can only be rebutted by proving that they managed the company with all the requisite of loyalty and diligence and (b) the limitation period runs from the date when the final list of creditors is drawn up and it is suspended for the duration of composition which may have been entered into and starts to run again if such a composition is terminated or declared void;

(v) The proceed of the actions revert to the insolvency estate;

(vi) Under certain circumstances, the court may open insolvency proceedings against directors who fails to pay the compensation without having to assess whether they meet the conditions for being declared bankrupt.

Those features of the action include both purely procedural aspects and profiles relating to the right underlying the action, without the Court giving specific weight to one or another profile: eventually those characteristics are all tracked back and referred by the Court to the legal foundation of the action.

Accordingly, the Court seems to anchor the expression 'directly deriving from insolvency and closely connected to insolvency proceedings' to the legal foundation of the action, as if it encompasses both the procedural context and the right underlying the action.

The notion of the 'closeness of the link' between the action and insolvency proceedings lacking precise contours, the smooth approach adopted in Gourdain entailed an excessive discretion of the Court in the subsequent application of the Gourdain Formula. Indeed, the generic reference to the legal foundation of the action (indiscriminately referred to both procedural and substantial profiles) led the ECJ to subsequently give too much weight to specific features of the action relating solely to the context of proceedings.

In *Seagon*, the attention devoted by the court to the interpretation of the Gourdain Formula and its application with regard to the action to set a transaction aside is excessively concise and inadequate. It may be only recalled that the ECJ limited itself in stating that

> « *only the liquidator may bring such an action in the event of insolvency with the sole purpose of protecting the interests of the general body of creditors* […] *under the provisions of Paragraphs 130 to 146* [insO], *the liquidator may challenge acts undertaken before the insolvency proceedings were opened which are detrimental to the creditors* […] *therefore* [the action is] *intended to increase the assets of the undertaking which is the subject of insolvency proceedings* » [1296].

Rather hastily, from those arguments the Court infers that in *Gourdain* the Court found that

> « *an action similar to that at issue in the main proceedings is related to bankruptcy or winding-up if it derives*

[1296] *Seagon*, at [16].

directly from the bankruptcy or winding-up and is closely connected with the proceedings for the 'liquidation des biens' or the 'règlement judiciaire' » [1297].

According to the arguments adopted on that occasion by the Court, the 'close link' between the action and the insolvency proceedings seems to be met for the mere fact that *(i)* the action is brought by the trustee, *(ii)* by virtue of the powers that he derives from national bankruptcy law and *(iii)* that the action is exercised for the benefit of creditors: all profiles that do not pertain to the very nature of the right underlying the action. Not a single word, in effect, is spent by the Court on the legal foundation of the action to set a transaction aside (*i.e.* considered as the right underlying the action *stricto sensu* [1298]). The undesirable consequences of this approach will be addressed below.

Luckily enough, the action under examination being an action to have a transaction set aside, in *Seagon* (at least as regards to the classification of the action) the Court had an easy task, since, using the words of the Advocate General « *despite the differences between the legal systems of the Member States, the solutions which those systems offer in respect of disposals of assets in fraud of creditors have a common genetic code* » [1299].

Therefore, although the Court's condensed arguments on the application of the Formula Gourdain cannot be shared, the qualification of an action to set a transaction aside action as an Annex Action was certainly correct (and nearly obvious) [1300].

However, the interpretation of the Gourdain Formula as a unique and flexible condition reveals all

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1297 *Seagon*, at [19]. Correctly Oberhammer severely criticises this statement of the Court and recalls that the action in question in the *Gourdain* case was by no means an action to set a transaction aside (but a liability action against directors). P. OBERHAMMER, 'Europäisches Insolvenzrecht: EuGH Seagon /Deko Marty Belgium und die Folgen', in P. APATHY, R.BOLLENBERGER, P. BYDLINSKI, G. IRO, E. KARNER and M. KAROLLUS (eds), *Festschrift für Helmut Koziol zum 70. Geburtstag*, Jan Sramek Verlag, 2010, p. 1241.

1298 The arguments purported by the Court concerning the nature of an action to set a transaction aside seem to simplify the detailed analysis carried out by the Advocate General. On this point, the Advocate General, Ruiz-Jarabo Colomer, moved from a comparison between the common *action pauliana* and an action to set a transaction aside brought in the context of insolvency, stressing the autonomous nature of the latter. The Advocate General submitted that the rules governing the traditional *actio pauliana* in civil law diverged significantly from the rules governing an action to set a transaction aside brought in the context of insolvency proceedings. Indeed « *the fundamental difference between the action to set aside in civil law and the action in the context of an insolvency to set a transaction aside lies in the effects which each action produces since, under the general rules, those effects are confined to the individual creditors who have brought the action, whereas, under the insolvency rules the effects apply to the whole of the assets and therefore benefit all creditors* » (see the opinion of Advocate General Ruiz-Jarabo Colomer, at [27]). Moreover, the Advocate General maintained that, despite the differences between the legal systems of the Member States, the solutions which those systems offer in respect of transactions detrimental to creditors have 'a common genetic code' (*ibid*., at para. [26]). Therefore, the civil action and its insolvency law counterpart must be considered as forming two distinct sets of action, whose differences are crucial in determining the applicable rules on conflict of laws. From these premises, the Advocate General inferred that whilst the common *actio pauliana* is covered by the Brussels I Regulation (as ruled in ECJ, 10 January 1990, Case C-115/88, *Mario P. A. Reichert and others v Dresdner Bank*, in ECLI:EU:C:1990:3 and in ECJ, 26 March 1992, C-261/90, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG*, in ECLI:EU:C:1992:149), an action to set a transaction aside brought in the context of insolvency proceedings, is excluded from the material scope of Insolvency Regulation, pursuant to the decision rendered in the *Gourdain* case.

1299 Opinion of the Advocate General, at [26].

1300 G. MONTELLA, 'Regolamenti (CE) n. 1346/2000 e (UE) 2015/848 e competenza internazionale nelle cause che "derivano direttamente dalla procedura di insolvenza e le sono strettamente connesse"', in *Fallimento*, 7, 2017, p. 777.

its shortcomings when considering the (in)famous *Alpenblume* case. In that case the Court has evidently bolstered the very same arguments put forward in *Seagon*, with some minor additions [1301], coming up with an outcome that, according to some authors, needs to be consigned to oblivion [1302]. It should be recalled briefly that that case - or, at least, the case as understood by the Court [1303] - concerned a decision declaring ineffective the transfer (and the resulting action for the restitution) of shares representing the share capital of an Austrian company made by the trustee appointed in the course of insolvency proceedings of a Swedish undertaking.

The Court found that the link (again generically referred to the legal foundation of the action, as the Court recalls here the *Gourdain* case) between that decision and insolvency proceedings was particularly close. Indeed, following the reasoning of the Court the legal foundation of the action underlying that decision was based on insolvency law, since

(i) the transfer of shares made by the trustee (and the claim for their restitution) is a « *direct and indissociable consequence of the existence of powers which [the trustee] derives from insolvency law* » [1304];

(ii) the provisions governing the powers of the trustee derogate from the general rules of private law, and, in particular, from property law, since « *in the case of insolvency, debtors lose the right freely to dispose of their assets and the liquidator has to administer the assets in insolvency on behalf of the creditors, which includes effecting any necessary transfers* » [1305];

(iii) the estate of the undertaking (which was subject to the insolvency proceedings) was increased as a consequence of the transfer of the shares by the trustee [1306].

Once again, as it happened in *Seagon*, the Court seems to maintain that in order to qualify an action (or a judgement) as an Annex Action, the sole conditions to be met are the involvement of the trustee and the increase (or decrease) of the assets of the insolvency estate. The ECJ made explicit that the involvement of the trustee must be regarded as an element pertaining to the legal foundation since the divestment of the debtor and the appointment of the trustee to manage the debtor's assets derogates to the common rules of property law.

The reasoning of the Court lacks persuasiveness.

The simplicity of the Court's reasoning is all the more apparent from the fact that it ignores the circumstance that the undertaking SCT Industri acted *in bonis*, after the closure of insolvency

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1301 Although surprisingly, the Court does not even mention the judgement rendered in *Seagon*, albeit handed down only few months earlier. Oberhammer reads this omission as an evidence of the superficial analysis carried out by the Court. P. OBERHAMMER, 'Im Holz sind Wege: euGH SCT./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit b. EuGVVO', in *IPRax*, 2010, p. 317-324; F. CORSINI, *op. cit.* p. 1084.

1302 P. OBERHAMMER, 'Im Holz sind Wege: euGH SCT./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit b. EuGVVO', *cit*, p. 318.

1303 P. OBERHAMMER, 'Im Holz sind Wege: euGH SCT./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit b. EuGVVO', *cit*, p. 320.

1304 *Alpenblume*, at [28].

1305 *Alpenblume*, at [27].

1306 *Alpenblume*, at [29].

proceedings, either in the context of the action brought in Austria (in which it acted as an intervening third party), and in the action brought in Sweden [1307]. To this respect the Court merely observes that the closeness of the link « *is not weakened by the fact that* […], *the insolvency proceedings had been closed when the action for restitution of title was brought before the Austrian courts* ».

Even leaving aside this aspect, as noted by the vast majority of scholars, such an approach would entail that every action brought in the course of insolvency proceedings (*recte* even after the closure of insolvency proceedings! [1308]) would represent an action 'directly deriving from insolvency and closely connected to insolvency proceedings'.

Indeed, the fact that the trustee is bestowed with the task of administering the debtor's assets represents by definition an effect that derives from the opening of insolvency proceedings [1309]. Also, the fact that an action, to some extent, affects (actively or passively) the insolvency estate seems inevitable and cannot represent a determinative element to characterise an action as an Annex Action [1310].

As noted some years later by Advocate General Bobek, a reasoning of this kind implies that

> « *An 'insolvency black hole' would be opened: because the legal act was carried out by a liquidator, who is acting by virtue of specific rules relating to insolvency, and the money comes from or reverts to the estate, which is also due to specific rules on insolvency, then anything and everything occurring within those two parameters would effectively fall within the Insolvency Regulation* » [1311].

Therefore, should these arguments be considered as genuinely indicative of a connection between the action and the insolvency proceedings, the mere existence of the insolvency proceedings would legitimate the qualification of an action as Annex Action. Which seems contrary to the principle underlying the Gourdain Formula, pursuant to which only actions with a close and direct connection to insolvency proceedings are subject to the *vis attractiva*.

It is not unreasonable to believe that such an extreme interpretation is the result of the excessive discretion of the Court due to the absence of parameters and the unclear contours relating to the interpretation of the Formula Gourdain, which was applied too flexibly.

1307 Moreover, as correctly pointed out by a German author, in the case at stake the CJUE relied on inaccurate facts, probably due to the formulation of the deferred question. As a consequence, in assessing the question referred by the Swedish Supreme Court, the CJUE underestimated the circumstance that in the case brought before the Austrian Court Alpenblume appeared as mere intervener and was not directly summoned as respondent, which was not duly highlighted by the Court. See P. OBERHAMMER, 'Im Holz sind Wege: euGH SCT./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit b. EuGVVO', *cit.*, p. 320.

1308 F. CORSINI, 'Le azioni (indirettamente) derivanti dal fallimento, tra Regolamento n. 44 del 2001 e Regolamento n. 1346 del 2000', in Rivista trimestrale di diritto e procedura civile, 2010, p. 1085.

1309 Which is also reflected in Article 1 EIR, as a condition for the application *ratione materiae* of the Insolvency Regulation.

1310 B. LAUCKEMANN, 'Jurisdiction – Annex Actions', *cit,* pp. 184-185.

1311 Opinion of the Advocate General Bobek delivered on 18 October 2018, ECLI:EU:C:2018:850, at [61]. In the same sense, see F. CORSINI, 'Le azioni (indirettamente) derivanti dal fallimento, tra Regolamento n. 44 del 2001 e Regolamento n. 1346 del 2000', *cit.*, p. 1087.

However, as of the *German Graphics* case [1312], while continuing to interpret the Gourdain Formula as a single condition, the ECJ has started to offer a clearer guidance and set some boundaries concerning the actual content of the Gourdain test.

Indeed, it was reaffirmed that the decisive criterion to be ascertained is the closeness of the link between the action and insolvency proceedings, in the sense of the case-law resulting from Gourdain (thus implying that the legal foundation of the action must be based on insolvency law). However, implicitly taking the distance from its previous case-law [1313], the Court also made clear that « *the mere fact that the liquidator is a party to the proceedings is not sufficient to classify the proceedings* […] *as proceedings deriving directly from the insolvency and being closely linked to proceedings for realising assets* » [1314].

The reasoning of the Court in *German Graphics* (although still concise) appears much more focused on the legal foundation of the right underlying the action: the Court finds that the action for the restitution of assets brought by a creditor of the undertakings [1315] under reservation of title

(i) is independent of the opening of insolvency proceedings;

(ii) seeks only to ensure the application of the reservation of title clause to the benefit of the (single) creditor;

(iii) is not based on the law of the insolvency proceedings, nor it requires the involvement of the trustee.

I shall revert later to the fact that I consider it wrong that the Court held that *generally* an action for the restitution of assets brought by the assignee-creditor against the undertaking is not directly deriving from insolvency proceedings [1316]. For the moment, suffice here to observe that, methodologically speaking, by stating that the procedural context is not the decisive criterion of the Gourdain Formula, the Court took a fundamental step towards a better specification of the proximity test represented by the Gourdain Formula.

II.3.2.2. The content of the Gourdain Formula, when considered as a twofold test

As said above, from the *F-Tex* case, the expression 'directly deriving from and closely connected with insolvency proceedings' was intended as a two-pronged criterion [1317]. Therefore, the Gourdain test became progressively more structured.

For the sake of clarity, then, it is necessary to address the two conditions separately to examine (if

1312 Quite curiously the composition of the Court in *German Graphics* remained almost unchanged compared to that of the *Alpenblume* case!

1313 Eloquently, with respect to the interpretation of the Gourdain Formula, despite using the very same wording the ECJ does not even mention the *Alpenblume* case, handed down only few months before.

1314 *German Graphics*, at [33].

1315 The fact that in the case at stake the claimant was a creditor, and not the trustee needs some further specifications, which are addressed in the next Chapter V §§ V.4.1, V.4.2

1316 see *infra* Chapter V, §§ V.4.2.4, V.4.2.5.

1317 The logic relationship between the two criteria is addressed in the next paragraph § 18.3 of this Chapter.

possible) the content of each.

II.3.2.2.1. The (first) condition of the direct derivation

As regards the condition of the direct derivation from insolvency proceedings, it is in *F-Tex* and (perhaps more clearly) in *Nickel&Goeldner* that the Court first referred it specifically to the right or the obligation underlying the action.

In the *F-Tex* judgement, the Court clearly considered that an avoidance action under § 129 InsO. is an Annex Action, stressing that in principle the substantive right underpinning the action derives directly from insolvency proceedings because the right to set aside a transaction undertaken by the debtor before the opening of insolvency proceedings which is detrimental to the creditors is a right stemming from the opening of insolvency proceedings, since the German insolvency law confers it upon the trustee.

However, on that occasion, the Court deemed it superfluous to linger excessively on the condition of the direct derivation. In this respect, the ECJ made it plain that the question whether the right underpinning the action retains a direct link with the debtor's insolvency proceedings once it is acquired by the assignee could remain open [1318]. Indeed, it was the Court's view that, following the assignment of the action to the sole creditor of the debtor by the trustee, the exercise of the right acquired (*i.e.* the action) did not retain a close connection with insolvency proceedings.

Therefore, no further indications can be inferred from this case with respect to the elements that the Court appreciated to ascertain whether the right underpinning the action is directly deriving from insolvency proceedings.

Some more hints come from the second case mentioned above.

In *Nickel&Goeldner* the ECJ slightly modified the wording originally adopted in Gourdain. The Court stated, in facts, that assessing the legal basis of the action does not concern the location of the statutory provision governing the action, rather it means determining whether « *the right or the obligation* [underlying] *the basis of the action finds its source in common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings* » [1319].

In that case, the Court found that the action for the payment of a debt arising out of the provision of some services in execution of a contract for carriage brought by the trustee was not directly deriving from insolvency proceedings as

(i) it « *could have been brought by the creditor itself* [*i.e.* the insolvent debtor] *even before his divestment deriving from the opening of insolvency proceedings* », and

(ii) « *in that situation, the action would have been governed by rules concerning jurisdiction applicable in civil and*

[1318] *F-Tex*, at [41].

[1319] *Nickel&Goeldner*, at [27]. See also *Nortel*, at [28].

commercial matters » [1320].

In the following *Nortel* case, in which the same interpretation of the criterion of the direct derivation from insolvency was implemented, the Court found (rather arguably) that the right underlying an action concerning the allocation between main and secondary proceedings of the proceeds arising out of the sale of the debtor's assets is governed Articles 3 and 27 EIR [1321].

A different (and opposite) approach was, however, taken in *H. v. H.K.* where the Court adopted a teleologic approach.

When faced with an action under Article 64 GmbHG, pursuant to which the managing director of a company must reimburse the payments which he made on behalf of that company after it became insolvent or after it was established that the company's liabilities exceeded its asset, the Court acknowledges that the right underlying such an action is not based on insolvency law, since the exercise of that action does not require insolvency proceedings to have formally been opened.

Therefore, the ECJ admits that the condition of the direct derivation from the insolvency of the debtor, as interpreted in *Nickel&Goeldner*, was unfulfilled.

However, the Court maintained that « *this fact per se does not preclude such an action being characterized as an action which derives directly from insolvency proceedings* » since that provision « *derogates from the common rules of civil and commercial law, specifically because of the* [substantial] *insolvency of the debtor company* » [1322]. The Court further justifies its decision by stating that the action, when brought in the context of insolvency proceedings, pursues objectives under insolvency law, much alike to those of an action to set a transaction aside. Namely, the action seeks to preserve the distributable assets of the debtor, in the interest of all its creditors.

The consequences of that decision are of paramount importance. The approach bolstered by ECJ in the *H. v. H.K.* case entails that even an action whose legal basis was not grounded on the rules specific to insolvency proceedings, but on civil and commercial rules, when exercised *on the occasion* of

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1320 *Nickel&Goeldner*, at [28].

1321 The Court's reference to Articles 3(2) and 27 EIR does not seem entirely convincing, as these are rules on jurisdiction which do not concern the legal basis for the action. Actually, on this point, the arguments put forward by the Advocate General seem more persuasive. Indeed, Advocate Mengozzi submitted that the rights claimed by NNSA's former employees and the *Comité d'entreprise* underlying the action brought before the referring court are generally governed by Article L. 641-13 of the Commercial Code, which governs the order of creditors' rights within collective proceedings. Also, it was noted that, with reference to the credit claimed by the joined administrators (*i.e.* administration expenses), pursuant to the coordination protocol, entered into between the joined administrators of the main procedure and the trustee appointed in the secondary procedure, the preferential status of such a credit was assessed on the basis ofthe Insolvency Act of 1986, the Regulation and the European Communication and Cooperation Guidelines for Cross-border Insolvency, published by INSOL Europe in 2007. Therefore, the Advocate General concluded that, undoubtedly, although the first part of the claim was to be decided by the Tribunal de Commerce, on the basis of the Memorandum and the coordination protocol, the applicable rules were, in any case, those specific to insolvency proceedings. See the Advocate General opinion delivered on 29 January 2015, ECLI:EU:C:2015:44, at [25] - [27]. See also B. LAUKEMANN, 'Regulatory copy and paste: The allocation of assets in cross-border insolvencies – methodological perspectives from the Nortel decision', in Journal of Private International Law, 2016, nt. 22.

1322 *H. v. H.K.*, at [40].

insolvency proceedings must be regarded as an Annex Action, thus falling within the scope of the Insolvency Regulation.

Some authors attempted to mitigate the disruptive innovation brought by this judgement, by stating that the teleologic interpretation adopted by the court resembles that one of *Alpenblume*. A French author maintained that since the action under Article 64 GmbHG aims at restoring the bankruptcy estate, akin an action to set a transaction aside, and one of the condition of the action is the material insolvency of the debtor, the solution found by the Court does not differ significantly from the *Nickel&Goeldner* case-law [1323]. However, such an argument may be easily rebutted by observing that all the initiatives brought by the trustee eventually seek to preserve the distributable assets of the debtor, in the interest of all its creditors.

In *Tünkers* the Court seems to have returned to the (narrower) interpretation of the direct derivation as in *Nickel&Goeldner*[1324].

Still, it must be highlighted that the arguments put forward by the Court do not make a clear-cut distinction between the right and it exercise. Indeed, despite referring to the second condition of the test (*i.e.* the close connection of the action with insolvency proceedings), the Court found that the *right* to claim for damages for unfair competition of the assignee of a part of a business of an insolvent company, has undoubtedly a derivation from the insolvency of the debtor, for the part of the business was acquired by the trustee. However, as the Court notices, once it has become part of the assignee's assets, that right 'cannot retain a direct link with the debtor's insolvency' [1325].

In *Valach*, the first criterion of the direct derivation from insolvency is clearly referred to the right or obligation underlying the action and the lucid reasoning of the Court is extremely clear in this sense. It must be remembered that the case concerned an action for the liability of the committee of creditors, brought by the shareholders of the undertaking and by companies in business relationships with the insolvent company.

With reference to the obligation underlying the action, the Court found its legal basis stemmed from the specific rules of insolvency law, for the duty of the committee of creditors to act in the joint interest of all the creditors is an obligation that is expressly provided by national insolvency law. Therefore, the alleged infringement of such a duty lies with the same legal basis. The Court states that « *the obligations which form the basis of bringing an action for liability in tort against a committee of creditors* […] *originate in rules that are specific to insolvency proceedings* » [1326].

1323 M. SENECHAL and R. DAMMANN, *Le droit de l'insolvebilité*, Joly (LGD) eds, 2018.

1324 See *Tünkers*, at [22], where the Court states « *as regards the first criterion, it must be recalled that, in order to determine whether an action derives directly from insolvency proceedings, the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings* ».

1325 *Tünkers*, at [29].

1326 *Valach*, at [36].

In NK, with reference to legal basis the Dutch Peeters Gatzen action, the Court finds that it is an action for liability for a wrongful act, according to which a third party is held liable for the violation of its legal duties, whose infringement causes a loss to the creditors of the undertaking. On this ground, it was submitted that such an action is based on the ordinary rules of civil and commercial law and not on the derogating rules specific to insolvency proceedings [1327].

II.3.2.2.2. The (second) condition of the close connection

Turning to the second condition of the close connection from insolvency proceedings, from the *F-Tex* judgement it may be understood that it must be referred to the *exercise* of the right in the context of the proceedings (*i.e.* the action). In that case the Court observed that, although it is assumable the nature of the right to have a transaction set aside underlying the action of the assignee is the same of the right conferred from insolvency law to the trustee [1328] (or, at least, as mentioned above, the Court does not solve the question whether the assignation of the right to a third party amends the very nature of the right), the exercise of that right once acquired by the assignee is « *is subject to rules other than those applicable in insolvency proceedings* » [1329].

The elements concerning the action that are symptomatic of a close connection with insolvency proceedings may be inferred *a contrario* from the subsequent arguments of the Court.

In particular, to be closely connected to the insolvency proceedings it is relevant that

(i) the trustee, acting in the interest of the creditors, is legally obliged to exercise the action;

(ii) the proceeds of the action revert to the estate;

(iii) the closure of the insolvency proceedings affects the exercise by the trustee of the right to have a transaction set aside.

It may be inferred, therefore, that these elements are regarded as fulfilling the condition of the close connection of the action to insolvency proceedings.

Arguments confirming this view may be found also in *Nickel&Goeldner*. Although in that case the Court considered it superfluous to examine whether the criterion of the close connection with insolvency proceedings was fulfilled, it was again stressed that the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part and, therefore, « *the fact that, after the opening of insolvency proceedings* […] *the action* […] *is*

1327 *NK*, at [33], [34] and [37].

1328 M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', *cit.*, p. 131, infers for the reasoning of the Court that « *at least in thesis*, [...] *the link of the direct derivation from the insolvency proceedings can never be regarded as severed, even if the action is assigned to a third party* [quantomeno in thesi, […] il vincolo di dipendenza dalla procedura fallimentare non possa mai considerarsi reciso, neppure in ipotesi di trasferimento dell'azione a un terzo] ». Similarly, TH. MASTRULLO, 'Action révocatoire - L'action exercée par le cessionnaire du droit de révocation que le syndic tire de la lex concursus relève de la matière « civile et commerciale » au sens du règlement « Bruxelles I »', in *Revue des procédures collectives*, 6, November 2012, comm. 184.

1329 *F-Tex*, at [42].

taken by the insolvency administrator appointed in the course of those proceedings and that the latter acts in the interest of the creditors does not substantially amend the nature of the debt relied on which continues to be subject, in terms of the substance of the matter, to the rules of law which remain unchanged » [1330].

Some indications on the content of the condition of the close connection between the action and insolvency proceedings may be also found (*a contrario*) in the *Tünkers* judgement, where the Court submitted that the action brought against the assignee of a part of the business of an insolvent company was not closely connected with the procedure because it *(i)* does not concern the exercise of the powers nor the conduct of the trustee, (ii) it is a separate action (iii) is not based on the rules specific to insolvency proceedings. Moreover, (iv) the possible consequences of such an action cannot have any influence on insolvency proceedings and (v) it is brought in the own interest of the claimant and not on behalf of creditors.

As said above, the reasoning of the Court seems here more confused as to the distinction between the two criteria. Indeed, the Court seems to refer to the direct derivation some arguments that in the previous case law were referred to the close connection (and *vice versa*). However, trying to put some order in reasoning of the Court, it is assumable that the elements above may be referred to the procedural context of the action.

In *Valach* the Court acknowledged once more that second criterion pertains to « *the closeness of the link between a court action and the insolvency proceedings* ». However, in that case the examination of the procedural context was addressed briefly by the Court and is scarcely useful to determine which procedural elements the ECJ took into account, as it merely repeated the arguments already put forward with respect to the direct derivation. Indeed, the Court limited itself to maintain that « *it will be necessary to analyse in particular the extent of that committee's obligations in the insolvency proceedings and the compatibility of the rejection with those obligations. Such an analysis clearly presents a direct and close link with the insolvency proceedings, and is therefore closely connected with the course of those proceedings* ».

The *NK* judgement, on the contrary, proves to be useful for the determination of the content of the second condition of the Gourdain Formula, as the Court lists the following features of the Peeters Gatzen action, as part of the procedural context of that action namely that the action

(i) can be brought (also) by the liquidator in the interests of all the creditors as part of his general task, recognised in the relevant national law, of administering and liquidating the bankrupt estate;

(ii) the proceeds of that action, if the claim succeeds, accrue to the estate for the benefit of all the creditors in order to be distributed according to the rules of the liquidation plan

(iii) it is not necessary to examine the individual position of each creditor concerned and the third party against which the action has been brought cannot use against the liquidator the defences which it would have available against the creditors individually

(iv) such an action may be brought by the creditors individually, whether before, during or after

[1330] *Nickel&Goeldner*, at [29].

the conduct of the insolvency proceedings.

II.3.3. [Segue] *Cumulative or alternative criteria?*

Once acknowledged that, accordingly to the predominant and most recent case-law [1331], the direct derivation and the close connection must be regarded as two separate conditions, having an autonomous meaning, it bears now addressing the logical relationship between those two criteria.

With reference to this point as well, the answers provided by the case-law are not straightforward.

Among the decisions analysed, various approached adopted by the ECJ may be identified (thus creating uncertainties to interpreters and practitioners with reference to the application of the Gourdain Formula).

According to a first approach, the fact that one of the conditions of the test was fulfilled prevented the Court the Court from examining the second one.

In *F-Tex* - which, as seen above, is the first judgement in which the ECJ submitted that the Gourdain Formula comprises two conditions - the Court grounded its decision on the second criterion of the test. Indeed, the Court found that « *the exercise by the assignee of the right acquired is not closely connected with the insolvency proceedings* ». (second condition) [1332]. Once ascertained that the action brought by the assignee did not retain a close connection with insolvency proceedings, due to the very assignation of the action, it was submitted that there was no « *need to rule on the existence of any direct link between that action and the insolvency of the debtor*" [1333].

Similarly, in *Nickel&Goeldner* the Court held that the action brought by the trustee did not « *have a direct link with the insolvency proceedings opened in relation to the applicant*" (first condition). Aa a consequence, the ECJ considered it unnecessary to « *examine whether the action is closely connected with the insolvency proceedings* » (second condition) [1334].

The fact that the Court did not deem necessary to analyse both criteria, once ascertained that one of them was unfulfilled, may lead one to understand, then, that the conditions of the Gourdain Formula are to be considered as cumulative [1335].

A different approach, however, was adopted in other cases, in which the Court examined both

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1331 Cass. SS.UU. 27 March 2009, n. 7428 found that an action seeking the declaration of voidness of the contract and the enforcement of the guarantee for defects of the contract itself, must be considered as actions not deriving from insolvency proceedings. See also Cass. no. 11189/1993, according to which the *vis trahens* of insolvency proceedings does not operate for actions that are already in the assets of the debtor, corresponding to pre-existing subjective rights, and that are in a mere occasional relationship with insolvency proceedings. On the contrary, the *vis attractiva concursus* operates for disputes that, even if related to pre-existing relationships, have suffered deviations from their typical legal scheme.

1332 *F-Tex*, at [41].

1333 *F-Tex*, at [48].

1334 *Nickel&Goeldner*, at [31].

1335 Among scholars supporting the cumulative nature of the conditions of the Gourdain Formula see M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int' Lis*, p. 129.

conditions. Which seems to be in contradiction with the cumulative nature of the two conditions, suggesting instead that they are alternative criteria [1336].

The *Tünkers* case provides a good example. On that occasion, it was maintained « *an action for damages for unfair competition* […] *is not based in the rules specific to insolvency proceedings* » (first condition) [1337]. Although the first criterion not being fulfilled, the Court nevertheless deemed it appropriate to examine also the condition of the close connection between the action and the insolvency proceedings, and found that « *the acquired right, once it has become part of the assignee's assets, cannot retain a direct link with the debtor's insolvency in all cases* » [1338].

In the decision *H v. H. K.*, the Gourdain Formula was interpreted more than ever as a two-tier alternative test. It is noteworthy that Court assesses the existence of both the criteria: the fact that one of them was not fulfilled (thee direct derivation from insolvency proceedings) did not prevent the Court from examining the other one.

In *Valach,* also, the Court found that the action for liability brought against the committee of creditors was the direct and inseparable consequence of the insolvency of the debtor and stemmed from the provisions of national law governing insolvency proceedings [1339]. Further on, as regards the second condition of the test, the ECJ deemed it was necessary to examine the extent of that committee's obligations in the insolvency proceedings and concluded that « *such an analysis clearly presents a direct and close link with the insolvency proceedings* […] *and is therefore closely connected with the course of those proceedings* » [1340].

In *NK* the ECJ examined both conditions as well. First, the Court found that the *Peeters Gatzen* action is based on the ordinary rules of civil and commercial law and not on the derogating rules specific to insolvency proceedings (first criterion) [1341]. Then, the Court seems to consider whether that action retains a close connection with insolvency proceedings [1342].

From the above framework, it can therefore be concluded that the relationship between the 'direct derivation' and the 'close connection' is not defined at all by the ECJ, which sometimes seems to consider the two conditions as cumulative and some others as alternative.

1336 As correctly pointed out by the Advocate General Bobek in the Opinion rendered in NK « *if the two criteria need to be fulfilled, it would be rather futile to examine both criteria when it is clear that one of them is unfulfilled* ».

1337 *Tünkers*, at [27].

1338 *Tünkers*, at [27]. Again, the wording used by the Court shed confusion of the content of the second condition, which should not concern the right underlying the action, but the procedural context.

1339 *Valach*, at [35].

1340 *Valach*, at [38]. T. MASTRULLO, 'Droit européen et international des procédures collectives', in *Revue des procedures collectives*, 3, 2018 submits that interpretation of the court went one step further than in *Tünkers* and *Nickel&Goeldner*, because the Court specified that, provided that the first criterion of the test is fulfilled, also the second condition of the test must be analysed.

1341 *NK*, at [34].

1342 *NK*, at [35] and [36], where the Court finds that « *the existence of a link with insolvency proceedings is undeniable, since an action brought by the liquidator in the interests of the creditors is concerned, the fact remains that* […] *such an action may be brought by the creditors individually, whether before, during or after the conduct of the insolvency proceedings* ».

A further ambiguity which has been found in the case-law of the Court and which concerns the logical relationship between the two criteria, is the decisiveness of one condition over the other. Indeed, in some cases, the ECJ singled out a criterion and defined it as the decisive one. That was the case in *Nickel&Goeldner*, in which - despite both conditions being analysed - it was submitted that the *decisive criterion* is not the procedural context of which that action is part, but the *legal basis* thereof [1343]. Under such an approach, the second condition of the Gourdain Formula (which in those cases was still examined by the Court) does not entail a free-standing criterion, but more a litmus test for the verification of the truly key criterion.

Contrary to that approach, which underlined the first condition of the test, more recently the Court held that both conditions are equally decisive. For instance, in *Tünkers* the ECJ, after 'copying and pasting' what stated in *Nickel&Goeldner* (that the legal basis of the action is the decisive criterion [1344]) added that, pursuant to the approach adopted in *Alpenblume*, « *the Court has consistently held that it is the closeness of the link between a court action and the insolvency proceedings that is decisive* » [1345].

It is thus fair to acknowledge that an overall analysis of the Court's decision clearly shows that there is not even a uniform approach with reference to the logical relationship between the two conditions of the direct derivation from insolvency and the close connection with insolvency proceedings.

II.3.4. Interim conclusions on the Gourdain Formula

On the basis of the analysis carried out in the previous paragraphs it is fair to maintain that, throughout its 40 years of application, the interpretation of the Gourdain Formula has been subject to an interpretative evolution.

In the first period, spanning from 1979 to 2012, the Court has adopted a flexible approach, which interpreted the Gourdain Formula as comprised of a unique criterion, a 'close link' with the procedure indifferently referred to both the procedural and substantive profiles of the action.

From 2012 up to the present, the Court has interpreted the Gourdain Formula as a more structured test, comprising of a twofold criterion.

It seems to be possible to affirm with a reasonable degree of certainty that the criterion of direct derivation concerns the substantive profile of the cause of action, *i.e.* the right or the obligation underpinning the action. According to the majority of the ECJ decisions, the determinative element to assess whether an action must be characterised as Annex Action is whether the right or the obligation underpinning the action finds its source in common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings.

The direct derivation, therefore, designates a *genetic* bond between the substantive claim exercised and

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[1343] *Nickel&Goeldner*, at [27]. See also, *Nortel*, at [28] and *Valach*, at [29].

[1344] See *Tünkers*, at [22].

[1345] and *Valach*, at [29].

the insolvency proceedings. Although the Court never declared it explicitly, it may be inferred that a right is regarded as directly deriving from insolvency proceedings, when *(i)* either it stems directly and originally form insolvency proceedings (*i.e.* that right does not even exist in an ordinary civil and commercial context) or *(ii)* although in principle it is governed by civil and commercial rules, it is affected by the opening of insolvency proceedings to such an extent that it may be considered as a different right, which must be assessed according to the rules of insolvency law.

The actual bearing of such a criterion may be understood if one considers that the deviation from the ordinary rules of civil and commercial law on the allocation of jurisdiction entailed by the *vis attractiva* concursus, is the procedural mirroring, at the jurisdictional level, of the numerous derogations from the ordinary substantive rules of law that are provided for by insolvency law.

The Court therefore has put forward an interpretation that goes beyond the procedural concept of 'action', revealing that the meaning of the expression 'deriving from' insolvency proceedings, should not be referred to the action *per se*, but rather to the relationship existing between the exception to the common rules of procedural law - which consists ultimately in the allocation of the jurisdiction to the courts of the Member State opening insolvency proceedings - and the numerous derogations from the substantive ordinary civil and commercial principles that are provided for by insolvency law.

The derogation from the ordinary rules of jurisdiction therefore appears to be nothing more than the procedural aspect of as many derogations from ordinary substantive law.

From this point of view, what derives from insolvency proceedings is not necessarily the action, but rather substantive claim that the courts must hear and determine. This means that the notion of 'actions arising directly from' insolvency proceedings thus covers all actions which, having regard to the plea of the claimant or the counterclaim raised by the defendant, must be decided on the basis of the specific rules and principles of (substantive) insolvency law.

The interpretation of the first condition of the direct derivation needs a further clarification. As mentioned, the action (*recte* the claim underpinning the action) must derive from *insolvency proceedings*. Should one adhere to a strict interpretation of the first condition, the term of reference for the assessment of whether the right originates form insolvency proceedings or it results 'insolvificated' (*i.e.* its essential features are substantially amended by the ordinary rules of civil and common principles) should be the formal opening of the procedure, that triggers the application of the specific rules of insolvency law, which, as explained, deals with the specific phenomenon of the common pool problem [1346]. Only those rights that stem from the opening of insolvency proceedings or that are substantially amended by it in their essential features should be regarded as deriving from insolvency proceedings. All other actions, retaining their (ordinary) civil and substantive nature, when brought in the course of insolvency proceedings have a mere occasional link with the procedure,

[1346] See *supra* the Preface.

which excludes them from the scope of the *vis attractiva concursus*.

However, as discussed, in the *H. v. H.K.* the ECJ has bolstered a different (and somewhat more flexible) interpretation which considers as fulfilling the first condition of the direct derivation also those actions the underpinning right of which is not amended by the opening of insolvency proceedings, but that includes in its ordinary essential element the material insolvency of the debtor [1347].

Indeed, the opening of insolvency proceedings bears no substantive amendments to the right underlying an action under § 64 GmbHG, which retains the same essential characteristics when exercised by the trustee on the occasion of insolvency proceedings and when it is brought outside.

But the ECJ seems to have considered it sufficient that the action derives from the material *insolvency* of the debtor, on the (wrong) assumption that since the constitutive elements of the cause of action (the *causa petendi*) of § 64 GmbHG include the material insolvency (irrespectively of the opening of insolvency proceedings), they derogate from the ordinary rules in civil and commercial matters to such an extent that it should have been characterized as insolvency law.

This interpretation has been much criticised by scholars [1348], because - if taken to its extreme consequences (*i.e.* if applied to an action that does not involve in its constitutive elements the material insolvency of the debtor and that is not essentially amended by the opening of insolvency proceedings) - it would entail that even actions with a mere occasional link with the insolvency procedure would be attracted to the jurisdiction of the Member State of the COMI [1349].

1347 However, as noted by some scholars, it is somehow a paradox to consider the action as deriving from insolvency proceedings, while stating that it also exists independently from them. D. BUREAU, 'Procédure d'insolvabilité : mise en place d'une action contre un défenseur domicilié dans un État tiers', in *Rev. crit. DIP*, 2015, p. 462.

1348 C. PAULUS, 'Under Article 6', in C. PAULUS, *EuInsVO - Europäische Insolvenzverordnung*, 2017, at [6]. W. G. RINGE, 'under Article 6', in R. BORK, K. VAN ZWEITEN, *Commentary on the European Insolvency Regulation*, at [6.08].M. MENJUCQ, 'Tribunal compétent en matière d'action en responsabilité délictuelle contre le débiteur' in *rev. proc. coll.*, May 2017, comm. 61, TH. MASTRULLO, in *Rev. sociétés*, 2017, p. 507, L. BOGGIO, 'La revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', in Giur.it, 2017, p. 2150. M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', *cit.*, p. 132. *Contra* R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENECHAL and R. DAMMAN, *Le droit de l'insolvabilité*, Joly eds., 2018, p. 416.

1349 Such a broad application (as some author say 'exorbitant') of the Insolvency Regulation was heavily criticized mostly by French scholars. See P. NABET, 'Sanction du dirigeant d'une société en procédure d'insolvabilité selon le règlement (CE) n° 1346/2000 et liberté d'établissement', in *Revue critique de droit international privé*, 2016, p. 544. See also F. JAULT-SESEKE et D. ROBINE, 'Champ d'application du règlement insolvabilité (29 mai 2000) : entre répétitions et precisions', in Bullettin Joly des Sociétés, 2015, 2, p. 95; F. JAULT-SESEKE et D. ROBINE, 'Action en remboursement à l'encontre du dirigeant d'une société étrangère en situation d'insolvabilité : la lex concursusest applicable', in *Bullettin Joly des Sociétés*, 2016, 3, were particularly harsh on the Court, wondering whether « *N'est-il pas paradoxal de faire varier la loi applicable au gré des considérations procédurales ? Il existe une différence de régime artificielle qui puise son origine dans une qualification elle-même artificielle. On a le sentiment que la Cour a d'abord fait le choix d'appliquer le règlement Insolvabilité et qu'ensuite seulement, elle s'est efforcée de le justifier. Une même impression se dégageait de l'arrêt H. dont la solution dictait celle de l'arrêt Kornhaas. Il était en effet difficilement envisageable que la Cour de justice, après avoir considéré que l'action de l'article 64 du GmbHG trouve sa source dans le droit de l'insolvabilité pour en déduire la compétence juridictionnelle, écarte cette solution pour déterminer la loi applicable*». See F. JAULT-SESEKE et D. ROBINE, 'Action en remboursement à l'encontre du dirigeant d'une société étrangère

Until now, however, the ECJ has referred this (broader) interpretation solely to the German action under § 64 GmbHG, which, although may not be considered as a specific insolvency law rule *stricto sensu* (as it may be exercised also when insolvency proceedings are not opened [1350] and its substance would not change), in practice deals with a situation that preludes to a common pool problem.

The ECJ reasoning in *H. v. H.K.* is not entirely shared here, because I submit that the *vis attractiva concursus* should be construed narrowly, it being a significant restriction of the respondent's due process right, which may be justified only in the light of the specific nature of the action (*i.e.* when it must be decided according to insolvency law).

Nevertheless, should one adhere to the ECJ's interpretation, the first condition assumes a different, broader, meaning, as it would turn to be fulfilled when the action derives directly not from the insolvency procedure, but from the (material) insolvency of the debtor.

Leaving that profile aside, it is noted that the positive characterisation of a right as directly deriving from insolvency proceedings still leaves room for uncertainties. In some cases, it is relatively easy to acknowledge that a right or an obligation 'ontologically' arises with the opening of insolvency proceedings. The archetype of those rights is the right underlying an avoidance action.

On the contrary, it is more difficult to determine when a pre-existing commercial and civil legal situation is essentially shaped by the opening of the insolvency procedure, to such an extent that it should be governed by insolvency law. Indeed, the degree of substantive transformation that the right undergoes as an effect of the opening of insolvency proceedings represents a discretionary evaluation, which seems to lack objectives criteria. How and which elements (in positive terms) should guide the interpreter in assessing whether the right underlying the action is *sufficiently* amended in its essential elements by the opening of insolvency proceedings?

The answer is not yet clear. Some judgements of the Court rather clarify the factors that are *not* decisive for the scrutiny of the direct derivation. Above all, the recent case-law makes it plain that the procedural context should not interfere with the assessment of the legal basis of the action, it being relevant only for the purposes of the evaluation of the second criterion.

Therefore, the mere fact that the *locus standi* of the action lies with trustee by express provision of the law should play no role with reference to the legal basis of the action. Also, it would be irrelevant

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en situation d'insolvabilité : la lex concursus est applicable', in *BJS*, 2016. « *La coïncidence des compétences législatives et juridictionnelles à laquelle conduit l'arrêt Kornhass, et qui est caractéristique du droit de l'insolvabilité internationale, pouvait-elle néanmoins être écartée ? […] La Cour de justice prend le soin de justifier sa solution d'une autre façon encore.* […] *Elle voit ainsi un lien direct entre les deux obligations qui pèsent sur le gérant en cas d'insolvabilité et la demande de remboursement est, en substance, analysée comme un manquement à l'obligation de demander l'ouverture d'une procédure d'insolvabilité qui relève, au même titre que cette obligation, de la lex concursus (art. 4 § 2, 1re phrase). Se trouve ainsi complétée la liste des questions relevant de la loi de la procédure : elle détermine les conditions d'ouverture de la procédure d'insolvabilité, les personnes qui ont l'obligation d'en demander l'ouverture, ainsi que les sanctions de cette obligation. Le raisonnement ne convainc pas. Il conduit à créer une « faillite virtuelle », le droit de l'insolvabilité prenant effet en raison de la seule réunion de conditions et principalement d'une insolvabilité. Ce choix est contestable. Il est certes possible que la procédure ait un effet en quelque sorte rétroactif par le jeu des actions révocatoires. Mais, dans ce cas, la procédure existe* ».

[1350] For instance, when the debtor's assets prove to be insufficient to cover the costs of the procedure (§ 26(1) InsO).

whether national laws provide that the competent court to hear the action is the insolvency court. Again, the fact that the proceeds revert to the estate does not reveal the insolvency-derived nature of the right underlying the action. It is submitted that, similarly, no weight should be given to other formal profiles such as the location within the insolvency code or the civil and commercial code of the statutory provisions governing the action.

According to some authors, elements that may be symptomatic of a substantive derivation of the right from the opening of insolvency proceedings are the limitation period for bringing the action dependent from the closure of the procedure [1351], and the *res iudicata* effects of the decision [1352].

In that constellation, it seems rather straightforward that when the right underlying the action was pre-existing in the legal sphere of the debtor, it is not substantially amended in its essential features by the opening of the insolvency proceedings. The mere fact that the trustee acts as a legal substitute of the debtor represents an automatic consequence of the divestment of the latter, which could at least count for the purposes of the procedural context, but carries no weight as regards the right exercised by the trustee, which remains the very same that the debtor could have brought outside of the insolvency procedure [1353].

On the contrary, major problems arise with reference to actions that seek the protection of the general body of creditor's rights. In those cases the right underlying the action would be a pre-existing civil and commercial right of the creditors which is exercised in the context of insolvency proceedings (which may be traced back to the infringement of the creditor's shared right that the value of the debtor's assets is not undermined, as it serves as a general collateral for the satisfaction of their insolvency claims). The inquiry on the direct derivation in such a scenario should determine whether such a right when exercised in the context of the procedure is sufficiently amended in its essential features to maintain that it must be determined pursuant to the specific rules of insolvency law. Lately, in the NK judgement, the Court seems to deny the direct derivation for those rights, giving a major importance to the fact that the creditor has a concurrent entitlement to autonomously seek the protection of his right, even in the course of insolvency proceedings exercising the action *uti singulo.*

The interpretation of the direct derivation with reference to those actions, however, is not yet entirely clear. It may be only said that recently there has been a general tendency on the part of the Court to consider that the Brussels Ia Regulation should be applied in cases of doubt (*i.e.* where the opening of the procedure does amend the right, but it is uncertain whether those amendments appear to be

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1351 See in this sense *Gourdain*, at [4]. See also B. LAUKEMANN, 'Jurisdiction – Annex proceedings', *cit.*, p. 184.

1352 See also B. LAUKEMANN, 'Jurisdiction – Annex proceedings', *cit.*, p. 184, referring to actions concerning contested insolvency claims.

1353 In the light of the above, it is submitted that the Court went too far in the Alpenblume case when it considered as an Annex Action brought by the debtor *in bonis* after the closure of insolvency proceedings for the recovery of shares sold by the trustee, as the legal basis of the action did not reveal any substantive amendment neither as an effect of the opening of insolvency proceedings, nor after its closure.

sufficient to consider the first criterion fulfilled) [1354].

For the European *vis attractiva concursus* to operate, it seems not enough that the action whose characterisation is in question (or rather, the substantive right behind it) derives directly from insolvency proceedings, but it is also necessary that, when the action is exercised, the procedure which gives rise to it is still ongoing and that the action benefits from that action as an instrument for the achievement of its own institutional aims, as well as of the objectives of the Regulation.

The second condition of the close connection, then, seems to be referred to a *functional link* of the action with the insolvency proceedings, which the Court, by requiring it to be 'close', assumes to be of a permanent and current nature [1355].

From the cases analysed, it seems that the close connection may be referred to the procedural context of the *action*, *i.e.* the fact that it is brought in the procedural context of insolvency proceedings.

The elements that may be regarded as symptomatic of the close connection may be several, but ultimately they seems usually to be traced back to the fact that the *(i)* the trustee is a part to the action; *(ii)* he acts on behalf of the creditors (but not of the debtor); *(iii)* he is legally bound to exercise the action and *(iv)* that the proceeds of the action revert to the estate.

The relevance of the second condition of the test has been questioned by some scholars, because in the majority of the ECJ decisions, its scrutiny seems rather superficial and ultimately superfluous. [1356].

It is true that in the vast majority of the cases, where the right underlying the action is found to be directly deriving from insolvency proceedings, in the meaning described above, it is likely that the action will be functionally linked to the insolvency proceedings. Tendentially, when the first condition is met, the close connection would not represent a free-standing criterion, but rather it would be a 'litmus test' of the direct derivation of the right underlying the action.

Nevertheless, on some occasions the Court has demonstrated that the close connection can override the direct derivation condition.

The first occasion is the mentioned *H. v. H.K.* judgement. On that occasion the Court stated that « *that an action based on Paragraph 64 of the GmbHG and brought outside the context of insolvency proceedings may fall within the scope of the Lugano II Convention or, as the case may be, that of Regulation No 44/2001. However, that is not the situation in the case in the main proceedings* » [1357].

This confirms that, although based on the material insolvency of the debtor, where exercised outside

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1354 P. DE CESARI and G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa*, *op.cit.*, p. 81; L. BOGGIO, 'La revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', in *Giur.it*, 2017, p. 2150.

1355 Some authors criticise the condition of the close connection with insolvency proceedings, because it would be a source of uncertainty, it being considered that measuring the 'closeness' of the link between an action and an insolvency procedure may involve 'a wide variety of factors'. R. DAMMAN and M. GUERMONPREZ, 'Les critères de l'action annexe au sens du règlement n° 2015/848', in *Mélanges AEDBF*, VII, 2018.

1356 TH. MASTRULLO, 'Adoption d'un double critère de l'action annexe', in *Revue Des Procédures Collectives*, 3, May-June, 2018.

1357 *H. v. H.K.*, at [25].

of insolvency proceedings the Action under § 64 GmbHG should be regarded as an ordinary civil and commercial action and it is the mere exercise of it in the context of the insolvency procedure that characterises it as Annex Action. In such a circumstance, the close connection with insolvency proceedings turns (arguably) to be determinative for the inclusion of the action under the umbrella of the Insolvency Regulation.

The second occasion is the *F-Tex* case where the ECJ held that, although it is submitted that the right underlying the action was directly deriving from insolvency proceedings (but the Court did not take a stance on this point), its assignment to a third party (or to a creditor) interrupts the close connection with the procedure.

Both cases demonstrate that it is not sufficient that the right underlying the action proves to be directly deriving from insolvency proceedings: the interpreter should always consider whether the action *retains* a close connection with insolvency proceedings. Therefore, it seems more prudent to consider that the two conditions should be deemed as cumulative [1358].

The fact that, in order to characterise a certain action as an Annex Action rather than as an ordinary civil or commercial one, it is necessary to fulfil the twofold link, genetic and functional, with insolvency proceedings, may perhaps be considered as excessive [1359].

Be as it may, although the Court has not proved to be always consistent on this point, is seems rather clear from the last ECJ decisions that an Annex Action, to be characterised as such, must meet both the conditions of the (substantive and genetic) direct derivation and the (functional and procedural) close connection with insolvency proceedings.

That further demonstrates the autonomous nature of the European *vis attractiva concursus* from the national one, which generally requires only the genetic relationship with insolvency proceedings.

The overall impression, however, is that, rather than a dogmatic definition of what is an Annex Action, the ECJ has used the Gourdain Formula as a practical test that is applied on a case by case basis with reference to the single national actions, without following a clear and coherent methodological path [1360].

1358 BARIATTI S., VIARENGO I., VILLATA F., VECCHI F., IN HESS B., OBERHAMMER P., BARIATTI S. et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017.

1359 M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', *cit.*, p. 132.TH. MASTRULLO, 'Adoption d'un double critère de l'action annexe', *cit.*

1360 J.-L. VALLENS, 'Quel est le tribunal compétent pour connaître d'une action en responsabilité pour concurrence déloyale contre le cessionnaire d'une branche d'activité ?' in *Dalloz*, 2017, p. 2357.

CHAPTER V

THE (UE) REGULATION 2015/848

CONTENTS: IV.1. The recast of the Insolvency Regulation - IV.1.1. The path towards the revision of the Insolvency Regulation - IV.1.2. Towards a new era of substantial harmonisation of insolvency law in Europe? - IV.2. The new regime of (not so anymore) 'insolvency proceedings' - IV.2.1. The material scope of the Recast Regulation - IV.2.1.1. The notion of insolvency proceedings under the Recast Regulation - IV.2.1.2. The role of Annexes under the Recast Regulation - IV.2.1.3. Is the 'collective dimension' of the problem concerning the boundaries between the Brussels Ia Regulation and the Recast Regulation solved? - IV.3. [Segue] the jurisdiction of Annex Actions: something old and something new - IV.3.1. Article 6(1) Recast Regulation: the (exclusive) *vis attractiva concursus* for Annex Actions - IV.3.2. Article 6(2) Recast Regulation: related actions

So far, the issues concerning the relationship between the Insolvency Regulation dated 2000 and the Brussels Regime and the approach adopted by the European case-law towards them have been taken into account.

At this point of the reasoning, before attempting to draw some conclusions concerning the topic of Annex Actions, the structure of this dissertation imposes to address the novelties introduced by the recast of the Insolvency Regulation.

This Chapter being to some extent the halfway point, it aims at discussing the main innovations that have been brought in the regime of cross-border insolvencies by the Recast Regulation, specifically focusing on the novelties that affect the boundaries of that regime with the Brussels Ia Regulation.

Therefore, after a brief outline of the process for the recasting of the previous regulation and some quick insights on the tendency emerged in late years for the harmonisation at the European level of national substantive insolvency rules, this Chapter takes into account the revised scope of application of the Recast Regulation, essentially reproducing the same argumentative structure employed with regard to the Insolvency Regulation. Besides, some further considerations are suggested on the 'collective dimension' of the problem, as emerging under the new set of rules. The major relevance of that profile notwithstanding, for present purposes it merely serves as a steppingstone to the main topic of this research, which is the 'individual dimension' of Annex Actions. Therefore, I deemed it appropriate to put here some final remarks on that topic.

Evidently, the new Article 6 RR will be extensively analysed, but merely from an objective point of view, as all the critical assessments on the impact of the new provision on the issue of Annex Actions is referred to the last Chapter of this work.

IV.1. The recast of the Insolvency Regulation

The current rules on cross-border insolvencies represent a balanced response to some shortcomings and inadequacies of the Insolvency Regulation that have emerged after more than ten years of its application.

As briefly mentioned in Chapter III, the Insolvency Regulation proved to be a successful instrument that through its application, has successfully solved delicate issues arising in insolvencies with cross-border implications, as witnessed by a vibrant judicial practice as well as by the copious ECJ case-law [1361].

Nevertheless, the extensive application of the EIR unveiled also some of its 'genetic' weaknesses that were already well-known at the time of its adoption in 2000. Being the result of a commixture of two texts dating back to the early 1990s [1362], the Insolvency Regulation could reflect only partially the new tendencies of the Member States, which were emerging at the end of the 1970s. In those years, the process of reforming the traditional pillars of insolvency laws had just begun, shifting from a traditional conception of it based on purely liquidation proceedings towards a more rescue-oriented and reorganisation-friendly modern insolvency law, aimed at pursuing the rehabilitation of viable, but financially distressed business [1363].

At the time of the enactment of the Insolvency Regulation, the urge to avoid any further delays in bringing to completion the protracted saga of the Insolvency Project led the European legislature to set aside all perplexities and postpone temporarily any systematic revision at a later date [1364]. However, the awareness of the necessary reform of the EIR to be carried out shortly after, however, was evidenced in Article 46 EIR, imposing a duty on the Commission to present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, no later than 1 June 2012.

IV.1.1. The path towards the revision of the Insolvency Regulation

In the midst of a climate of full ferment of legislative reforms, in which the Member States faced with the economic crisis were experimenting with new early redress procedures, the impulse to the revision process was given by the Commission in April 2011, by commissioning studies aimed at assessing the status and evaluating the application of the Insolvency Regulation, in preparation for

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1361 L. CARBALLO PIÑEIRO, 'Towards the reform of the European Insolvency Regulation: codification rather than modification', in *NiPR*, 2014, p. 207.

1362 See *supra* Chapter II, Section 1, § I.5.

1363 M. BALZ, 'The European Union Convention on Insolvency Proceedings', in *American Bankruptcy Law Journal*, 1996, p. 486.

1364 F. GARCIAMARTÍN, 'The review of the EU Insolvency Regulation: some general considerations and two selected issues (hybrid procedures and netting arrangements)', in L. LENNARTS and F. GARCIAMARTÍN, *The review of the EU Insolvency Regulation: some proposals for amendment*, Report of the Netherlands association for comparative and international insolvency law, 2011.

the release of the report envisaged by Article 46 EIR [1365]. The commissioned studies were also supported by the initiative of the European Parliament's committee of legal affairs, which - on the basis of parallel research conducted by INSOL Europe [1366] - formulated a report on insolvency proceedings in the context of EU Company Law (the s.c. 'Lehene Report') [1367].

On 30 March 2012, the Commission launched a public consultation on modernising EU rules governing insolvencies [1368] and charged (another) group of experts [1369] with the task of drafting a comprehensive report evaluating the application of the Insolvency Regulation in each Member State and suggesting reform proposals, serving as a basis for the Commission's report on the application of the Insolvency Regulation [1370].

As a consequence of that intense consultative work and the studies carried out, five main areas of intervention emerged: *(i)* the scope of the Insolvency Regulation, which did not reflect the 'rescue culture' enacted in many systems of the Member States; *(ii)* the difficulties relating to the interpretation of the COMI and the determination of the jurisdiction opening of insolvency proceedings; *(iii)* the coordination between main and secondary proceedings; *(iv)* the publicity of the opening of insolvency proceedings to secure that foreign creditor could lodge their claims; and *(v)* the regime on the insolvency of groups of companies.

On 12 December 2012, the Commission published a proposal for the recast of the EIR [1371]. In

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1365 On the process of adoption of the Recast Regulation see, among other, G. MOSS, I. FLETCHER, S. ISAACS, *The EU Regulation on insolvency proceedings*, Oxford, 2016, pp. 16-18, F. MUCCIARELLI, 'Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?', in *European Company and Financial Review*, 2016, p. 5; I. FLETCHER, 'Spreading the Gospel: The Mission of Insolvency Law, and the Insolvency Practitioner, in the early Twenty-First Century', in R. PARRY, P. J. OMAR, *International Insolvency Law: Future Perspectives*, Nottingham-Paris, 2015, p. 179.

1366 INSOL Europe is an academic and practitioners' association. A group of experts chaired from R. van Galen released in May 2012 a proposal on the 'Revision of the European Insolvency Regulation', available at https://www.insol-europe.org.

1367 See the Draft report with recommendations to the Commission on insolvency proceedings in the context of EU company law of the Committee on Legal Affairs, dated 6 June 2011, 2011/2006(INI) – released as Doc. PR\869632EN.doc. Note that in the Report it is stated that on its own motion the Parliament requested the Commission to submit one or more legislative proposals: « […] *relating to an EU corporate insolvency framework, following the detailed recommendations set out in the Annex hereto, in order to ensure a level playing field, based on a profound analysis of all viable alternatives* ».

1368 Consultation on the future of European Insolvency law (closed 12 June 2012) https://europa.eu/rapid/press-release_IP-12-324_en.htm.

1369 A consortium of the Universities of Heidelberg and Vienna, headed by B. Hess, P. Oberhammer and T. Pfeiffer.

1370 See B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003.

1371 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings', Strasbourg 12 December 2012, (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD). See L. PANZANI, 'Il progetto della Commissione europea di riforma del Regolamento 1346/00', in *Ilfallimentarista*, 24 April 2013; C. PASINI, 'La relazione della Commissione sull'applicazione del regolamento (Ce) n. 1346 del 2000: prospettive di riforma', in *Riv. Trim. dir. Proc. Civ.*, 2014, p. 693. The Commission considered the option of partially harmonising Member States' insolvency regimes and of abolishing secondary proceedings. However, as emerges from the Impact assessment accompanying the Commission's proposal, such an option was rejected the Commission rejected this option, arguing that it would « *require an in-depth comparative-law analysis of national insolvency laws and procedures which would enable the Commission to identify the precise areas in which procedural harmonisation would be necessary and feasible, and not too*

response to the Commission's proposal, the Parliament circulated a report proposing numerous amendments to the Commission's proposal ('the Parliament's Report') (1372).

Following lengthy inter-institutional negotiations, on 12 March 2015, the Council formally adopted a text as its first reading position, which was subsequently adopted by the Parliament at a first reading position on 20 May 2015. The legislative process for the adoption of the new regulation was officially concluded with the formal act of signing by the respective Presidents of both institutions on the same date. Eventually, the Recast Regulation was published in the Official Journal on 5 June 2015 and entered into force on 26 June 2015.

IV.1.2. Towards a new era of substantial harmonisation of insolvency law in Europe?

Before addressing the innovative features of the Recast Regulation in further detail, it is worth mentioning the feverish activity of the European institution towards a possible harmonisation of (substantive) insolvency law.

Following the impulse of the initiatives undertaken in the course of 2012-2013 described in the previous paragraph and the adoption of the Entrepreneurship 2020 Action Plan (1373), in parallel with the process of recasting the EIR, the focus of the EU institution shifted (finally) also on harmonisation-proposals (1374). Under the blueprint of the further studies conducted on the topic (1375), in 2014 the Commission adopted the Recommendation on a new approach to business failure and insolvency (hereafter, the 'Recommendation') (1376).

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intrusive to the national legislations and insolvency systems ». See Impact Assessment Accompanying the document 'Revision of Regulation (EC) No. 1346/2000 on insolvency proceedings', Strasbourg 12. 12. 2012, [SWD(2012) 416 final]. See *infra* in this Chapter § IV.1.2.

1372 The final report by the European Parliament's Committee of Legal Affairs on the Commission's Proposal for a Regulation amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, dated 20 December 2012 (A7-0481/2013, released as Doc. RR\1014200EN.doc). See also the legislative resolution adopted by the Parliament on 5 February 2014, P7_TA(2014) 0093. On 3 June 2014, the EU Council published a proposed text of a "compromise document", issued as DOC.10284/14.ADD 1, with an Addendum dated 4 June 2014, 10284/14, ADD 1, COR 1.

1373 COM(2012) 742 final, where « *the Member States are invited* […] *to reduce when possible, the discharge time and debt settlement for honest entrepreneurs after bankruptcy to a maximum of 3 years by 2013 and to offer support services to businesses for early restructuring, advice to prevent bankruptcies and support for small and medium enterprises to restructure and re-launch* ». See recital 9 to the preamble of the Recommendation.

1374 As Wessels put it: eventually, the H-word is out! See B. WESSELS, 'Harmonisation of Insolvency Law in Europe', in *European Company Law*, 2011, p. 27 and ff.

1375 See S. BARIATTI, R. VAN GALEN, *INSOL Europe – Study on a new approach to business failure and insolvency – comparative legal analysis of the Member States' relevant provisions and practices*, released as Doc. Just/2012/JCIV/CT/0194/44. See also the study of A. PIECKENBROCK, 'Das ESUG – fit für Europa?', in *NZI*, 2012, p. 906.

1376 Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, in Official Journal, L. 74/65, 24 March 2014. K. VAN ZWIETEN, 'Restructuring Law: Recommendations from the European Commission', in *Law in Transition*, 2015. G. CORNO, 'L'armonizzazione comunitaria delle normative in materia di crisi d'impresa, in *il Fallimentarista*, 19 June 2014; see also U. MACRÌ, 'Un commento a prima lettura', in *Fallimento*, 2014, p. 399; S. MADAUS, 'The EU recommendation on business rescue - only another statement or a cause for legislative action across Europe?', in *Insolvency Intelligence,* 2014, p. 81.

The reason behind this renewed interest in the possible harmonisation of State rules is that several Member States, including Italy, were (as it is still the case) undertaking reviews of their national insolvency laws with the purpose to improve the corporate rescue framework and second-chance-instruments for entrepreneurs. Therefore, the European lawmaker seised the opportunity to promote coherence in those and any future national initiatives, to strengthen the functioning of the internal market [1377].

The Recommendation aimed at encouraging the Member States to establish a (national) framework ensuring *(i)* the efficient restructuring of viable enterprises in financial difficulty and *(ii)* give honest entrepreneurs a second chance.

The choice to adopt a non-binding instrument (such as recommendations under Article 249 TFEU) was the result of an explicit choice by the Commission. Other options were taken into consideration, but then rejected: a fully harmonised procedure would have proven to be too ambitious and fraught with difficulties. Instead, a directive laying down minimum standards would have required coordinated with the many undergoing reforms on insolvency law in the Member States, requiring a long period of negotiations, without being effective in the short term and helping to overcome the severe financial crisis of the last decade.

Time had come for a directive while the present work is in the process of being drafted.

In June 2019, the Directive on preventive restructuring frameworks, on the discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt was issued [1378].

Briefly explained, the Directive addresses four main issues:

a) early warning tools and access to information (Article 3) – Member States are required to provide for clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay.

Such tools may include: *(a)* alert mechanisms when the debtor has not made certain types of payments, *(b)* advisory services provided by public or private organisations or *(c)* incentives under national law for third parties with relevant information about the debtor to flag to the debtor a negative development of its business activity (third parties may include accountants, tax and social security authorities).

1377 See Recital 10 of the Recommendation.

1378 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 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), in *Official Journal*, L. 172/18 26 June 2019. G. BENVENUTO, S. MEANI, 'Direttiva UE n. 1023/2019 sulla ristrutturazione preventiva, esdebitazione ed insolvenza: prime valutazioni', in *Ilfallimentarista*, 30 July 2019.

Also, it is provided that Member States ensure that the debtor and employee's representatives have access to the relevant information about the availability of early warning tools as well as of procedures and measures concerning restructuring and discharge of debt.

b) preventive restructuring frameworks (Title II) – For the purposes of the Directive, restructuring is defined as « *any measure aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those element* ».

The Directive provides that Member States must ensure that, where there is the likelihood of insolvency, debtors have access to a preventive restructuring framework enabling them to restructure their business and ensure their viability, thus attempting to avoid insolvency (Article 4). In this respect, the Directive governs, sometimes in detail, the effects of preventive restructuring proceedings. Rules on stay of individual enforcement actions (Articles 6 - 7), content of the restructuring plan and its adoption (Articles 8 - 9), judicial valuation and confirmation of the plan (Articles 10 and 14), cross-class cram down (Article 11), new and interim finance (Article 17), duties of directors (Article 19) are included.

c) Discharge of debt and disqualification (Title III) – Member States must ensure that insolvent entrepreneurs have access to at least one procedure that can lead to a full discharge of debt. Article 21 and 22 of the Directive specify that the period after which insolvent entrepreneurs must be discharged should be no longer than three years starting from the judicial decision sanctioning a restructuring plan (or the start of the implementation of the plan) or, in case of other proceedings, the decision opening insolvency proceedings. It is also provided that whenever an insolvent entrepreneur obtains a discharge of debt, any disqualifications from pursuing a business on the sole ground that the entrepreneur is insolvent must cease to have effect.

d) measures to increase the efficiency of restructuring, insolvency and debit procedures include, *inter alia*, that Member States ensure that members of the judicial and administrative authorities, as well as appointed practitioners, dealing with procedures concerning preventive restructuring, insolvency and discharge of debt are suitably trained and have the necessary expertise for their responsibilities.

For present purposes it bears noticing that the Directive does not affect the scope of application of the Recast Regulation, which deals with the different issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings. In particular, Recital 13 of the Directive makes it clear that the approach taken in the Recast Regulation, which allows the Member States to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A, remains unaltered [1379]. Besides, the Directive, although not

[1379] See *infra*, this Chapter, § IV.2.1.2.

requiring that procedures addressed therewith fulfil all the conditions for notification under Annex A, is intended to be fully compatible with, and complementary to, the rules on cross border insolvencies set out by Recast Regulation.

IV.2. The new regime of (not so anymore) 'insolvency proceedings'

Reverting to the Recast Regulation, the recasting action has moved following three main directions: Firstly, the new text enshrines the vast majority of the principles expressed by the ECJ case-law on the interpretation of the EIR's provisions.

Leaving Article 6 RR on the side-lines for the moment, a clear example of that are the new specifications concerning the concept of COMI, which acknowledges the relevance of the criterions of permanence and ascertainability, which are now included in the definition of COMI [1380].

Secondly, the Recast Regulation enshrines some tools that were developed in practice, such as the s.c. 'synthetic proceedings'. Article 36 RR, in facts, provides that the insolvency trustee in main insolvency proceedings may give an undertaking, to local creditors in the Member State in which secondary insolvency proceedings could be opened, that he will comply with the distribution and priority rights that said creditors would have in respect of the assets located in the Member State in which said secondary insolvency procedure could be opened (the relevant point in time for determining which are those assets shall be the moment at which the undertaking is made) [1381].

Thirdly, the European legislature introduced new fresh rules of its own, represented, for instance, by the rules concerning the (much discussed) framework for group insolvency proceedings, under Chapter V RR.

The reform has certainly brought about significant innovations compared to the text of the previous Insolvency Regulation (this can be seen from the trite fact that the new regulation is twice as long as the previous Insolvency Regulation).

However, the fundamental principle of limited universality has not been undermined and the basic scheme of the Regulation has remained unchanged. The basic architecture of the Recast Regulation is still based on the possibility of opening a main procedure in the Member State where the COMI of the debtor is located, with tendentially universal effects in all Member States. The Member State in the territory of which the debtor has an establishment may be shielded from the universal effects of main proceedings, when secondary proceedings are opened to secure the local creditor's interests. Since the Recast Regulation has left untouched the fundamental characteristics of the Insolvency Regulation, only those aspects of novelty of the new regime that are relevant to the issues under

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1380 See F. MUCCIARELLI, *op. cit.*, p. 13, who stresses that in defining the notion of COMI the Regulation Recast replaces the adverb 'therefore' with the conjunction 'and', which does not imply anymore a causality relation between the two criteria of 'permanence' and 'ascertainability'. See *supra*, Chapter II, Section 2, § II.1.2.1.

1381 See, *inter alia*, E. TORRALBA MENDIOLA, '"Synthetic" insolvency proceedings', in *Analysis GA&P*, November 2015.

consideration will be addressed here. For all other aspects relating to insolvency proceedings covered by the EIR, reference should be made to what was explained in Chapter III, except for some innovations which will be duly taken into account.

IV.2.1. The material scope of the Recast Regulation

When compared with the previous text of Article 1(1) EIR, the scope of application *ratione materiae* of the Recast Regulation proves to be extremely widened. As discussed, the purpose of the legislature was that of updating the rules on cross-border insolvencies with the most recent trends emerged in national legislation, far more oriented towards the rescue of companies in distress than geared towards liquidation [1382].

Therefore, for the purposes of bringing pre-insolvency and hybrid proceedings within the material scope of the Recast Regulation, the legislature has, on the one hand, enlarged the boundaries of some requirements that were previously envisaged under the Insolvency Regulation for proceedings to fall within its sphere of application, and it has introduced some new requirements, on the other.

IV.2.1.1. The notion of insolvency proceedings under the Recast Regulation

The new conditions defining the new notion of insolvency proceedings falling within the scope of the Recast Regulation (*recte* in the list of Annex A) are that proceedings must be *(a)* public, *(b)* collective proceedings, *(c)* if need be, also interim proceedings, *(d)* based on laws relating to insolvency *(e)* whose purpose must be rescue, adjustment of debt, reorganization, or liquidation.

1382 G. MOSS, I. FLETCHER, S. ISAACS, *The EU Regulation on insolvency proceedings*, Oxford, 2016; G. CUNIBERTI, P. NABET and M. RAIMON, *Droit de l'insolvabilité. Règlement (UE) 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité*, LGDJ, 2017; B. HESS, P. OBERHAMMER, S. BARIATTI S. et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017; BORK R. AND R. MANGANO, *European cross-border insolvency law*, Oxford, 2016; B. WESSELS, *International Insolvency law*, Deventer, 2017, C. PASINI, 'La relazione della Commissione sull'applicazione del regolamento (Ce) n. 1346 del 2000: prospettive di riforma', in *Riv. Trim. dir. Proc. Civ.*, 2014; P. DE CESARI e G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il regolamento (UE) 2015/848 relativo alle procedure di insolvenza*, Torino, 2017. L. SAUTONIE-LAGUIONIE, C. LISANTI, *Règlement (UE) n. 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité, Commentaire article par article*, Paris, 2015. F. JAULT SESEKE and D. ROBINE, 'Le règlement 2015/848 : le vin nouveau et les vieilles outres', in *Rev. Crit. Droit. Intern. Privé,* 2016, p. 21. L. SCOLLO, 'Promulgato il nuovo regolamento (Ue) n. 2015/848 sulle procedure di insolvenza transfrontaliera', in *Dir. Comm. Internaz.*, 2015, p. 907; P. DE CESARI, 'Regolamento 2015/848 e il nuovo approccio europeo alla crisi dell'impresa', in *Fallimento*, 2015, p. 1011; S. PACCHI, 'La raccomandazione della commissione Ue su un nuovo approccio all'insolvenza alla luce di una prima lettura del regolamento Ue 848/2015', in *Giust. civ.*, 2015, p. 537; G. CORNO e S. BARIATTI, *Il regolamento (UE) 2015/848 sulle procedure di insolvenza*, Milano, 2016; G. CORNO e S. BARIATTI, 'Il regolamento (UE) 2015/848 del Parlamento europeo e del Consiglio del 20 maggio 2015 relativo alle procedure di insolvenza (rifusione). Una prima lettura', in *Ilfallimentarista*, 2015; C. GARLATTI, 'Regolamento del parlamento europeo e del Consiglio relativo alle procedure di insolvenza (rifusione)', in *Fallimento*, 2015, p. 509; A. LEANDRO, 'A first critical appraisal of the new european insolvency regulation', in *Dir. UE*, 2016, p. 215. F. MUCCIARELLI, 'Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?', in *European Company and Financial Review*, 1/2016. On the material scope of the Recast Regulation see also K. LENZIG, 'La nouvelle définition des procédures d'insolvabilité couvertes par le champ d'application du règlement d'insolvabilité', in *rev. proc. coll.*, 2015, doss. 3; P. NABET, 'Le champ d'application matériel direct du règlement européen sur l'insolvabilité', in *BJE*, 2014, p. 273.

Starting from the requirements that were already provided by the Insolvency Regulation and that have been retained within the new autonomous notion of 'insolvency proceedings', the new Article 1(1) RR has only apparently kept the terminology used for the four conditions set forth by the former version of Article 1(1) EIR. (*i.e.* proceedings that are *(i)* collective, *(ii)* based on insolvency law, *(iii)* where the debtor is partially or totally divested and *(iv)* a trustee is appointed [1383]).

It bears noticing that, to match those requirements with the new types of proceedings now encompassed within the scope of the provision at stake, their meaning was significantly amended (and sometimes superficially misused).

As far as the first condition of the collectiveness is concerned, Article 2(1) RR defines 'collectiveness' as the « *inclu*[sion of] *all or a significant part of a debtor's creditors* [to proceedings]*, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them* ». Recital 14 RR further specifies that to be characterised as 'collective', proceedings must include a significant part of the creditors (even though only financial ones), to whom a debtor owes a substantial proportion of his outstanding debts [1384], with the (superfluous?) proviso that those kind of proceedings pursue rescuing objectives and do not affect the right of creditors that are not involved. Moreover, it is also specified that the fact that some insolvency proceedings for natural persons exclude specific categories of claims, such as maintenance claims, from the possibility of a debt-discharge should not mean that such proceedings are not collective.

In that constellation, although in principle a definition of collectiveness must certainly be welcomed - given its absence in the EIR, and the inaccuracies highlighted by scholars with respect to the definition given by the Virgós-Schmit Report - one cannot but notice that the new definition has partially blurred the true meaning of 'collectiveness', referring to 'true' insolvency proceedings.

To the traditional notion of (true) collectiveness, which concerns the specific phenomenon of the common pool problem, dealt with by the 'traditional' insolvency proceedings (a notion which still stands under the Recast Regulation, as witnessed by the specification of Recital 14 RR that « *proceedings that lead to a definitive cessation of the debtor's activities or the liquidation of the debtor's assets should include all the debtor's creditors* » [1385]) the new regime juxtaposed another 'a-technical' definition of collectiveness,

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1383 See *supra* Chapter II, Section 2, § II.1.2.1.

1384 As noted by scholars, while art. 1(1) RR refers vaguely to a 'significant part of' the debtor's creditors, Recital 14 RR specifies that creditors involved in the procedure must be a significant part to whom the debtor « *owes* […] *a substantial proportion of the debtor's outstanding debts* ». G. MOSS, I. FLETCHER, S. ISAACS, *The EU Regulation on insolvency proceedings*, Oxford, 2016, p. 423. It is understood that is deferred to the national applicable to determine whether the significance of the creditors must be measured in numbers or value of their credits. The same authors also argue that by specifying that the debts are 'outstanding' the Recast Regulation does not imply that debts must forcedly be immediately due and payable, otherwise the scope of application of the Recast Regulation would be significantly curtailed.

1385 It must be pointed out, however, that it is not entirely correct to state that the collectiveness of the procedure, in within the specific meaning of the term referred to traditional insolvency proceedings, is applicable only in the event that there is the definitive cessation of the debtor's activities or the liquidation of the debtor's assets. As was seen, albeit tendentially aiming at the liquidation of the debtor's assets, traditional insolvency proceedings may also pursue restructuring objectives. See *supra* Chapter II, Section 2, § II.1.2.1.2.

with a completely different meaning, which must be kept neatly separated from the first one (albeit both are now encompassed in the broad meaning of 'collectiveness').

As regards pre-insolvency and hybrid proceedings, the term 'collectiveness' merely describes the circumstance that proceedings have a multiparty dimension. They may involve all creditors or a part of them. Nevertheless, this term does not *at all* reflect the 'common pool' implications discussed in this work (for this reason for present purposes pre-insolvency and hybrid proceedings shall be jointly labelled as 'quasi-collective proceedings', regardless of the circumstance that they involve all or part of the debtor's creditors).

'Truly' collective proceedings, as explained, are those procedures where the deadlock of cooperation between the debtor and its creditors triggers the statutory response of a compulsory centralised proceedings aimed at the orderly satisfaction of creditors [1386]. Instead, 'quasi-collective' proceedings based on 'laws relating to insolvency' do not entail the application of those specific rules, and should rather be regarded as a multi-party private-autonomy response to a deadlock of cooperation between the debtor and some (or all) of his creditors.

In this respect, it may be added that the notion of (true) 'collectiveness' cannot be referred to quasi-collective proceedings even when they come with a temporary stay of individual enforcement actions (which, in any case, is not always envisaged in the context of those proceedings). In this respect, it must be highlighted that the rationale behind a stay of individual enforcement within the context of pre-insolvency and hybrid proceedings greatly differs from that one underlying the ban of individual enforcement in insolvency proceedings. The former aims at creating a *safe niche*, mainly in the interest of the debtor, to ensure him sufficient time for entering into negotiations with all or part of his creditors. The latter pursues the different objective of an orderly satisfaction of the right of all creditors within the common pool dimension.

Also, it bears observing that in pre-insolvency and hybrid proceedings there are not coercive (substantial) restrictions as to the enforcement of the creditor's rights deriving from the opening of proceedings : creditors are not forced against their will to subject their enforcement right to a certain regime stipulated by the legislature, nor those specific rules enacted by legal systems as a response to the debtor's inability to meet its obligations come into play [1387].

Therefore, when faced with the new definition of collectiveness one must be well aware of the different implications that that concept entails where referred to 'truly collective proceedings' and 'quasi collective proceedings'.

[1386] See *supra*, Preface.

[1387] Bork and Mangano seem to note as well the different meaning that collectiveness assumes (but they do not draw any conclusion on this point, besides they merely submit that the question of collectiveness remains undetermined). They point out that, for instance, in the *sauveguarde accélérée* and *sauveguarde accélérée financière* claims are brought « *individually by each creditor and are not distributed according to a collective formula, making it doubtful whether these can be seen as collective proceedings* ». R. BORK, R. MANGANO, *op.cit.*, pp. 64-65.

As to the second condition of 'insolvency' proceedings, the Recast Regulation has kept the former 'label' that its provisions cover 'insolvency' proceedings. However, the reference to 'insolvency' does not concern anymore the objective condition of the insolvency of the debtor (as apparently was the case under the EIR). The Recast Regulation clearly states that it is sufficient the likelihood of insolvency for a procedure to be considered as an 'insolvency procedure', within the new meaning of this concept. Indeed, the Recast Regulation seems to refer the concept of 'insolvency' to 'proceedings based on laws relating to insolvency' [1388], without excluding, at the same time, that proceedings which are based on company law, but are designed exclusively for insolvency situations may fall into its scope of application [1389]. Recital 16 RR specifies, however, that proceedings that are based on general company law and are not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. That specification must be read in conjunction with Recital 7 RR, pursuant to which « *However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012* » [1390].

The other two requirements of the divestment of the debtor and the appointment of the liquidator have also been retained by the RR.

However, their necessary cumulative fulfilment is not anymore required for the application of the regime of cross-border insolvencies, as they represent only one of the possible effects of proceedings covered by the RR [1391].

As to the divestment of the debtor, Article 1(1)(b) RR merely makes it explicit that the divestment of the debtor may be also partial, because the debtor may be left in the capacity of administering his assets under the supervision of the court or of a court-appointed supervisor (which, se seen, was a possibility already provided under the EIR [1392]). Article 2(3) RR, however, provides for a more detailed definition of debtor in possession, stating that

> « *debtor in respect of which insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner* […] *and where, therefore, the debtor remains totally or at least partially in control of its assets and affairs* ».

1388 R. BORK, R. MANGANO, *op.cit.*, p. 59. In the light of the fact that the concept of insolvency within the meaning of the Recast Regulation equates 'proceedings based on insolvency law', it was submitted that the title of the Recast Regulation ('on insolvency proceedings') must be regarded as still up-to-date, in that it must be read as Regulation on proceedings based on insolvency law. See S. BARIATTI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *op. cit.*, p. 47.

1389 S. BARIATTI, in B. HESS, P. OBERHAMMER, S. BARIATTI, *op. cit.* p. 41. Contra, P. NABET, 'Application *ratione materiae*', in G. CUNIBERTI, P. NABET and M. RAIMON, *Droit de l'insolvabilité. Reglèment (UE) 2015/848 du 20 mai 2015 relatif aux procedures d'insolvabiité*, LGDJ, 2017, p. 30.

1390 According to some authors, with those two Recitals, the Recast Regulation makes it clear in cubic letters that schemes of arrangements would fall outside either of the scope of the Recast Regulation and the scope of the Brussels Regime.

1391 P. NABET, 'Application *ratione materiae*', *cit.*, p. 32. A. LEANDRO, 'A first critical appraisal of the new european insolvency regulation', in *Dir. UE*, 2016, p. 217.

1392 See *supra* Chapter II, Section 2, § II.1.2.1.4.

As to the appointment of the trustee, hybrid and pre-insolvency proceedings being encompassed within the umbrella of the Recast Regulation, a joined reading of Recital 10 RR and Articles 1(1)(c), 2(d) RR seems to lead to the conclusion that also 'quasi-collective' proceedings consisting of a reorganisation plan or an agreement sanctioned by the court (which leave the debtor in possession *and* do not require the appointment of a trustee) should fall within the material scope of the Recast Regulation [1393].

Turning to the new requirements specifically added by the Recast Regulation, Article 1(1) and Recital 13 RR state that confidential proceedings are excluded from the scope of the Recast Regulation.

It is provided that the new regulation applies only to proceedings the opening of which is subject to publicity, so as to enable creditors, one the one hand, to become aware of the procedure and to lodge their claims, thus ensuring the collective nature of the procedure itself (Recital 13) and the possibility to challenge the jurisdiction of the court which opened the procedure, on the other hand (Recital 12).

The need for proceedings to be public is a requirement specific to the Recast Regulation, for it was (only apparently) not envisaged by the EIR. It is specified 'apparently', because under the EIR that requirement was, in fact, self-evident. Indeed, all insolvency collective proceedings are public, by definition.

The rationale behind this condition lies exclusively with the introduction within the material scope of the Recast Regulation of restructuring proceedings. In particular, it was duly considered that in some Member States pre-insolvency and hybrid proceedings take the form of confidential negotiations between the debtor and part or all of its creditor, aimed at restructuring the debtor's business. For instance, the Italian *piano attestato di risanamento* [1394], is not (necessarily) published in the register of companies [1395]. Also, in France, the *mandate ad hoc* [1396] and *conciliation* [1397] are confidential proceedings. It was purported that it would be too burdensome (if not impossible) for creditors in another Member State to be informed that confidential negotiations are undergoing. Therefore, the effects of that kind of proceedings would hardly be recognisable in the other Member States.

1393 See S. BARIATTI, in B. HESS, P. OBERHAMMER, S. BARIATTI, *op. cit.* p. 45.

1394 See art. 67(3)(d) l. fall.

1395 It is provided that the plan *may* be published in the companies' register, upon request of the debtor (on the assumption that the debtor is subject to certain publicity obligation such as the publication of balance sheets). However, the norm is unclear, since it refers to 'publication' without specifying whether it is a mere filing or a public disclosure of the plan. L. STANGHELLINI, A. ZORZI, 'il piano attestato di risanamento', in A. JORIO, B. SASSANI, *Trattato delle procedure concorsuali*, Milano 2017, p. 557.

1396 See article L. 611-3 Cod. Comm.

1397 See articles from L. 611-1 to L. 611-15 Cod. Comm. On the exclusion of the *conciliation* from Annex A see P. NABET, 'Champ d'application', in G. CUNIBERTI, P. NABET and M. RAIMON, *Droit de l'insolvabilité. Règlement (UE) 2015/848 du 20 mai 2015 relatif aux procedures d'insolvabilité*, LGDJ, 2017, p. 43. On the appropriateness of including the *mandate ad hoc* and the *conciliation* within the scope of application of the Insolvency Regulation see P. GUYOMARCH, 'La nécessité d'intégrer le mandate ad hoc et la conciliation dans le règlement européen 1346/2000', in *JCPE*, 2015, p. 22. R. DAMMANN, G. PODEUR, 'Le mandate ad hoc une porte d'entrée pour l'application aux groups des sociétés du règlement européen relative aux procédures d'insolvabilité', in *RLDA*, 2006, p. 104.

It must be borne in mind that in principle the confidentiality of proceedings is often ensured under national laws with the view to incentive the recourse to those proceedings on the part of the debtor facing an earlier stage of distress, permitting the rehabilitation of his business, but at the same time preventing that the full disclosure of the state of crisis alarms some creditors or third parties.

Also, the Recast Regulation codifies the *Eurofood* case-law where it states that interim proceedings must be regarded as insolvency proceedings thus falling within its scope [1398].

Eventually, the Recast Regulation specifies that insolvency proceedings may pursue either rescue, or adjustment of debt, reorganization or liquidation objectives.

In the light of the above, following the scheme provided by Article 1(1) RR proceedings falling within the scope of the Recast Regulation are of three types.

(a) traditional 'truly' collective insolvency proceedings, are those proceedings which meet the four requirements originally set out by the Insolvency Regulation, the only amendments being the reference to the 'insolvency practitioner' rather than to the liquidator (which has in practice no relevance, but witnesses the change of attitude of the European legislature) and the abolition of the former Annex B specifically listing purely liquidation proceedings [1399].

The Recast Regulation then extends the regime of cross border (truly collective) insolvency proceedings - one may add, to the extent that it is compatible - to 'quasi-collective' procedures that were previously outside of the EIR's scope [1400], but - it is submitted here - that were not outside the scope of the Brussels Ia Regulation (unless they involved common pool problems and were not listed under Annex A [1401]). In particular, those proceedings are

(b) Proceedings where the debtors' insolvency is not a necessary pre-requisite (they may be designed for situations of both insolvency and likelihood of insolvency), where the debtor remains in possession, no trustee is necessarily appointed, but the debtor's assets are subject to the control or supervision by a court [1402]. In the light of Recital 10 RR, the notion of 'control of the court' should

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1398 In this respect it must be noted that art. 2(7) RR also includes within the definition of 'judgement opening insolvency proceedings as « *(i) the decision of any court* to […] *confirm the opening of such proceedings*; *(ii) the decision of a court to appoint an insolvency practitioner* ».

1399 See *supra* Chapter II, Section 3, § III.3.3.

1400 R. BORK, R. MANGANO, *op. cit.*, p. 64.

1401 See *supra*, Chapter II, Section 3, § III.3.2.2.

1402 It must be kept in mind that the EIR allowed the debtor to only be partially devested, in that it was considered sufficient that he retained a certain degree of authority to dispose of his assets, subject to the supervision and approval of the court appointed liquidator or the supervision of the court. Also, it must be borne in mind that pure insolvency proceedings could well be aimed at reorganisation purposes. Therefore, the distinction between the categories *sub* (a) and (b) must necessarily be that the second type of procedures *(i)* does not cumulatively meet all four requirements of the former article 1(1) EIR; *(ii)* must not be aimed at the liquidation of the debtor's assets and the cessation of the undertaking. In this respect, I note that this category may encompass also 'collective proceedings' which involve 'common pool' problems, which were actually excluded from the EIR for being designed only on situations of distress and not insolvency (provided that they were not listed in Annex A). The French *sauveguarde* (which, as mentioned above, is not based on the debtor's insolvency) therefore falls into this category. Under this perspective, it is submitted that it was correct to insert

be broadly interpreted, in that it is specified that it includes also situations where the court only intervenes 'on appeal' by a creditor or other interested parties. In some proceedings falling within this category, the role of the court could be extremely marginal, it being required that it takes only a decision at some point during the procedure (it could be either the opening, the confirmation of the opening of proceedings or the sanctioning of a plan).

(c) proceedings mainly designed for situations of likelihood of insolvency, where the debtor may obtain a moratorium of enforcement actions brought by individual creditors, to ensure the prospects of a restructuring of his business. Such procedures should not be detrimental to the general body of creditors and, if no agreement on a restructuring plan can be reached, those proceedings should be preliminary to other procedures covered by the Recast Regulation.

IV.2.1.2. The role of Annexes under the Recast Regulation

As discussed in the previous Chapters, under the previous regime, the main deadlock to the dovetailing between the EIR and the Brussels Regime was the mechanism of Annex A.

During the recasting process, among the necessary areas of intervention, both the issues of the unclear relationship between the definition of insolvency proceedings under Article 1(1) EIR and the Annexes A and B, on the one hand, and the lack of scrutiny on the compliance of national proceedings included therein with the four requirements of Article 1(1) EIR, on the other, were singled out.

According to the Virgós-Schmit Report, Annexes were an integral part of the regulatory framework provided by the Insolvency Regulation (1403). However, as explained, the condition precedent for the Annex mechanism to be efficient, as imagined by the draftsmen of the Insolvency Regulation, was that proceedings listed in Annex A would reflect all national insolvency proceedings complying with the four requirements of Article 1(1) EIR.

Considering the unfortunate discrepancies emerged in practice (1404) and the fact that nothing in the EIR clearly defined the interface between the two norms, several approaches were proposed by scholars.

A first radical proposal was that of deleting the Annexes, thus entrusting the application of the Recast Regulation to the interpretation of Articles 1(1) and 2 EIR. That solution was not considered as a viable avenue, since the Annexes indeed proved to be a useful guidance for the courts addressed with the recognition of judgements concerning the opening, conduct and closure of proceedings issued in another Member State (1405).

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the *sauveguarde* within Annex A (though it did not satisfy all the requirements of article 1(1) EIR). See *supra* Chapter II, Section 3, § III.3.2.2.

1403 See Virgós-Schmit Report, at [48].

1404 See *supra* Chapter II, Section 3, § III.3.3.

1405 B. HESS, P. OBERHAMMER. and T. PFEIFFER, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report*, 2014, p. 94, fn. 236.

A second proposal, supported by the case-law of the ECJ [1406] and the majority of scholars, would regard Annexes A and B not only as an integral part of the regime of the EIR, but as hierarchically superior to the requirements of Article 1(1) EIR, in that they would be binding and determinative to define the material scope of the Insolvency Regulation.

A third option would mitigate the role of Annexes, considering them as a mere exemplifying list, with no influence on the substantive scope of the Recast Regulation. It was submitted that the corollary to that interpretation was that they would not have the value of a substantive provision (as such, with no binding force). Nevertheless, two viable alternatives were put forward under this view: considering the Annexes as delegated acts under Article 290 TFEU [1407] or qualifying them as implementing provisions under Article 291 TFEU [1408]. That second proposal was considered as the most suitable compromise: the Member States would have retained the prerogative of self-promoting national proceedings to be included in the Annexes, while the Commission would have been empowered with a 'gatekeeper' task, scrutinising the compliance of national proceedings with the requirements set forth by Article 1(1) RR [1409]. In this respect authoritative scholars have also proposed the appointment of an expert committee assisting the Commission in its task [1410].

Both options would have ensured the twofold beneficial result. On the one hand, it would have vested with binding force the Annexes, thus providing legal certainty and foreseeability as to proceedings listed therein, which would be aligned to the requirements of the RR, due to the Commission's control. On the other hand, the 'negative filter' power [1411] of the Member States would have been counterbalanced ensuring the application of the Insolvency Regulation also to those procedures not (hopefully yet) included in the Annex [1412].

Incidentally, it is worth mentioning that in the course of the institutional negotiations on the Commission's proposal to introduce a new procedure for amending Annexes - where the amending power was vested with the Commission instead of the Council - the delicate issue of the pivotal (and uncontrolled) right of the Member States to promote national proceedings in Annex A (thus ultimately triggering the application of the European regime of cross-border insolvencies) was duly

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1406 See the *Bank Handlowy* and *Radziejewski* judgements, already mentioned in Chapter III, Section 3, § III.3.3.

1407 Article 290 TFEU reads « *A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power* […] *the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act* ».

1408 Article 291 TFEU reads « *Member States shall adopt all measures of national law necessary to implement legally binding Union acts. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases* […] *the Council* ».

1409 See F. MUCCIARELLI, 'Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?', in *European Company and Financial Review*, 1/2016, p. 12.

1410 See B. WESSELS, *International Insolvency law*, *cit.*, at [10425t].

1411 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, *op. cit.*, p. 67. F. MUCCIARELLI, *op. cit.*, p. 12.

1412 B. HESS, in B. HESS, P. OBERHAMMER, T. PFEIFFER, *op. cit.*, p. 97.

underlined by the Parliament. It was acknowledged that, despite the lack of any rule obliging the Member States, they « *need to notify* […] *any substantial changes affecting their national rules on insolvency proceedings* » provided that they comply with Article 1(1) RR, since « *it is not for the Member States to decide which proceedings fall under Annex A* » [1413].

Despite the indisputable worthiness of the proposed innovations, none of the abovementioned alternative options was accepted within the text of the Recast Regulation, which, on the contrary, (inexplicably) enshrines only the radical positions expressed by the ECJ.

Indeed, Recital 9 RR reads

> « *This Regulation should apply to insolvency proceedings which meet the conditions set out in it.* […] *Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation* ».

The consequences brought by the Recital are unescapable and merciless: all national proceedings not listed in Annex A fall outside of the scope of the Recast Regulation [1414]. Any future attempt of tempering the granitic statements of the ECJ case-law on the binding force of Annex A (which would have been theoretically possible under the EIR, given the ambiguities of the text) is now precluded (unless one disregards Recital 9 RR, which theoretically has no binding value, and one resorts to the ambiguities of the text [1415]).

Needless to say, the binding nature of Annex A (assuming that the procedures listed therein do comply with the requirements of Article 1(1) RR) plays an important role in ensuring legal certainty and predictability in an area characterised by an extremely high degree of technicality, aggravated by the considerable differences between the laws of the Member States.

Nevertheless, the excessive rigidity towards insolvency proceedings not listed in Annex A ultimately proves to undermine the very objective of fostering the proper functioning of the internal market, which requires that cross-border insolvency proceedings should operate efficiently and effectively.

Indeed, the exclusion of a national procedure from the list of Annex A has no impact on the nature of proceedings, which still remains a 'collective' or 'quasi-collective' procedure.

1413 The latter specification was due to the text proposed by the Commission, which seemed more permissive, providing that Member States shall notify the Commission of national proceedings « *which they want to have included in Annex A* ». Actually, the text of the Commission would not in any case have allowed Member States to include procedures other than those compliant with Article 1(1) EIR, since the Commission's proposal also provided that « *the Commission shall examine whether the notified rules comply with the conditions set out in Article 1 and, where this is the case, shall amend Annex A by way of delegated act* ». See Amendment 66, in Amendments 001-069 by the Committee on Legal Affairs dated 29 January 2014 (PE527.276/1). See also F. MUCCIARELLI, *op. cit.*, p. 13.

1414 G. CORNO, S. BARIATTI, *Il regolamento (UE) 2015/848 sulle procedure di insolvenza*, Milano, 2016.

1415 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, *op. cit.*, p. 72; G. MC CORMACK, 'Something Old, Something New: Recasting the European Insolvency Regulation', in *The Modern Law Review*, 2016, 79, p. 121 and ff.

Therefore, save for what will be said below about the latter ones, by precluding any substantive role to the provision of Article 1(1) RR, the Recast Regulation has perhaps produced as many severe consequences as those that the day-to-day interpretation of Article 1 RR on the part of national judges would have entailed.

The new regime does not either solve the risk of (possibly opportunistic) reforms of proceedings already listed in Annex A, which may be radically amended by the Member States in their fundamental features (but not in their name) to such an extent that they do not meet anymore the conditions of Article 1(1) RR. Those proceedings would benefit of automatic recognition without any possibility for the courts of the other Member States to verify the content of that procedure (which admittedly would be a burdensome task).

What further exacerbates the inflexibility of the solution adopted by the new text is the lack of any procedure for amending Annex A, which - according to some authors - was the worst choice that could have been made [1416]. For unclear political reasons, neither Article 45 RR nor the amended procedure proposed by the Commission were embedded in the Recast Regulation. Accordingly, any amendment of Annex A should be adopted pursuant the (much more lengthy) ordinary legislative procedures under Article 294 TFEU [1417].

The over-rigid 'Annex approach' within the Recast Regulation entails that the Member States are (confirmed to be) in the driver's seat as to the actual application of the European provisions on cross-border insolvencies, since they are under no duty to notify their national proceedings. It follows that the practical usefulness of Article 1(1) RR seems to be limited to a mere guideline for the European institutions to verify the inclusion of national proceedings within the list of Annex A. Indeed, the ordinary legislative procedure should (at least) ensure that only proceedings complying with the new enlarged notion of insolvency proceedings are included therein [1418].

Practice seems to demonstrate that the amending procedure of Annex A via the ordinary legislative cannot reflect in due time the changes of the national legal frameworks of the Member States: the procedure takes up to 12-18 months to adopt the amended version of the Annexes, whereas the Member States notify newly reformed proceedings just before their entrance into force [1419].

1416 B. WESSELS, 'The European Union Regulation on Insolvency Proceedings Recast: The first commentaries', in *European Company Law*, 2016, 13, p. 82 ff.

1417 That was recently confirmed in the Commission's proposal for a Regulation a regulation of the European Parliament and of the Council replacing Annex A to Regulation (EU) 2015/848 (COM(2016) 317 final; 2016/0159 (COD), where the Commission stated that « *Since the Annexes are intrinsic part of the Regulation, their modification can only be achieved via the legislative amendment of the Regulation* ». The Commission's proposal led to the adoption of Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017, in *Official Journal*, 2017, L. 57/29.

1418 See L. SAUTONIE-LAGUIONIE, C. LISANTI, *Règlement (UE) n. 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité, Commentaire article par article*, Paris, 2015.

1419 The ordinary legislative procedure has already been used twice. The abovementioned Regulation (EU) 2017/353 took into consideration new proceedings notified by Poland in December 2015 and entering into force in Poland as of January 2016. On 13 June 2018, the Parliament adopted at first reading (corresponding to the final legislative act, for the agreement reached with the Council) its position in the Council's proposal

Two cautious possible lessening were suggested by scholars with regard to the shortcomings deriving from that unfortunate solution.

The first would advise Member States to postpone the entry into force of newly reformed national provisions after their inclusion of Annex A (and, intuitively to notify them as soon as their reform are completed) [1420].

The second suggestion aims at contrasting a too rigid approach towards national proceedings which are not listed in Annex A, but that represent newly reformed 'sub-categories' of proceedings already included in the scope of the Recast Regulation (the problem, as explained, had already arisen in the course of the Insolvency Regulation [1421]). The inflexible application of the Recast Regulation would, in fact, exclude those proceedings from the scope of the Recast Regulation (and ultimately from benefitting of the simplified recognition regime set forth therein). As a consequence, proceedings like the Italian *concordato preventivo in bianco*, the *amministrazione straordinaria delle grandi imprese* and the *accordi di ristrutturazione con banche e intermediari finanziari* would be excluded since they are not expressly mentioned in Annex A under their local name [1422]. However, a more reasonable view would suggest deeming that those proceedings fall under the umbrella of the Recast Regulation as well.

Also, the new regime provides that judges must verify *ex officio* whether they have jurisdiction under Article 3(1) and 3(2) RR. This would simplify the task of the other Member States which would have a 'label' on the judgement opening such non-listed-in-Annex-A-proceedings, certifying that they meet all the requirements of Article 1(1) RR.

IV.2.1.3. Is the 'collective dimension' of the problem concerning the boundaries between the Brussels Ia Regulation and the Recast Regulation solved?

In the light of the above, it bears now examining whether the enlargement of the Recast Regulation's scope of application has any impact on the conclusions submitted in Chapter III concerning the its relationship with the Brussels Regime.

Briefly recalling, it was suggested that under the realm of the Insolvency Regulation, (only) two gaps might have occurred, respectively concerning

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for a regulation of the European Parliament and of the Council replacing Annex A to Regulation (EU) 2015/848 on insolvency proceedings (P8_TC1-COD(2017)0189). New proceedings had been notified in January 2017 from Croatia, followed by other notifications on the part of Bulgaria, (again) Croatia, Latvia, Portugal, Belgium. At the time of the adoption of the Parliament's position, all national proceedings were already entered into force in the relevant Member States.

1420 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, *op. cit.*, p. 73.

1421 See *supra* Chapter III, Section 3, § III.3.3.

1422 See B. WESSELS, 'What is an insolvency proceeding anyway?', in *International Insolvency Law Review*, 2011, p. 16. Referring to the *amministrazione straordinaria delle grandi imprese*, the author states « *I am rather doubtful that the Court of Justice of the European Union would provide a decision of this kind, as it would not fit within the Regulation's closed-list system* ».

(i) national 'truly' collective insolvency proceedings meeting all the requirements set forth by Article 1(1) EIR, but that are not listed in Annex A (for whatever reason: a discretionary choice of the Member State, newly reformed procedures which were not timely reflected in Annex A or B, and the like);

(ii) national 'truly' collective proceedings not fulfilling all the requirements of Article 1(1) EIR, but that deal with common pool problems (for instance, the *sauveguarde* and the *amministrazione controllata*, which are 'truly' collective, but are not based on the insolvency of the debtor).

That was justified on the fundamental assumption - assuming the (illusory) sound functioning of the mechanism of Annexes - that *tendentially* (*i.e.* apart from the two gaps above) the Insolvency Exception of Brussels Ia and the Insolvency Regulation covered a coextended area, since the material scope of the former should be interpreted in the light of the latter. The Brussels Regulation, therefore, excluded only proceedings representing the statutory reaction to common pool problems.

In the light of that assumption, it was also submitted that all other kinds of proceedings in which insolvency is a part of the picture (*i.e.* pre-insolvency proceedings and hybrid proceedings) should have fallen within the scope of the Brussels Regime, it being understood that it provides for a suitable regime for regulating multiparty proceedings, mainly dealing with forms of *jurisdictio volontaria.*

Although that interpretation seems correct form a doctrinal point of view, it has nevertheless been demonstrated that practice has often shown difficulties relating to the relationship between the two instruments, essentially linked to the fact that (erroneously) the Insolvency Exception has been interpreted as applicable also to those proceeding that were called here 'quasi collective proceedings' (*i.e.* pre-insolvency proceedings and hybrid proceedings).

Against this background, it must then be examined the approach adopted by the European legislature towards this profile in the process of recasting the Insolvency Regulation.

Contrary to the previous regime, the Recast Regulation explicitly mentions the relationship between the set of rules provided therein and the Brussels Regime.

The starting point in this respect must be Recital 7 RR, where the European legislature establishes that « *Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012. Those proceedings should be covered by this Regulation* ». As anticipated, the same Recital acknowledges the need that « *The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments* » adding, at the same time that « *the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012* ».

Recital 16 RR further states that « *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* ».

Naturally, also the abovementioned Recital 9 RR dealing with the role of Annex A needs to be taken into account in this context, since - as was the case under the EIR - in the Recast Regulation it plays a decisive role against the dovetailing.

When read together, those provisions prove to be contradictory and face interpreters with the same bivalent interpretation that has been described already in Chapter III. The relationship between the two regulations can (still) be construed in two opposite ways.

A first interpretation - which unfortunately seems the most obvious when reading the new text - would maintain that the interpretation of the formula '*Bankruptcy, winding-up, judicial arrangements, compositions and analogous proceedings*' of Article 1(2)(b) Brussels Ia should be read independently from the scope of application of the Recast Regulation: the Brussels Regulation would exclude from its scope indiscriminately all kind of proceedings dealing with insolvency-related situations, while only 'insolvency proceedings' as autonomously defined in Article 1(1) RR would fall in the narrower scope *ratione materiae* of the Recast Regulation.

Arguments supporting this view might be found, first, when considering that the Recast Regulation, while affirming that proceedings excluded from the scope of the Brussels Regime should fall within its scope [1423], immediately clarifies that its application requires that proceedings must meet the conditions set out in it, and further curtails its scope by stating that those proceedings that are listed exhaustively in Annex A [1424].

That would mean that all proceeding admittedly excluded from the scope of the Brussels Regulation, which do not meet the requirements set out from the Recast Regulation (*i.e.* not fulfilling the description of Article 1(1) RR) would fall in a regulatory creep, governed by the rules of private international law of each Member State. A strong argument upholding this conclusion would be Recitals 7 and 16 RR, since the former clearly states that the exclusion of proceedings from Annex A does not imply that they are covered by the Brussels Regime. The latter seems to suggest that proceedings that are based on general company law, but that are not designed exclusively for insolvency situations, should not fall either within the scope of the Recast Regulation or the Brussels Regulation.

On this assumption, scholars have submitted that the enlargement of the Recast Regulation's material scope notwithstanding, increasing the types of proceedings subjected to its regime would not affect the scope of application of the Brussels Ia Regulation [1425].

If new forms of insolvency proceedings (within the general meaning of Article 1(1) RR) are included in the scope of application of the Recast Regulation, what happens is simply that the regulatory lacuna

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1423 Recital 7 RR.

1424 Recital 9 RR.

1425 T. LINNA, 'Actio Pauliana - "Actio Europensis?" Some Cross-Border Insolvency Issues', in *Journal of Private International Law,* 10, 2014.

between the Brussels Regime and the former Insolvency Regulation is only partially filled [1426]. Needless to say, this perspective denies any actual dovetailing and seems to consider the objective enshrined in Recital 7 RR as a mere declaration of (utopic) intent.

That would be the case, for instance, of debt adjustment proceedings of many Member States (such as France, Finland, Luxembourg, and Sweden) which have decided (!) not mention their consumer debt adjustment proceedings in Annex A.

The second alternative interpretation would maintain, on the contrary, that the enlargement of the scope of application of the EU regime on cross-border insolvencies partially shifts the scope of Brussels Regime, but leaves unaltered the competence of the Brussels Regulation for those proceedings not fulfilling the requirements of the Recast Regulation [1427].

This view seems to espouse the (here supported) interpretation that *in thesi* the Insolvency Exception excludes from the scope of application of the Brussels Regime only 'truly' collective proceedings, *i.e.* only those proceedings derogating from the ordinary civil liability regime, which deal with the common pool problems. Therefore the reform has not merely 'partially filled-in' a lacuna, but rather it has made clear that the better-suited provisions for the newly emerged 'quasi-collective' proceedings (hybrid and pre-insolvency proceedings) is that of the Recast Regulation, although from a doctrinal point of view they could be governed also by the Brussels Regulation (since they are not dealing with common pool problems).

In this respect, the inclusion of pre-insolvency and hybrid proceedings under the umbrella of the Recast Regulation would respond to practical logics and legislative policy expediency reasons, rather than stemming from juridical considerations.

The reasons underlying such a legislative choice are quite easily understandable: when recasting the Insolvency Regulation, the European legislature was confronted with a great variety of national proceedings recently developed by the Member States to respond more effectively to the economic crisis [1428].

All in all, (only) from a macroeconomic point of view, those new proceedings may be equated to purely collective insolvency proceedings in that they all presuppose the pathological functioning of the mechanism securing the common civil liability regime. That pathological situation occurs where there is a deadlock in the ordinary cooperation between the debtor and his creditors (*i.e.* on the one side, the person with the powers to dispose of the assets, whenever he fails to meet the obligations

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1426 T. LINNA, *op. cit.*, p. 75.

1427 F. MUCCIARELLI, *op. cit.*, p. 11 « *The Brussels I Regulation, indeed, does not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". Therefore, the Brussels I Regulation and the Insolvency Regulation are mutually exclusive, and their scopes should be aligned. Consequently, the inclusion of pre-insolvency procedures in the scope of the Insolvency Regulation also alters the scope of the Brussels I Regulation* ».

1428 H. EIDENMÜLLER, 'What is an insolvency proceedings?', in *Oxford Legal Studies Research*, 2017, Paper No. 31, p. 10.

entered into in connection to those assets acting as collateral - the debtor – and, on the other side, those subjects who have granted credit to the debtor relying on the expectation to enforce their right of credit on those liable assets - the creditors - [1429]). Admittedly simplifying, the fundamental idea is that there is no distress or insolvency without the disruption of the cooperation between the debtor and his creditors. Accordingly, (formal) insolvency law (in its broadest meaning) pursues the aim of resolving disputes between the parties involved in those situations, to re-establish legal peace [1430].

Being all aimed at avoiding or resolving the debtor's state of insolvency, the new 'quasi-collective' proceedings 'borrow' some principles and features from 'truly' collective insolvency proceedings, such as a temporary moratorium of individual enforcement claims, readjusting their operation to their specific (and different) purposes.

With the consequence that, from a systematic point of view, it is consistent and reasonable to place those proceedings within the same regulatory framework of the other procedures which they have borrowed some principles from. Putting them in the same statute might generate certain cost advantages because, for instance, an initial general chapter can be used to stipulate certain rules that apply to all types of proceedings.

Another reason justifying the inclusion of pre-insolvency and hybrid proceedings under the scope of the Recast Regulation may be found in the prevention of forum shopping. Indeed, subjecting their regulation to the jurisdictional regime provided under the Brussels Ia Regulation (which, as seen, provides for alternative *fora*) would eventually foster the risk of opportunistic behaviours on the part of the parties involved in those proceedings which - albeit substantially of a contractual nature - involve multiple and delicate interests, whose relevance is above party autonomy. On the contrary, the exclusive nature of the head of jurisdiction represented by the COMI, would ensure greater predictability and legal certainty.

Eventually, the decision to transplant restructuring proceedings into the Recast Regulation's toolbox also expresses a choice of value by the European legislator towards those procedures, which are clearly considered to be worthy of benefiting from the simplified recognition regime provided for therein.

While this *ex ante* practical approach is ultimately convincing from a judicial policy point of view, it may turn to be unsatisfactory when considering that, from an *ex post* scholarly standpoint, to look at insolvency proceedings from a unitary perspective (as the Recast Regulation seems to allude) risks to conceal the necessary doctrinal taxonomy describing two different outcomes, supported by two different procedures, governed by two different sets of rules [1431].

1429 M. FABIANI, *Il diritto della crisi e dell'insolvenza*, Bologna, 2017, p. 10.

1430 S. MADAUS, 'Leaving the shadows of us bankruptcy law: a proposal to divide the realms of insolvency and restructuring law', in *Eur. Bus. Org. Law Rev.*, 2018 and L. HÄSEMEYER, *Insolvenzrecht*, Cologne, 2007, at [2.01]: 'insolvenzrechtliche Haftungsordnung als eine Friedensordnung' (insolvency liability order as a peace order).

1431 S. MADAUS, *op. cit.*, p. 616.

As anticipated, it is submitted that when dealing with the new notion of 'insolvency proceedings' (and that of 'collectiveness'), the interpreter should be well aware of the fact that the European legislature has proceeded 'inductively', merging proceedings of profoundly different nature within the same legal instrument.

The logic consequence (yet, somewhat unfortunate since it lacks consistent normative basis [1432]) was that of labelling under the same generic concept of 'insolvency proceedings' (and 'collective') procedures that are not truly collective insolvency proceedings.

Should this interpretation turn to be correct, taking it one step further, it is submitted that the new definition of insolvency proceedings cannot be regarded anymore as an autonomous (substantive) notion, as was the case with the definition of insolvency proceedings provided by the EIR.

Under Article 1(1) EIR, insolvency proceedings were defined through the four requirements of *(i)* insolvency *(ii)* collective proceedings where the *(iii)* debtor is devested and *(iv)* a liquidator is appointed.

That provision characterised (for the purposes of European private international law) the true insolvency nature of uniform kinds of national proceedings, all dealing with common pool problems. With the consequence that Article 1(1) EIR played at the same time a role of positive integration (meaning that proceedings meeting the requirement provided therein were insolvency proceedings for the purposes of both the EIR and the Brussels Regime) and of negative integration (what was excluded from that material definition could not be regarded as insolvency proceedings for the purposes of either the EIR, or for the Brussels Regulation).

On the contrary, the new article 1(1) RR resembles more to a merely formal descriptive norm (*norma di fattispecie*) grouping together very different proceedings which cannot be characterised as insolvency proceedings for the mere fact that they are subject to the regime of the Recast Regulation. Because of that the new Article 1(1) RR does not play a role either of positive or of negative integration. It is neutral as regards to the characterisation of proceedings, serving exclusively as a purely formal description of proceedings listed therein.

Against this background, it is possible to further develop the abovementioned second interpretation of the boundaries between the Insolvency Regulation and the Brussels Regime and attempt to suggest a different approach to that *prima facie* suggested by the Recitals.

The scope of the Insolvency Exception should still be interpreted as excluding (only) truly collective insolvency proceedings, as defined by the former version of Article 1(1) EIR. Besides, those collective insolvency proceedings should fall within the scope of the Recast Regulation [1433] *in addition* to certain pre-insolvency and hybrid proceedings provided that they meet the conditions set forth by Article 1(1) RR, which are now subject to the regime provided therein as well.

[1432] H. EIDENMÜLLER, 'What is an insolvency proceedings?' in *Oxford Legal Studies Research*, 2017, Paper No. 31.

[1433] Recital 7 RR.

When those requirements are not met, the distinction between 'truly' collective insolvency proceeding and 'quasi-collective' proceedings takes on relevance : the former proceedings being actually excluded from the Insolvency Exception, would fall in the regulatory gap governed by national private international law rules (as was the case in under the former EIR). As to the latter group of 'quasi-collective' proceedings, they would not be excluded from the scope of application of the Brussels Regime. Therefore, when Recital 7 RR states that the interpretation should avoid as much as possible loopholes, it is implying that those procedures not encompassed in the scope of the Recast Regulation would fall within the scope of application of the Brussels Ia Regulation.

The further specification concerning the fact that procedures not listed in Annex A should not be regarded as automatically covered by the Brussels Ia Regulation, must then be interpreted as playing the same role of the expression 'provided that it applies' in Article 32(2) RR (formerly article 25(2) EIR): it merely alerts courts and practitioners that when facing proceedings excluded from the Insolvency Regulation, they should carefully examine whether the automatic recognition regime of the Brussels Regulation may not be applicable, since they may fall into the scope other instruments (*i.e.* neither the Recast Regulation not the Brussels Ia Regulation), such as the already mentioned Directives on insolvency proceedings concerning insurers (Directive 2009/138 EC) and of credit institutions (2001/24/EC) or actually fall within the scope of another exception of the Brussels Regulation.

IV.3. [Segue] the jurisdiction of Annex Actions: something old and something new

One of the most important innovations set forth by the Recast Regulation is the introduction of a specific head of jurisdiction for Annex Actions.

Article 6 RR, headed 'Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them', reads

> « *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.*
>
> *Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.*
>
> *The first subparagraph shall apply to the debtor in possession, provided that national law allows the debtor in possession to bring actions on behalf of the insolvency estate.*
>
> *For the purpose of paragraph 2, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings* ».

From a first appraisal, it emerges clearly that the new provision has enshrined the principle of the *vis attractiva concursus* uttered by the ECJ since the *Seagon* judgement, and progressively developed by the case-law that was analysed in the previous Chapter III.

Nevertheless, Article 6 RR provides for a double (and opposite) *vis trahens*. The first, is a centripetal attraction, albeit limited, towards the court opening the insolvency procedure (for present purposes, the 'inclusive connection', Article 6(1) RR). The second, is a centrifugal attraction, towards the courts of the defendant's domicile (the 'extractive connection', Article 6(2) and (3) RR).

It is fair to submit, then, that the recast activity of the European legislature has not only been limited to consolidating the solutions imposed by the ECJ case-law, but it has also actively sought to temper the latter ones, introducing significant innovations.

Before analysing the new rules concerning the jurisdiction of Annex Actions, it should be noted that the *vis attractiva concursus* can only be referred to 'truly' collective insolvency proceedings. The reason is quite obvious: the *vis attractiva concursus* represents a jurisdictional tool to implement the specific rules of insolvency law, conceived – it must be reinstated again – as the statutory response to the common pool problem. Only in the context of 'truly' collective proceedings the need of such a special rule of jurisdiction arises. Indeed, the rules such as the bar of enforcement actions (intended at a remedy to the 'asst race' of creditors and not as a 'breathing space' for negotiations) and the *vis attractiva concursus* are nothing but specific tools aimed at implementing the (coercive) satisfaction of creditors regulated following a ranking and a precise order (the *par condicio creditorum*), which is imposed by the law.

Instead, in the context of pre-insolvency and hybrid proceedings - where, simplifying, creditors agree on the restrictions to their claims, even where the involvement of the judicial authority is provided at some point of the 'quasi-collective' procedure - there would be no justification at all to divert from the ordinary rules of the Brussels Regime, as there would be no insolvency liability regime to be implemented.

Therefore, when dealing with Article 6 RR, such a preliminary remark must be kept in mind, paying particular attention to those 'truly' collective proceedings where the divestment of the debtor is only partial.

IV.3.1. Article 6(1) Recast Regulation: the (exclusive) vis attractiva concursus for Annex Actions

Article 6(1) RR provides that the courts of the Member State in the territory of which insolvency proceedings are opened have jurisdiction on actions 'directly deriving from insolvency proceedings and closely linked with them'.

The text of the Recast Regulation reproduces *verbatim* the Gourdain formula [1434] and codifies the latter also with reference to jurisdiction, introducing the international *vis attractiva concursus* in accordance with the interpretation of the *Seagon* case-law.

Indeed, the new provision designs a rule on international jurisdiction according to which the COMI indicates not only the Member State whose courts are vested with the jurisdiction to open main insolvency proceedings, but to hear and decide Annex Actions as well. It is still deferred to the domestic rules of each Member State to allocate the (functional) competence between its national courts [1435], the Recast Regulation thus abstaining from realising a true *vis attractiva concursus*.

One may well wonder whether it is not appropriate to raise, then, the same doubts that were raised with regard to the *vis attractiva concursus* codified during Phase I of the Insolvency Project. What happens if the national rules of the Member State do not provide for a criterion of competence that identifies a judge who can decide on an Annex Action? Should it be assumed that Member States must provide themselves at least with a subsidiary rule on competence (as is the case with Article 27 of the new CCI, providing for the subsidiary competence of the Tribunal of Rome)?

What is important to point out is that the actual concentration of the Annex Actions before the bankruptcy court would not be a direct consequence of the mechanism under Article 6 RR but could possibly result from the application of the *vis attractiva concursus* provided for by the national rules.

The consequences of this point shall be addressed afterwards.

The international *vis attractiva concursus* regards the jurisdiction of both Annex Actions brought by the trustee and creditors acting as claimants. Given the bar for creditors to bring individual actions (and also in the light of the *German Graphics* case law), the creditor's or third party's *locus standi* to bring an Annex Action may be found, for instance, in the event of actions directed against the trustee or in the case of disputes relating to the exercise of his powers [1436].

Arguing *a contrario* with Article 6(2) RR, which is formulated as being the exception to a general rule, from the very publication of the Recast Regulation the vast majority of scholars have maintained that the jurisdiction provided by Article 6(1) RR should be regarded as exclusive [1437]. The fact that the jurisdiction of the COMI *may* suffer an exception only under strict conditions (as provided under Art 6(2) RR) would confirm that whenever those specific circumstances do not occur an Annex Action

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1434 The French version of the Gourdain formula is slightly changed in the RR since it substitutes the wording '*actions qui découlent'* used in the EIR with '*actions qui dérivent*'. However, the variation seems to be attributable to a mistake of translation, with no consequences as to the interpretation of the provision. G. CUNIBERTI, 'La compétence des tribunaux de la faillite', in G.CUNIBERTI, P. NABET and M. RAIMON, *Droit de l'insolvabilité. Règlement (UE) 2015/848 du 20 mai 2015 relatif aux procedures d'insolvabilité*, LGDJ, 2017. *Contra* S. BARIATTI, 'Recent case-law concerning jurisdiction and the recognition of judgements under the European Insolvency Regulation', in *RabelsZ*, 2009, p. 73.

1435 See also Recital 26 RR, recasting Recital 15 EIR.

1436 For actions brought by creditors against the estate, see *infra* Chapter V, § V.4.2.

1437 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, *op. cit.*, p. 93. P. MANKOWSKI, 'Under Article 6', in P. MANKOWSKI, M. F. MÜLLER and J. SCHMIDT, *EuInsVO 2015*, Munich, 2016, at [27]; R. BORK and R. MANGANO, *op. cit.*, [3.75].

must be brought before the courts of the insolvency *forum*. On that ground, it was maintained that, as a general rule, Article 6(1) RR sets out an exclusive jurisdiction [1438].

It may be recalled that such an interpretation was already (timidly) submitted when interpreting the *Seagon* judgement. Although the Court did not expressly take a position on the issue (for it was not expressly required to do so), it seemed to be somewhat prone to believe that the jurisdiction of the bankruptcy court was exclusive. However, the articulated arguments of the Advocate General, who invoked the need to ensure a certain degree of flexibility to the liquidator when acting in the interest of the body of creditors, cast doubts on the solution to be adopted to actually achieve the *effet utile* of the Insolvency Regulation.

Also, it must be pointed out that Article 21(1) RR, concerning the powers of the insolvency practitioner, recasting the former Article 18(1) EIR, did not amend the text of the provision, pursuant to which the trustee may exercise all the powers bestowed upon him by the *lex fori* « *in another Member State* ». Which seems to be inconsistent with the exclusive nature of the jurisdiction under Article 6(1) RR.

All uncertainties that may derive from the silence of Article 6(1) RR on this point must now be regarded as dispelled in the light of the recent *Wiemer&Trachte* judgement that, although referring to the Insolvency Regulation, expressly stated the exclusive nature of the *vis attractiva concursus*.

The text of Article 6(1) RR refers generally to proceedings opened 'in accordance with Article 3RR', without distinguishing between the first and the second paragraphs thereof. A literal interpretation leads reasonably to maintain, then, that the *vis attractiva concursus* operates equally in the context of both main and secondary proceedings [1439].

Again, the case-law of the ECJ handed down after the publication of the Insolvency Regulation silences any contrary interpretation : the *Nortel* judgement (which is, in fact, another example of the 'creative' interpretation made by the ECJ) attributes to secondary proceedings the same centripetal force over Annex Actions as main proceedings.

1438 D. ROBINE, 'Les actions connexes', in D. ROBINE and F. JAULT-SESEKE, *Le nuoveau Règlement insolvebilité: quelles évolutions?*, Paris, 2015, pp. 61-68; R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENECHAL and R. DAMMAN, *Le droit de l'insolvabilité*, Joly eds., 2018; C. LEGROS, 'Les actions annexes', in F. JAULT-SESEKE and D. ROBINE, *Le droit européen des procedures d'insolvabilité à la croisée des chemins*, Paris, 2013, p. 119 and ff.; F. MÉLIN, *Le règlement Communautaire du 29 mai 2000 relatif aux procedures d'insolvabilité*, ed. Bruylant, 2008, p. 197 and ff.; Y. BRULARD, 'Les actions annexes', in Y. BRULARD, L-C. HENRY, V. MARQUETTE et al., *L'insolvabilité nationale, européenne et internationale*, 2017; P. DE CESARI AND G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il Regolamento (UE) 2015/848 relativo alle procedure d'insolvenza*, Torino, 2017; F. MUCCIARELLI, 'Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?', in *European Company and Financial Review*, 2016, p. 20; S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017; G. MOSS, I. FLETCHER, S. ISAACS, *The EU Insolvency Regulation on Insolvency Proceedings*, Oxford, 2016.

1439 G. CUNIBERTI, 'La compétence des tribunaux de la faillite', in G. CUNIBERTI, P. NABET and M. RAIMON, p. 175; R. MANGANO, *op. cit.*, at [3.81]; D. ROBINE, 'Les actions connexes', *cit.*, p. 65.

Admittedly, on that occasion the Court referred to actions concerning the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings. One may reasonably doubt, therefore, as to whether the *vis attractiva* in the context of secondary proceedings concerns exclusively those kinds of Annex Action. In this respect, Articles 3(2) and 21(2) RR seem to confirm that view, in that they stress that the effects of secondary proceedings are limited to the debtor's assets in the Member State of the latter's establishment.

The wording of those provisions seems to allude that, at the best, the liquidator is entitled to initiate in another Member State actions to set a transaction aside and actions for the restitution of moveable assets, which he claims that were removed from the Member State of the secondary procedure [1440]. Against this background, it is still doubtful whether, the *vis attractiva concursus* in the context of secondary proceedings may operate also in respect to other Annex Actions, such as liability actions against directors domiciled in another Member State [1441].

Under the new Recast Regulation, the answer should be in the affirmative.

The fact that secondary proceedings, although territorial in scope, must no longer pursue merely liquidation purposes, also serves as a reason for this. Recital 47 RR confirms that conclusion, providing that «*This Regulation should not prevent the courts of a Member State in which secondary insolvency proceedings have been opened from sanctioning a debtor's directors for violation of their duties, provided that those courts have jurisdiction to address such disputes under their national law* ».

Nevertheless, it must be pointed out that, with regard to the regime of the Insolvency Regulation, the solution does not seem so obvious.

According to the *Nortel* decision, the exclusive jurisdiction of main and secondary proceedings must (arguably) be intended as concurrent. That solution has to be applied also with reference to the new rules, with the consequence that all the perplexities related to the principle of priority and the risk of irreconcilable judgments, illustrated above [1442], remain even in the regime provided for by the Recast Regulation.

In this constellation, one could fairly maintain that Article 6(1) RR represents a 'victory' for the ECJ case-law, that has been codified to a great extent in that provision.

[1440] Also, it bears observing that the ECJ seems to confirm this view in *Wiemer&Trachte*, at [40], where it states « *the powers of the liquidator are, in the context of proceedings covered by Article 3(2) of Regulation No 1346/2000, territorially limited in so far as, by virtue of that provision, the effects of those proceedings are confined to the assets of the debtor situated in the territory of the Member State on the date those proceedings are opened. In such a situation, the liquidator must therefore be able to bring an action to set a transaction aside in connection with those proceedings before a court of a Member State other than the one which opened the secondary proceedings if the assets that are the subject of those proceedings were transferred, after those proceedings were opened, to another Member State* ».

[1441] In this respect, it must be recalled the conflicting French case-law of the judgement *NOB*, *Alkor* and Trib. Comm. Charleroi (see *supra* Chapter III, Section 2, § II.2.4.).

[1442] See *supra* Chapter III. Section 2, § II.2.4.

One aspect that is not entirely clear whether it has been embedded in the provision at hand, is the universal scope of the *vis attractiva concursus* uttered by the ECJ in the *Schmid* and *H. v. H.K.* case-law [(1443)].

The doubt arises because, again arguing *a contrario* with Article 6(2) RR, the text of Article 6(1) RR makes no reference to the fact that the defendant must be domiciled in a Member State. Moreover, the first part of Recital 35 RR - which undoubtedly refers to the interpretation of the inclusive connection provided for in Article 6(1) RR - where it indicates avoidance actions as an example of Annex Actions, states that they are '*against defendants in other Member States*' [(1444)], while in the second part of the same Recital, the fact that the defendant must be domiciled in a *Member State* is not expressly specified.

The ambiguity of Recital 35 RR may lead one to opposite interpretations: either the provision means that an action 'is *brought* in another Member State against defendants' (regardless to their domicile), or it entails that actions are 'against defendants *domiciled* in another Member State'.

The Italian, Spanish and German version of Recital 35 RR point to the first reading, since they both omit the expression '*domicile*' ('domicilio' and '*Wohnsitz*') of the defendant [(1445)]. On the contrary, the French version states « *actions engagées contre des défendeurs établis dans d'autres États membres* ».

Therefore, the opinion of those who exclude that this is an oversight on the part of the legislature cannot be fully shared [(1446)].

Assuming that is was an intentional omission, it has been submitted that the difference as to the personal scope between the inclusive connection and the extractive connection that would result by espousing the first interpretation could be explained in the light of the different *rationale* underlying Article 6(1) and 6(2) RR [(1447)]. The former would aim at maximising the efficiency and effectiveness of insolvency proceedings, by ensuring that Annex Actions reach also defendants in third states. The latter would pursue the same objective of efficiency of the procedure, but at the 'horizontal' level, coordinating the courts of different Member States and the scope of the Brussel Regime with the Recast Regulation, whenever the defendants are domiciled within Member States.

Yet, the idea that the EU legislator wanted to depart from the *Schmid* case-law cannot be discarded *a priori* either, and, indeed, it is strongly supported by French scholars, who naturally based themselves

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1443 Authoritative French scholars regret the fact that this issue was not sufficiently addressed during the reform of the Regulation. See F. JAULT-SESEKE and D. ROBINE, 'L'application du règlement « insolvabilité » dans les relations avec un Etat tiers', in *Dalloz*, 2014, p. 916.

1444 The other versions read « *contro convenuti in altri Stati membri* » « *engagées contre des défendeurs établis dans d'autres États membres* ».

1445 In Italian, Spanish and German Recital 35 reads respectively « *le azioni revocatorie contro convenuti in altri Stati membri* » and « *las acciones revocatorias frente a los demandados en otros Estados miembros* », « *Anfechtungsklagen gegen Beklagte in anderen Mitgliedstaaten* ».

1446 A. LEANDRO, 'A First Critical Appraisal of the New European Insolvency Regulation', in *Il Diritto dell'Unione Europea*, 2016, p. 4.

1447 A. LEANDRO, *cit.* p. 4.

on the French version of the text [1448]. As explained, in the *Schmid* case, the Court itself, in fact, almost apologized for the implications that the extension of the *vis attractiva concursus* to defendants domiciled in third countries would entail. The ECJ stated that creating a foreseeable and legally certain procedural framework as of the jurisdiction for insolvency-related actions, together with the need of avoiding forum shopping would entail sufficient objectives of public interest that justify a restriction to the respondent's right of defence (regarded as the possibility to divert the defendant from the forum of his home county, which is not an unfettered prerogative).

Given the silence of the Recast Regulation on this point (contrary to the Brussels Ia Regulation, which expressly provides that Member States, under their domestic rules, may also attract to their jurisdiction defendants domiciled in third states) one might well wonder whether the EU legislature in did not take a different position on this point than the legislative policy evaluations supported by the Court in the *Schmid* case [1449].

Be that as it may, it is reasonable to consider that the first reading should be preferred. If only because - as demonstrated so far - in codifying the European *vis attractiva concursus*, the Recast Regulation has proven to have largely drawn (indeed, one could say that it has slavishly followed) from the teachings of the ECJ.

From a general standpoint, the inclusion of the European *vis attractiva concursus* in the Recast Regulation must be welcomed, at least under a systematic perspective.

On the one hand, it finally provides for a statutory basis to a principle which, although considered as *ius receptum*, was only established by case law. Moreover, as was shown, it is a principle whose scope

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1448 M. MENJUCQ, 'Un élargissement du champ d'application essentiellement procédural', in *Rev. proc. coll.,* 2015, p. 2, affirming « *Cette jurisprudence 10 reçoit un démenti net du nouveau règlement.* […] *Le considérant 34 précise donc bien que le défendeur doit être établi dans un autre Etat membre, condamnant ainsi la jurisprudence Schmid* ».

1449 It could also perhaps be argued that against the extension of the *vis attractiva concursus* towards non-EU-domiciled parties also militate principles of fair trial and equality of arms of defendants. The restriction of the right of defence imposed to the respondent by the *vis attractiva concursus* holds for both defendants domiciled in the EU and even more so for third countries defendants: as far as Annex Actions are concerned, the *vis attractiva concursus* indeed sets forth a *forum actoris* which derogates from the general rule of the defendant's domicile. However, as said above, such a restriction seems to be justifiable in the light of the objective underlying the *vis attractiva concursus*. With this in mind, one might wonder whether, in case of related actions under Article 6(2) RR, it does not constitute an infringement of equal treatment to provide that the possibility of re-establishing the general rule of the forum of the defendant's domicile depends only upon the circumstance that one or more defendants are domiciled within the EU. All in all, the very (functional) definition of what constitutes an Annex Action does not depend upon the defendant's domicile. Therefore, it does not seem entirely fair that the consolidation of the jurisdiction of related actions before the defendant's domicile turns to be possible, *ceteris paribus*, for the mere fact that the defendant is domiciled within EU. Based on these considerations, too, it could then be doubted that Article 6(1) RR has enshrined the universal effectiveness of the *vis attractiva concursus* of the *Schmid* judgment. Otherwise, given that ultimately the *vis attractiva concursus* is a procedural rule that aims to benefit the mass of creditors, it could be considered that the trustee (provided that the conditions of art. 6(2) RR are met) could bring related actions against the same defendant before courts of the third state. In this scenario, considering the limited scope of application of traditional conventions, and the difficulties that may arise from the application of national rules of private international laws, *de jure condendo* it may be suggested that the Regulation provides for a specific rule for the recognition of (related) judgments given abroad. The recent UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments could also play an important role in this respect.

has been progressively defined by the ECJ, so its codification certifies and consolidates some of the results achieved so far.

Also, the *vis attractiva* eventually managed to align the rules of jurisdiction with the regime of recognition and enforcement set forth by Article 32 RR, thus ensuring the *ex lege* dovetailing between the scope of application of the Recast and the Brussels Ia Regulation (*recte* the Insolvency Exception thereof), at least as to the 'individual dimension': only actions 'directly deriving from insolvency proceedings *and* closely linked with them' are excluded from the regime of the Brussels Ia Regulation. On the contrary, whatever falls outside that definition, is governed by the latter instrument (1450).

This would also confirm the statement uttered in the *H v. H.K.* judgement, where that Court stated that an action somewhat connected to situation involving the material insolvency of the debtor « *and brought outside the context of insolvency proceedings may fall within the scope of the Lugano II Convention or, as the case may be, that of Regulation No 44/2001* » (1451).

It must be stressed that, as regards Annex Actions, this holds true notwithstanding Recital 16 RR, pursuant to which « *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* ».

Again, misunderstandings may arise from the use of the English term 'proceedings', but as the Italian, English and Spanish versions clearly demonstrate, Recital 16 refers exclusively to the 'collective dimension' of the boundaries between the Brussels Regime and the Recast Regulation.

Therefore, the fact that an individual action is based on statutory provisions that are not exclusively designed for insolvency situations is not determinative for its characterisation as Annex Action, for the purposes of the Recast Regulation (1452).

IV.3.2. Article 6(2) Recast Regulation: related actions

Not only does the new regime enshrine the principle that Annex Actions should fall within the jurisdiction of the courts of the Member State in which insolvency proceedings are opened. It also acknowledges the possibility of excluding that jurisdiction, under certain circumstances.

In this respect, the Recast Regulation introduces what some authors call an 'extractive connection' from its scope of application (1453).

1450 Unless the subject matter of the action or the judgement does not fall within one of the other *intentional* exceptions.

1451 ECJ, 4 December 2014, Case C-295/13, *H. v. H.K.*, ECLI:EU:C:2014:2410, at [25].

1452 This may be the case of the actions for the liability of directors in the interest of the company or on behalf of creditors provided for by articles 2393 and 2394 Italian Civil Code, which are exercised in the context of insolvency proceedings by the trustee under article 146 l. fall. Under certain circumstances (for instance, when the undertaking is not eligible for insolvency proceedings, for he does not meet the conditions of art. 1 l. fall.), it may happen that such an action, that is based on the Italian civil and company law, applies to situations in which the material insolvency of the company is involved. However, under no circumstance this would lead to the exclusion of such an action from the scope of application of the Brussels Ia.

1453 D. ROBINE. 'Les actions connexes', *op.cit.* p. 64. The author specifies « *L'article 6 offre la possibilité, sous certaines conditions, d'opter pour la compétence des juridictions de l'état membre où le défendeur est domicilié. Il y a donc* […] *la création*

Article 6(2) RR provides that

> « *Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012* ».

The provision, therefore, endows with the trustee the power to concentrate [1454] two actions closely related with one another before the same jurisdiction [1455] of the defendant's domicile, « *if he considers it more efficient to bring* [both] *the action*[s] *in that forum* » [1456].

The rationale underlying the introduction of a rule derogating from the *vis attractiva* set forth by Article 6(1) RR is the express objective of avoiding the risk of irreconcilable judgments, in case of separate actions. It is thus acknowledged that the parallel existence of the Brussels Ia Regulation and the Insolvency Regulation (and of actions laying in a 'grey zone' whose characterisation as civil and commercial or insolvency-related actions is mostly unclear) does not only require the respective fields of the two instruments to be defined. It also creates a risk of parallel proceedings and conflict of decisions. Under this perspective, the new head of jurisdiction may be considered as lessening the concerns about the friction between the application of the two instruments, since it loosens the boundaries between them [1457].

Article 6(2) RR is understood as partially revising the Gourdain Formula (thus indirectly enlarging the material scope of Brussels Ia): actions 'directly deriving from insolvency and closely connected with insolvency proceedings', in principle excluded from the provisions governing 'civil and commercial matters' would, under specific circumstances, be subject to that regime [1458].

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d'une connexité extractive de ce champ d'application ». See also S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, *op.cit.*, p. 121; G. MOSS, I. FLETCHER, S. ISAACS, *op. cit.*, p. 101.

1454 The wording 'bring both actions in the court' is perceived as problematic by some authors, who point out that the wording of the provision does not expressly provide the possibility that the trustee may *combine* the related actions before the same court. T. LINNA, 'Actio Pauliana - "Actio Europensis?" Some Cross-Border Insolvency Issues', in *Journal of Private International Law,* 10, 2014.

1455 It bears noticing that according to the Italian version of art. 6 RR seems to suggest a somewhat inconsistent solution with the other translations. It textually reads that the trustee could obtain the reunion of related actions before the courts of the State where the defendant is domiciled (« *l'amministratore può ottenere la riunione delle due azioni* »). Under a textual interpretation, that would entail that the trustee would be forced to first lodge the actions separately - *i.e.* the Annex Action before the State opening insolvency proceedings, under art. 6(1) EIR and the civil 'non-insolvency-related action before the courts of the defendant's domicile, under art. 4 Brussels Ia - and only subsequently request their reunion before the latter jurisdiction. A solution of that kind would be clearly absurd and wholly contrary to the efficiency of proceedings. When compared with the other linguistic versions, however, one should understand that it was due simply to a translation mistake. See P. DE CESARI and G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il Regolamento (UE) 2015/848 relativo alle procedure d'insolvenza*, *cit.*, p. 84.

1456 Recital 35 RR.

1457 D. ROBINE. 'Les actions connexes', *op.cit.*, p. 65.

1458 G. CUNIBERTI, 'La compétence des tribunaux de la faillite', *op. cit.*, p. 179.

At a closer look, however, the avoidance of irreconcilable judgements is not the sole objective pursued by the norm. That would be the case if the possibility to bring together related actions was given to both the trustee and the creditors.

The text of Article 6(2) RR refers, in facts, exclusively to the trustee acting (or the debtor in possession, provided that national law allows the debtor in possession to bring actions on behalf of the insolvency estate) as the claimant. Therefore, it is fair to maintain that the new provision equally pursues the goal of ensuring (once again) the maximum degree of efficiency and effectiveness of insolvency proceedings. In this sense, then, the EU lawmaker seems to have taken into consideration the stances of those scholars according to whom the (over-rigid) exclusive nature of the *vis attractiva* would weaken the powers of the trustee, thus frustrating the effectiveness of proceedings.

Because it is an exception to the general rule, the operation of Article 6(2) RR is subject to the presence of certain conditions.

First, it is rather redundant to say that the trustee should envisage to exercise (at least) another action together with the Annex Action.

Second, the 'related' action must be 'civil and commercial'. Therefore, it must fall within the scope of Brussels Ia, as defined by its Article 1(1) (*i.e.* depending on the elements which characterise the nature of the legal relationship between the parties to the dispute and the basis and the detailed rules governing the action [1459]).

Third, the seised court must have jurisdiction pursuant to Brussels Ia. It is undisputed that, to operate the provision of Article 6(2) RR, the subject matter of the related action, albeit civil and commercial *lato sensu*, should not be excluded from the material scope of Brussels Ia, via one of the exceptions listed under its Article 1(2) thereof.

Also, the defendant against whom the action is brought must be domiciled in a Member State. In case of a defendant domiciled in a third state (or in Denmark) the Recast Regulation excludes the applicability of Article 6(2) RR (and the jurisdiction of the related action should be governed pursuant to the private international law of the Member State) [1460].

In the light of the *Schmid* case-law, one could argue that, since the *vis attractiva concursus* operates also in respect of those defendants whose domicile is located outside EU, then also the mechanism of Article 6(2) RR could operate in case of related civil and commercial actions *vis à vis* third state defendants. As explained in the previous paragraph, the universal scope of the *vis attractiva* is not clearly established by the wording of Article 6(1) RR. What is undoubtable from the clear wording of the Recast Regulation, however, is that for the purposes of Article 6(2) RR *all* defendants must be domiciled within the EU. In any case, another argument that militates against the interpretation that Article 6(2) RR could apply also to non-EU-domiciled defendants is represented by the fact that the

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[1459] See *supra* Chapter II, Section 2, § II.2.3.

[1460] D. ROBINE, 'Les actions connexes', *op. cit.*, p. 71; P. DE CESARI and G. MONTELLA, *op. cit.*, p. 85, G. CUNIBERTI, 'La compétence des tribunaux de la faillite', *op. cit.*, p. 173.

concentration of actions operates one-way: Article 6(2) RR merely allows that the Annex Action is brought before the Member State of the defendant's domicile and not *vice versa*. Therefore, the purpose of Article 6(2) RR is not to deprive the defendant of the civil claim of the *forum conveniens* of Brussels Ia. Moreover, in providing the alternative forum of the defendant's domicile, the Recast Regulation re-establishes the prevalence of Brussels Ia as the general regime for the determination of jurisdiction to which the RR is an exception [1461].

Fourth, as stated, unlike Article 6(1) RR, the claimant of both actions must be the trustee or, according to Article 6(2) second subparagraph RR « *the debtor in possession, provided that national law allows the debtor in possession to bring actions on behalf of the insolvency estate* ». This specification pertains to those cases in which proceedings entail a partial divestment of the debtor who preserves his legal capacity to bring actions.

However, it must be observed that the hypothesis under which the debtor in possession acts 'on behalf of the insolvency estate' and not in its own interest are rare and must be treated carefully.

Indeed, in proceedings leaving the debtor in possession, also where such proceedings may be regarded as 'truly' collective, it is likely that the debtor will be acting in its own interest, exercising its (ordinary civil and common) rights. It must be assessed, then, when the debtor is not exercising his own rights, which would only indirectly benefit the creditors, but rather that he is acting pursuant to a specific rule of insolvency law as if he was the representative of rights that specifically pertain to the creditors, by virtue of a specific *locus standi*. One example may be the Italian action under Article 168(3) l. fall. where the debtor in the context of the *concordato preventivo* (which is a 'truly collective' insolvency proceedings, although leaving the debtor in the possession of his assets under the surveillance of the court) is vested with the *locus standi* to challenge on behalf of the general body of the creditors the judicial mortgages and liens created in the 90 days prior to the opening of insolvency proceedings [1462].

Finally, actions must be 'related', under both the subjective (actions must be « *against the same defendant* ») and the objective dimension. According to Article 6(3) RR actions are related « *where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings* ». That formula mirrors the exact wording of Articles 8(1) and 30(3) Brussels Ia, which adopts the very same definition of related actions. It follows that, for reasons of consistency, Article 6(3) RR should be interpreted autonomously and according to the case-law concerning its

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1461 P. STONE, *EU Private International Law*, Edward Elgar, 2014, p. 35. P. DE CESARI AND G. MONTELLA, *op.cit.* p. 86.

1462 Article 168(3) l. fall. reads « *Le ipoteche giudiziali iscritte nei novanta giorni che precedono la data della pubblicazione del ricorso nel registro delle imprese sono inefficaci rispetto ai creditori anteriori al concordato* [judicial mortgages registered in the 90 days preceding the date of publication of the appeal in the commercial register are ineffective compared to creditors prior to the arrangement] ». See on the exceptional nature of such an action (which seems to be the only 'Annex Action' in the context of the *concordato preventivo*) M. FABIANI, 'Il concordato preventivo', in G. DE NOVA (ed.), *Fallimento e concordato preventivo. Commentario del Codice civile e codici collegati Scialoja-Branca-Galgano*, Bologna, 2014, p. 543.

corresponding provisions in Brussel Ia. In this respect, it must be borne in mind that, the European legislature having promoted a functional (and autonomous) concept of connection, the risk of conflicting decisions was not found only in cases of actions based on the same legal ground, it was considered sufficient that they concerned the same factual and legal situation [1463] (but could be governed by substantive rules of different Member States [1464]). Some authors have argued that the concept of connection under Article 6(3) RR should, however, be interpreted more broadly, since in the context of the Recast Regulation it is the trustee who decides at its own discretion whether it is more effective to bring the action before the courts of the defendant's home State.

Moving to the functioning of the jurisdictional mechanism provided by Article 6(2) RR, it was argued that it establishes only international jurisdiction, pursuant to Recital 26 RR. Therefore, any reference to any other head of special jurisdiction set forth by the Brussels Ia Regulation [1465] would be excluded and the trustee could only resort to the general forum of Article 4 Brussels Ia (and, in case of a plurality of defendants, Article 8(1) Brussels Ia). On a strictly literal basis this seems to be confirmed by the reference to by the reference to 'courts' (plural) in general.

However, ambiguities may arise due to the fact that Article 6(2) refers generally the 'jurisdiction pursuant to Regulation (EU) No 1215/2012'.

The fact that only the trustee may decide to bring related actions before the courts of the defendant' home State entails that the latte cannot challenge the jurisdiction of said court on the ground of Article 6(1) RR. Yet, the defendant may still prevent the application of Article 6(2) whenever, before the trustee has commenced proceedings, he seises another court (having jurisdiction on the related civil and commercial action, under one of the alternative forums provided Brussels Ia) seeking negative declaratory relief [1466]. In that case, the rules on the *lis pendens* (Article 29 Brussels Ia) would prevent the other court seised by the trustee to decide (both) the Annex Action and the related action.

Leaving this scenario aside, it must be said that the defendant can in any case challenge the jurisdiction of the court seised by the trustee contesting the connection between the Annex Action and the civil action, under Article 6(3) RR. It is unclear whether the court may refuse to treat the two actions together, detecting the lack of connection *ex officio* (on its own motion). It seems reasonable to believe so, since the *vis attractiva* provides for an exclusive forum.

1463 ECJ, 11 October 2007, Case C-98/06, *Freeport plc v. Arnoldsson*, ECLI:EU:C:2007:595; ECJ, 27 September 1988, Case C-189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, ECLI:EU:C:1988:459.

1464 ECJ, 1 December 2011, Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, ECLI:EU:C:2011:798.

1465 See *supra* Chapter III, Section 2, § II.2.4.1.

1466 ECJ, 16 December 1994, Case C-406/92, *The owners of the cargo lately laden on board the ship 'Tatry' v. the owners of the ship 'Maciej Rataj'*, ECLI:EU:C:1994:400. ECJ, 25 October 2012, Case C-133/11, *Folien Fischer AG and Fofitec AG v. Ritrama SpA*, ECLI:EU:C:2012:664.

CHAPTER V

THE RELEVANCE OF A UNIFORM APPROACH TO THE PROBLEM OF THE *VIS ATTRACTIVA CONCURSUS*: SOME FURTHER OBSERVATIONS

CONTENTS: V.1. A preliminary question: the usefulness of the European vis attractiva concursus - V.2. Article 6 RR: a cure for all the woes? - V.2.1. The (fair) regulation of the dynamic profile of the vis attractiva concursus under Article 6(1) RR and some practical (domestic) issues - V.2.2. The interaction of the vis attractiva concursus with the rules governing the recognition and enforcement - V.2.3. The (still problematic) static profile of the vis attractiva concursus - V.3. The appropriateness of the Gourdain Formula, the doing nothing approach and some proposals *de lege ferenda* - V.3.1. The first proposal: the annex approach -V.3.2. The third approach: autonomous notion of Annex Actions and a uniform list - V.4. An attempt of classification: methodological premises - V.4.1. A first possible distinction: the core of insolvency proceedings and all the others Annex Actions? - V.4.2. A European area regarding only the collective enforcement? - V.4.2.1. The jurisdiction of actions for the (contested) determination of insolvency claims lodged with insolvency proceedings (acceptance actions) - V.4.2.1.1. Acceptance actions specifically concerning the profile of the satisfaction of the creditors with insolvency proceedings - V.4.2.1.2. Acceptance actions concerning the merits of insolvency claims - V.4.2.2. Post-opening actions for the determination of insolvency claims - V.4.2.3. Insolvency claims which at the moment of the opening of insolvency proceedings are the subject matter of a pending lawsuit -V.4.2.4. Actions brought by secured creditors concerning the right of segregation of assets from the debtor's estate and the right for separate satisfaction - V.4.2.4.1. Actions regarding rights in rem over assets located in another Member State different than that opening insolvency proceedings - V.4.2.4.2. [Segue] The interplay between Article 8 RR and avoidance actions - V.4.2.4.3. Actions for the determination of rights in rem covering assets located within the Member State opening insolvency proceedings and other secured (and preferential) rights not falling under Article 8 RR - V.4.2.5. Actions for the determination of assets forming the insolvency estate -V.4.2.5.1. Actions brought by the debtor against the trustee (or vice versa) for the determination of assets forming the insolvency estate - V.4.2.5.2. Actions brought by creditors or third parties for the determination of assets forming the insolvency estate - V.4.3. The 'other' actions brought in the context of insolvency proceedings -V.4.3.1. Avoidance actions - V.4.3.2. [Segue] Avoidance actions assigned to a third party or to a creditor - V.4.3.3. Actions for the liability against the trustee, the committee of creditors and other bodies of the procedure - V.4.3.4. Actions relating to debts of the estate arising after the opening of insolvency proceedings -V.4.3.4.1. Actions relating to contracts entered into by the trustee - V.4.3.4.2. Actions deriving from the costs of insolvency proceedings - V.4.3.5. Actions brought by the trustee against a creditor or a third party seeking the payment of a debtor's claim arisen before insolvency proceedings - V.4.3.6. Actions relating to the continuation or the termination of pending contracts -V.4.4. [Segue] Actions in a 'grey zone' -V .4.4.1. Corporate actions and directors' liability- V.4.4.1.1. Actions brought on behalf of the company - V.4.4.1.2. Actions brought on behalf of the creditors - V.4.4.2. Liability Actions against creditors and third parties - V.4.4.2.1. The (ordinary) *actio pauliana* brought by the trustee -V.4.4.2.2. The Dutch Peeters Gatzen action - V.4.4.2.3. The action for abusive credit financing - V.4.4.2.4. The transplant of the Italian notion of 'actions of the estate' at the European level and their uniform treatment.

This final Chapter offers a critical assessment of the principle of the European *vis attractiva concursus*. It first questions the usefulness of the rule establishing the attraction of some actions to the jurisdiction of the courts of the Member State opening insolvency proceedings. It will try to assess whether such a principle represents a mere procedural rule or whether it also protects some specific substantive interests that arise with the insolvency procedure.

Then, the impact of the reform brought up by Article 6 RR is critically tackled, giving an account of some consequences referring to its concrete functioning, also concerning its interrelation with the provisions dealing with the recognition and enforcement of judgement. As will be discussed, the main shortcoming of the new jurisdictional rule set out by the Recast Regulation is represented by the retention of the (perhaps inevitably) vague Gourdain Formula as the test to identify the actions falling within the scope of the *vis attractiva concursus*, without providing any objective criteria.

In this respect, this Chapter offers, then, two alternative solutions *de lege ferenda*. In anticipation of what will be discussed below, from a scholarly perspective, the preferred approach would be that of autonomously classifying functionary similar types of actions on a principle based approach and determine *a priori* whether their attraction to the courts of the Member State of the COMI actually responds to the specific insolvency-related exigences underpinning the *vis attractiva concursus*. Therefore, a significant part of this Chapter is dedicated to an attempt of classification of the actions that it is submitted should be brought in the context of insolvency proceedings, determining for each of them, on the basis of a correct application of the Gourdain Formula, whether they fall within the scope of the Brussels Regulation or, on the contrary, their jurisdiction should be attracted to the Brussels Ia Regulation.

V.1. A preliminary question: the usefulness of the European *vis attractiva concursus*

The rules provided by Article 6 RR reveal the EU legislature's ambition to establish an autonomous principle of the European *vis attractiva concursus* into the system of the Recast Regulation.

As was the case with the provision of Articles 17 and 15 of, respectively, the Preliminary Draft Convention and the Draft Convention, it must be borne in mind that in principle the European *vis attractiva concursus* assumes its own specific features when applied at the European level, which should differentiate it from the national rules on the allocation of competence, determining whether some insolvency-related actions are to be brought before the insolvency court or must be are adjudicated by the ordinary civil and commercial venues.

Indeed, in order to ensure its equal application across the Member States, the European *vis attractiva concursus* (and, therefore, the Gourdain Formula determining its scope) should be regarded as an autonomous notion of EU procedural insolvency law, interpreted ad applied autonomously, irrespective of the national conception of the (domestic) *vis attractiva concursus* (if any) of the Member State opening insolvency proceedings.

As explained, at the domestic level, in particular under the Italian perspective, the *vis attractiva concursus* determines only the functional competence of the insolvency court with regard to some specific insolvency-related actions brought by the trustee. It does not concern, on the contrary, actions brought by creditors against the divested debtor subject to insolvency proceedings (in particular, actions for the determination of insolvency claims) as their *de facto* attraction to the insolvency court

is governed by different rules, concerning the procedural rules applicable to the assessment (on the merits and the enforcement) of those claims [1467].

The Recast Regulation, instead, qualifies the *vis attractiva concursus* as a mere connecting factor for the allocation of the (accessory [1468]) jurisdiction of the courts of the Member States opening insolvency proceedings, without making any distinction between actions brought by the trustee and the creditors. The procedural rules applicable to the determination of insolvency claims, instead, are determined by the (uneven) *lex councursus* of the Member State opening insolvency proceedings.

This implies that, in applying the European *vis attractiva concursus*, the interpreter must keep a 'laical' approach, and determine for each action, on a case-by-case basis, if the Gourdain Formula leads to the conclusion that it falls within the scope of Article 6(1) RR.

On the one hand, then, it must be observed the European *vis attractiva concursus* has a broader scope than what it seems to have at a national level, where it often only pertains to some actions brought by the trustee (and the diametrically opposite actions for negative relief eventually brought by the creditors).

It being a rule (merely) establishing the jurisdiction of the Member State opening insolvency proceedings, the European *vis attractiva concursus* does not achieve a full concentration of the Annex Actions before the insolvency court. Such an effect is ultimately deferred to the domestic rules allocating the territorial and functional competence between national courts, in case the Member State of the COMI acknowledges the (national) *vis attractiva concursus*.

Therefore, on the other hand, the operation of the *vis attractiva concursus* at the European level is rather weakened in respect to the principle applied at national level.

Keeping that in mind, it bears now questioning the true usefulness and the systematic function of the principle established in the first instance by the ECJ and further codified in the Recast Regulation.

Indeed, once the *vis attractiva* has 'fallen' into the European dimension, in the terms referred to in Article 6 RR, it would be difficult to affirm that it acts in the sense of bringing together *disjecta membra unius capitis* [1469]. The objective of the principle of European *vis attractiva concursus* appears not so much to ensure the unity of the (single) procedure, by attracting to the competence of the same judge all the disputes inherent to insolvency proceedings, rather it merely pursues the unity of the jurisdiction, in the sense that insolvency proceedings and Annex Actions must be both subjected to the jurisdiction and to the procedural and substantive rules dictated by the *lex concursus* of the same Member State.

Until the introduction of Article 6 RR, the main obstacle to reach such an objective lied with a paradox that was (as partially still is the case under the Recast Regulation) inherent to the system set

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1467 With reference to the Italian system, see *supra* Chapter I, § I.2.2.

1468 B. LAUKEMANN, 'Jurisdiction - Annex Proceedings', *cit.*, p. 169.

1469 V. COLESANTI, 'Unité et universalité de la faillite', in *Les problems internationaux de la faillite et le Marché* Commun, Padua, 1971, p. 32.

forth by the European rules dealing with cross-border insolvencies (a paradox which is contingent upon the differences among the national systems of insolvency law and that ultimate relates to the lack of a harmonisation in this domain).

On the one side, according to Article 7 RR (formerly Article 4 EIR) the rules governing insolvency proceedings are determined according to the *lex concursus*, which applies to both the substantive and the procedural profiles of the procedure. However, in anticipation of what will be better explained in the paragraphs below, the procedural rules of the *lex concursus* are understood as not determining the rules on the jurisdiction [1470].

This means that, ultimately, rather than pushing towards a uniform and common European insolvency procedure, the Insolvency Regulation (differently from its 'successor', the Recast Regulation) entailed that a national insolvency procedure (with its peculiar characteristics set out in its national law) stood at the European level as a procedure with universal effects, dictating the directives to be followed for the conduct and administration of the procedure, thus leaving the unity of the procedure to the determination of the (national) *lex concursus*.

Indeed, under the realm of the former Insolvency Regulation, the EU rules of cross-border insolvencies established a specific and uniform jurisdictional rule only with regards to the opening of insolvency proceedings. From a jurisdictional perspective (and with regard to the recognition and enforcement regime as well), the former European rules seemed to conceive a rather fragmented idea of insolvency proceedings, as a sequence of (separate) phases of the procedure, scanned by judgements.

The fact that the *vis attractiva concursus* was judicially established by the ECJ has only in theory rectified this situation as *de facto* it fostered the 'uneven' approach towards the jurisdiction of insolvency proceedings, imposing to await for the intervention of the Court to establish, on a case-by-case basis, whether the jurisdiction of certain (national) actions was attracted to the courts of the Member State opening the insolvency proceedings.

Under this perspective, the impact of the new Article 6 RR may be of greater importance than what may appear at first sight, as it plays the systematic function of partially reconciling the paradox above described, which kept separated the (national) procedural rules from the (European) jurisdiction.

It is submitted that - albeit a mere rule for the allocation of the jurisdiction, which does not affect the internal competence - the codification of an autonomous centralised head of jurisdiction (*i.e.* the *vis*

1470 In anticipation of what will be explained in the paragraphs below, it must be specified that the procedural rules mentioned by article 7 RR are understood by the majority of scholars as excluding the rules on the jurisdiction (see M. VIRGÓS and F. GARCIAMARTÍN, *The European Insolvency Regulation: law and practice*, 2004, The Hague, p. 58). Another part of scholars, however, purports that the *lex concursus* applies also to the jurisdiction, invoking the general applicability of the *lex fori* (see A. LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sulle procedure d'insolvenza*, Bari, 2008, p. 125). Suggestive as it may be, the idea that the allocation of the jurisdiction is contingent upon the national law, seems to run counter the fundamental idea of the Insolvency Regulation (and of the ECJ), which aims at establishing a uniform ground for the jurisdiction for (the opening of) insolvency proceedings.

attractiva concursus) vesting the courts of the Member State opening the procedure with all the actions that directly derive from and are closely connected with insolvency proceedings resorts to a partial unity (at least at the jurisdictional dimension) the insolvency procedure and stimulates a further reflection on the part of the interpreters on the nature of insolvency proceedings as a complex and unique procedure [1471].

The autonomous nature of the European *vis attractiva concursus* entails that it would be appropriate to abandon the approach adopted hitherto, which defers to the ECJ the determination on a case by case basis whether a *national* action falls within the scope of the (European) *vis attractiva concursus*, as its correct application should imply that the actions falling within its scope should be identified according to the autonomous nature of the new head of jurisdiction.

Moreover, as a corollary observation, the *vis attractiva concursus* should have as its ultimate objective (but not as a condition precedent) the synchronisation of the *forum* and the *ius*. As it will be demonstrated, this is not an absolute rule, as the Recast Regulation provides for the exception of the general applicability of the *lex fori* concursus. However, the correct application of the Gourdain Formula leads to the conclusion that, in principle, the fundamental reason for the attraction of some actions before the insolvency forum ultimately lies with the fact that the right underpinning the action (*i.e.* its legal basis) must be decided pursuant to the insolvency law.

The reasons put forward by the ECJ for the introduction of such a principle at the European level were *(i)* the efficiency and effectiveness of the administration of the procedure, *(ii)* the foreseeability and legal certainty of the jurisdiction and the applicable law in the field of insolvency proceedings, *(iii)* the avoidance of forum shopping and *(iv)* the sound functioning of the internal market. It was submitted that those reasons *per se* do not reveal the true essence of the *vis attractiva concursus*, as the achievement of those objectives would entail that all actions brought in the context of insolvency proceedings should be attracted not only before the courts of the Member State opening insolvency proceedings [1472], but before the insolvency court itself.

Should one adhere uncritically to the above principles pinpointed by the ECJ as the fundamental grounds underlying the *vis attractiva concursus*, one would conclude that the mere opening of insolvency proceedings would constitute *de facto* a sufficient ground to derogate from the jurisdictional regime set forth by the Brussels Regulation.

Instead, from the very beginning the *vis attractiva concursus* was conceived as a rule regarding only certain actions which, albeit retaining the traditional structure claimant vs. respondent, are characterised as 'directly deriving from and closely linked to insolvency proceedings'.

1471 This is particularly important in relation to the determination of insolvency claims.

1472 A. KONECNY, 'Feststellungsprozess über die Haftung für künftige Schäden und Beklagtenkonkurs. Anmerkungen zu OGH 2 Ob 287/08g', in *ZIK*, 2009, p. 110.

As specified by some scholars, the European *vis attractiva concursus* purports to serve the functioning of insolvency proceedings at its core [1473]. The attraction to the jurisdiction of the courts of the Member State opening the insolvency proceedings would then be functional to the attain the *essential* objectives of the insolvency proceedings, it being a procedural mean for ensuring the liability function of insolvency law, *i.e.* the orderly, efficient enforcement of insolvency claims, governed by the *pari passu* principle. Therefore, only those actions whose decentralisation from the insolvency forum would hinder that specific objective of the insolvency procedure should fall under the umbrella of the *vis attractiva concursus*.

V.2. Article 6 RR: a cure for all the woes?

From a general perspective, the novelty represented by the introduction of Article 6 RR must be welcomed, if only for the fact of having attributed a regulatory basis to the European *vis attractiva concursus*. With a view to critically assess the impact of the reform, for the sake of clearness and proper understanding, the distinction between the dynamic profile (*i.e.* the functioning of the mechanism for the allocation of the jurisdiction) and the static profile (*i.e.* the scope of the *vis attractiva concursus*) must be resorted here and treated separately.

V.2.1. The (fair) regulation of the dynamic profile of the vis attractiva concursus under Article 6(1) RR and some practical (domestic) issues

To start with the dynamic profile of the *vis attractiva concursus*, the established rules allocating the jurisdiction of Annex Actions seem to be fairly regulated by Article 6(1) RR.

Briefly recalling its main features, the *vis attractiva* concursus establishes an *(i)* exclusive rule on the jurisdiction, *(ii)* which operates in the context of both main and secondary proceedings *(iii)* that seems to be applicable when the defendant is domiciled in third States.

It seems fair to acknowledge that the rules conferring at the European level the jurisdiction to the courts of the Member State opening the insolvency procedure are clearly regulated.

It is not worth spending more words on the dynamic profile of the *vis attractiva concursus* as it was extensively dealt with in Chapter IV. Reference is thus made to what already discussed there.

To recall the dynamic profile, however, allows to observe that two problematic profiles may still arise in determining the (national) competent venue adjudicating the action , which - although not pertaining to the European set up of the *vis attractiva concursus* but rather to its implementation when it comes to the determination of the competence at the national level - may lead to negative conflict of jurisdiction.

The first issue concerns the scenario where the action at issue does not fall within the notion of Annex Action, and therefore its jurisdictional regime is governed by the Brussels Ia Regulation. If the

[1473] L. HÄSEMEYER, *Insolvenzrecht*, Cologne, 2007, p. 76.

general forum of the defendant applies, pursuant to Article 4 thereof, the national rules on the territorial competence should indicate the specific court hearing the case.

It is submitted that, when facing a non-Annex Action, likely to be exercised in a different Member State than that were insolvency proceedings are pending, the national rules governing the allocation of the domestic competence to be taken into account should be only those dealing with the ordinary civil and commercial matters, thus excluding any other criteria allocating the internal competence on the basis of insolvency law. Otherwise, the possibility to resort to *all* national rules of competence (including the *vis attractiva concursus*) would frustrate the European characterisation of the action as an ordinary civil and commercial claim, as the domestic *vis attractiva concursus* would indicate that the competence should lie with the insolvency court.

An example will clarify the above. Insolvency proceedings are opened in Italy *vis-à-vis* a limited liability company registered under Italian law. The trustee wants to bring a *corporate* action against the managing director of the company (thus acting on behalf of the company under Articles 146 l. fall. and 2393 c.c.) who is domiciled in Spain. As will be demonstrated below [1474], on the basis of the autonomous application of the Gourdain Formula, corporate actions brought by the trustee on behalf of the company are not Annex Actions. Therefore, in the example at stake, the trustee would sue the managing director according to Article 4 or Article 7(1) Brussels Ia. The former would lead the trustee to bring the action before the courts of the Member State where the defendant is domiciled. The latter would determine the jurisdiction of the specific court of the place where the contractual obligation of the director must be performed (*i.e.* in principle, where the company has its main centre of administration, presumably the within the state of the COMI). Assuming that it is strategic for the trustee to bring proceedings before the Spanish courts (for instance, because this would speed up the enforcement of the judgement, since all the assets of the managing director are all located in Spain), the Spanish national rules on the competence would apply to determine the local court hearing the liability actions.

As discussed, however, within the legal systems adopting the domestic *vis attractiva concursus* (as is the case of Spain in the example proposed), it may be regarded as a mere rule on the (functional) competence.

It is submitted that, by virtue of the autonomous characterisation as a non-Annex Action, the corporate liability action brought by the trustee should be treated as an ordinary civil and commercial claim by the Spanish courts. Therefore, only the ordinary rules of the Spanish civil procedural code should come into play in the allocation of the national competence, giving no weight to the rules established by Article 8 LC. Indeed, should the latter apply, the characterisation of the action brought by the trustee would turn to be useless, as Article 8 LC (establishing the attraction of such a kind of actions before the insolvency forum) would lead the Spanish court to decline the competence,

[1474] See *infra,* § V.4.5.1.1.

because of the opening of insolvency proceedings in Italy [1475]. It follows that, for the system to work, the (desirably autonomous) characterisation made at the European level of the action as a non-Annex Action would in practice affect also the national qualification of the same action, when it has cross-border elements. That further confirms the practical relevance of the necessary autonomous interpretation of the *vis attractiva concursus* and of the characterisation of Annex Actions.

The second profile refers to the opposite scenario where, the concerned action being characterised as an Annex Action, thus attracted under the European *vis attractiva concursus* to the jurisdiction of the Member State opening the insolvency proceedings, the national rules on the competence lack a specific venue for that type of action. That would especially be the case for those Member States that do not espouse the national *vis attractiva concursus* such as Germany.

For instance, if insolvency proceedings are opened in Germany, and the trustee wishes to bring an action to set a transaction aside against a third party domiciled in another Member State, the autonomous characterisation of that kind of action as Annex Actions [1476] vests the German courts with the jurisdiction to hear the case, as they are the courts of the Member State opening insolvency proceedings.

That is what was precisely established in the *Seagon* judgement. However, the German courts were faced with difficulties in implementing the ECJ decision, as they lacked a rule for the allocation of the internal competence for those disputes. It is understood that initially the (domestic) gap was filled in through the interpretation by way of analogy of § 19a *Zivilprocessordung* ('ZPO', the German civil procedure code), which allowed to establish the competence *ratione materiae* of the insolvency court [1477]. Recently, with a view to avoiding the negative conflict of jurisdiction (*recte* competence) under discussion, the German legislature provided for a limited *vis attractiva concursus* with specific reference to Annex Actions falling within the scope of Article 6(1) RR [1478]. Under the *Einführungsgesetz zur Insolvenzordnung* ('EGInsO', the German Act implementing the Recast Regulation), the new § 102 (c)(6) EGInsO (bearing the heading '*Örtliche Zuständigkeit für Annexklagen'* [Local competence for Annex Actions]) provides that where Article 6(1) RR allocates the jurisdiction for Annex Actions

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1475 See *supra* Chapter I, at § I.2.

1476 See *infra,* § V.4.4.1.

1477 BGH, 19 May 2009 - IX ZR 39/06, in *NJW*, 2009, p. 2215. § 19a ZPO provides that « *The general venue of an insolvency administrator for actions concerning the insolvency estate is determined by the seat of the insolvency court* [Der allgemeine Gerichtsstand eines Insolvenzverwalters für Klagen, die sich auf die Insolvenzmasse beziehen, wird durch den Sitz des Insolvenzgerichts bestimmt] ». Such provision was reformed on 27 June 2001. On the former regulation see G. GRASMANN, 'Inlandswirkungen des Auslandskonkurses über das Vermögen eines im Konkurseröffnungsstaat ansässigen Gemeinschuldners', in Zeitschrift für Konkurs, Treuhand und Schiedsgerichtswesen, pp. 157-181.

1478 Therefore, it is not anymore necessary to recur to the analogy with §19a ZPO. S. MADAUS, 'Artikel 6 - Zuständigkeit für Klagen, die unmittelbar aus dem Insolvenzverfahren hervorgehen und in engem Zusammenhang damit stehen', in B. M. KÜBLER, H. PRÜTTING, R.BORK, in *KPB InsO, Kommentar zur Insolvenzordung,* Cologne, September 2019, at [6].

with the German courts, and there is no competent venue pursuant to the national law, the insolvency court must be vested with the competence to hear the Annex Action [1479].

A closely related issue was brought to the attention of the ECJ in the context of the *F-Tex* case (but it remained unsolved). The referring *Lietuvos Aukščiausiasis Teismas* (the Lithuanian Supreme Court Court) asked the Court, *inter alia*, whether the protection of the applicant's right to a court under Article 47 EU CFR allows the court of a Member State to find of its own motion that it has jurisdiction, regardless of the fact that according to the provisions of European Union law concerning the determination of international jurisdiction it cannot so decide. In that case, the referred question concerned the scenario where the courts of the Member State opening insolvency proceedings decline the jurisdiction upon the erroneous assumption that the action at stake is not an Annex Action. However, the practice could demonstrate that the seised court (albeit bestowed with the jurisdiction under the Recast Regulation) could erroneously decline the jurisdiction, acknowledging the lack of national rules vesting it with the competence to hear the case.

The above demonstrates that the implementation of the Recast Regulation may be confronted with practical difficulties at a national level. It is submitted that each Member State should evaluate whether its national system is provided with an adequate set of rules on the distribution of the domestic competence, by providing, if need be, for the subsidiary competence of the insolvency court for cross-border insolvency litigations, as Germany did [1480].

V.2.2. The interaction of the vis attractiva concursus with the rules governing the recognition and enforcement

The introduction of the new Article 6(1) RR has reinstated the (much struggled for) statutory parallelism between the rules on the jurisdiction and those on recognition and enforcement.

As was the case under the Insolvency Regulation, Article 32(1) second subparagraph RR has retained the principle according to which the automatic recognition provided for judgements concerning the opening of insolvency proceedings (set forth by Article 19 RR) is extended also to judgements deciding Annex Actions.

1479 § 102 (6) EGInsO reads « *If, following the opening of insolvency proceedings, the German courts have jurisdiction to hear and determine actions pursuant to Article 6 paragraph 1 of Regulation (EU) 2015/848 without other provisions conferring local jurisdiction, the place of jurisdiction shall be determined by the seat of the insolvency court. For actions under Article 6 paragraph 1 of Regulation (EU) 2015/848 which, under Article 6 paragraph 2 of the Regulation, are connected with another civil or commercial action against the same defendant, the court having jurisdiction for the other civil or commercial action shall also have local jurisdiction* [Kommt den deutschen Gerichten infolge der Eröffnung eines Insolvenzverfahrens die Zuständigkeit für Klagen nach Artikel 6 Absatz 1 der Verordnung (EU) 2015/848 zu, ohne dass sich aus anderen Vorschriften eine örtliche Zuständigkeit ergibt, so wird der Gerichtsstand durch den Sitz des Insolvenzgerichts bestimmt. Für Klagen nach Artikel 6 Absatz 1 der Verordnung (EU) 2015/848, die nach Artikel 6 Absatz 2 der Verordnung in Zusammenhang mit einer anderen zivil- oder handelsrechtlichen Klage gegen denselben Beklagten stehen, ist auch das Gericht örtlich zuständig, das für die andere zivil-oder handelsrechtliche Klage zuständig ist] ». On the new § 102 (6) EGInsO reads see, *inter alia*, A.M. SWIERCZOK, 'Der neue Art. 102c EGInsO', in *ZInsO*, 2017, p. 1861. See also S. MADAUS, *op. cit.*, at [6].

1480 F. CORSINI, *Profili transnazionali dell'azione revocatoria fallimentare*, Turin, 2010, p. 53. Analogous problems were raised with reference to the Draft convention. See on this point V. COLESANTI, 'Unité et universalité de la faillite', in *Les problems internationaux de la faillite et le Marché* Commun, Padua, 1971, p. 32.

Therefore, the characterisation of actions as Annex Actions is not only relevant for the purposes of the allocation of their jurisdiction, but it is also determinative for the applicability of the simplified regime of recognition and enforcement set forth by the Recast Regulation for judgements handed down in relation to them (1481).

Judgements that do not qualify as dealing with actions 'directly deriving from and closely linked with insolvency proceedings', cannot benefit of the simplified principle of Article 32 RR (1482). Instead, their recognition would be subject to Article 36-38 Brussels Ia Regulation (1483).

As already discussed, the main difference between the two regimes lies essentially with the fact that, under Article 33 RR, the only ground which may justify the refusal for the recognition and the enforcement of a judgement handed down in the context of insolvency proceedings (including those relating to Annex Action) is the manifest infringement of public policy, whereas, under Article 45 and 46 Brussels Regime, other grounds may lead to the refusal of the recognition and the enforcement of the 'civil and commercial' judgement (1484).

At this point, account should be given to the perplexities raised by some scholars referring to the recognition of judgements regarding Annex Actions handed down by a court erroneously affirming its jurisdiction (thus neglecting the applicability of the *vis attractiva concursus* to that action, due to the difficult characterisation of the action as Annex Actions or not).

According to some authors (1485), the Member States addressed with the recognition should be able to refuse the recognition of the judgement whose subject matter was erroneously included (or excluded) from the Recast Regulation by the adjudicating court. In principle, such a solution must be shared, in the sense that the addressed court should refuse to apply the simplified regime of the Recast Regulation (or the Brussels Ia) upon which recognition is sought. What cannot be shared it the exacerbation made by some authors maintaining that the erroneous characterisation of the action would lead to the impossibility to recognise the judgement under both the Brussels Ia Regulation and the Recast Regulation (1486).

1481 It bears recalling here that by virtue of article 32(1) RR the enforcement of judgements relating to insolvency proceedings is carried out pursuant to articles 39-57 Brussels Ia, with the significant exception of articles 45 and 46 thereof. Article 32 therefore excludes the application of the (further) conditions for the refusal of recognition and the enforcement laid down in articles 45-46 Brussels Ia Regulation, which must therefore be considered as replaced by article 33 RR.

1482 See *supra* Chapter II, Section 2, at § II.1.4.

1483 See *supra* Chapter II, Section 2, at § II.2.4.2.

1484 In a recent judgement the French Supreme Court has stated that the Insolvency Regulation has excluded the ground for the refusal of recognition provided by the Brussels Ia Regulation « *pour substituer ses propres motifs de refus* ». See Cass. Comm., 6 July 2016, n- 15-14664, *Mag Import*, in *Rev. proc. coll.*, 2016, comm. n.177 with observation by M. MENJUCQ.

1485 A. BRIGGS, *The conflict of laws*, Oxford, 2008, p. 123-124. G. VAN CALSTER, *European private international law*, Oxford and Portland, 2016, pp. 191-192. See also, J.J. FAWCETT, J.M. CARRUTHERS, P. NORTH, *Cheshire, North & Fawcett: Private International Law*, Oxford, 2008, p. 42 and ff. 4.

1486 See Z. FABOK, 'Grounds for refusal of recognition of (quasi-) Annex judgements in the Recast European Insolvency Regulation', in *int. Insolv. Rev.*, pp. 295-313. M. FARINA, 'La giurisdizione infracomunitaria in materia di azione revocatoria ordinaria e fallimentare in due pronunce della Corte di Giustizia', in *Judicium*, 1/2019. Z.

The theory put forward those scholars deals with two opposite situations which, albeit pathological (but yet not fictional), may derive from a wrong application of Article 6 RR.

The first scenario concerns the situation where the courts of the Member State opening insolvency proceedings assume that they have jurisdiction on an action which they erroneously characterise as Annex Action [1487]. The trustee wishes to recognise and enforce the 'quasi-Annex judgement' in another Member State. In such a case, the issue that may arise is whether the evaluation made by the adjudicating court (*i.e.* the insolvency court or another court in the territory of the Member State opening insolvency proceedings) that the action falls under Article 6(1) RR is binding upon the courts of the other Member State.

Would it be possible, for the recognising court to refuse the application of Article 32(1) second subparagraph RR? Can the court refuse the recognition of the judgement on the grounds provided by Article 43 Brussels Ia, thus disregarding (and reviewing) the characterisation of the action made at the jurisdictional level? Or, again, should the recognising court deem that the judgement does not fall *at all* in the subject matter of the Brussels Regulation, as it falls within one of the other exceptions provided under Article 1(2) Brussels Ia?

The second (and opposite) scenario assumes that the courts of a Member State different than that opening insolvency proceedings erroneously assume to have jurisdiction because they characterise the action as an ordinary civil and common action, when instead it is an Annex Action. Are the court of the Member State opening insolvency proceedings entitled to refuse the recognition of the foreign judgement? And if yes, should they do so on the ground of the Brussels I Regulation or of the Recast Regulation (and in the latter case, may the question be pushed to the point that the public policy exception could be invoked)?

The above scenarios tackle a more general issue of European private international law dealing with whether the judge addressed with the recognition or the enforcement of a judgement may second-guess whether the issue decided by the adjudicating court falls within the scope of the Brussels Regulation or another EU regulation and whether, on this ground, it may refuse the recognition and enforcement of such a judgement.

As explained in Chapter II, the automatic recognition of judgement handed down by the courts of the Member States lies with the fundamental principle of mutual trust. As a corollary of this principle,

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CRESPI REGHIZZI, 'Reservation of title in insolvency proceedings: some remarks in light of the German Graphics judgment of the EC'J', in *Yearbook of International Private Law*, 2010 Vol. XII p. 563.

[1487] This may be the case of a judgment given by the courts of the Member State opening insolvency proceedings against, for instance, an employee domiciled in another Member State on the assumption that the case is an Annex Action: the question that arises in such a situation is whether the employee may, in the Member State of his domicile where the trustee seeks the enforcement of the purportedly Annex-judgement, challenge the recognition of the judgement on the basis of breach of the rule of exclusive jurisdiction laid down Article 45(1)(e)(i) Brussels Regulation, by calling into question the conclusion drawn by the national court that the action is traceable back to the notion of Annex Action.

one of the fundamental rules governing the regime of the automatic recognition in EU private international law is the prohibition to review the jurisdiction of the adjudicating court [1488].

Nevertheless, authoritative scholars maintain that the principle, according to which any alleged wrong assumption of jurisdiction under a specific EU Regulation on the part of the adjudicating court cannot represent a ground for refusal of the judgement, can apply only once that it is clear that the subject matter of the judgement falls within the scope of that Regulation, as if the latter condition was an implicit ground for the refusal of recognition as well.

Under this approach, the issue whether the subject matter of a judgement falls within the scope *ratione materiae* of a EU Regulation should be necessarily assessed at both the jurisdictional and the recognition and enforcement stage, or it should be, at least, when the adjudicating court has not expressly taken into account the issue of its jurisdiction [1489].

It was then submitted that the principle of mutual trust does not push the recognising court at the point that it should be bound by the assessments made by the adjudicating court, simply accepting the view of the latter court on the applicability *ratione materiae* of a Regulation to a certain subject matter. Arguments confirming this opinion may trivially be found acknowledging that many ECJ preliminary rulings tackle the material scope of application of regulations at the recognition stage of a judgement rendered by another Member State [1490].

Within the Brussels Regulation this principle is not stated in explicit terms (but it was never put into discussion by the supporters of this view) [1491]. On the contrary, the Recast Regulation seems to take a clearer stance on this point. When Article 32(2) RR states that judgements not falling within its material scope of application shall be recognised pursuant to the rules of Brussels Ia, 'provided that it is applicable', it seems to allude precisely to the fact that the evaluation at the jurisdictional level of the correct characterisation of the subject matter (decided by the judgement whose recognition is sought) represents a condition precedent for the application of one or another regime of recognition (or, on a subsidiary basis, the rules of private international law, should no other EU Regulation be applicable). Therefore, while preventing the applicability of the simplified regime of the Recast Regulation to judgements not falling within the material scope thereof, at the same time it seems to

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1488 See *supra* Chapter II, Section 2, at § II.2.4.2.

1489 A. BRIGGS, *The conflict of laws*, Oxford, 2008, p. 123-124. The author seems to support the view that the wrong assumption that a subject matter of the dispute falls within the scope of one EU Regulation must only be reviewed if it was not expressly raised before adjudicating court. In this case, the court where recognition is sought should consider the issue. On the contrary, where the court hearing the case has found that the case falls within the scope of application of the concerned Regulation, the court where recognition is sought would have only a discretionary power to review the evaluation made by the court rendering the judgement.

1490 See, among others, the *Alpenblume* and the *German Graphics* judgement. For literature, see G. VAN CALSTER, *European private international law*, Oxford and Portland, 2016, pp. 191-192. See also, J.J. FAWCETT, J.M. CARRUTHERS, P. NORTH, *Cheshire, North & Fawcett: Private International Law*, Oxford, 2008, p. 42 and ff. 4.

1491 See, among others, A. BRIGGS, *op. cit.* p. 123-124, stating « *it seems certain that the recognising court must decide for himself whether the judgement was given in a civil and commercial matter and is not bound* ».

allow national competent authorities to avoid the refusal of the jurisdiction in case the Brussels Ia Regulation applies [1492].

Assuming that this view is correct, ad reverting to the two scenarios drew above, the erroneous characterisation of an action as Annex Action made by the court opening insolvency proceedings may preclude the recognition of the judgement on the ground of the (wrong) jurisdiction of the court under Article 45 Brussels Ia Regulation. The same conclusion, however, does not seem to apply to the opposite case, where an Annex Action is erroneously decided by an ordinary civil and commercial court.

In the first case, it was assumed that the courts of the Member State opening insolvency proceedings have handed down a judgement erroneously characterising the dispute as an Annex Action ('quasi-Annex judgement'). It could be, for instance, an action brought by the trustee against an employee for the breach of the latter's duties under the employment contract.

Should one espouse the theory that a condition precedent for the (refusal of) recognition of a judgement is that its subject matter falls within the material scope of the EU Regulation, the provisions of which are invoked for its recognition and enforcement, then, in the example above, the judgement debtor (the employee) could challenge the (automatic) recognition and the enforcement of the quasi-Annex judgement in the Member State where it is sought, maintaining that it could not benefit of the simplified regime set forth by Articles 32(1) second subparagraph and 33 RR and he could invoke the grounds for the refusal of the recognition of the Brussels Ia Regulation, if applicable. The addressed court should then not apply the Recast Regulation and evaluate whether the subject matter of the judgement falls within the scope of the Brussels Ia Regulation. In this case, it would be able to apply if need be the grounds for refusal provided therein (in the example made Article 45(1)(e)(i) Brussels Ia would preclude the recognition and the enforcement of the quasi-Annex judgement).

Otherwise, if the subject matter of the judgement falls within the scope of either the 'public law' exclusion of Article 1(1) Brussels Ia or one of the other exceptions under Article 1(2) thereof, unless sector-specific EU Regulations apply, the recognition of that judgement should be governed by the private international law rules of the addressed Member State.

In the second scenario, it was assumed that the non-insolvency forum hands down a judgement wrongly assuming that it does not constitute an Annex Action. In this case it is likely that the request for the (refusal of) recognition by the judgement debtor would be grounded on the (more severe and thus more favourable to him) provisions of the Brussels Ia Regulation, as the adjudicating court has assumed its jurisdiction on that basis.

[1492] This seems the position of the ECJ in the *German Graphics* case, when it states, at [19] that « *the court responsible for the enforcement must, before declaring that a judgment should be recognised which is not within the scope of application of Regulation No 1346/2000, in accordance with Regulation No 44/2001, determine whether the judgment at issue is within the material scope of the latter regulation* » .

Adhering to the view that the recognition could be refused where the subject matter of the judgement does not fall within the material scope of the Brussels Ia Regulation, the judgement creditor [1493] would still be able to invoke before the addressed court that the recognition of the foreign Annex-judgement would still be governed by the Recast Regulation. The narrow interpretation of the public policy exception under Article 33 RR would in practice frustrate any possibility for the judgement debtor to obtain the refusal of the recognition of the Annex judgement, at least surely not on the ground that the foreign court has wrongly assumed its jurisdiction. Nevertheless, it must be borne in mind that, as it will be explained afterwards, it seems that the enforcement of the foreign judgement (where directed against the debtor subject to insolvency proceedings) would still be subject to the *lex concursus* as far as the opposability of the decision (or some profiles of it) to the insolvency procedure is concerned [1494].

One author, however, argues that, even at the recognition stage, the principle of mutual trust 'is rather dubious' and, accordingly, in the second scenario imagined above the recognition of the Annex judgement should be refused on the basis of public policy, which should be extended to protect the integrity of insolvency proceedings from an Annex Action decided by an ordinary civil and commercial court [1495].

To uphold such an (arguable) conclusion the author uses as an example the *German Graphics* case. He submits that the true reasons behind the Dutch court's referral to the ECJ in that case was that it was looking for an additional ground for the refusal of the recognition of the foreign judgement, in a situation where the action should be qualified as Annex-judgement [1496].

As illustrated in Chapter III, in that case the ECJ held that a judgement (and therefore an action) obtained by the vendor for the recovery of assets under a reservation of title clause does not constitute an Annex Action. Yet, the author imagines that the ECJ had decided that the action in *German Graphics* was considered an Annex Action and claims that, should that be the case, the Court would have retrospectively held that German courts lacked jurisdiction to decide the case, as it was to be attracted to the Dutch courts (*i.e.* the courts of the Member State opening insolvency proceedings).

[1493] It is uncertain whether the court could apply the Recast Regulation *ex officio*. The general principle of the *favour ricognitionis* and the wording adopted by the Court in *German Graphics* at [19] could be arguments to believe so. However, the issue seems of scarce practical importance.

[1494] M. MONTANARI, 'esclusività del procedimento di verifica dello stato passive e ordine pubblico processuale', in *Fallimento*, 2019 (not yet published). See *infra* at §§ V.4.3.2. and V.4.3.4.

[1495] Z. FABOK, *op. cit.*, p. 311.

[1496] Fabok (correctly) maintains that in the *German Graphics* case it was apparent that the decision of the German court ordering protective measures regarding the machinery located in the Netherland was of civil and commercial nature and that clearly none of the other exceptions of the Brussels Regulation came into play in that case (which would have excluded the application of the Brussels Regulation). Therefore, if the true rationale underpinning the preliminary question referred to the ECJ had not been that of seeking for an alternative ground for the refusal of the recognition on the basis of the insolvency exception, the question raised by the Dutch court would have been merely hypothetical and would have been rejected by the ECJ. See Z. FABOK, *op. cit.*, p. 307.

The author submits that, under this hypothetical scenario, the Member State would be forced to recognise the judgement under Article 32(1) RR, although it was rendered by a court lacking jurisdiction. The author criticises this mechanism arguing that the qualification of the judgement in itself should not be enough to extend the automatic recognition to decisions rendered by the wrong court. In his opinion, this would lead to the paradox that « *the more a foreign noncompetent forum intervenes into the insolvency proceedings the more legal ground for foreign judgement would have to be automatically recognised by the opening Member State* ».

Therefore, an alternative approach is suggested by the author [1497]: the public policy exception could be invoked as a ground for the refusal of the judgement rendered by the court lacking jurisdiction on the Annex Action. The reasons underpinning this argument are that public policy would protect not only constitutional protected rights and fundamental policies of the Member State addressed with the recognition of the judgement, but also the fundamental principles of the European Union. The latter ones would include also the efficiency and effectiveness of cross-border proceedings and legal certainty, which would both be infringed if the Annex-judgement (rendered by the non-insolvency forum) is recognised automatically [1498].

The extension of public policy as a ground for reviewing the jurisdiction of the foreign court does not seem convincing.

1497 The analysis of the theory put forward by Fabok is only partially analysed in the text. Actually, the author pushes the reasoning one step forward, affirming (rather contradictorily) that Annex-judgements rendered by a non-insolvency court may be regarded as falling outside of the scope of the Recast Regulation, because the decision was not rendered by the courts of the Member State opening insolvency proceedings without consideration of the ongoing insolvency proceedings. Their recognition under article 32(1) RR should be refused based on the public policy exception. At the same time, they could not be considered as ordinary civil and commercial actions, but rather as actions falling within the Insolvency Exception because the link of the judgement with insolvency proceedings would somewhat be strong enough to exclude it from the scope of the Brussels Ia Regulation. On that (wrong) assumption, the author submits that Annex judgements delivered by non-insolvency forum would fall into a regulatory gap, where unless the recognition is not provided by the private international law rules of the addressed court, the judgement would be *inutiliter data* as its recognition would be refused. Leaving aside the argument of the public policy exception as a ground for the revision of the jurisdiction of the (non-insolvency) forum, which is analysed in the text, it is submitted that the author goes too far and gives the impression that regulatory gaps between the Recast Regulation and the Brussels Regime should be found at any cost. First and foremost, the characterisation of the action as Annex Action does not depend at all upon whether the courts handing down the judgement are located within the Member State opening insolvency proceedings (that is instead the jurisdictional effect of the characterisation), nor upon the fact that insolvency proceedings are ongoing. It is only fulfilment of the condition set forth by the Gourdain Formula that determines whether an action may be regarded as Annex or non-Annex. Second, the argument according to which, once the action is characterised as non-Annex Action, it would still be possible that since it retains a sort of connection with insolvency proceedings it would be excluded from the scope of the Brussels Ia Regulation, lacks any basis. Annex Actions are actions closely linked with the procedure whose legal basis either directly stems from insolvency proceedings or significantly derogates from the ordinary civil and commercial rules. There is no such a tertium genus as the author seems (arbitrarily) to assume.

1498 As to the efficient administration of the procedure, Fabok maintains that the automatic recognition of a judgement concerning an Annex Action, rendered by the non-insolvency forum would not serve the effectiveness and efficiency of insolvency proceedings, especially in case that the foreign decision proves to inconsistent to the objectives of insolvency proceedings. As to the legal certainty, the mere fact that the non-insolvency forum assumes the jurisdiction of an Annex Action, would violate the principle of legal certainty of the defendant, who foresees that the jurisdiction for Annex Actions would lie with the Member State opening insolvency proceedings. See Z. FABOK, *op. cit.* pp. 309-310.

At the outset, it is excluded that the efficiency and effectiveness of insolvency proceedings (deriving from the concentration of Annex Actions before the insolvency forum) may be considered as a principle of public policy, as even within the system designed by the same Recast Regulation it is subject to many exceptions for the sake of other objectives which are clearly considered hierarchically predominant (for instance, the protection of local creditors).

More in general, I see no reason why the prohibition of the jurisdictional review of the adjudicating court and the mutual trust should be overruled (only) when referred to Annex Actions. All in all, the risk that a judgement rendered by a court (even manifestly) lacking jurisdiction is accepted under any instrument of EU private international law.

As a closing remark, it must be noted that a recent ECJ decision seems to strongly militate against the interpretation (here supported) that the addressed court may refuse the recognition of a judgement on the ground that its subject matter does not fall within the material scope of the Brussels Ia Regulation or the Recast Regulation.

In the *Ágnes Weil* judgement the issue referred to the Court concerned the issuance of the certificate under Article 53 Brussels Ia in relation to a court order for the payment of certain sums under the settlement of rights in property deriving from a *de facto* (unregistered) non-marital partnership [1499].

The question raised by the referring court was whether Article 53 of the Brussels Ia Regulation must be interpreted as meaning that, if requested by one of the parties, the court of the Member State that delivered the decision must issue the certificate relating to the decision automatically, without examining if the case falls within the scope of that Regulation.

The ECJ stated that

> « *the enforcement procedure, under Regulation No 44/2001, precludes, like enforcement under Regulation No 1215/2012, any subsequent review on the part of a court of the Member State addressed of whether the action giving rise to the judgment for which enforcement is sought falls within the scope of Regulation No 44/2001, the grounds for challenging the declaration that a judgment is enforceable being exhaustively laid down by that regulation* » [1500].

Although the subject matter of the preliminary ruling concerned (a mixture of) the different exceptions on 'the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession', it is submitted that the principle established by the Court therein may prove to be applicable also with regard to the Insolvency Exception. It would follow that the characterisation made by the adjudicating court of the subject matter of an action as encompassed in the scope of one EU Regulation rather than another one would (arguably) be binding for the courts of another Member State subsequently seised with the recognition of the judgement handed down by the Member State of origin.

1499 ECJ, 6 June 2019, C-361/18, *Ágnes Weil v. Géza Gulácsi*, ECLI:EU:C:2019:473.

1500 *Ágnes Weil*, at [35].

V.2.3. The (still problematic) static profile of the vis attractiva concursus

In the light of the paragraphs above, it is apparent that the main shortcoming of the new rule under Article 6 RR are the uncertainties that surround the Gourdain Formula. Its establishment within the Recast Regulation shows the EU legislature' ambition to provide its autonomous principle of *vis attractiva concursus* in the system of cross-border insolvencies, but what falls within the scope of that rule still leaves room to a number of uncertainties. In this respect the impact of Article 6 RR is debatable.

The Recast Regulation has merely reinstated, without clarifying its true meaning, the Gourdain Formula as the test to characterise Annex Actions falling within the jurisdictional regime of Article 6(1) RR and the simplified recognition rules of Article 32 RR. In this sense, it could be seen as a missed opportunity since the text does not fully answer all the questions that have arisen so far in the practice [1501]. The EU legislature, therefore, may be blamed for merely having codified the former ECJ case law, without seizing a fruity occasion to rectify the inconsistencies which, as seen, have been shown by the ECJ.

Actually, in the Parliament's Proposal [1502] it was suggested to insert among the general definitions of Article 2 RR an autonomous notion of Annex Actions, reading

> « [Art. 2(g2)] '*action directly deriving from insolvency proceedings and closely linked with them*' *means an action directed at obtaining a judgment that, by virtue of its substance, cannot be, or could not have been, obtained outside of, or independently from, insolvency proceedings, and that is exclusively admissible where insolvency proceedings are pending* ».

The proposed amendment was justified on the acknowledgement that it was necessary a clarification concerning which actions are covered by the Gourdain Formula, as it turns to be important for the determination of jurisdiction according to Article 3a [1503].

The definition proposed by the Parliament clearly bolstered a restrictive interpretation of the *vis attractiva concursus* focusing on the legal foundation of the action ('by virtue of its substance').

Albeit not decisive, the general definition of the concept of 'action directly deriving from and closely linked with insolvency proceedings' suggested by the Parliament Proposal could have perhaps

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1501 the 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000' (released as COM(2012) 743 final) refers at p. 11 that « *the 44% of respondents to the public consultation reported no problems with the interaction between the Regulation and the Brussels I Regulation which have not been satisfactorily solved by case-law. Nevertheless, the Commission concludes that the absence of an express rule on jurisdiction for insolvency-derived action gives rise to uncertainty for legal practitioners not well versed in the CJEU's case law. In addition, the fact that a liquidator cannot cumulate an insolvency-related action with an action covered by the Brussels I Regulation has been criticised* ».

1502 See *supra* Chapter IV, § IV.1.1.

1503 See the amendments proposed by the Committee on Legal Affairs, dated 29 January 2014 (Doc. A7-0481/001-069.1).

provided some further guidance. For unknown reasons, however, such a general definition was not encompassed within the text of the Recast Regulation and, eventually, the European legislature seems to have passed the buck of defining which actions fall within the Gourdain Formula to the ECJ.

The lack of any clearer provision notwithstanding, the Recast Regulation seems to provide some aids to interpret the concept of 'action directly deriving from and closely linked with' insolvency proceedings actually means.

From a general perspective, it seems that the sole fact that the trustee may derogate from the *vis attractiva concursus* by virtue of Article 6(2) RR has *per se* weakened the idea of the concentration of actions before the jurisdiction of the Member State opening insolvency proceedings as an indefectible condition to achieve the effectiveness and the efficiency of the procedure, which the ECJ intended to promote with the *Seagon* judgment [1504]. The objective of the efficiency and the effectiveness of the procedure, in facts, seems to be pursued by means of an 'extractive' concentration, derogating to the mandatory nature of the *vis attractiva*, and not, on the contrary, an 'inclusive' one [1505].

A further confirmation of the fact that the Recast Regulation would bolster a narrow interpretation of the Gourdain Formula may be grasped from Recital 35 RR. By mentioning (director's liability) actions « *on the basis of insolvency law* » and actions « *based on company law or general tort law*, the Recital seems to refer (albeit maladroitly) to the legal basis of the action, thus perhaps alluding to the *Nickel&Goeldner* case-law, pursuant to which the evaluation of the right underlying the action should be the determinative criterion to characterise an action as Annex Action, and not the procedural context.

However, those are vague textual and interpretative arguments, the persuasiveness of which could legitimately be doubted in their application. As will become clearer in the following paragraphs, such an impression seems to be immediately dispelled by the reference made in Article 6(2) second subparagraph RR to actions brought « *on behalf of the insolvency estate* », seems to reveal a proneness of the EU legislature towards a functional approach (contradicting the above impressions) [1506].

Recital 35 RR provides also for three examples of Annex Actions.

In particular, those include « *avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings* » an action for director's liability on the basis of insolvency law [1507].

1504 See L. BOGGIO, 'La revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', in *Giur. It.*, 2017, p. 2150.

1505 L. CARBALLO PIÑEIRO, 'Towards the reform of the European Insolvency Regulation: codification rather than modification', in *Nederland International Privaatrecht*, 2014, p. 215, who criticises the choice of the EU legislature to provide for the 'extractive connection' under Article 6(2) RR, maintaining that it would have been more appropriate to concentrate the 'related actions' before the court of the Member State of the COMI.

1506 R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018, p. 419. See *infra* § V.4.5.

1507 See the second phrase of Recital 35 RR (concerning 'related actions' under Article 6(2) RR).

By contrast, the same Recital makes clear that « *actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings* ».

It is unclear the weight to be given to Recital 35 RR. At the outset, it bears observing that, although recitals are not binding, the ECJ case-law on Annex Actions demonstrates that one may reasonably doubt as to the truthfulness of this statement (after *Seagon*, who could ever underestimate their relevance?).

With that in mind it is submitted that the Recast Regulation seems to somewhat undermine the value of the interpretative guideline provided by Recital 35 RR itself. Indeed, the body of the text has embedded only avoidance actions in Article 6(1) RR, as if the European legislature itself 'mistrusted' the examples given in Recital 35 RR.

Indeed, if one relies on the ECJ case-law the three examples of actions provided therein are not always Annex Actions, nor the criterion which the Recital seems to allude to concerning director's liability actions proves to be clear enough and proves to be not aligned with (an arguable part of) the ECJ case-law and the Gourdain Formula.

Turning the attention to the specific examples provided by Recital 35 RR, as to avoidance actions, it must be pointed out that, according to the ECJ case-law, only tendentially they are Annex Actions (1508). Indeed, the Court suggests that it is not sufficient that the legal foundation of the action stems from the opening of insolvency proceedings (which surely occurs as to avoidance actions), but its characterisation as Annex Action would be contingent also on the basis of its close connection with insolvency proceedings. As will be discussed, in the *F-Tex* case the ECJ found that the condition of the 'direct derivation' may be overruled by the second condition of the 'close connection' where the avoidance action is assigned to a creditor of the insolvent undertaking (1509). The decision of the ECJ on that occasion is not entirely shared and, according to some authors, it was significantly influenced by the very specific circumstance of the case, in that the assignee was the sole debtor's creditor. Nonetheless, it is not clear whether the affirmation that avoidance actions are Annex Actions (under both Recital 35 and Article 6 RR) must be interpreted as a repudiation of the *F-Tex* case law, meaning that *a priori* avoidance actions must be considered Annex Actions, even where assigned to a creditor or a third party, or whether they are Annex Actions only when they are brought by the trustee.

As to actions concerning advance payment for costs of the proceedings, as will be discussed below, their characterisation as Annex Actions is undoubtedly reasonable, however (together with that of actions concerning obligations that arise in the course of the insolvency procedure), it does not seem to be straightforward upon a strict application of the Gourdain Formula (1510).

1508 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017, p. 97.

1509 See *infra*, § V.4.4.2.

1510 See *infra,* § V.4.4.4.2.

Eventually, the general statement that actions for the liability of directors 'based on insolvency law' are Annex Actions and those based on company law and tort law are not such, is not sufficiently clear, as it could lead the interpreter to give account to the formal and irrelevant location of the statutory provision governing the action rather than focussing on the substantive right underpinning the action [1511]. Again, it is not clear it the EU legislature has consciously taken the distance from the ECJ case-law, and in particular from the *H. v. H.K.* case-law, where an action based on company law was regarded as an Annex Action as well. Be what it may, a correct interpretation of the wording 'based on insolvency law' (*i.e.* that the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings) turns to be of pivotal importance [1512] and hopefully will induce a *revirement* by the ECJ on some of the positions previously taken [1513].

Interpreters should not even rely uncritically on the example provided by Recital 35 RR concerning what does not represent an Annex Action. Indeed, the vague expression 'actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings' may well point, *ex latere creditoris*, to any typical civil and commercial dispute concerning the a contract, concluded by the debtor *in bonis*. However, it may also identify actions that result from the termination of the contract decided by the trustee under the powers granted to him by the *lex concursus* or actions brought by the counterparty *in bonis* seeking the performance of the payment due under the contract (in other words, an insolvency claim), which are both Annex Actions.

The former actions are certainly 'civil and commercial matters', amenable to the Brussels Regime, whereas the latter ones are Annex Actions when exercised by trustee or against the estate [1514].

In the light of the above, it seems fair to conclude that rather than providing for an illuminating aid, Recital 35 RR may turn to be somewhat misleading if interpreters and judges rely on the examples provided therein uncritically. As suggested by scholars, Recital 35 RR only provides for mere clues as to the existence (or the non-existence) of Annex Actions [1515].

1511 Casaola seems to have fallen into such misunderstanding when she states that « *the "direct derivation" from the insolvency, however, should be considered looking at the procedural context as the abstract possibility to bring the claim to the insolvency court. Indeed, it should be noted that the legal basis of the provision does not always indicate its function and applicability. The position of the norm within the national system is a discretional choice of the national legislature. It may depend on several factors such as historical developments, legal theories, political reasons* ». O. CASAOLA, 'The transaction avoidance regime in the recast European insolvency regulation: Limits and prospects', in *Int. Insolv. Rev.*, 2019, 28, pp. 1–21.

1512 See *infra,* § V.4.5.1.

1513 L. BOGGIO, 'La revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', in *Giur. It.*, 2017, p. 2150.

1514 This clarification seems necessary in the light of the *Alpenblume* judgement, which is submitted that has interpreted too broadly the Gourdain Formula.

1515 See S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017, p. 97. *Contra* Mucciarelli, who deems Recital 35 RR to be quite specific, but not complete. F. MUCCIARELLI, 'Procedure concorsuali secondarie, localizzazione dei beni del debitore e protezione di interessi locali', in *Giur. Comm.*, 2016, p. 13.

Under the actual framework of the ECJ, then, one cannot but conclude that the determination of what is an Annex Action is still left to the (rather discretionary) evaluation of national judges, and eventually to the ECJ.

V.3. The appropriateness of the Gourdain Formula, the doing nothing approach and some proposals *de lege ferenda*

At this point of the reasoning it bears questioning whether an alternative approach to the Gourdain Formula is desirable and, if need be, feasible.

According to some scholars, all in all, the Gourdain Formula together with the examples offered by the Recital 35 RR could provide for a sufficient solution to the determination of what is an Annex Action, and hence they would leave the current rules unchanged.

Under this approach, the European *vis attractiva concursus* would stand as an autonomous criterion (*i.e.* to be interpreted according to the method of the autonomous interpretation). However, the scope of such a principle would be ultimately deferred to the ECJ, which will continue to play a key-role in applying the vague (perhaps inevitably vague) Gourdain Formula to each national action [1516].

Although acknowledging that some doubts may still arise, the supporters of that a view tend to minimise the inconsistencies emerged in the Court's decisions, submitting that the in the ECJ's case-law several elements have been identified to contribute to characterise Annex Actions [1517].

They endure that the Recast Regulation has taken a clear stance on the issue of Annex Actions: leave courts and practitioners the task of interpreting on a case-by-case basis the Gourdain Formula in the light of the several criteria individuated by the ECJ case-law [1518].

I tend to disagree with the solution of contenting with the solutions currently bolstered by the EU legislature, merely restating the Gourdain Formula, the latter requiring, at least, a clearer interpretation

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1516 F. MUCCIARELLI, 'Procedure concorsuali secondarie, localizzazione dei beni del debitore e protezione di interessi locali', in *Giur. Comm.*, 2016, p. 13.

1517 R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018, p. 419, who (arguably) speaks even of a 'fil rouge' of the ECJ case-law on Annex Actions, adopting the teleologic interpretation; De Cesari and Montella reluctantly acknowledge that the new Recast Regulation seems to leave no other choice than await each time for the clarifications of the ECJ. See P. DE CESARI and G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa*, *op. cit.*, pp. 136-137. F. MUCCIARELLI, 'Procedure concorsuali secondarie, localizzazione dei beni del debitore e protezione di interessi locali', in *Giur. Comm.*, 2016, p. 13.

1518 S. BARIATTI, I. VIARENGO, F. VILLATA, F. VECCHI, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017, p. 98 acknowledge that only the minority of the respondents to the questionnaire submitted in the research project of the Max Planck Institute has found that the ECJ case-law has provided for a better suited-criterion for the delineation between the Brussels Ia Regulation and the Recast Regulation. However, those authors mention also the criteria put forward to by B. Laukemenn (B. LAUKEMANN, 'Jurisdiction – Annex Proceedings', in B. HESS, P. OBERHAMMER, T. PFEIFFER, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report*, 2014), in the context of the Vienna-Heidelberg Report to facilitate courts and practitioners to classify actions (thus implicitly acknowledging the insufficiency of the Gourdain Formula.

[1519]. Certainly, only the future application of the Recast Regulation will be able to confirm whether the indications currently provided are sufficient to provide for a uniform application of the *vis attractiva concursus*, which appears in the Recast Regulation to be drawn within narrower boundaries than those emerging from the case law *H. v. H. K.*, and seems closer to the interpretation of the *Nickel&Goeldner* case-law [1520].

Nonetheless, in addition to the inconsistencies of the Recast Regulation and shortcomings of the examples provided by Recital 35 RR, highlighted above, the contradictions of which the ECJ case-law has recent given prove of, seems to confirm that it is unlikely that the approach of 'doing nothing' would ultimately solve the contradictions arisen in the last years. In two recent cases, the *NK* and the *Feniks* judgements, which are almost contemporaneous and deal with functionally similar actions (as they both concerned actions brought by the trustee on behalf of the creditors aimed at the reinstatement of the insolvency estate) the ECJ has, in facts, bolstered two diametrically opposite approaches, notwithstanding the fact that it could have 'inspired' its decision to the guidelines of the Recast Regulation (already in force, but not yet applicable *ratione temporis* to the facts of those cases).

In the light of the above, it must be questioned whether an alternative option to the currently envisaged solution is feasible.

Some authors, when dealing with the topic under discussion, invoke the need for a more precise description of the Gourdain Formula, or at least the indication of objective criteria to be referred to the two conditions of the 'direct derivation' and the 'close connection'. Otherwise, the coherent and homogeneous application of the Recast EIR would be compromised [1521].

It must be certainly be shared the impression that the Gourdain Formula as currently formulated is not sufficient to identify what is an Annex Action.

That is confirmed tritely by the fact that the operation of the *vis attractiva concursus* being left to the vague concept that an action 'derives directly' and is 'closely linked with' insolvency proceedings has

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1519 S. GROMPE, *Die vis attractiva concursus im Europäischen Insolvenzrecht, Ein Instrument zur Konkretisierung des Insolvenzstatuts,* Halle-Wittembergi, 2018, p. 205 and ff.

1520 See in this sense also L. BOGGIO, 'Insolvenza internazionale – la revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', in *Giur. It.*, 2017, p. 2145, who observes « *The so-called vis attractiva concursus as an element of procedural efficiency, although reaffirmed in principle, is resized by the Regulation* [...] *it is more difficult to submit the need for a more strict interpretation pro-attraction aimed at reconducting as many actions as possible within the jurisdiction of the State opening insolvency proceedings.* [La cd. vis attractiva concursus come elemento di efficienza, per quanto riaffermata in linea di principio, esce ridimensionata dal Regolamento […] risulta più difficile sostenere la necessità di un'interpretazione più rigorosamente pro concorsualità ossia finalizzata a ravvisare per il maggior numero di azioni possibile la riconducibilità nell'ambito della giurisdizione dello Stato di apertura della procedura d'insolvenza]». See also D. ROBINE, 'Les actions connexes', in F. JAULT-SESEKE, D. ROBINE, *Le nouveau règlement insolvabilité: quelle évolutions?*, Paris, 2015, p. 65.

1521 See among others, L. CARBALLO PIÑEIRO, 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', in *InDr*et*,* 3, 2010, p. 22, who efficaciously states that the establishment of the *vis attractiva concursus* is welcomed, but it is not completely satisfactory as « *it opens the Pandora's box* ».

O. CASAOLA, 'The transaction avoidance regime in the recast European insolvency regulation: Limits and prospects', in *Int. Insolv. Rev.*, 2019, 28, p. 10.

given rise (at both the ECJ and national case-law) to discording interpretations to such an extent that two diametrically opposite solutions may be singled out:

(i) The first solution focuses on the *genetic* bond of the action with the insolvency proceedings, thus taking into consideration the legal foundation, *i.e.* the right or the obligation underlying the action. That approach would entail a narrower scope of the *vis attractiva concursus*. It would only apply in relation to those actions which appear to be conceived as triggering the judicial protection of rights existing only in the context of insolvency proceedings, intended as the statutory response to the common pool problems (either because the right stems directly from the opening of the procedure or because, although finding its source in the ordinary civil and common rules, they are modified to such an extent that they can be deemed to be a new *substantive* right) [1522].

Should one adhere to such an interpretation, the second criterion of the 'close connection', rather than a free-standing *functional* criterion, seems rather an interpretative aid to confirm the genetic condition, verifying that the action is also exercised in the course of insolvency proceedings (a condition which may seem obvious but that, in the light of the *Alpenblume* case, apparently should not be regarded as superfluous), by the insolvency trustee acting on behalf and in the interest of the general body of the creditors. The only temperament that such an approach could at list admit is that when the Annex Action is assigned to a third party or a creditor, the connection with the insolvency procedure should be deemed to tenuous to retain the jurisdiction of the insolvency court.

(ii) The second solution would ultimately focus on the *functional,* procedural context of the action exercised in the course of the insolvency procedure, irrespective of whether the substantive right underlying the action is 'forged' by the opening of insolvency proceedings or, on the contrary, it finds its source in civil and commercial law.

Such an approach would entail a broader scope of the *vis attractiva concursus* (encompassing surely civil and commercial actions dealing with the material insolvency of the debtor). However, it would not lead to the exacerbated conclusion that any action could be attracted to the jurisdiction of the Member State opening insolvency proceedings (which would be the case if one considers sufficient that the trustee is a party to the action), because the procedural context seems to have been interpreted rather constantly by the ECJ as referring to the 'qualified' scenario where the trustee is acting *on behalf of all the creditors* (and not of the debtor), and the proceeds of the action benefit the estate [1523].

As will be demonstrated, the adhesion to one or another of those solutions, when concretely applied to the specific cases, leads to opposites conclusions, as if the 'direct derivation' and the 'close connection', rather than a twofold criterion (or a hendiadys), represent quite an oxymoron.

1522 The ECJ decisions adopting (more or less evidently) such an approach are: *Gourdain*, *German Graphics*, *Nickel&Goeldner*, *Nortel*, *Tünkers*, *Valach* and *NK*.

1523 The ECJ decisions purportedly adopting such an approach are: *Alpenblume*, *F-Tex*, *H. v. H.K.* and *Kornhaas*.

Therefore, it is submitted that the condition precedent to provide for a more precise definition of the Gourdain Formula should be the taking of a clear stance on the narrower or broader scope (that the legislature wishes) to impress on the *vis attractiva concursus*, choosing *a priori* (and not on a case-by-case basis) the approach to be followed.

That choice ultimately relates to the interpretation of the objectives pursued by the Recast Regulations. As stated, the *vis attractiva concursus* was grounded on the *effet utile* of the Insolvency Regulation, and namely the efficient and effective administration of insolvency proceedings.

What matters, then, is to understand how to interpret the objective of 'efficiency and effectiveness of insolvency proceedings'.

It must be discarded at once the idea that such an objective should concern the mere economic profile of time and cost savings of the procedure, objectively regarded as a 'regular' jurisdictional activity. Indeed, it is reasonable to imagine that it would be quicker, more efficient and less costly for the trustee to bring an action before the courts of his own *forum* rather than bringing an action before another jurisdiction [1524]. The pursue of such an objective - albeit valuable - is (or should be) desirable for any proceedings (both insolvency proceedings and civil and commercial proceedings), but it cannot justify the deflection from the fundamental principle of the *actor sequitur forum rei*, nor it could explain the exclusive (and not relatively exclusive) nature of the *vis attractiva concursus*.

Should such an interpretation be applied, it would entail that all the disputes arising in the course of the procedure would be necessarily attracted to the Member State opening insolvency proceedings for the mere fact that a procedure is opened, which seems to be beyond the rationale underpinning the *vis attractiva concursus* from the very beginning [1525].

However, neither the first nor the second solution seem to take into account such an acceptation of the objective of the Recast Regulation. Indeed, the (correct) application of both excludes, for instance, that actions brought by the trustee as a mere processual substitute of the divested debtor and which, accordingly, the latter could have brought independently from the opening of insolvency proceedings should be regarded as Annex Actions.

It is submitted that, to fully understand what efficiency and effectiveness of insolvency proceedings actually means, and why it is the tenet that has guided the ECJ when establishing the *vis attractiva concursus*, one should go back to the origin of the issue and consider that the Recast Regulation represents (at least as far as 'truly collective' proceedings are concerned) the transposition of the statutory reaction to the common pool problems at the European level, which, in the absence of a

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[1524] As correctly pointed out by Laukemann, such a conclusion should not be deemed to be true *a priori*, because it could be more advantageous for the trustee to commence the action directly in the Member State of the defendant's domicile for the future enforcement of the action. B. LAUKEMANN, Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 January 2014, Case C-328/12 – Schmid/Hertel', in *IILR*, 2014, p. 105.

[1525] See supra, Chapter I, Section 4, § IV.1. In this sense also L. CARBALLO PIÑEIRO, 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', in *InDr*et*,* 3, 2010, p. 15.

harmonised EU material insolvency law (for the moment), can only assume the form an harmonised procedural framework. Such an (autonomous) framework appears to be primarily aimed at pursuing the centralised and orderly distribution of the assets of the debtor between the creditors, pursuant to the *par condicio creditorum* principle.

It is under those lenses that one should read the objective of 'efficiency and effectiveness' of *insolvency proceedings* for the purposes of the interpretation of the *vis attractiva concursus*: only those actions whose delocalisation would prejudice or interfere with the efficient and the effective statutory response to the (truly) collective dimension of the procedure should be allocated with the courts of the Member State opening insolvency proceedings.

At this point, it bears observing that the *par condicio creditorum* is not a synonym of the maximisation of the satisfaction of the creditors.

The first principle represents a criterion to be followed in the orderly distribution of the assets among creditors, merely ensuring that (unsecured) creditors are equally satisfied, and impose to compensate the preferential treatments of one over the others on the part of the debtor.

The maximisation of the satisfaction of the creditors, on the contrary, obeys to a different logic, although strictly connected with the common pool problems. It allows the trustee, acting on behalf of the creditors, to bring any action securing that the allocation of the losses, which takes place in the context of the collective procedure, is minimised at the possible extent. However, those actions are not necessarily directed at the reinstatement of the *par condicio creditorum*.

In the light of the above, it is submitted that the objective of the effectiveness and efficacy of insolvency proceedings should be understood as relating to those two possible perspectives, which are reflected by the two solutions drawn above.

Focusing on the origin of the substantive right underpinning the action - which is the approach adopted by the first solution - implies that the scope of the *vis attractiva concursus* should encompass only those actions involving facts and interests that must be decided by applying the specific substantive and procedural rules that the *lex concursus* provides for the (collective) crisis of cooperation between the debtor and its creditors.

In this respect, then, the first solution pursues the objective of improving the efficiency and effectiveness of insolvency proceedings by synchronising the jurisdiction of the Annex Action and the *lex concurus* governing insolvency proceedings: the court of the Member State opening insolvency proceedings should be able to provide an answer to the dispute at stake more rapidly than a foreign court. It must be noted that the application of a foreign law is indeed a typical feature of private international law. In principle, the fact that the courts of a Member State could have to apply a foreign law to the merits of the case should not be regarded as an exceptional circumstance, but rather as the rule. However, unlike civil and commercial (material) law, insolvency law represents a particularly technical domain of law, where the intertwining of procedural and substantive rules underlies a

bundle of different (also super-individual) interests, strongly influenced by domestic historical developments, legal theories, political reasons.

Therefore, the reasoning underpinning the first solution is that it would be more efficient and effective for the objectives of the procedure that all those actions which interfere with the set of rules governing the orderly distribution of the debtor's assets to the creditors are decided by the courts which are familiar with those rules [1526].

The second solution, on the contrary, seems to include in the scope of the *vis attractiva concursus* also another type of actions, aimed at compensating the damages suffered by the creditors for the pauperization of the debtor's assets in the s.c. 'twilight zone', in the moment of the vicinity of insolvency, during which there is no prospect of avoiding the opening of insolvency proceedings.

Those actions - which in the context of insolvency proceedings are generally brought by the trustee on behalf of the creditors - would be included in the scope of the *vis attractiva concursus*, although the decision on the substantive rights and the interests underpinning the action often does not require the application of the specific rules of insolvency law (still, as will be explained, their exercise is subject to a sort of 'metamorphosis', due to the procedural and collective context of insolvency proceedings). They would be attracted to the jurisdiction of the court of the Member State because they would ultimately maximise the satisfaction of the whole body of creditors within the collective distribution of the proceeds [1527].

Once that such a fundamental choice on the objective to be pursued has been made, it is submitted that a useful alternative formulation to the Gourdain Formula has already been provided by the ECJ case law.

If the first solution is adopted, Annex Actions would be those whose « *right or obligation* […] *has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings* » [1528], and, subordinately, which are also procedurally connected with the insolvency procedure, because they are exercised by the trustee and their proceeds revert to the insolvency estate.

On the contrary, should one wish to bolster the second approach, Annex Actions would be those whose legal foundation encompasses as a fact the material insolvency of the debtor, whenever they are brought by the trustee, who acts « *a body responsible for insolvency proceedings* […] *required to act in the interest of the creditors*, [and the action] *is intended to increase the assets of the undertaking which is the subject of*

1526 Incidentally it may be observed that the difficulties that may arise for the application of the foreign insolvency law would still occur should one adhere to the interpretation put forward by the ECJ in *F-Tex* according to which assigned avoidance actions are not Annex Actions. Such a solution is admissible as long as the *vis attractiva concursus* is aimed at the efficiency and the effectiveness of the procedure, and not of the Annex Action. See S. MADAUS, 'Artikel 6 - Zuständigkeit für Klagen, die unmittelbar aus dem Insolvenzverfahren hervorgehen und in engem Zusammenhang damit stehen', in B. M. KÜBLER, H. PRÜTTING, R.BORK, in *KPB InsO, Kommentar zur Insolvenzordung*, Cologne, to be published in September 2019

1527 S. GROMPE, *Die vis attractiva concursus im Europäischen Insolvenzrecht, Ein Instrument zur Konkretisierung des Insolvenzstatuts,*Halle-Wittembergi, 2018, p. 230.

1528 *Nickel&Goeldner*, at [27].

insolvency proceedings [to the benefit of all the creditors] *and the closure of the insolvency proceedings has* […] *effect on the exercise of the action* » [1529].

The solution that it is supported here is the first one, because it is understood that the *vis attractiva concursus* represents (only) the jurisdictional tool to preserve the efficiency and the effectiveness of the procedure conceived as the orderly distribution of the debtor's assets (but not necessarily the maximisation of the creditor's satisfaction) and that only the application of the specific rules concerning the statutory response to the common pool problem would legitimately divert the defendant from the courts of his own country [1530].

Whatever approach is chosen, it is however submitted that providing the Gourdain Formula with a more specific meaning through the mere inclusion of a general provision of the kind of those suggested above could still not be sufficient. Any formulation in more precise terms of the Formula Gourdain would inevitably clash with the practical application to the specific actions.

That is because the Gourdain Formula does not seem to represent an adequate test to be applied indistinctively to the assessment of any claims involved in the insolvency procedure.

Insolvency proceedings are characterised by subsequent phases, some of which are essential and irreducible (*i.e.* the lodging, verification and acceptance of insolvency claims, the distribution of the proceeds out of the liquidation of the debtor's assets); some other phases, albeit functional to the pursue of the objectives of the procedure, are merely potential (*i.e.* the commencement, on the part of the trustee, of actions aimed at the reinstatement of the insolvency estate, avoidance actions, and actions determining which assets form part of the estate, and the like).

The subject matter of the necessary phases may be ultimately traced back to the insolvency claims of the creditors seeking the satisfaction of their right by means of the orderly and collective distribution of the debtor's assets, which is the only avenue available to them, once insolvency proceedings are opened. Those claims represent the very core of the common pool problem dealt with by the procedure.

It is submitted that an 'holistic' approach towards the Gourdain Formula would neglect the fact that in the context of insolvency proceedings the enforcement of creditor's claims assumes a peculiar form and is subject to a number of restrictions, under both a substantives and a procedural perspective, which profoundly differentiate such an adjudication from that one that takes place under the ordinary civil and commercial enforcement law [1531].

1529 *F-Tex*, at [36], [43]-[44].

1530 As stated by van Calster, the « *Vis attractiva concursus does not have superhero status: the forum concursus cannot attract cases that are too far removed from the insolvency* » G. VAN CALSTER, in www.gavclaw.com. Carballo Piñeiro, for instance, seems to support the opposite view, suggesting that actions aiming at avoiding a bigger loss of the creditors, thus increasing the insolvency estate, could be included in the scope of the recast regulation. See L. CARBALLO PIÑEIRO, 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', *cit.*, p. 20. See also R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018.

1531 H. EIDENMÜLLER, 'What is an insolvency proceeding?', *op. cit.*, p. 12.

As already discussed [1532], the fact that their determination is made in the context of the collective procedure entails not only that the vertical relationship between the debtor and the creditors is taken into consideration (as is the case under a regular enforcement procedure). The enforcement of the individual creditor's claim is also necessarily shaped by the horizontal and collective dialogue between all the creditors - whose interest are all equally relevant in the course of insolvency proceedings under both the profile of the procedure to be followed and the substantive determination of the claim - and must take into consideration the involvement of other super-individual interests.

It will be demonstrated in further detail, Article 6(1) RR does not reflect such an ontological difference that insolvency claims assume in the context of insolvency proceedings, as it does not make any express distinction between actions brought by the creditors and the trustee.

However, it would be reductive to consider insolvency claims as actions 'directly deriving from' and 'closely connected with' insolvency proceedings, in that they represent the very core of the procedure. An argument that tritely demonstrates the above is the fact that it appears to be an exceptional case in which the subjective side of the action (*i.e.* whether it is the creditor or the trustee that is acting as the claimant) can modify the regime of satisfaction of the claim, despite the *petitum* and *cause petendi* of the action being identical. For instance, an action for the recovery of a claim based on the same contract concluded by the debtor *in bonis* would receive a completely different treatment if brought by the creditor acting against the debtor subject to bankruptcy proceedings or by the trustee against the creditor.

In the light of the above, it is submitted that conceiving the Gourdain Formula as a general rule of jurisdiction, applicable indistinctively to all claims involved in the course of insolvency proceedings, without acknowledging the substantial difference illustrated above, would not give due weight to the true reason entailing the attraction of insolvency claims to the jurisdiction of the Member State opening insolvency proceedings. Such a reason is not reflected by the direct derivation and the close connection of the action with the insolvency procedure, but rather it derives from the collective dimension that the satisfaction of those claims assumes in the context of insolvency proceedings.

I shall revert to this aspect afterwards. For the moment, what is stressed here is that viewed in isolation the test represented by the Gourdain Formula does not have much explanatory power.

Rather than struggling with a clearer general definition of the Gourdain Formula (which would still be welcomed but that would not be sufficient to dispel the uncertainties that have arisen throughout the years of application of the former Insolvency Regulation), the interpreter should not only focus on the concept of 'action', but rather 'fragment' the action to identify the substantive claims exercised through it, in order to understand whether they can be said to derive directly from the opening of insolvency proceedings or whether, on the other hand, the law governing the adjudication of the right

[1532] See *supra,* Preface.

for which protection is sought remains the ordinary civil and commercial law. Only subsequently the close connection condition should come into play.

Such an analysis can be naturally be conducted by way of interpretation under the current regime, but it is suggested that two different solutions *de lege ferenda* could be proposed.

V.3.1. The first proposal: the annex approach

A first approach would be represented by the application of the method of the operating list (*i.e.* the Annex approach) to the issue of Annex Actions.

As explained, because of the marked differences between the laws of the various Member States and the absence of a European substantive law on the subject matter, the Recast Regulation (like the Insolvency Regulation) renounced to define precisely the concept of 'insolvency proceedings', since it was impossible to arrive at a specific definition of the term, if not for certain general principles which are common to the various national insolvency proceedings.

The problem relating to the precise identification of Annex Actions seems in a certain sense analogous and closely related to that of the definition of insolvency proceedings.

It was stated above that the *vis attractiva concursus* represents a jurisdictional tool aimed at the pursue of the objective of insolvency proceedings. However, the lack of a uniform definition of what is an insolvency procedure, the absence of an harmonised EU substantive insolvency law, together with the different approaches throughout the Member States with respect to the principle of *vis attractiva concursus* could lead one to believe that it is not possible to go beyond the general definition of some germinal common principles, whereas it would be practical that the actual identification of Annex Actions is deferred to a list of actions elaborated by each Member State, indicating those actions that are considered to be such based upon its own insolvency law [1533].

Therefore, it could be considered that the current wording of Article 6 RR should remain unchanged, or at least provided with a more specific definition of the Gourdain Formula, establishing the autonomous test to be applied to identify the Annex Actions (likewise the conditions set forth under Article 1(1) RR for the determination of insolvency proceedings). Each national legislature would then be given the task of providing a list of national actions which meet the conditions of the direct derivation and close connection to insolvency proceedings, to be included in a new Annex.

It must be highlighted that such a solution does not coincide with the general applicability of the *lex concursus* (or the *lex fori*) [1534]. The proposed solution does not imply that, under Article 7 RR, the State

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1533 Carballo Piñeiro also refers to this possibility, but she discards it as an option not viable, for reasons that will be explained. L. CARBALLO PIÑEIRO 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', *cit.*, p. 15. Also, it bears noticing that France has partially bolstered such an approach in the Décret n° 2018-452 dated 5 June 2018, '*pour l'application du règlement (UE) n° 2015/848 du Parlement européen et du Conseil du 20 mai 2015 relatif aux procédures d'insolvabilité et de l'ordonnance n° 2017-1519 portant adaptation du droit français à ce règlement*' and in the former '*Circulaire du 17 mars 2003 relative à l'entrée en vigueur du règlement n° 1346/2000 du 29 mai 2000 relatif aux procédures d'insolvabilité'*.

1534 See *supra*, Chapter I, Section 4, § IV.2.4.

of the *lex concursus* would determine, according to its own concept of *vis attractiva concursus* (if any), whether and which actions should be attracted to the jurisdiction of its own courts, or whether, instead, it admits the jurisdiction of other foreign jurisdictions. Such an approach could perhaps have been supported before the *Seagon* judgement and introduction of Article 6 RR, but it is no longer relevant in view of the fact that the European legislature, by introducing (or rather codifying) the rule of European *vis attractiva concursus* has provided for a specific head of jurisdiction for Annex Actions, which must be interpreted in an autonomous manner and cannot merely reflect the unilateral approach adopted by the single Member States.

Therefore, the application of the Annex approach to the issue of the *vis attractiva concursus* would allow an autonomous notion of *vis attractiva concursus* to be maintained, because the test to define whether the link between an action and insolvency proceedings is sufficiently close would be interpreted autonomously (*i.e.* by assessing if such an action derives directly from and is closely connected with insolvency proceedings). However, in performing the test, the specific substantive features of the right underpinning the action under its national law would necessarily be taken into account.

Not dissimilarly from what happens for the definition of rights *in rem* under Article 8 RR [1535], the interpreter would be faced with a concept (*i.e.* that of Annex Action) overlapping the features of an autonomous notion of EU (procedural) law and a national one: the Annex Action would be characterised as such if it derives directly from and is closely connected with insolvency proceedings (autonomous notion of EU insolvency law), but that characterisation would exist in so far as the national features of the action respect those conditions (national interpretation of the action) [1536].

Therefore, it is fair to second-guess that such a method would entail that the scope of the *vis attractiva* concursus would have a variable geometry, depending upon the national legal frameworks, albeit interpreted in the light of the autonomous boundaries established by the EU legislature. Therefore, such a solution would provide for a uniform interpretation, but would not lead to the uniformity of solutions.

All in all, this method does not differ much from that one applied so far by the ECJ. As has already been pointed out, the Court has applied the (not always coherent) autonomous interpretation of the criteria of the direct derivation and close connection to the specific idiosyncrasies of the structure

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1535 See *infra*, § V.4.3.4.

1536 See P. DE CESARI AND G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il Regolamento (UE) 2015/848 relativo alle procedure d'insolvenza*, *op. cit.*, p. 136. See also Crespi Reghizzi, who states that « *The link between the action at issue and the bankruptcy proceedings must be measured through an autonomous criterion (i.e. by establishing whether such action derives directly from and is closely related to a bankruptcy proceedings). However, in performing such test, one must necessarily consider the features of the claim in comparison to national law of insolvency of a certain Member State. Such reference to national law, of course, is not inconsistent with the principle of autonomous interpretation* ». See Z. CRESPI REGHIZZI, 'Reservation of title in insolvency proceedings: some remarks in light of the German Graphics judgment of the EC'J', *cit.*, p. 566, fn. 17

and functions of national actions under 'its' national law, in order to determine on a case-by-case basis whether this could be considered an Annex Action or not [1537].

In thesi, the method of operating with a 'national' list would merely perform in advance the interpretation that is currently entrusted with the Court, with a view to ensure a simple applicability in practice for interpreters and practitioners, who would be provided with an immediate guideline to ascertain whether national actions fall within the scope of the Recast Regulation.

Such a solution would overcome the shortcomings deriving from the generic and abstract conditions set forth by Article 6 RR, thus ensuring legal certainty and foreseeability. Also, the fact that national legislatures would be the ones to evaluate the applicability of the (autonomous) Gourdain Formula would guarantee a better evaluation of the action, since a national perspective would surely provide for a better insight of its specific features, rather than those emerging in the context of a reference for a preliminary ruling to the ECJ [1538].

However, at least two arguments militate against such a proposal.

The first is that not all the actions that may be brought in the context of (national) insolvency proceedings are provided with a statutory legal basis. Some actions are the outcome of legal theories or jurisprudential constructions. Therefore, the list based upon national insolvency law would inevitably be incomplete [1539]. Moreover, lacking a precise stance on the scope to be given to the Gourdain Formula, the inclusion of (typical) national actions could lead to different results, depending upon the broader or narrower interpretation of the Gourdain Formula espoused by the Member State.

The second problem takes into account a more realistic view of the actual functioning of Annex A on the definition of insolvency proceedings, which ultimately leads to the conclusion that this type of solution would not really be effective.

In facts, the annex approach would leave the Member States with a (discretionary) monopoly on the actions to indicate as Annex Actions - as is the case of insolvency proceedings -, with the risk that some actions that according to the Gourdain Formula would be Annex Action could be excluded from the application of the Insolvency Regulation and *vice versa*.

Moreover, in the absence of specific rules for the amendment of the Annexes (given that Article 45 RR has not been inserted in the Recast Regulation [1540]), also the amendments of the envisaged Annex enumerating (national) Annex Actions would be subject to the ordinary procedure. This would make

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1537 See B. LAUKEMANN, 'Jurisdiction – Annex proceedings', *op. cit.*, p. 180.

1538 J.L. BISMUTH, in *Revue des sociétés*, 1980, p. 540, who was particularly critical with the assessment made by the ECJ in the Gourdain judgement with reference to the *action en comblement du passif*, stating that the Court merely concerned itself with the textual provisions governing the action, but did not take into account the French case-law interpreting it.

1539 L. CARBALLO PIÑEIRO, *cit.*, p. 15.

1540 See *supra*, Chapter IV, § IV.2.1.3.

it unlikely that the procedures for amending the Annex would be able to keep the pace with internal changes in the national framework of the Member States.

V.3.2. The third approach: autonomous notion of Annex Actions and a uniform list

A second solution would consist of elaborating a uniform and list of Annex Actions, grouping functionally similar national actions autonomously interpreted, which would be attracted to the jurisdiction of the Member State opening insolvency proceedings.

The idea of creating a common list of Annex Actions has already been proposed by several authors [1541], more or less explicitly, who identify in this system an almost obligatory step to eliminate uncertainties and application doubts. The ultimate need to establish a catalogue of Annex Actions also emerges implicitly from the simple analysis of the legal writings specifically focused on the issue of the jurisdiction of Annex Actions, which have all attempted to provide a list of actions to be included in the European *vis attractiva concursus* [1542].

From a methodological standpoint, the approach of a common list of actions for jurisdictional purposes is not a new and does not either appear so extravagant when one considers that it was the solution adopted from the outset in the Insolvency Project. As the Lemontey Report stated, establishing the *vis attractiva* at the European level by providing only for a general definition without listing specifically which actions fall in its sphere of operation was deemed to be an insufficient solution as it would have entailed undesirable uncertainties on the applicability of the Draft Convention or the Brussels Convention. The common list was regarded as the best solution to overcome the difficulties inherent to the discrepancies between Member States on the allocation of

1541 F. CORSINI, *Profili transnazionali dell'azione revocatoria fallimentare*, Turin, 2010.

1542 See, among others, C. WILLEMER, *Vis attractiva concursus und die Europäisches Insolvenzordnung*, Tubingen, 2006, S. GROMPE, *Die vis attractiva concursus im Europäischen Insolvenzrecht Ein Instrument zur Konkretisierung des Insolvenzstatuts,* Baden Baden, 2018, T. WALDMANN, *Annexverfahren im Europäischen Insolvenzrecht,* Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien, 2015. L. CARBALLO PIÑEIRO, *Acciones de reintegración de la masa y derecho concursal internacional*, Santiago de Compostela, 2005; B. LAUKEMANN, 'Jurisdiction – Annex Proceedings', in B. HESS, P. OBERHAMMER, T. PFEIFFER, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report*, 2014. See also D. ROBINE, 'Les actions connexes', in F. JAULT-SESEKE, D. ROBINE, *Le nouveau règlement insolvabilité: quelle évolutions?*, Paris, 2015., R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018, G. CUNIBERTI, 'La compétence des tribunaux de la faillite', in G. CUNIBERTI, P. NABET and M. RAIMON, *Droit de l'insolvabilité. Reglèment (UE) 2015/848 du 20 mai 2015 relatif aux procedures d'insolvabiité*, LGDJ, 2017, p. 176. Y. BRULARD and J. MATERNE, 'Les Actions Annexes', in Y. BRULARD, L.-C. HENRY, V. MARQUETTE, J. MATERNE, M. MENJUCQ, D. ROBINE, V. RUELLE, J-L. VALLENS, P. WAUTELET, B. WESSELS (eds.), *L'insolvabilité nationale, européenne et internationale*, Paris, 2017, p. 126., F. MÉLIN, *Le règlement Communautaire du 29 mai 2000 relatif aux procedures d'insolvabilité*, 2008, ed. Bruylant, p. 201. K. PANNEN, *EuInsVo*, Berlin, 2007. Other authors have limited themselves to list the cases already decided by the ECJ P. DE CESARI AND G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa. Il Regolamento (UE) 2015/848 relativo alle procedure d'insolvenza*, Torino, 2017, C. LEGROS, 'Les actions annexes', in F. JAULT-SESEKE, D. ROBINE, *Le droit européen des procedures d'insolvabilité à la croisée des chemins*, Paris, 2013. K. PANNEN, *EuInsVo*, Berlin, 2007.

the jurisdiction between those actions which, strictly speaking, do not form an essential or irreducible part of the insolvency procedure but, when taking place, they become such [1543].

The value of these statements is confirmed by the fact that even at national level, where the principle of the *vis attractiva concursus* has been provided in general terms (namely in France and Italy [1544]), using the nebulous formula according to which 'actions directly deriving from insolvency proceedings are attracted to the jurisdiction of the insolvency court' (conceptually not dissimilar from the Gourdain Formula), it has always created considerable debates, both on the part of the legal doctrine and of the national case-law. In the attempt to fill in such an expression with a concrete meaning, national scholars have developed a variety of opinions which, albeit not disclosing apparent macroscopic differences between the general definitions proposed, give rise to very different results when faced with their concrete application to the individual case. The Spanish system, instead, has opted for a national exhaustive list of (purely internal) proceedings attracted to the insolvency court, which has allowed to dispel many of the doubts arisen elsewhere, proving that the specific enumeration of the actions falling within the (national) *vis attractiva concursus* may prove to be, in principle, a viable option [1545].

At the European level, however, the closed list system is certainly not an easy solution to implement, as also witnessed by the fact that it was one of the most controversial issue during the Insolvency Project. If at the time of the Preliminary Draft Convention there were only six Member States (and then thirteen at the time of the Draft Convention), today this solution mandates for the agreement between the (currently) 28 Member States of the EU in order to highlight whether a minimum common denominator among functionally similar actions that arise in the course of insolvency proceedings can be singled out (for the purpose of establishing the jurisdiction) and that could then fall under autonomous notions of types of Annex Actions.

However, it does not seem entirely impossible to reach such an objective. A recent example of a 'closed list' approach may be found, for instance, in the Unified Patent Court Agreement (UPCA), where Article 32 lists the actions that are attracted to the exclusive competence of the Unified Patent Court [1546]. The analogy with Article 32 UPCA is not intended to compare two rules that not only

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1543 See Lemontey Report, *cit.*, pp. 55-56.

1544 As noted in Chapter I, the formula 'actions deriving from insolvency proceedings' is embedded in both the Italian article 24 l.fall. As to France, article R. 662-3 Cod. Com., instead, states that « *le tribunal saisi d'une procédure* […] *connaît* de *tout ce qui concerne la procedure* ». The French case law has specified, however, that actions falling in the scope of that provision are only disputes arising from the procedure or over which it has legal influence.

1545 The recent UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, dated 2018 (available at www.uncitral.org) provides for a general definition of 'insolvency-related judgements', reading « *Insolvency-Related Judgment means a judgment that: a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and b. Was issued on or after the commencement of that insolvency proceeding; and (ii) Does not include a judgment commencing an insolvency proceeding* ». The Guide to Enactment, however, provides for a non-exhaustive list of actions, which are suggested to consider as encompassed in that definition by national legislatures incorporating the Model Law into their national law.

1546 Agreement on a Unified Patent Court, in *OJ*, C 175, 20 June 2013, not yet into force for a complex issue regarding the requirements for its entry into force (Article 89 AUPC provides that to enter into force it must

are dictated in different domains, but also establish two different rules (the competence of a common EU court and a general rule on jurisdiction). What bears pointing out is that *in thesi* it is not entirely impossible to identify a common list of actions that, albeit construed differently in the national systems of the Member States, must be submitted to one jurisdiction, even between 28 Member States.

The main obstacle to such a solution is represented, however, by the very test entailed by the *vis attractiva concursus*, which takes into consideration the legal foundation of the action.

Under the current European landscape, which, as has been said on several occasions, is characterised by national insolvency laws developed in very different terms, is it possible to create a uniform list of actions when the test for identifying such actions precisely requires taking into account the legal basis of the action as shaped by the national system? If the European *vis attractiva concursus* is nothing more than a procedural reflection of the deviations which the national substantive rules of insolvency law produces to ordinary civil and commercial (substantive) law, is it possible to decouple the test of the Gourdain Formula from the national law of each Member State, establishing such derogations independently and in very different ways ?

I believe that a valuable answer in the positive could be provided by applying a principle based approach to insolvency law, carving out the commonalities instead of stressing the differences between national insolvency laws, focusing on the underlying principles and their reflections in national insolvency law in order to identify a *jus commune europeaeum*.

Instead of focusing on the specific characteristic of the action as governed by its national law, then, the determination of the jurisdiction for Annex Actions should rather focus on the common interests underlying an homogeneous type of action, in order to label it as Annex Action, according to the objectives of the Recast Regulation, exclusively for jurisdictional purposes.

The principle-based approach (which is the cornerstone of the autonomous interpretation of any European concept) seems to have given promising results in a number of recent studies [1547] and it seems to be the stepping stone for the gemmation of the latest tendency pushing towards the harmonization of EU insolvency law [1548].

The solution represented by the establishment of a uniform list would, of course, have the merits of providing judicial security and predictability to the system. At the same time, if carefully drafted, it would also overcome the problem of the continuous evolution of national legal systems, that under the Annex approach would hardly be reflected in due time, as the list would not indicate the specific

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be ratified by 13 Member States, including the three Member States with the highest number of European patents, namely the UK, France and Germany). The Brexit and the difficulties in the ratification by Germany are slowing the process of entry into force of such an instrument.

and the Brexit.

1547 See for instance the CERIL Report on avoidance transactions 26 September 2017, n. 2017-1, available at www.ceril.eu.

1548 See *supra* Chapter IV, at § IV.2.

national actions falling within the scope of the European *vis attractiva concursus*, but would merely indicate a general type of actions, whose common features indicate that, despite the differences across Member States, they are functionally aimed at pursuing the objective of the Recast Regulation and fall within the Gourdain Formula.

Moreover, the system of the single list would allow the European legislator (but only it) to decide whether to attract to the jurisdiction of the Member State of opening also other actions, which meanwhile, on the basis of the Gourdain Formula are excluded from a rigorous application the European *vis attractiva concursus*. The latter being a rule on the jurisdiction that does not automatically determine the law applicable to merits of the case, some actions could be attracted to the courts of the Member State of the insolvency procedure on the basis of other evaluations of EU legislative policy expediency. Indeed, the many interests involved in insolvency proceedings could make the list change should the EU legislature decide to intervene to evaluate one specific interest over another.

Under the current rules, however, it seems that the prevailing interpretation pushes towards the centralisation before the jurisdiction of the Member State of the COMI of only those actions revealing an intrinsic connection with the bankruptcy procedure, with the meaning specified above.

All in all, a common list would emancipate the Gourdain Formula form the current approach, which entails a necessarily fragmented construction of the *vis attractiva concursus*, as it currently assumes that the idiosyncrasies established by the national law between the claim and the insolvency procedure must be necessarily taken into consideration.

It would represent a further step towards the establishment of a nucleus of uniform (EU) procedural insolvency law, leading to a uniformity of solutions and not only uniform interpretation.

V.4. An attempt of classification: methodological premises

In the light of the above, the following paragraphs attempt to draw a catalogue of Annex Actions, on the basis of the narrower interpretation of the Gourdain Formula illustrated in the previous paragraphs.

Before proceeding with the analysis of the individual cases, however, it is advisable to clarify some methodological aspects.

The first of those is the relationship between the rules of jurisdiction (Articles 3 and 6 RR) and the general applicability of the *lex concursus* provided by Article 7 RR.

In order to identify Annex Actions, some scholars have considered that an efficient solution, which would provide legal certainty, could be that of limiting the scope of application of *vis attractiva concursus* to all those matters which Article 7(2) RR provides are governed by the applicable law [1549].

1549 P. MANKOWSKI, M. MULLER, J. SCHMIT, 'Under Article 6', in *EuInsVO 2015*, Munich 2016, at [6]. P. MANKOWSKI, in *EWiR*, 2015, p. 93; P. MANKOWSKI, 'Insolvenznahe Verfahren im Grenzbereich zwischen EuInsVO und EuGVVO', in *NZI,* 2010, p. 508. *Contra*, J. HAUBOLD, 'Europäisches Zivilverfahrensrecht und Ansprüche im Zusammenhang mit Insolvenzverfahren', in *IPRax*, 2002, 3, p. 163, fn. 96, who contests that the list referred to in Article 7(2) RR (dealing with the applicable law) can be traced back to the list of actions in

The rationale underpinning such a solution is rather clear: the Gourdain Formula assumes that only those matters whose substantive right is governed by (national) insolvency law (regarded as the statutory response to common pool problems) should be brought before the Member State opening insolvency proceedings. Given that Article 7 RR provides a list of matters to which the *lex concursus* of the Member State opening insolvency proceedings must be applied, it would follow that actions concerning those matters should be automatically encompassed within the scope of action of the *vis attractiva concursus* [1550].

Such an interpretation - albeit in principle valuable, because it would establish the automatic synchronisation of *forum* and *ius* - proves to be wrong from a methodological point of view, it unduly restricts the scope of the *vis attractiva concursus* and it is also firmly rejected by the unanimous ECJ case-law.

It is methodologically wrong because the interests involved in the determination of the applicable law are different from those ones involved in the determination of jurisdiction. While the former rules ensures that applicable law could be correctly applied by a court no matter where a claim is filed, the latter provisions ensure that there is an appropriate contact between the selected jurisdiction and the subject matter of the claim, with a view to ensure that the facts and the interest at stake are thoroughly analysed.

The determination of the jurisdiction of the action is therefore a logical condition precedent to the determination of the applicable law, and it would be erroneous to invert the relationship between those rules for the mere fact that it applies to the domain of insolvency law, where the jurisdiction 'entails' the determination of the applicable law.

Article 7 RR is encompassed in the first kind of rules and provides for a mere conflict of law rule [1551]. Thus, in line with its characteristic as a typical provisions of private insolvency law, it points to the law of the legal system of the Member State opening insolvency proceedings as the law whose application is deemed the appropriate one, for matters falling within the scope of the Recast Regulation. The interests underlying Article 7 RR is that of excluding the applicability of national

articles 10-12 and 17 of the Preliminary Draft Convention and the corresponding provisions of the Draft Convention. The author correctly points out, firstly, that originally the provision at stake were intended solely for the purpose of the jurisdiction and that the synchronisation of *forum* and *ius* was added only in the Draft Convention which had provided for a specific rule (see *supra* Chapter I, Section I, §§ I.2-I.3) Secondly, the lists provided in the *avant projets* and that under article 7(2) RR are not completely identical. Thirdly, the two catalogues are marked by a profound divergence, consisting of the fact that while articles 15 Preliminary Draft Convention and 17 Draft Convention represented exhaustive lists, Article 7(2) RR is unanimously considered as a mere exemplificatory catalogue (see Virgós-Schmit Report, at [91]). Therefore, limiting the *vis attractiva concursus* to actions concerning the matters under article 7(2) RR not only has no legal basis, but risks to excessively restrict its scope and would create legal uncertainty with respect to all the hypotheses expressly not included therein.

1550 S. GROMPE, *Die vis attractiva concursus im Europäischen Insolvenzrecht Ein Instrument zur Konkretisierung des Insolvenzstatuts,* Baden Baden, 2018, p. 219.

1551 See Virgós-Schmit Report, at [88].

private international rules as far as insolvency proceedings are concerned and widening the effects of the opening of insolvency proceedings to all Member States.

However, it conceals a traditional problem of characterisation typical of private international law, which explains why such a solution would unduly limit the scope of the *vis attractiva concursus*. The general principle according to which the *lex concursus* applies for 'matters covered by it' implies an EU harmonised characterisation of what is a 'rule of insolvency law', for the purposes of applicable conflict of law rules. A partial harmonised characterisation has been made in Article 7(2) RR, listing examples of matters which are typically encountered in the course of insolvency proceedings, thus presumedly covered under the systems of all the Member State by their domestic insolvency law (1552). Therefore, as far as those profiles are concerned, for the purposes of the determination of the applicable law, they must be characterised as EU insolvency law, governed by the *lex concursus* (presumably, but not necessarily, the domestic insolvency law) excluding the recourse to *renvoi* (1553).

However, the list of matters provided by Article 7(2) RR is merely exemplificatory, which means that for any other matter that arises in the context of insolvency proceedings that cannot be characterised as 'insolvency law', « *the law of the State of the opening may displace the law normally applicable, under the common pre-insolvency rules on conflict of laws, to the act concerned* » (1554). The identification of the law applicable to all other aspects that do not fall in the scope of the Recast Regulation must follow the other applicable private international law instruments of the Member State opening insolvency proceedings.

Limiting the scope of the *vis attractiva concursus* to actions concerning the matters listed under Article 7(2) RR would risk to excessively restrict the scope of operation of the allocation of jurisdiction on Annex Actions, because some actions concerning matters not included therein, could still be attracted to the jurisdiction of the Member State opening insolvency proceedings or *vice versa* (1555).

Eventually, such a solution would also undermine the usefulness of Article 6 RR itself (1556).

With partially different arguments, another part of the scholars gives relevance to Article 7 RR to determine the jurisdiction considering that when the Recast Regulation specifies that the *lex concursus* covers the procedural aspects, it refers also to the jurisdiction. Reference is generally made to Recital

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1552 The Virgós-Schmit Report states, at [90] that « *The substantive effects referred to the competence of the law of the State of the opening by article 4, are those typical of insolvency law, i.e. effects which are necessary for the insolvency proceedings to fulfil its aims* ». G. MOSS, I. FLETCHER, S ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, p.

1553 D. DUURSMA, 'Under article 4', in H.C. DUURSMA-KEPPLINGER, D. DUURSMA and E. CHALUPSKY *Europäische Insolvenzording, Kommentar*, Vienna and New York, 2002, at [7].

1554 Virgós-Schmit Report, at [91].

1555 B. LAUKEMANN, 'Jurisdiction – Annex Proceedings', in B. HESS, P. OBERHAMMER, T. PFEIFFER, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report*, 2014, p. 186. R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018, p. 421. CARBALLO PIÑEIRO, 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', in *InDr*et*,* 3, 2010, p. 16. Z. FABOk, 'The jurisdictional paradox in the Insolvency Regulation', in *NIBLeJ*, 4(1), 2016, p. 10

1556 J. HAUBOLD, 'Europäisches Zivilverfahrensrecht und Ansprüche im Zusammenhang mit Insolvenzverfahren', in *IPRax*, 2002, 3, p. 163, fn. 96.

66 RR, providing that unless otherwise stated, the law of the Member State opening insolvency proceedings, the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned (1557).

It could be argued that the jurisdiction may be referred to the procedural rules which Recital 66 RR refers to. However, such an interpretation does not seem persuasive, and must be discarded. The procedural rules of the *lex concursus* pertain to a number of rules concerning the domestic procedural rules governing the conduct of the procedure (such as the debtors amenable to insolvency proceedings, the phases of the procedure, the national authority dealing with the opening of insolvency proceedings and its conduct, the time limits and the form for the lodging of claims, the remedies for the challenge of judgements, and the like) (1558). It is a world-wide principle that courts apply their own procedural law, so that Article 7 RR, with regard to its procedural effects, can be seen as a derivative of this common procedural conflicts rule (1559). It must be recalled here that insolvency law is characterised by a pronounced intertwining between substantive and procedural issue, to the extent that often is difficult to distinguish between them (1560). Nevertheless, the procedural rules cannot determine the jurisdiction, because this would entail giving relevance to the unilateral determination of the Member State opening insolvency proceedings, which is contrary to the establishment of an autonomous principle of European *vis attractiva concursus*.

The fact that it would not possible to deduce jurisdictional consequences from a provision dealing with the applicable law is implicitly confirmed by the *Seagon* judgement, where the Court did not even mention Article 4(2)(m) EIR to infer the jurisdiction of an action to set a transaction aside (1561).

More significantly, the relevance of conflict-of-law rules for jurisdictional purposes was expressly rejected in the *German Graphics* case, where the court refused to draw any conclusion about the characterisation of an action as an Annex Action (*i.e.* it refused establish the jurisdiction) on the basis of Article 4(2)(b) EIR, since that provision « *only constitutes a rule intended to prevent conflicts of law* » (1562).

1557 A. LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sulle procedure d'insolvenza*, Bari, 2008, p. 131, M. FABIANI, 'La comunitarizzazione della revocatoria transnazionale come tentativo di abbandono di criteri di collegamento fondati sull'approccio dogmatico', in *Fallimento*, 2004, p. 380. V. PROTO, 'Gli atti pregiudizievoli nelle procedure di insolvenza transnazionali: giurisdizione e legge applicabile', in *Fallimento*, 2009, p. 480.

1558 See in this respect the enumeration made by the Virgós-Schmit Report, at [91].

1559 T. PFEIFFER, 'Applicable law- Article 4', in B. HESS, P. OBERHAMMER, T. PFEIFFER, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report*, 2014, p. 243.

1560 See C. VELLANI, *Competenza per attrazione e fallimento,* Padua, 1996, p. 264-265.

1561 M. MONTANARI, 'La sottrazione al reg. n. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', in *Int'lis*, p. 129. But see the opinion of the Advocate General Colomer, which mentions article 4(2)(m) EIR.

1562 *German Graphics*, at [37]. See in this sense also ECJ, 5 July 2012, Case C-527/10, *ERSTE Bank Hungary Nyrt v Magyar Állam and Others,* ECLI:EU:C:2012:417. For national case-law see *Fondazione Enasarco v. Lehman Brothers France SA,* [2014] EWHC 34 (Ch), at [57]-[58], *Gibraltar Residential Properties Ltd v. Gibralcon*, [2010] EWHC 2595 (TCC), at [34] and the Italian Cass., SS.UU., 21 July 2015, n. 15200, in *Giust. civ. mass.*, 2015. According to some authors, this conclusion of the ECJ in *German Graphics* was poorly supported, because other cases would demonstrate that within the European Judicial Area, more than once private international rules (or material provisions) have been considered to interpret rules on jurisdiction. See Z. CRESPI REGHIZZI, *op. cit.*, p. 568,

Therefore, any idea that the law applicable to an action may serve as an argument to ground its characterisation as Annex Actions should be discarded form the outset [1563].

In the light of the above, some significant consequences must be highlighted.

Firstly, the synchronisation between *lex concursus* and *forum concursus* - in principle desirable, when it entails that the Member State of the procedure applies its national insolvency law - cannot be automatically purported as it may lack in some cases of a legal basis within the scheme of the Recast Regulation.

Secondly, the corollary consequence is that Article 3 and 6 RR regulating the jurisdiction should be treated separately from Article 7 RR (and the other conflict of law rules). Because of that, it may well happen that (arguably) a 'civil and commercial' court (seised under the jurisdictional regime of Brussels Ia) may have to apply the *lex concursus* (for instance, when avoidance transactions are assigned, although such a conclusion is here contested) and, *vice versa*, the *forum concursus* may happen to apply, for instance, the *lex societatis* or the *lex contractus* to some profiles of the claim (all in all, this is a circumstance which the Recast Regulation seems to admit, see for example under Article 16 RR).

Yet, despite that methodological precondition, as will be discussed, the *lex concursus* still affects the possibility that the courts of another Member State may hear a certain case, *de facto* influencing the jurisdiction.

V.4.1. A first possible distinction: the core of insolvency proceedings and all the others Annex Actions?

As said, the condition precedent for cross-border insolvency proceedings to be 'collective' is that individual enforcement actions on the part of the (preferred and unsecured [1564]) creditors are barred across all the other Member States as of (the recognition of the first judgement) opening the insolvency proceedings on the part of the Member State in the territory of which the debtor has his COMI [1565].

That was one of the pillars of the Insolvency Regulation and partially it still is the case for the Recast Regulation, at least when referred to truly collective proceedings [1566].

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referring to ECJ, 6 October 1976, Case C-12/76, *Industrie Tessili Italiana Como v. Dunlop Ag*, i ECLI:EU:C:1976:133.

1563 *Contra* A. LEANDRO, 'Effet utile of the Regulation No. 1346 and Vis Attractiva Concursus: Some Remarks on the Deko Marty Judgment', in *Yearbook of private international law*, 2009, pp. 469-480, Z. CRESPI REGHIZZI, *op. cit.* p. 572. More nuanced S. BARIATTI, 'Filling in the Gaps of EC Conflicts of Laws Instruments: the Case of Jurisdiction over Actions Related to Insolvency Proceedings', in G. VENTURINI - S. BARIATTI (eds.), *New Instruments of Private International Law, Liber Fausto Pocar*, Milan, 2009, p. 32.

1564 The reason for this specification will become clearer afterwards, when the position of creditors holder of rights *in rem* will be dealt with. See *infra* § V.4.3.4. For the moment, suffice here to say that the collectiveness and the orderly satisfaction of creditors the orderly satisfaction of creditors concern mostly unsecured creditors concern mostly unsecured creditors and a residual category of preferential creditors.

1565 See *supra* Chapter II, Section 2, § II.1.2.1.1.

1566 Yet, it must be recalled here the different facet of the concept of collectiveness referred to pre-insolvency and hybrid proceedings explained in Chapter V.

Against this backdrop, however, if one considers the provisions dictated on the jurisdiction, one has the impression that the Recast Regulation bolsters a rather fragmented understanding of the insolvency procedure [1567].

The reason underpinning the collective dimension of insolvency proceedings was already explained at the very beginning of this work: (national) insolvency proceedings must be considered as the statutory response to the common pool problems - and the 'asset race' associated with it - which require the establishment of domestic specific procedural and substantive rules, which, *inter alia*, restrict individual enforcement actions on the part of the debtor's creditors [1568].

It was also explained that the Recast Regulation does not push for the harmonisation of national insolvency laws to be brought within the scope of its application, as it acknowledges the only (apparently irreconcilable) differences between the laws in the Member States. Therefore, it is for the national legal order of each Member State to establish its own procedural and substantive response to the common pool problem of the creditors.

Nevertheless, it is submitted that, although the EU legislature leaves untouched the Member States sovereignty in this field and their procedural autonomy, still the Recast Regulation provides for a uniform and autonomous, but additional, procedural framework, that establishes a European enforcement area [1569], aiming *de minimis* at assembling the totality of the debtor's assets into one insolvency estate, thus preserving the system of the collective resolution of insolvency proceedings and the equal treatment of all EU creditors which underpins any insolvency proceeding. Subject to explicit exceptions provided by the Recast Regulation, that aim is incompatible with individual attempts by creditors to obtain satisfaction of their claims by means of procedural avenues outside of the insolvency proceedings [1570].

A first preliminary question that arises is whether the bar of individual enforcement actions represents a procedural effect of the opening of (national) insolvency proceedings, thus governed by the *lex concursus* (provided that all Member States are presumed to impose such a procedural restriction, at least as far as unsecured creditors are concerned [1571]) or whether the Recast Regulation establishes an autonomous rule of exclusive (centralised) jurisdiction for the enforcement of insolvency claims.

1567 For the ancient debate on this profile see G. MORELLI, *Diritto processuale civile internazionale*, Padua, 1954, p. 143. U. AZZOLINA, *Il fallimento e le procedure concorsuali*, III, Turin, 1961, p. 1775. P. SERENI, Rassegna di giurisprudenza sul fallimento nel diritto internazionale privato (anni 1924-1934)', in *Riv. dir. comm.*, 1935, p. 626.

1568 H. EIDENMÜLLER, 'What is an insolvency proceeding?', *op. cit.*, p.

1569 B. LAUKEMANN, 'Avoidance actions against third state defendants: jurisdictional justice or curtailment of legal protection? European Court of Justice 16 January 2014, Case C-328/12 - Schmid/Hertel', in *International insolvency law review*, 5(2), 2014, p. 104.

1570 These are the words used by the Advocate General Bobek in the *ENEFI* judgement, ECJ, Case C-212/15, *ENEFI Energiahatékonysági Nyrt v. Direcţia Generală Regională a Finanţelor Publice Braşov (DGRFP)*, ECLI:EU:C:2016:841.

1571 P.R. WOOD, 'Principles of International insolvency (Part III)', in *International insolvency review*, 4,1995, p. 114.

The practical outcome of one or the other interpretation would be the same, *i.e.* that the creditor, to enforce his claim against the debtor, would have no other choice than recurring to the courts of the Member State of the debtor's COMI.

Yet, the question is not only of a purely doctrinal savour. Apart from the aforementioned methodological profile [1572], which seems to exclude that the *lex concursus* bear no repercussions on the rules of jurisdiction, it must be noted that, should one adhere to the view that the bar of individual enforcement measures derives from the procedural rules established by the *lex concursus* - which as explained do not include jurisdiction - then one should also conclude that the courts of the other Member States erroneously seised with an individual petition seeking the satisfaction of an insolvency claim would actually have jurisdiction [1573], but they could not hear the case because, under the application of the *lex concursus*, the claim would be inadmissible. Some authors define such an effect as a *de facto vis attractiva concursus* [1574].

Instead, the assumption that the opening of insolvency proceedings in the Member State of the COMI would also establish the exclusive jurisdiction for the (collective) enforcement of the insolvency claims (in the form of the distribution of the debtor's assets), would lead to the conclusion that all the other Member States, whenever seised by the individual creditor for the satisfaction of its credit, should deny their jurisdiction.

The distinction between a decision grounded on the lack of jurisdiction or the inadmissibility of the claim - because its adjudication requires the application of the specific insolvency procedural rules - for (erroneous) procedural rules would produce its consequences (at the national level) on the remedies available to challenge that decision. With exclusive reference to the Italian system, for instance, until a decision is not rendered, the question of the jurisdiction may be challenged before the Supreme Court with the specific remedy under Article 41 c.p.c. ('regolamento di giurisdizione'), which is an additional preventive tool to the ordinary remedies to set a judgement aside. On the contrary, the decision of the court declaring the claim inadmissible on the ground that it must be assessed according to the specific (procedural and substantive) rules of the (foreign) *lex concursus* may be challenged only with the ordinary remedies, before the Court of Appeal [1575].

1572 See *supra*, § V.4.

1573 Unless one reaches the conclusion that the Recast Regulation should govern the jurisdiction for those actions, necessarily the jurisdiction would follow the rules of the Brussels Ia Regulation. The court identified through the application of those rules should then declare the claim inadmissible, at least as far as the profiles concerning its 'execution' are concerned, because those must take place in the framework of the insolvency procedure. See in this sense Z. FABOk, 'The jurisdictional Paradox in the Insolvency Regulation', in *NIBLeJ*, 4(1), 2016.

1574 Z. FABOk, 'The jurisdictional Paradox in the Insolvency Regulation', in *NIBLeJ*, 4(1), 2016.

1575 In a recent case, the Italian Supreme Court considered inadmissible the remedy of the *regolamento preventivo di giurisdizione*, commenced by an Egyptian creditor of a debtor, subject to insolvency proceedings in Italy. The reasoning of the Supreme Court is rather complex as the decision on the Italian jurisdiction involved also a pending arbitration proceedings in France (therefore one of the issues involved concerned also the applicability of article 15 EIR). For present purposes, however, it is relevant that the Supreme Court considered the remedy under Article 41 c.p.c. inadmissible on the ground*, inter alia*, that the bar of enforcement actions did not concern

The Recast Regulation is not entirely clear on this point.

Article 7(2) RR establishes that the *lex concursus* governs the conditions for the opening of insolvency proceedings, their conduct and their closure, and procedural and substantive effects that the procedure has on (enforcement) proceedings brought by individual creditors (Article 7(2)(f) RR [1576]). However, as explained, the ECJ case-law seems rather straightforward in understanding that the procedural profiles covered by the *lex concursus* do not concern the jurisdiction [1577].

Therefore, the bar of enforcement actions being a procedural *effect* of the procedure under the *lex concursus*, the automatic recognition of the judgement opening insolvency proceedings set forth by Article 19 RR undoubtedly entails that the court erroneously seised should declare the individual enforcement action inadmissible [1578]. However, that does not answer the question whether the seised court would have jurisdiction over the individual claim.

In order to determine whether the Recast Regulation establishes an autonomous rule on the (exclusive) jurisdiction for enforcement actions brought by creditors is then necessary to shift the attention to other rules of the Recast Regulation.

On the one side, the rules concerning the jurisdiction are Article 3 and 6 RR. As illustrated above, the former vests the courts of the Member State of the COMI with the exclusive jurisdiction (only) to open insolvency proceedings, but it does not address the jurisdiction of the further phases of it.

« *non riguarda, in senso tecnico, una questione di giurisdizione, ma afferisce agli effetti della dichiarazione di insolvenza* […] *le norme di cui all'art. 4 lett. f) del Reg. CE n. 1346/2000,* […] *non possono, pertanto trovare applicazione al caso in esame, essendo dettate solo al fine d'individuare la legge applicabile per determinare gli effetti della procedura d'insolvenza sui procedimenti individuali relativi ad uno specifico bene o diritto del quale il debitore è spossessato: si tratta, in sostanza, di norme dichiaratamente ed espressamente operanti sulla legge applicabile, non sulla competenza giurisdizionale in tema di apertura della procedura d'insolvenza; quanto alla competenza giurisdizionale, il Regolamento si occupa soltanto d'individuarla in relazione all'apertura della procedura (art. 3), individuando come competenti ad aprirla i giudici dello Stato membro in cui è situato il centro degli interessi principali del debitore (i.e., nella specie, il tribunale fallimentare di Milano)* […] *E ciò a tacere dalla ulteriore considerazione per la quale l'individuazione della legge applicabile non integra una questione di giurisdizione, ma rappresenta questione di merito devoluta al giudice competente.* [technically, it does not concern a question of jurisdiction, but relates to the effects of the declaration of insolvency […] the rules laid down in Article 4(f) [EIR], cannot, therefore, be applied to the present case, being dictated solely for the purpose of identifying the law applicable to determine the effects of insolvency proceedings on individual proceedings relating to a specific asset or claim of which the debtor has been divested: these are, in essence, rules which are openly and expressly operating on the applicable law, not on the jurisdiction for the opening of insolvency proceedings. As to the jurisdiction, the [Insolvency Regulation] only deals with it in relation to the opening of proceedings (article 3), which identifies as having jurisdiction to open the insolvency procedure the courts of the Member State where the centre of the debtor's main interests is located (in this case, the insolvency court of Milan) […]. This is not to mention the further consideration that the identification of the applicable law does not constitute a question of jurisdiction but represents a question of substance referred to the competent court] ». See the Italian Cass., SS.UU., 21 July 2015, n. 15200, in *Giust. civ. mass.*, 2015.

1576 As it will become clearer in the next paragraph, when article 7(2)(f) mentions 'proceedings brought by individual creditors' it refers only to enforcement actions. See *infra* this Chapter at § V.4.2.

1577 See the case-law cited above at § IV.4.

1578 This seems the stance taken by the ECJ in the *AMI Semiconductor* judgement, where the Court stated at [67] and [68] « *the question has arisen of how that jurisdiction is to be exercised vis- à-vis a party against which insolvency proceedings have been instituted* […] *it appears that in the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible* ».

The latter provision states that the courts of that Member State are vested with the jurisdiction regarding Annex Actions.

On the other side, Article 32(1) RR, on the recognition and enforcement, provides that judgements concerning the course and closure of insolvency proceedings handed down by the courts having jurisdiction pursuant to Article 3 RR, as well as those regarding Annex Actions, must be automatically recognised in accordance with Article 19 RR.

Considering the much-strived-for parallelism between the rules on jurisdiction and those on recognition and enforcement (which the Recast Regulation seems to have further pursued by introducing Article 6 RR), it must be assumed that, albeit referring only to the opening of insolvency proceedings, Article 3 RR or Article 6 RR confer upon the courts of the Member State of the debtor's COMI the exclusive jurisdiction, also with all actions concerning the course and the closure of insolvency proceedings.

It is submitted that enforcement actions brought by creditors (which in the course of insolvency proceedings take the procedural form of the lodging, verification and admission of the claim) are included within the category of actions concerning the course of insolvency proceedings.

It would follow that, although the majority of the case-law seems to consider that the bar of enforcement actions is a question relating to the (procedural) rules of the *lex concursus* - which *in thesi* does not shift the jurisdiction of enforcement actions from the ordinary regime set forth by the Brussels Ia Regulation [1579] - it is submitted that a correct interpretation of the Recast Regulation should lead to the conclusion that the courts of the Member State are vested with the exclusive jurisdiction as regards creditor's enforcement actions, which by definition concern the *core* of the conduct of the insolvency procedure.

In other words, the Recast Regulation seems to provide for a compulsive and exclusive universal jurisdiction of the main insolvency procedure (at least until a secondary procedure is not opened) because the only way for the creditor to enforce his claim is the lodging of his credit with the insolvency procedure, which determines pursuant to the *lex concursus* the right of the creditor to participate to the distribution and the ranking of his claim. In this respect, then, it must be kept in mind that the main (and perhaps the sole) objective of the Recast Regulation is to attribute to a (national) main insolvency proceedings not only a universal effect, which - it seems almost superfluous to stress it - postulates not only the opening of insolvency proceedings and the general

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[1579] In addition to the mentioned *AMI Semiconductor* case, see also ECJ, 21 January 2010, Case C-444/07, *MG Probud Gdynia sp. z o.o.*, ECLI:EU:C:2010:24, where the Court seems to bolster more systematic approach, which refers the universal effects of insolvency proceedings to articles 3, 4, 16, 17 and 25 EIR, which are rules referred to jurisdiction, applicable law, recognition and enforcement and therefore seems to imply that the bar of individual enforcement measures should be related also to the jurisdiction of the court erroneously seised. On the basis of those provisions the Court states at [47] that « *the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required*, […] *are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit* ». By referring to the legislation of the Member State, the Court seems to consider that the issue pertains to the applicable law.

applicability of the *lex concursus*, but also pushes towards the (halved) unity of such proceedings [1580], which presupposes (adopting the creditors' perspective, *i.e* the other side of the coin of the fragmented view of the procedure) a centralised jurisdiction for enforcement 'actions', that are the conceptual prerequisite of the proceedings.

It is further submitted that, under a scholarly perspective, it would be preferable to relate the jurisdiction of enforcement actions to Article 3 RR and not to Article 6 RR.

It could be argued, on the basis of the Gourdain Formula, that the right of enforcement of creditors is a pre-existing right which is modified by the opening of insolvency proceedings, which forces the creditors to satisfy their claim in a compulsorily centralised collective procedure, governed by specific rules and principles restricting (also substantively) their right.

However, the enforcement of the creditor's right does not represent an action 'deriving from and closely connected with insolvency proceedings'. Instead, they constitute the essence of the insolvency procedure (they are the common pool problem), because the latter consists in the collective realisation of the rights of all the debtor's creditors and, thus, they are the ultimate reason for the universality and the collective resolution of insolvency proceedings.

In the light of the above, rather than to Article 6 RR, the jurisdiction of those actions would be anchored to a purposive interpretation of Article 3 RR, which, as discussed, vests the courts of the Member State of the COMI with the exclusive jurisdiction not only to open insolvency proceedings, but also to hear and determine the enforcement of insolvency claims, regarded as actions concerning the conduct of insolvency proceeding [1581].

To put it differently, the opening of insolvency proceedings pursuant Article 3 RR *de facto* establishes the jurisdiction of the Member State of the COMI as regards a unique and complex procedure, which must be regarded as a whole.

V.4.2. A European area regarding only the collective enforcement?

Up to this point of the reasoning the aspect of the execution and the satisfaction of the individual claim has been particularly emphasised. It was stated that the Recast Regulation establishes a European (collective) enforcement area, which pursues the compulsive concentration of individual enforcement actions before one Member State, precluding any attempt by individual creditors to

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1580 For the distinction between unity and universality of the procedure see *supra* Chapter II, Section 1, § I.2.

1581 Also Fabok seems implicitly to share this opinion, where he (hastily) states that « *The main characteristic of insolvency proceedings is that they are collective in nature* […] *in the system of the EIR the enforcement pertains to the competence of the state where enforcement is sought* (see Article 25 EIR; Article 32 recast EIR) ». Z. FABOK, 'The jurisdictional Paradox in the Insolvency Regulation', *op. cit.*, p. 6 and fn. 36. See also Carballo Piñeiro, who states that « *the scope of the vis attractiva concursus does not depend on the conflict of rules laid down by the Insolvency Regulation, but on the definitions set out by article 25 of the same Regulation* […] *it should be beyond doubt that the forum concursus is the only court to bring claims concerning […]the lodging of claims against the debtor's estate after the opening of insolvency proceedings* ». L. CARBALLO PIÑEIRO, 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', in *InDr*et*,* 3, 2010, pp. 16-17.

obtain individual satisfaction of their claims by means of procedural avenues different from the insolvency proceedings.

An enforcement action consists of the realisation of the rights the creditor. However, in principle it is preceded by an action on the substance of the claim, which seeks the adjudication of the rights and obligations underlying that claim [1582].

A sound interpretation of the Recast Regulation seems to curtail the scope of the collectiveness (*i.e.* the jurisdictional concentration before the Member State opening insolvency proceedings) only to the enforcement of claims and all the relating profiles that derive from the fact that such an enforcement takes place in the collective insolvency procedure (*i.e.* the ranking, the lodgement, order of distribution, and the like), which are governed by the *lex concursus* and deferred to the exclusive jurisdiction of the Member State opening insolvency proceedings [1583].

Arguments in support of this may be found in a number of swaths of the Virgós-Schmit Report.

First and foremost, the definition of collectiveness provided therein stresses the profile of the satisfaction (but not the assessment on the merits) of the claim, reading « *all the creditors concerned may seek satisfaction only through the insolvency proceedings, as individual action will be precluded* » [1584].

With respect to Article 7(2)(f) EIR, the Report states that said provision governs « *the effects of the insolvency proceedings on executions brought by individual creditors, their suspension or prohibition after the opening of collective insolvency proceedings* » [1585].

As to Article 18 RR (addressing pending lawsuits) reference is again made to the enforcement, as the Report specifies that

> « *The effects on individual enforcement actions are governed by the law of the State of the opening (see Article 4(2)(f)) so that the collective insolvency proceedings may stay or prevent any individual enforcement action brought by creditors against the debtor's assets* » [1586].

Eventually, the interpretation of the obligation of return under Article 23 EIR also highlights the profile of the satisfaction of the individual creditor, in that it is made clear that « *a creditor who, after the*

1582 It is interesting to note that a peculiar aspect of insolvency proceedings is the inversion between the assessment on the merits of the credit and the enforcement title. In ordinary civil and commercial disputes, the creditor should demonstrate the validity and the existence of his credit, in order to obtain an enforceable title on the ground of which he can obtain the satisfaction of his claim. Things are quite the opposite in the context of insolvency proceedings. The title for enforcement here is represented by the judgement opening the insolvency procedure, which legitimates the collective enforcements over the debtor's assets. After the judgement is rendered, the creditor must prove his claim with the insolvency court. The fact that the debtor is entitled to file the request for the opening of insolvency procedure does not contradicts the above: by doing so, the debtor does exactly for what the creditors would ask for, i.e. that the enforcement of their credit is governed by insolvency law addressing the common pool problem. M. FABIANI, *Il diritto della crisi e dell'insolvenza*, Torino, 2017, p. 23.

1583 Therefore, as far as enforcement actions are concerned, as it was rather obvious, the synchronisation between *forum* and *jus* is established.

1584 See Virgós-Schmit Report, at [49(a)].

1585 See Virgós-Schmit Report, at [91(f)].

1586 See Virgós-Schmit Report, at [142].

opening of proceedings, obtains total or partial satisfaction of his claim individually […] *breaches the principle of collective satisfaction on which the insolvency proceedings are based* » [1587].

In the light of the above, the profile of the adjudication on the substance of the claims (*i.e.* the existence, legal basis, validity, amount), whose satisfaction is sought by creditors, seems to be excluded from the scope of the Recast Regulation, at least as far as the jurisdictional regime is concerned.

From an Italian perspective, it should be beyond doubt that not only the enforcement action of the creditor must be brought before the insolvency forum, but any claim regarding the assessment on the merits of the creditors' claim must be deferred to the specific centralised procedural framework set forth by the insolvency procedure [1588].

In this respect, the actions on the merits of the claim are not 'attracted' to insolvency proceedings *stricto sensu*, by virtue of the *vis* attractiva, but they also form the essence of the insolvency procedure itself, since the very core of it is represented by the 'collectiveness' (in Italian, the '*concorso*' of creditors), that has a facet both procedural and a substantive facet [1589].

Briefly recalled, under the Italian system the opening of insolvency proceedings produces some effects (*recte* restrictions [1590]) concerning the judicial protection of the creditor's rights, under both a procedural and a substantive perspective [1591].

The substantive effects are regulated by Articles 54-63 l.fall. which establish the substantive restrictions that the claim suffers as an effect of the opening of insolvency proceedings (s.c. 'concorso sostanziale', substantive collectiveness).

The procedural restrictions to the judicial protection of the creditor's claims ('concorso formale') comes not only in the form of the bar of individual enforcement measures (as provided under Article 51 l.fall.), but entails also that all individual actions for declaratory relief must be centralysed before the insolvency court (Article 52 l.fall., [1592]) and they must be assessed according to the specific procedural rules, set forth by Articles 92-103 l. fall. [1593].

1587 See Virgós-Schmit Report, at [172].

1588 See *supra* Chapter I, at § I.2.1.

1589 A. LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sulle procedure d'insolvenza*, Bari, 2008, pp. 124-125 and L. CARBALLO PIÑEIRO, 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', in *InDr*et*,* 3, 2010, p. 17.

1590 H. EIDENMÜLLER, 'What is an insolvency proceeding ?', *op. cit.*, p. 19.

1591 The Italian Legge Fallimentare refers to the effects of insolvency proceedings over the creditors (and their credits), but it then provides that the effects are of both substantive and procedural nature. Therefore, I tend to agree with those scholars submitting that it would be more correct to affirm that insolvency proceedings affect the judicial protection of the creditors' individual enforcement right. See M. FABIANI, *Il diritto della crisi e dell'insolvenza*, Torino, 2017, p. 173.

1592 As recently recalled by the Italian Supreme Court, however, the concentration before the insolvency court of the actions on the merits of insolvency claims suffers a number of exceptions. See Cass. 15 April 2019, n. 10540, in *Giust. civ. mass.*, 2019.

1593 The regulation of the procedural effects of insolvency proceedings on the claims (*i.e.* the legal protection of the rights of creditors in the context of insolvency proceedings) seems to be treated by the Italian Insolvency Act with an inverted logical order, since it first mention the enforcement of the claims and then it addresses

Therefore, the Italian legislature tendentially considers that every aspect of the creditors' claims brought against the debtor subject to insolvency proceedings (its lodging, ranking, but also the determination of its existence, legal basis, validity, content and amount) should comprehensively be governed by the procedural rules of insolvency law, before the insolvency court.

The principle underpinning such a legislative choice reflects the need to concentrate all creditors' claims in a single procedural context, because it would promote the respect for the *pari passu* principle, but also enables each creditor to dialogue with the others, since the more creditors there are, the lower the percentage of satisfaction of each creditor [1594].

Under this perspective, there would be no need to assess whether actions for the (mere) determination of insolvency claims are to be characterised as Annex Actions for the purposes of international jurisdiction: being an essential phase of insolvency proceedings as much as the enforcement of the insolvency claim, they would be directly subject to the jurisdiction of the Member State where the debtor has his COMI, pursuant to Article 3(1) EIR.

However, other legal systems (likewise Germany [1595]) put an emphasis on the nature of insolvency proceedings as a (mere) enforcement procedure, which - albeit regulated by the specific insolvency rules determined by the fact that those procedures deal with common pool problems - should not derogate excessively from the ordinary regime of civil and commercial law. Therefore, the assessment on the merits of the (insolvency) claim is deferred to the ordinary civil court.

This seems precisely the perspective adopted also by the European legislature. As explained in the previous paragraph, the Recast Regulation (as was the case with its predecessor) seems to embed the idea that (truly collective) insolvency proceedings are mere collective enforcement procedures, as the EU legislature limits the profile of the collectiveness only to the satisfaction of the claims.

The Recast Regulation, indeed, does not provide for the necessarily centralised procedural modalities of verification [1596] of insolvency claims, nor does it establish uniform material rules on the point,

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their (judicial) assessment on the merits. The reason for this inversion is historical, as it highlights the nature of insolvency proceedings as a (collective) enforcement procedure. See M. FABIANI, *Il diritto della crisi e dell'insolvenza*, *cit.*, p. 173.

1594 See M. FABIANI, *Il diritto della crisi e dell'insolvenza*, *cit.*, p. 173.

1595 See *supra* Chapter I, § I.5.

1596 It must be clear that when the Recast Regulation refers to the 'verification' of the claim, it refers exclusively to the procedural rules provided by national insolvency law governing the assessment of the claim, without referring to the law applicable to the substance of the claim. This emerges clearly when one considers that article 7(2)(h) RR mentions only procedural profiles of the *lex concursus*, *i.e.* the lodging, verification and admission, whereas the substantive profiles of the claim that may affect the claim - *recte* the right to enforce the claim with the insolvency proceedings - are regulated by article 7(2)(i) RR concerning, *inter alia*, the distribution of proceeds from the realisation of assets, the ranking of claims. Therefore, the verification of the claim relates to procedural profiles such as the judicial body competent to conduct the verification, the procedural rules to be applied, the remedies to challenge the verification. Instead, the substance of the claim (*i.e.* the existence, legal basis, validity, content or amount of a claim) should remain governed by the *lex causae*, *i.e.* the law applicable to the existence and validity of the claim, even where the verification of the claim, pursuant to the *lex concursus*, is made by the insolvency court. See G. CORNO, 'La disciplina della verifica del passivo nel Regolamento CE n. 1346/2000. Teoria, pratica e prospettive di riforma', in *Il Fallimentarista*, 20 March 2012.

since it merely sets a conflict-of-law rule, referring to the procedural insolvency law of the Member State opening the insolvency proceeding (Article 7(2)(h) RR), without excluding the possibility that the assessment on the merits of the credit may be carried out outside the insolvency proceedings, where the *lex concursus* provides so (as emerges also by Article 32 RR, referring to 'other judgements' governed by Brussels Ia) [1597].

Therefore, the concentration of the verification of the merits of the claim may be in practice be achieved only where the *lex concursus* of the Member State opening the insolvency procedure provides a stay concerning any lawsuit for declaratory relief of insolvency claims [1598]. In this scenario, by virtue of the automatic recognition of the judgement opening insolvency proceedings and its effects under the *lex concursus*, the court of the other Member States seised by a creditor for a declaratory relief (*i.e.* a decision concerning exclusively the existence, legal basis, validity, content or amount of a claim, without involving the aspect of its enforcement) should (again) declare the claim inadmissible pursuant to the *lex concursus*. Accordingly, should the creditor wish to obtain a declaratory relief regarding the mere existence or the validity of his claim to be enforced against the debtor, by virtue of the general applicability of the *lex concursus* he should necessarily seise the courts of the Member State opening insolvency proceedings.

Where the *lex concursus* does not provide so, however, at a first glance, nothing in the EU system on cross-border insolvencies seems to provide that the determination on the merits of the insolvency claims must be centralised before the insolvency forum [1599].

Such a conclusion rests however on the *lex concursus*, which, as discussed, does not determine the jurisdiction of an action.

It follows that one may question whether the centralisation of actions on the merits of insolvency claims cannot be achieved, if need be, by concluding that those actions are Annex Actions, as such attracted to the jurisdiction of the Member State opening insolvency proceedings.

Arguments militating in this direction may be found, *inter alia*, in the Preliminary Draft Convention and the Draft Convention. Articles 15 and 17 thereof included in the list of actions *Née de la faillite* also actions relating to the assessment of the merits of the claim. The Lemontey Report specified that not only the procedural participation in the distribution of the debtor's assets was to be centralised before the insolvency forum, but also all disputes relating to the substantive aspects of the credits (their existence, amount, ranking). Therefore, the draftsmen of the *Avant Projets* deemed it appropriate

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1597 See in this sense Cass. 15 April 2019, n. 10540, in *Giust. civ. mass.*, 2019.

1598 As noted by M. VIRGOS and F. GARCIAMARTÍN, *The European Insolvency Regulation: law and practice*, 2004, The Hague, p. 58, often national insolvency law provide for a temporary moratorium precluding the commencement of any action (declaratory and enforcement ones), also to allow the trustee to make an inventory of all the debtor's liabilities. See, for instance, § 89(1) InsO (Germany), Article 55(2) Ley Concursual (Spain) Articles L. 622-21, II and L. 641-3 Code de Commerce (France).

1599 It would thus be fair to maintain that the Recast Regulation relegates the protection of the *par condicio creditorum* at the enforcement stage, *i.e.* at the moment of the distribution of the proceeds out of the liquidation of the creditor's assets.

to specify that actions for the determination of credits are excluded from the scope of application of the Brussels Convention [1600].

Therefore, what needs to be understood here is whether, pursuant to the Gourdain Formula, actions seeking the determination (on the substance) of an insolvency claim, regardless of the *lex concursus*, may be considered *lato sensu* as an Annex Action [1601], thus attracted by virtue of a different principle to the jurisdiction of the Member State of insolvency proceedings, as if they were included too in the *core* of the insolvency procedure.

To better explain that concept, it seems more appropriate to distinguish between: *(i)* actions for the determination of a lodged claim formally contested by the trustee or by another creditor (acceptance actions) [1602]; *(ii)* actions seeking a declaratory relief brought by the insolvency creditor prior to the lodging of his credit with the insolvency proceedings, but after the opening of insolvency proceedings (post-opening actions for the determination of insolvency claims); *(iii)* insolvency claims which at the moment of the opening of insolvency proceedings are the subject matter of a pending lawsuit [1603]. (*iv)* actions brought by secured creditors or creditors with an equivalent right *in personam*. *(v)* Actions concerning the restitution of an asset forming part of the insolvency estate deserve a separate mention in this section, because they concern the right *in rem* by definition (*i.e.* property).

In anticipation of what will be explained afterwards, it is submitted that the Gourdain Formula proves to be insufficient to explain the attraction of actions concerning insolvency claims brought by unsecured creditors against the insolvent debtor, which seems nevertheless appropriate.

V.4.2.1. The jurisdiction of actions for the (contested) determination of insolvency claims lodged with insolvency proceedings (acceptance actions)

Acceptance actions are judicial proceedings which are aimed at the determination of insolvency credits (generally monetary claims) that have *already* been lodged before the insolvency court (in the broadest meaning of this term under the Insolvency Regulation) of the Member State opening insolvency proceedings and that is formally contested by the trustee or by other creditors.

1600 See Lemontey Report, p. 60.

1601 Actions on the determination of insolvency claims were treated as Annex Actions by the Advocate General in the *Riel* case, where he seems to equate the action for the determination of insolvency credits to the actions brought to the attention of the Court in *Wiemer&Trachte* (an action to set a transaction aside), *NK* (a *Peeters Gatzen* action) and *Fenix* (an *action pauliana*). See also for the exclusion from the scope of the Lugano Convention See also, Bundesgerichtsof, 23 April 2007, BGE 133 III 386, where the Federal Swiss court found that action for the determination of a lodged claim in the Swiss proceedings falls in the Lugano insolvency exception, as they are Annex Actions).

1602 The application of the *lex concursus* to various profiles actions is provided by Article 7(2)(f) first sentence, 7(2)(g) first sentence and article 7(h) RR.

1603 Article 7(2)(f) second sentence and article 18 RR.

As noted by authoritative scholars, those actions stand at the crossroad between the procedural participation to the distribution of the debtor's asset (*i.e.* the enforcement of the insolvency credit) and the protection of the individual substantive right [1604].

The claim lodged by the creditor may be contested with reference either to its 'civil and commercial' substance (*i.e.* its existence, legal basis, validity, amount content and amount) or with reference to profiles which pertain specifically to its satisfaction in the context of insolvency proceedings (its ranking, the opposability to the insolvency estate, the quality of insolvency claim, from of lodging).

The Member State's legal systems reveal substantial differences with respect to the territorial competence on those claims. For instance, in Germany, pursuant to § 179-180 InsO, if a claim is disputed by the insolvency trustee or one of the (other) insolvency creditors, it is left to the creditor to pursue the acceptance of the claim against the disputing party before competent ordinary civil and commercial court. On the contrary, in the Italian system, Articles 92-103 l. fall. provide for a centralised system before the insolvency court dealing with both the determination and the enforcement of the claims of all creditors, including the secured one [1605].

Nevertheless, in the light of the autonomous character of the Gourdain Formula, the abovementioned discrepancies should not be contingent on characterisation of those actions.

It is submitted that, from a theoretical point of view, the characterisation of those actions should take into account such a distinction and consider the specific ground of the plaintiff's contestation [1606], although some authoritative scholars submit that a characterisation on the basis of the concrete cause of action would entail legal uncertainty [1607]. Such a risk is however solved here because, as it will be demonstrated, in both cases an acceptance actions should be attracted to the jurisdiction of the Member State opening insolvency proceedings.

V.4.2.1.1. Acceptance actions specifically concerning the profile of the satisfaction of the creditors with insolvency proceedings

Starting from the acceptance action whose legal basis concern the (substantive and procedural) restrictions to the creditor's enforcement right in the context of insolvency proceedings (*i.e.* the right to participate to the distribution of the proceeds, according to the ranking and the conditions set forth by the *lex concursus*) it was already demonstrated that they are the *core* of insolvency proceedings. It was also suggested to subsume the jurisdiction for those actions under Article 3 RR, rather than under Article 6 RR.

When a dispute concerning the lodged insolvency claim arises, it is submitted that the application of the Gourdain Formula leads to the conclusion that they are Annex Actions. Indeed, as to the direct

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1604 See B. LAUKEMANN, 'Jurisdiction- Annex proceedings', *op. cit.*, p. 190.

1605 See in particular for acceptance claims article 98 l. fall (*opposizione allo stato passivo*).

1606 Such a distinction seems also to be supported by the Virgós-Schmit Report, at [196].

1607 B. LAUKEMANN, 'Jurisdiction – Annex Proceedings', *op. cit.*, p. 190.

derivation condition, it is possible to maintain both that the right underlying the action stems directly from the opening of insolvency proceedings (if considered as the right to participate to the collective distribution of the proceeds) or rather the a precondition for the latter, because the right to satisfy the credit of (all) the creditors pre-existed to the opening of insolvency proceedings [1608].

Therefore, under the latter view, it must be considered whether the opening of insolvency proceedings transforms the nature of the right. The degree of substantive changes to the right of creditors depends on each legal system. It may entail, for example, the suspension of the accrual of interest on the credit as of the opening of insolvency proceedings [1609] or the fact that albeit not yet fall due, for the purposes of the procedure the credits are considered as they fell due on the date of the opening of insolvency proceedings [1610]. Those kinds of restrictions are generally provided to ensure the *pari passu* principle and, on the basis of the comparative researches that have been made, it is acknowledged that under the Italian, French, Spanish and German systems, even though to different degrees, the right of the creditors are subject to a substantive restriction. Another symptom of the 'transformation' of the cause of action is represented by the fact that generally, the *res judicata* effects of acceptance actions is not binding *erga omnes* but only in respect to the trustee and the body of creditors at the moment of the opening of insolvency proceedings [1611]. Furthermore, although it must be clear that the mere fact that insolvency creditors may obtain a partial satisfaction of their claim does not represent *per se* a transformation of the nature of the right (as that may happen also in the context of ordinary enforcement proceedings, when more creditors of the same debtor *in bonis* 'attack' the same asset), what is peculiar to insolvency proceedings is that the specific statutory rules intervene to govern the orderly satisfaction of all insolvency creditors (the *pari passu* principle) [1612].

Therefore, it may be acknowledged that tendentially the right underlying an acceptance action concerning the participation to the distribution of the debtor's assets which is contested by the trustee

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[1608] Although scholars, even in the German systems, also consider that the cause of action for those specific actions is the creditor's right to participate in the distribution of the liquidation's proceeds. See H. SCHUMACHER, 'under § 179 InsO', in *MunchKomm-InsO,* 2008, at [7].

[1609] See, for instance, under the Italian system article 55 l.fall, art. L. 621-48 Cod. Comm. (« *Le jugement d'ouverture du redressement judiciaire arrête le cours des intérêts légaux et conventionnels, ainsi que de tous intérêts de retard et majorations* »). Under the Spanish system article 59 Ley Concursal (« *esde la declaración de concurso quedará suspendido el devengo de los intereses, legales o convencionales* »). It is understood that in Germany creditors can claim interest that has accrued after the opening of insolvency proceedings. However, interest accruing on such claims from the opening of the insolvency proceedings is subordinated to other claims of insolvency creditors. They will only be paid when all other insolvency creditors' claims have been satisfied.

[1610] See German law § 41 InsO.

[1611] See for German law §183 InsO.

[1612] In the German systems the transformation of the cause of action of the insolvency claim by virtue of the *pari passu* principle is witnessed by the fact that the contested creditor may only seek the acceptance of the credit in accordance with the description of the claim stated upon its filing or at the verification meeting (see § 181 InsO). Moreover, the ordinary court having the jurisdiction to hear the acceptance action must assess the value of the disputed insolvency credit on the basis of the amount to be expected for the claim upon distribution of the insolvency estate.

or another creditor is subject to an extensive degree of transformation following the opening of insolvency proceedings.

As far as the second condition of the Gourdain test is concerned (*i.e.* the close connection) it is superfluous to stress that here that the connection is particularly close. The trustee (or the contesting creditor) acting as the claimant in the context of acceptance actions regarding the right to the distribution of the proceeds of another creditor represents the whole body of creditors, as the determination of the claim directly affects all the insolvency creditors and their participation to distribution of the debtor's assets.

In the light of the above, it is fair to conclude that for jurisdictional purposes acceptance actions concerning the enforcement right of the creditor to be brought, under Article 6 RR (*recte* Article 3 RR), before the Member State opening insolvency proceedings.

V.4.2.1.2. Acceptance actions concerning the merits of insolvency claims

Turning to the case where the profiles contested concern the merits of the insolvency claim (*i.e.* the existence, validity, amount of the credit) it is submitted that a rigorous application of the Gourdain Formula leads to the conclusion that they are not Annex Actions.

The mere fact that one of the parties of the legal relationship goes insolvent and is subject to a collective procedure does not amend the substance of the (pre-existing) claim.

The right underlying the action neither stems from the opening of insolvency proceedings (as it was already existing in the legal sphere of the debtor *in bonis*), nor its cause of action is transformed by it. The opening of insolvency proceedings has no bearing on the nature of the right underlying those actions. Indeed, when limited to the substance of the claim, the acceptance action is the same action which the debtor would have been subjected to outside of insolvency proceedings. The first and decisive condition of the Gourdain Formula, then, is not fulfilled.

As to the second condition (*i.e.* the procedural context), it seems not to be met either.

Indeed as already explained, pursuant to the *German Graphics* case-law the fact that the trustee is party to the proceedings is not determinative, since it must be considered whether he is acting on behalf of the body of creditors or the debtor (as is the case in the kind of actions at stake). It is submitted that the trustee in declaratory relief concerning the insolvency claims could be regarded as the mere processual substitute of the debtor (as he would act on behalf of all the creditors only in case the acceptance action pertains to profiles regarding the collective enforcement of the claim). The outcome of the action would surely affect the insolvency estate, but, as explained many times in the course of this work, that is not a circumstance which the characterisation of an Annex Action should be contingent upon.

In the light of the above, a correct application of the Gourdain Formula would lead to the conclusion that those actions are not Annex Actions. It follows that, where the *lex concursus* does not provide for a stay of the creditors' individual lawsuit encompassing also declaratory relief and a centralised system

for the validation of insolvency claims (which, as explained, would *de facto* create a *vis attractiva concursus*, in that the court seised with a declaratory acceptance action should declare the claim inadmissible [1613]), the jurisdiction of the action should *in thesi* be governed by the provision Brussels Ia Regulation, including those concerning the prorogation of jurisdiction [1614].

The contested insolvency claim should be accepted as a conditioned credit in insolvency proceedings. Once that the creditor has obtained a declaratory relief on the existence of his claim, then, the judgement would be recognised pursuant to Article 32 Brussels Ia in the State opening insolvency proceedings [1615].

The theoretical correctness of that approach notwithstanding, it is submitted here that there are significant reasons (also of procedural-economy expediency) that militate in favour of the attraction of acceptance actions on the merits of the insolvency claim to the jurisdiction of the Member State opening insolvency proceedings.

With regard to the legal foundation of the action it may be stated that, albeit it is not substantially amended by the opening of insolvency proceedings, the declaration of the (lodged) insolvency claim, even where it is the sole subject matter of the contestation, may be regarded *lato sensu* as a preliminary question to the collective enforcement of the claim with insolvency proceedings, as the merits of the claim is the condition precedent for the creditor's right to participate to the (orderly) distribution of the debtor's assets Even though the trustee takes the place of the debtor in the dispute, in acceptance actions the assessment on the merits of the lodged claim is too closely linked with the subsequent distribution of the debtor's assets, which involves all the creditors [1616].

Uncoordinated declaratory relief would foster the risk of differential treatment of claimants depending upon whether they seek to proceed in the Member State of their domicile (Article 4 Brussels Ia) or another state (Articles 7(1), 7(3) or Article 25 Brussels Ia), in particular when creditors

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1613 Z. FABOK, 'The jurisdictional paradox in the insolvency regulation', *op. cit.*, p. 14.

1614 An argument that is frequently used by authors maintaining that declaratory relief on the insolvency claim should be subject to the Brussels Ia Regulation is the insolvency court lack of proximity to the facts of the case. Under this view, the concentration before the Member State opening insolvency proceedings would not take in due consideration the protection of certain group of weaker parties and the connection between case-specific conditions and the respective court. See *Oberlandesgericht Wien*, 30 October 2006, 10 Ra 47/06i, in *ZIK*, 2007, p. 165 cited by B. LAUKEMANN, 'Jurisdiction – Annex proceedings', *op. cit.*, fn. 602.

1615 That position is supported by M. VIRGÓS and F. GARCIAMARTÍN, *The European Insolvency Regulation: law and practice*, 2004, The Hague, p. 58. Those authoritative authors do not make the above distinction between an acceptance claim (*i.e.* an insolvency claim which is disputed by the trustee after its lodgment in the procedure) and post-opening actions seeking declaratory relief. They submit that when a creditor files his claim in insolvency proceedings in State 1, and the liquidator contests that claim on the basis of general contract law, where the contract provides for a choice of forum clause submitting any dispute to the exclusive jurisdiction of the courts of State 2, the creditor may bring his case to the courts of State 2. The credit would be accepted as a conditioned credit in proceedings opened in State 1, and the further judgement on the acceptance action may be recognised under article 32 Brussels Ia.

1616 All in all, the individual declaratory relief of an insolvency claim determines the right of all creditors involved in insolvency proceedings on the 'piece of the pie' that they will ultimately receive. See R. J. DE WEIJS, 'Harmonisation of European insolvency law and the need to tackle two common problems: common pool & anticommons', available at ssrn.com., p. 13.

domiciled in different Member State are the bearers of claims with an identical legal basis (as it occurs in case of investment damages [1617]). This would also lead to the risk of dissipation of the insolvency estate necessarily limited resources in litigation expenditure. The orderly insolvency process could be disrupted, and the estate dissipated, by proceedings brought in different jurisdictions by persons seeking the adjudication on the merits of the claim, through lengthy ordinary civil proceedings [1618].

The analysis carried out demonstrates that the Gourdain Formula, in relation to adjudicating actions concerning the (lodged) insolvency claims proves to be inadequate, because to justify the attraction of those claims to the courts of the Member State of the insolvency proceedings, the interpreter must invoke reasons which do not pertain to the legal foundation of the action (which is not substantially modified by the opening of insolvency proceedings) or the procedural context as intended in the Gourdain Formula test.

The inadequacy of the Gourdain Formula to assess the attraction of acceptance actions to the insolvency forum is fully demonstrated by the recent *Riel* case, where an action seeking the declaration of the existence of lodged insolvency claims (arising out of contracts relating to road construction projects, awarded as a result of public tendering procedures) was treated as an Annex Action and thus regarded as falling under the umbrella of the Insolvency Regulation (applicable *ratione temporis*). Although the conclusions reached by the Court must be shared, it is apparent that the Court has struggled to properly apply the Gourdain Formula.

After recalling that the decisive factor to identify the area within which an action falls is the legal basis of that action, the ECJ states

> « *the action for a declaration of the existence of claims provided for in Article 110 of the IO constitutes an element of Austrian insolvency legislation, it is clear from the wording of that provision that that action is intended to be brought in the context of insolvency proceedings, by creditors participating in those insolvency proceedings, in the event of a dispute concerning the accuracy or ranking of claims declared by those creditor* […] *it is apparent that, in view of those characteristics, the action for a declaration of the existence of claims under Article 110 of the IO derives directly from insolvency proceedings, is closely connected with them and has its origin in the law on insolvency proceedings* » [1619].

The reasoning of the Court did not actually take into consideration the legal foundation of the action seeking the declaration of the existence of the claim (*i.e.* the claims arising out of the contract entered into between the parties, whose legal foundation lies undoubtedly with ordinary civil and commercial law). Instead, the Court relied on the (irrelevant) circumstances that the location of the statutory

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1617 See. B. LAUKEMANN, 'Jurisdiction – Annex proceedings', *op. cit.*, p. 192.

1618 R. J. DE WEIJS, 'Harmonisation of European insolvency law and the need to tackle two common problems: common pool & anticommons', *op. cit.*, who explains the need for uniform rules on the validation of insolvency claims through the theory of anticommons.

1619 See *Riel*, at [36] - [38].

provisions governing the verification of claims (the *Prüfungsklage*'), is insolvency law, and that the action is brought in the context of insolvency proceedings.

This is because that kind of actions do not represent *stricto sensu* Annex Actions, but rather they should be regarded as the very *core* of insolvency proceedings, as they are closely intertwined with the common pool problems dealt with in insolvency proceedings. The assessment of the existence of the claim is a logical condition precedent for the enforcement of the claim, which in the context of insolvency proceedings is necessarily collective. The specific interconnection between the adjudication of the insolvency claim and its enforcement is also demonstrated by the fact that the decision on the merits of the claim being the 'precondition' of the sole purpose of creditor's right for the distribution of the debtor's assets, they generally have no binding *res judicata* effects outside the context of insolvency proceedings [1620].

Separating the profiles of the declaratory legal protection sought by the creditor from the execution of the claim, although *in thesi* correct in the light of the Gourdain Formula (because the legal foundation of the claim does not derive directly from insolvency proceedings), overlooks the (autonomous) objectives of the Recast Regulation. The facts and the interests underlying the creditors' claims should not be assessed by different jurisdictions. The principle of the *effectiveness and efficacy of insolvency proceedings*, as interpreted above [1621], imposes that all creditors should be subject to the same conditions and receive the same opportunities, as the pursuit of insolvency proceedings' objectives can only be successful within the framework of the unique proceedings [1622]. This principle should apply also to the assessment of the merits of insolvency claims, which should be subject to the jurisdiction of the same Member State, (the Member State opening insolvency proceedings).

As a result, it is submitted here that the preferable solution would be that of attracting the jurisdiction of declaratory relief of (lodged) insolvency claims to the Member State opening insolvency proceedings (or alternatively, to create a harmonised process of filing and verification of claims [1623], although technically such a solution would still concern the *applicable law*, thus creating only a *de facto*, but uniform, *vis attractiva concursus*).

1620 See *Fondazione Enasarco v. Lehman Brothers France SA,* [2014] EWHC 34 (Ch), at [57]-[58]. For instance, the assessment on the value of the claim within the insolvency procedure should have no relevance in respect to the amount of the credit of other severally liable subjects not involved in insolvency proceedings. See for a similar scenario the *AMI Semiconductor* case.

1621 See *supra* in this Chapter, § V.3.

1622 S. GROMPE, *Die vis attractiva concursus im Europäischen Insolvenzrecht, Ein Instrument zur Konkretisierung des Insolvenzstatuts*, *cit.,* p. 219 and ff. G. MCCORMACK, 'Reconciling European Conflicts and Insolvency Law', in *European Business Organization Law Review*, 15, p. 331.

1623 Insol Europe, *Harmonisation of Insolvency Law at EU level*, p. 16. « *In order to reduce uncertainty and create equal treatment among the creditors in the different EU Member States, there is an urgent need to harmonize the rules with regard to the filing and verification of claims, i.e. the procedures, time limits, penalties and consequences for failure to comply, information to be provided to creditors* ».

It being a rule establishing jurisdiction, but not the territorial competence, Member States may still have room to temper the (halved) concentration of acceptance actions, through their national rules on the allocation of internal territorial competence.

The courts of the Member State opening insolvency proceedings vested with the jurisdiction for acceptance claims (the insolvency court or any other court in that Member State) would determine the action on the basis of the law applicable to the subject matter of the claim. Therefore, where the existence, validity, legal basis, amount of the claim is contested, the court will probably apply the *lex contractus* or any other law governing the substance of the claim pursuant to the private international law rules (Rome I or Rome II), it being considered that those profiles are not governed by the *lex concursus* (see Article 7(2)(i) RR). Where the acceptance action concerns profiles regarding the collective enforcement of the claim, instead, such as the ranking, admission, and distribution of the proceeds, the court will apply the national *lex concursus* [1624].

V.4.2.2. Post-opening actions for the determination of insolvency claims

A similar reasoning applies to actions for the determination of an insolvency claims which has not yet [1625] been lodged before the insolvency court.

Provided that the *lex concursus* does not establish a general bar of lawsuits (including declaratory reliefs), but merely provides for the bar of enforcement actions, the creditor may seek a declaratory relief on the merits of his credit, with a view to obtain a title enforceable *erga omnes* (as the judgement, in this case, will have the ordinary *res judicata* effects). The creditor may wish to obtain a decision outside of insolvency proceedings for two reasons: *(i)* either he wants to invoke it against a third party (as a proof of his credit against the debtor or to enforce it against the third party severally liable with the debtor, but not subject to insolvency proceedings); *(ii)* either he wants to obtain a title on the basis of which he could invoke the accuracy of his credit in insolvency proceedings.

Once recognised in the Member State opening insolvency proceedings [1626], when lodging his claim the judgement would shield the creditor from any contestation with insolvency proceedings, at least

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1624 *Re Flightlease Ireland Ltd.*, 2005 IEHC, 274 (High Court of Ireland).

1625 Provided that the time limits for the lodging of claims have not expired. Otherwise, should the creditor fail to lodge its claim with insolvency proceedings (even after having obtained a declaratory judgement concerning the existence of his insolvency claim), the *lex concursus* governs the effects of such a failure (see article 7(2)(f) and (k) RR), including the forfeiture of the credit. See in this respect ECJ, 9 November 2016, Case C-212/15, *ENEFI Energiahatékonysági Nyrt v. Direcţia Generală Regională a Finanţelor Publice Braşov (DGRFP)*, ECLI:EU:C:2016:841.

1626 In this respect it is worth recalling the recent principle established by Italian case-law in a case concerning the recognition of a declaratory relief judgement obtained in the USA and subsequently lodged by the creditor before the Italian bankruptcy law. In Cass., 15 April 2019, n. 10540, the Italian Supreme Court stated that « *The centralised [Italian] procedure for the assessment of insolvency credits is not the only possible way to verify the claims admitted to insolvency proceedings. It follows that it is not contrary to public policy for a foreign judgment to assess such a claim outside of the insolvency court. That holds with regard to both the Italian national law - which acknowledges more than one case in which the decision on the existence and extent of the claim is vested with the jurisdiction of other courts (e.g. tax and administrative courts) and the Regulation (EU) No. 848/2015 since - considered that it does not provide for any uniform provisions on the verification of claims, and refers to the rules of the Member States – it does not express the indefectible principle under which the assessment of*

as far as the amount, validity and existence of the claim are concerned (provided that the ranking of the credit, the entitlement to lodge it and the enforcement of the declaratory judgement could in principle still be contested in an acceptance action, and are solely subject to the *lex concursus*).

It is submitted that if the creditor's intention for obtaining a declaratory relief rests with obtaining a judgement directed against a third party, the action should be regarded as an ordinary civil and commercial action, since it would not involve in any case the other insolvency creditors (however it should be necessary that the creditor declares such an intention to the court seised pursuant to the Brussels Ia Regulation).

In this constellation, the trustee would be acting as a mere procedural substitute of the debtor in relation to a claim which was already existing in the legal sphere of the debtor and whose legal foundation is not amended by the opening of insolvency proceedings. Moreover, there would be no connection with insolvency proceedings, because the judgement would serve different purposes than the satisfaction with the procedure.

On the contrary, where the creditor seeks the adjudication of his claim with a view to invoking the judgement against the debtor subject to insolvency proceedings and, thus, against all the creditors participating in the insolvency procedure, considerations similar to those drawn in the previous paragraph concerning an acceptance action on the merits of a lodged insolvency claim may be supported.

As said, upon a strict application of the Gourdain Formula, post-opening actions for the declaratory of an insolvency credit should not be considered as Annex Actions.

The connection of those actions with insolvency proceedings seems more loosened that in acceptance actions concerning the adjudication of a lodged claim because in the latter case also other creditors may contest the lodged credit, whereas that is not possible where the adjudication action is brought outside of insolvency proceedings and takes place exclusively between the trustee and the third party.

Therefore, it seems that those actions should be regarded as ordinary civil and commercial actions.

That seems to be confirmed by the Virgós-Schmit Report, where actions concerning the existence, the validity or the amount of a credit are classified as falling within the definition of 'other' civil and commercial judgement [1627].

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claims must be conducted before the insolvency proceedings in order to protect the "par condicio creditorum" [Il procedimento di accertamento dello stato passivo non costituisce l'unica modalità consentita per accertare eventuali ragioni di credito ammesse ad una procedura concorsuale. Ne consegue che non è contraria all'ordine pubblico la sentenza straniera che accerti tale credito al di fuori della cognizione del giudice fallimentare, e ciò sia avuto riguardo alla disciplina nazionale - che conosce più di un caso in cui la decisione sull'esistenza e l'entità del credito sia devoluta alla giurisdizione di altri giudici (ad es. il giudice tributario, quello amministrativo e la Corte dei conti) - sia in relazione alla disciplina europea di cui al Reg. (UE) 848/2015 che - non contenendo alcuna disposizione vincolante per gli Stati membri in tema di verifica dei crediti, e rinviando alla disciplina dello Stato di provenienza - non esprime principi irrinunciabili che impongano a tutela della "par condicio creditorum" necessariamente l'accertamento dei crediti in sede concorsuale] ».

[1627] See Virgós-Schmit Report, at [196].

As a consequence, in principle those actions should be brought before ordinary 'civil and commercial' courts, as identified under the Brussels Regime (thus even choice of court agreement would be enforceable against the trustee) [1628]. The substantial profiles will be governed according to the law applicable to the subject matter of the claim (*i.e.* either the law chosen by the parties or the law identified by the European international private law instruments or national rules). The *lex concursus*, instead, should not come into play since, in that kind of actions, it would not be disputed the lodgement or the ranking of the credit: those profiles would eventually be called into question during a subsequent acceptance action, within the context of insolvency proceedings.

That solution was wholly bolstered by English courts in the *Gibraltar Residential Properties Ltd v. Gibralcon* [1629].

In that case, the company Gibralcom, acting as the contractor, brought a declaratory relief action before English courts against the employer Gibraltar Residential Properties Ltd ('GRP'), a Spanish company subject to insolvency proceedings in Spain, under a choice of court agreement contained in a property development contract entered into between the parties *in bonis* providing for the exclusive jurisdiction of UK courts.

GRP challenged the jurisdiction of the English on the ground of the existence of the insolvency proceedings in Spain. The Court however rejected that argument. As specified by Stuart J

> « *This court will do no more than determine the rights of the parties under this contract, disputes which are subject to the exclusive jurisdiction of the courts of England and Wales, and make declarations accordingly, and, in particular, determine so far as it can which party is owed money by the other and how much* […] *this court would not seek to enforce its decisions given the existence of the insolvency proceedings in Spain. So if GRPL receives decisions that are in its favour from this court, it must lodge its claim in the Spanish insolvency proceedings. There will be no question of enforcement in this jurisdiction* » [1630].

Therefore, the Court confirmed the view that post-opening actions for declaratory reliefs are in substance civil and commercial matters, whose nature is not affected by the opening of insolvency

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1628 Supporting this view, among others, Z. FABOK, *op. cit.*, at [31] and G. MCCORMACK, 'Reconciling European Conflicts and Insolvency Law', in *European Business Organization Law Review*, 15, pp. 326-327.

1629 *Gibraltar Residential Properties Ltd v. Gibralcon*, [2010] EWHC 2595 (TCC).

1630 See *Gibraltar Residential Properties Ltd v. Gibralcon*, at [15]. Stuart J further stated that « *this court would not make orders directing Gibralcon to pay money to GRPL if the court found that, after all claims and cross claims had been taken into account, money was owed by Gibralcon to GRPL. Instead, the court would make declarations in relation to the matters set out above and then order a stay of execution so that GRPL could prove that debt in the Spanish insolvency proceedings. I must make it entirely clear that this court, having made declarations as asked, would then leave the question of GRPL's entitlement to payment to be dealt with in the insolvency proceedings in Spain* ».

proceedings [1631]. The same conclusion seems to be also upheld in the recent ECJ *ENEFI* and *Terragò* decisions [1632] .

A strong pro-argument supporting that interpretation is that, should those kind of proceedings be brought before the courts of the Member State opening insolvency proceedings, by lodging the claim, assuming that there is no contestation as to the ranking, lodging and validation of the claim, but exclusively about its validity and existence, the mere opening of insolvency proceedings would not change the fact that the assessment of those profile should be carried out under the law applicable to the merits of the claim (which is not the *lex concursus*) [1633]. That would entail that the courts of the Member State opening insolvency proceedings dealing with the case (regardless of whether it is the insolvency tribunal or another court of that Member State) could be forced to apply foreign laws.

Against that background, the allocation of the jurisdiction on actions for declaratory relief on insolvency-claims with the Brussels Regime could prove to be beneficial for the insolvency forum, as it could rely on the preliminary assessment of those profile made a court more familiar with the applicable law [1634].

Despite that solution seems correct form a doctrinal point of view, one could wonder whether, regardless to the sound application of the Gourdain Formula, *other* reasons would militate against the fact that those actions should not in principle be concentrated before the Member State opening the insolvency proceedings. Again, those other reasons seem to rest with the fact that, when directed against the insolvent debtor, the assessment on the merits of the claim is a condition precedent for the participation to the distribution of the proceeds, which takes place between all the insolvency creditors. The assessment of claims against the debtor must be channelled (at least) before the courts of the Member State opening insolvency proceedings, as it affects the distribution rights of all other creditors.

That was the opinion of the ECJ in the *AMI Semiconductor* case.

1631 For French case-law see Cour de Cassation. 13 April 1992, commented by J. P. REMERY, in *Rev. crit DIP*, 1993, p. 67. As noted by that Author, « *les actions des créanciers en paiement de créances antérieurs à l'ouverture de la procédure, étant alors précisé que le demandeur se verra néanmoins opposer le principe de l'arrêt des poursuites individuelles*. [Actions of creditors for the recovery of their credits, however, would then have to face the opposition of the bar of individual enforcement] »). See also F. MÉLIN, *Le règlement Communautaire du 29 mai 2000 relatif auc procedures d'insolvabilité*, *cit.*, p. 201.).

1632 See *infra* § V.4.2.3.

1633 See *supra* this Chapter, § V.4.

1634 See *Fondazione Enasarco v. Lehman Brothers France SA,* [2014] EWHC 34 (Ch), at [57]-[58], where Richards J stated that « *it is likely that the [insolvency] court will be greatly assisted by having the judgment of the [ordinary] court on the rights and liabilities of the parties under the [agreement], given that it is governed by English law. It is of course possible that the Swiss court would come to a different determination of these issues, presumably on the basis of expert English law evidence, but that evidence itself would have to take account of the decision of the English courts and the risk of irreconcilable decisions appears to me to be more theoretical than real. Even if the [insolvency] court came to a conclusion contrary to that reached by the English court, its decision would have effect only within the insolvency proceedings* […] *and would create no res judicata as to the substantive rights of the parties* ». See also *UBS AG v. Omni Holding AG*, [1999] EWHC 850 (Ch).

Following the early termination of a complex contract entered into between the EU Commission and several parties within the context of the Esprit programme, the Commission brought an action seeking the repayment of the advances, against its contractual counterparties, two of them subject to insolvency proceedings. Against those two defendants, the Commission submitted two alternative claims: *(i)* it claimed the satisfaction of its credit; alternatively; *(ii)* it asked for a declaratory judgement against the two defendants subject to insolvency proceedings.

As to the first request, the ECJ confirmed that the *enforcement* of individual claims *vis-à-vis* insolvency proceedings is inadmissible, as otherwise the creditor (in that case the Commission) « *would enjoy an unjustifiable advantage over the other creditors if they were allowed to pursue their claims in proceedings brought before the Community judicature when any action before national courts was impossible* » (1635).

The Court rejected also the alternative request concerning the declaratory relief, on the ground that « *an application seeking a finding which is to be relied on in insolvency proceedings implies the involvement of other parties, namely the other creditors of the insolvent undertaking* » (1636).

In the light of the above, the ECJ seems to allude that a claim for declaratory relief, in addition to the debtor (that is the natural counterparty in those actions, even if substituted by the trustee) affects the interests of the body of creditors to such an extent that it must be brought before the courts of the Member State opening insolvency proceedings (1637).

1635 See *AMI Semiconductor*, at [70].

1636 See *AMI Semiconductor*, at [76]. Some hints may also come from ECJ, 5 July 2012, Case C-527/10, *ERSTE Bank Hungary Nyrt v Magyar Állam and Others,* ECLI:EU:C:2012:417. In that case, the claimant (the Hungarian ERSTE Bank, formerly Postbank) brought an action before the Hungarian courts against the bank BCL Trading, that was subject to insolvency proceedings in Austria, seeking a declaratory judgement proving that it had a (secured) right over a secured deposit. In particular, the security deposit concerned the sums paid by the Hungarian State to BCL Trading *in bonis* for the purchase of the shares that the latter owned in ERSTE Bank and that the same BCL Trading had previously transferred to third parties as a guarantee. The shares had been assigned to the third parties as a guarantee following the refusal of ERSTE bank to pay the amount due under certain letters that it had assigned to BCL Trading, which were in turn assigned by the latter to the abovementioned third parties. The issue of jurisdiction was not referred by the parties to the ECJ. Nevertheless, interesting insight might be gleaned from the opinion of the Advocate General who stated « *I am of the view that that is precisely the nature of the action brought by ERSTE Bank, since it relates to a portion of the assets of BCL Trading affected by the decision opening the insolvency proceedings. For that reason, that action follows directly from the insolvency proceedings opened against BCL Trading and is closely connected to those proceedings. Since the action in question is of such a nature, international jurisdiction must be assessed on the basis of Article 3(1) of the Regulation, which leads us to the Austrian courts.* […] *Of course, that does not mean that the court concerned must necessarily be the same court as that which opened the insolvency proceedings* ». See the opinion of Advocate General Mazàk, delivered on 26 January 2012 (ECLI:EU:C:2012:37), at [41]-[42]. The Advocate General, then, considers that an action seeking a declaratory relief must be regarded as an Annex Action. However, the value of the Advocate General's reasoning must be limited to this specific profile, since it is not possible to agree with his statement regarding the characterisation as Annex Action of an action for recovery of an asset brought by a secured creditor. It should not be unnoticed, however, that the Court seems well aware of that (and of the *German Graphics* case-law) and implicitly criticised the conclusion of the Advocate General at [38] and [40].

1637 See also in this sense *Lornamead Acquisition Ltd v. Kaupthing Bank HF*, [2011] EWHC 2611 (Comm). A similar reasoning seems to be supported in the case *Galbraith v. Grimshaw* [1910] AC 508, p. 513 where Lord Dunedin J stated « *Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution* ».

That argument emphasises once more the fact that the Gourdain Formula [1638] - if one literally applies the precepts hitherto uttered by the ECJ case law - may lead to neglect uncritically some facets of a type of action, which ultimately reveal a nature inextricably linked to the collective insolvency liability regime [1639].

That may well be the case of the actions at stake, whenever the creditor brings them as a claimant. Indeed, albeit only indirectly affecting the value of the estate and involving the trustee as a mere processual substitute of the debtor (which would lead to exclude the condition of the 'close connection'), those actions prove to be a precondition too connected with the *core* of insolvency proceedings (*i.e.* the collective enforcement of the creditor's right via the distribution of the liquidation proceeds) to reasonably infer that a formalistic approach towards the Gourdain Formula should *a priori* exclude that they are Annex Actions [1640].

The characterisation of those actions (either when the claim is already lodged, or when the creditor brings them outside of insolvency proceedings with a view to subsequently lodge his claim) is therefore extremely controversial, in that from a doctrinal point of view both the abovementioned approaches prove to be valuable.

Since any regulatory gap between the Brussels Regime and the Insolvency Regime must be avoided, for the present purposes of classification, then, it is 'only' a matter of choosing the solution which would better strike a balance between the objectives of the two regulations. It is suggested that eventually the characterisation of those actions as Annex Actions would prove to be the most suitable solution.

V.4.2.3. Insolvency claims which at the moment of the opening of insolvency proceedings are the subject matter of a pending lawsuit

Against this backdrop, the question of the jurisdiction on pending lawsuit arises, as it calls in some observations concerning the same distinction between enforcement actions and actions seeking a declaratory relief drew above.

[1638] Which casually is not even mentioned in the *AMI Semiconductor* judgment.

[1639] *Contra,* Z. FABOK, *op. cit.*, at [36], who denies that the body of creditors would be suffer any prejudice by merely declaratory judgements, considered that the ranking and the satisfaction of the credit assessed therein would then be subject to the *lex concursus* in the course of insolvency proceedings. See also Advocate General Bobek in the opinion delivered on 19 June 2016 (ECLI:EU:C:2016:427), in the context of the *ENEFI* case, at [69] See also ECJ, 6 June 2018, Case C-250/17, *Virgílio Tarragó da Silveira v. Massa Insolvente da Espírito Santo Financial GroupSA*, ECLI:EU:C:2018:398, at [33].

[1640] The severe (yet, indirect) bearing of those actions on the body of creditors would also be confirmed by the fact that whenever those actions are brought before the ordinary courts of another Member State, in the determination of the percentage of satisfaction of all the other creditors, the trustee (and the court, in case the distribution plan proposed by the trustee must be validated by it), should in any case take into account the potential existence of those insolvency claims, that would be qualified as conditional claims.

As discussed, the Recast Regulation (as was the case with the Insolvency Regulation) distinguishes between the effects of the opening of insolvency proceedings on individual (enforcement) proceedings and those on lawsuits pending [1641].

Under Article 18 RR, 'individual proceedings' are subject to the *lex concursus*, whereas 'pending lawsuits' are governed by the *lex fori* of the State where the lawsuits are pending.

Bearing in mind that said provision is (only) a conflict of law rule, which does not provide any indication as to the jurisdiction over the pending lawsuits (for the reasons explained above), yet the precise definition of the scope of Article 18 RR is of pivotal importance as in practice the scenario of pending lawsuit is extremely frequent in the context of insolvency proceedings and the application of that provisions determines a significant exception to the general applicability of the *lex concursus*.

Therefore, before focusing on the jurisdictional regime of pending lawsuit, it is necessary to use a few words to describe its scope of application.

The new formulation of Article 18 RR, reads

> « *The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat* » [1642].

The scope of application of Article 18 RR provides that three cumulative conditions must be fulfilled: *(i)* there must be a 'lawsuit', *(ii)* the lawsuit must concern an asset or a right 'which forms part of a debtor's insolvency estate' and *(iii)* the lawsuit must be 'pending'.

Starting from the latter requirement, Article 18 RR provides no indication on the moment in time determining when insolvency proceedings and a lawsuit in another Member State are considered to be 'pending' for the purposes of the application of the *lex fori processus* [1643]. Needless to say, the reference point as to insolvency proceedings should be the recognition of the judgement opening insolvency proceedings, because it is from that moment that it produces its effects. On the contrary, as to the lawsuit, lacking any clear indication, the moment in time when the courts of the other Member State must be considered as seised seems to be deferred to the *lex fori processus* [1644].

1641 See Virgós-Schmit Report, at [142].

1642 Although the former text of Article 15 RR seems not to have risen particular concerns (See B. HESS, P. OBERHAMMER and T. PFEIFFER, *op. cit.,* p. 318), its recast entailed some amendments of no minor importance. For instance, the Recast Regulation expressly includes in the scope of article 18 RR pending arbitration proceedings. The applicability of the *lex fori processus* to a pending arbitration, albeit never referred to the ECJ, was raised before English courts in *Syska & Anor v Vivendi Universal S.A. & Ors* [2009] EWCA Civ 677, where the Court of Appeal found that the expression lawsuit pending also applied to arbitration proceedings. See implicitly also the Italian Cass. 21 July 15200, n. 2015.

1643 Yet, it must be noted that, as to the territorial scope of the norm, the lawsuit must be pending in a Member State, thus excluding actions brought in non-EU States and in Denmark.

1644 See R. BORK e R. MANGANO, 'Under Article 18', *op. cit.*, at [4.119], C. PAULUS, 'under article 5', in *Europäische Insolvenzordung*, Frankfurt, 2013, p. 191. Some authors have submitted that the moment in time where the court of the other Member State is seised must be determined pursuant to the *lex concursus*. P. DE CESARI e G. MONTELLA, *op. cit.* p. 134.

Again, the issue of the legal transplant into the Recast Regulation of the uniform solutions provided by the Brussels Regime comes into play. As noted by the majority of scholars, it would be desirable to provide for a uniform and harmonised concept of 'pending' lawsuit, applying in this context Article 32 Brussels Ia, which would identify the relevant moment at the time when the document instituting the lawsuit, or an equivalent document is lodged with the court [1645].

As the scope of Article 18 RR seems to concern ordinary adversarial actions, it is submitted that the rules on *lis pendens* provides a suitable tool, as it deals with comparable legal situations [1646].

Moving to the second condition, it is worth observing that the new wording of Article 18 RR has dispelled the uncertainties that revolved around the former text of Article 15 EIR.

Some versions of Article 15 EIR specified that the pending lawsuit (for declaratory relief) had to concern an asset or a right « *of which the debtor has been divested* » [1647]. On the contrary, other linguistic versions referred more generally to the « *insolvency estate* » [1648].

The linguistic discrepancies of Article 15 EIR led scholars and national case-law to doubt as to whether it was then limited to actions towards a specific asset or a specific right existing at the moment of the divestment (*i.e.* property actions for the recovery of the asset or a right *in personam* concerning an asset) thus favouring a static conception of the estate, considered as the result of the crystallisation of the assets in the moment of the divestment [1649]. Otherwise, one could interpret Article 15 EIR as encompassing pending lawsuit concerning, more generally, the insolvency estate as a result of the opening of insolvency proceedings (*i.e.* the dynamic conception of the estate, which underlines the fact that, once acquired, various initiatives can be undertaken (by the trustee) to extend (or restrict) the debtor's asset, involving a plurality of subjects, such as creditors already satisfied, as well as parties to contracts entered into with the debtor, pending at the time of the opening of the

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1645 See, *inter alia*, I. QUEIROLO, S. DOMINELLI, *op. cit.*, p. 1252; B. WESSELS, *op. cit.*, at [10712]; G. CUNIBERTI, 'Règles de conflits de loi', in G. CUNIBERTI, P. NABET, M. RAIMON, *op. cit.*, p. 266. Article 18 should be interpreted or construed autonomously, without making a reference to a national legal system. See for instance Austria Supreme Court 17 March 2005 (8Ob131/04d); H. DUURSMA-KEPPLINGER, 'Under Art. 15, in H. DUURSMA-KEPPLINGER, D. DUURSMA, E. CHALUPSKY, *EuInsVo,* Berlin, 2002, at [15]; R. Dammann, 'Under Article 15', in K. PANNEN (ed.), *European Insolvency Regulation*, Berlin, 2007, at [8]; R. BORK and R. MANGANO, 'Under Article 18', *European cross-border insolvency law*, Oxford, 2016, at [4.119].

1646 See *supra*, Chapter III, Section 2, § II.2.4.

1647 For instance, the French version provided « *concérnant un bien ou un droit dont le debiteur est dessaisie* ». In the Italian version, « *relative a un bene o a un diritto del quale il debitore è spossessato* ».

1648 The versions in Spanish, Czech, Danish and German, in particular, used the expressions « *un bien o un derecho de la masa* », « *majetku nebo práva náležejícího do majetkové podstaty* », « *et aktiv eller en rettighed i massen* » and « *einen Gegenstand oder ein Recht der Masse* ».

1649 See for instance *Syska & Anor v Vivendi Universal S.A. & Ors* [2009] EWCA Civ 677. *Flightlease Ireland Ltd*, [2005] IEHC 274, where the High Court clearly stated « *Since the claim pending in France is for a money sum and does not relate to an asset or right of which the debtor has been divested, the exception clearly does not apply here* ». C.A. Paris, 15 June 2007, *SAS Frontrange Solutions Framce v. van der schee*, RG. n. 06/22256, which excluded from the scope of Article 15 EIR the French *instance en référé provision* (which is a summary procedure to quantify a claim against the debtor). Trib. Venezia, 6 December 2015, in *Riv. dir. internaz. Priv. e proc.* excluded the admissibility of a claim seeking the assessment of the infringement of a contract, on the ground that the law applicable to such an action was the *lex fori concursus*. The court however alludes to the possibility that the claimant may expressly reserve the right to enforce the declaratory relief against the debtor after the closure of insolvency proceedings.

procedure). Under that view, hence, also monetary claims would be encompassed in the scope of Article 15 EIR [1650].

As mentioned, those uncertainties do not arise under the new wording of Article 18 RR.

As to the interpretation of the former wording of Article 15 EIR, in the *Tarragó* judgement [1651] the ECJ made it plain that it relates in general to assets and rights of the estate, thus including also monetary claims arising out of a contract entered into between the debtor and a creditor.

The *Terragó* case allows to shift the attention to the notion of 'lawsuit', which is particularly relevant for present purposes. On that occasion, the ECJ - retracing its precedent in *ENEFI* - affirmed « *it must be held that enforcement proceedings do not fall within the scope of application of Article 15 of Regulation No 1346/2000* […] *actions for a declaration* [relief] *which merely determine the rights and obligations of the debtor, without involving their realisation* […] *do not risk undermining the principle of equal treatment of creditors and the collective resolution of insolvency proceedings* » [1652].

In the light of the foregoing, it must be acknowledged that it is established case-law that the notion of lawsuit must be related exclusively to actions seeking a declaratory relief [1653].

Several arguments in support of that are bolstered by the Court on the basis of both a systemic and a purposive interpretation of the Insolvency Regulation and of other European acts (which applies also to the RR).

First, the concept of lawsuits must be construed more narrowly than that of 'proceedings brought by individual creditors'. In this respect, it must be noted that Article 18 RR is not systematically independent in the scheme of the Recast Regulation, in that it must be read in conjunction with Article 7(2)(f) RR, stating - as said - that the *lex concursus* governs the effects of insolvency *vis-à-vis* proceedings brought by individual creditors, with the exception of pending lawsuits. The use of a 'save for' clause, would clearly indicate a stricter concept of the term lawsuit in Article 7(2)(f) RR which should be the same of 'lawsuit' in Article 18 RR [1654].

Assuming therefore the different breadth between the meaning of proceedings brought by individual creditors and lawsuit, the notion of proceedings brought by individual creditors must be equated to enforcement proceedings under Article 7(2)(f) RR, on the basis of the objectives of the Recast Regulation. As discussed the RR « *is guided by the principle that the requirement of equal treatment of creditors, which, mutatis mutandis, underpins all insolvency proceedings, precludes, in general, proceedings brought by individual*

1650 See *Flightlease Ireland Ltd*, [2005] IEHC 274.

1651 ECJ, 6 June 2018, Case C-250/17, *Virgílio Tarragó da Silveira contro Massa Insolvente da Espírito Santo Financial Group SA*, ECLI:EU:C:2018:398.

1652 *Tarragó*, at [33].

1653 See ECJ, 9 November 2016, Case C-212/15, *ENEFI Energiahatékonysági Nyrt v. Direcţia Generală Regională a Finanţelor Publice Braşov (DGRFP)*, ECLI:EU:C:2016:841;

1654 See *ENEFI,* at [32] See also the articulate opinion of Advocate General Bobek, delivered on 9 June 2016 (ECLI:EU:C:2016:427), at [66]. *Tarragó,* at [24].

creditors by means of enforcement proceedings, introduced and conducted while insolvency proceedings against the debtor are pending » [1655].

Therefore, the concept of lawsuits within the purposes of the Recast Regulation should be interpreted as referring exclusively to actions seeking a declaratory relief, since individual enforcement actions would be in any case precluded outside the Member State of insolvency proceedings.

That conclusion is further upheld by Article 23 RR (formerly Article 20 EIR), which, as already explained, operated as a 'safeguard' norm, providing that the creditor obtaining the satisfaction of his credit outside of insolvency proceedings (through enforcement or direct payment of the debtor) must return what he has obtained to the trustee [1656].

The very same interpretation was uttered by the Court in the *LBI* judgement, concerning the Directive 2001/24 on the reorganisation and winding up of credit institutions. Yet, it must be noticed that Recital 30 of that Directive explicitly distinguish between lawsuit and procedures on individual enforcement actions.

In the light of the foregoing, the scope of Article 18 RR must be construed as encompassing only individual action seeking a declaratory relief on the existence or the validity of a right pertaining to the debtor's estate as resulting after the opening of insolvency proceedings [1657]. The judgement creditor would then be able to enforce its claim in the insolvency procedure pending in the Member State of the COMI of the debtor and satisfy its claim under the insolvency liability regime.

Once determined its scope of application, it is worth questioning the rationale underpinning the exceptional application of the *lex fori processus* to the effects of the opening of insolvency proceedings in another Member State.

The Court traces the usefulness of Article 18 RR back to Recital 8 RR, *i.e.* to ensure the efficient and effective conduct of cross-border insolvency proceedings (and not the protection of the single creditor [1658]). It is expressly stated that it would infringe that objective

« *to oblige the court hearing the case, in relation to judicial proceedings concerning a monetary obligation, to apply in the course of proceedings a foreign law with the sole aim of determining the effects that the opening of insolvency proceedings in another Member State would have on that case. That would risk delaying the judgment of that court relating to the*

1655 *Tarragó*, at [31], *ENEFI*, at [33].

1656 *ENEFI*, at [33].

1657 For a questionable application of Article 15 EIR on an action for the payment of a sum of money (and not a mere declaratory relief) in the Netherlands against a debtor declared bankrupt in Belgium see HR 11 December 2009, LJN: BK0867; NJ 2010, 4 (Parc de Chodes v. HBU) where the Dutch Court suspended the proceedings on the basis of the *lex fori* (disregarding the *lex oncursus*).

1658 Article 18's ultimate goal is to guarantee procedural clarity and certainty, see R. DAMMANN, 'UNDER Article 15', in K. PANNEN (ed.), *European Insolvency Regulation*, Berlin, 2007, at [8]; M. MÜLLER, 'Under Article 18', in P. MANKOWSKI, M. MULLER, J. SCHMIT *EuInsVO 2015*, *cit.*, at [15].

determination and fixing the amount of any debt and, if applicable, would prevent the creditor from registering in due time his claim in the insolvency estate in those insolvency proceedings ».

The above affirmation on the part of the Court requires some observations.

Article 18 RR (and the ECJ as well) states apodictically that in respect of a pending lawsuit the *lex fori processus* should govern 'the effects of insolvency proceedings'. However, the broad reference to the effects of insolvency proceedings seems somewhat inappropriate, as Article 18 RR may only derogate to the general applicability of the *lex concursus* in relation to some (specific) procedural effects produced by the opening of the insolvency proceedings.

The Recast Regulation acknowledges the tendency of many (if not all) Member States to provide for a specific regime governing the effects that the opening of insolvency proceedings has on pending lawsuit.

The vast majority (if not all) Member State laws have a rule providing that when (national) insolvency proceedings are opened individual pending litigations must be stayed, or transferred before the insolvency court or to be continue before the ordinary court (by the trustee who substitute the divested debtor) with the proviso that the enforcement of the judgement handed down in those proceedings is precluded (outside of insolvency proceedings).

In that constellation, the European legislature assumes that it would be more efficient that the court of the Member State that are hearing the pending lawsuit applies its own *lex fori* to determine the procedural effects of the insolvency proceedings, irrespective of whether the *lex concursus* acknowledges or not the *vis attractiva concursus* for pending lawsuit. To do so, that court should identify national insolvency proceedings whose nature is closest to that of main insolvency proceedings opened in the Member State of the debtor's COMI [1659] and, on that basis, decide whether *(i)* to suspend the pending lawsuit or not; *(ii)* the capacity of the debtor to remain a party of the proceedings with respect to the transfer of this power to the main liquidator; *(iii)* the conditions to challenge the judgement rendered and the like [1660].

It bears noticing that the procedural aspects mentioned above must be distinguished from the law applicable to the merits (the existence and validity) of the subject matter of the action seeking the declaratory relief, as the question of the applicable law will always be governed by the private international law rules of law applicable to the nature of the nature of the claim (*i.e.* Rome I or Rome II, which could also indicate the applicability of a different law than that of the Member State of the pending lawsuit).

Once the pending lawsuit is terminated, the judgement handed down shall be recognised in the Member State of the main insolvency procedure, where the judgement creditor would seek the enforcement of the judgement to the effects of the *lex concursus.*

[1659] See Virgós-Schmit Report at [92].

[1660] *Mazur Media Ltd v Mazur Media GmbH* [2004] EWHC 1566 (Ch), Austria Supreme Court 17 March 2005 (8Ob131/04d) and Austria Supreme Court 24 January 2006 (10Ob80/05w).

In this respect, then, the insolvency liability order of the State of the opening of insolvency proceedings would apply to the judgement rendered in another Member State, whose *res judicata* effects would pertain to mere existence and validity of the claim. All the effects (substantial and procedural) relating to the enforcement of the credit assessed in the judgement (*i.e.* the ranking of the credit, the capacity to lodge the claim, right to participate to the distribution of the assets, and the like), will be necessarily governed by the *lex concursus* when the enforcement of such a judgement is sought *vis-à-vis* the insolvency procedure.

Therefore, when the Court states that the application of the *lex concursus* by the courts of the Member States where the lawsuit is pending would 'delay the judgement fixing the amount of the debt', one should neither understand that that fixing is subject (automatically) to the *lex fori processus* (as it is governed by the European private international law rules) nor that that amount is enforceable *sic et simpliciter* against the insolvency estate, as it will be subject to the *lex concursus*. The *res judicata* effects of the recognised declaratory relief, where it has assessed the *quantum* of the claim assessed including the interest accrued, would not be enforceable against the insolvency estate as it would be subject to the effects of the *lex concursus* regarding, for example the stay of the accrual of the interests as to the opening of insolvency proceedings. What would be precluded to the insolvency forum to contest is ultimately the profile of the existence and the validity of the claim (as in any case, even when assessed before the insolvency forum, it is governed by the law applicable to the claim).

Against that background, it is now possible to move back to the jurisdiction on pending lawsuit.

As stated, Article 18 RR does not determine the jurisdiction over pending lawsuit, but only the procedural law applicable to it [1661].

That means that in principle all the above considerations should have no bearing on the international jurisdiction of the pending lawsuit. Even with respect to pending lawsuits, the decisive element to determine international jurisdiction will be the Gourdain Formula that identifies, according to a uniform test, whether the pending lawsuit is an Annex Action (and therefore whether it should be attracted to the insolvency forum, which, however, in this case will be forced to apply the *lex fori processus*) or whether to classify the action as civil and commercial.

However, reconciling the autonomous characterisation of Annex Actions under Article 6 RR with the functioning of Article 18 RR may lead to some inconsistencies.

Where insolvency proceedings are opened in the course of a pending lawsuit in another Member State against the claimant (*i.e.* the creditor in the individual action, but the debtor in insolvency

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[1661] See, among others, I. QUEIROLO, S. DOMINELLI, 'Gli effetti della procedura principale di insolvenza straniera sui procedimenti pendenti nel nuovo Reg. europeo 2015/848', in *Fallimento*, 2018, p. 1253. I tend to agree with that opinion and therefore, it is not possible to wholly share the suggestion put forward by some authors that the rationale underpinning article 18 RR would be that of avoiding the rule of the *vis attractiva concursus* under the law of the Member State opening insolvency proceeding, as the provision at stake has no (direct) effect on the allocation of the jurisdiction at the European level. G. MOSS, I. FLETCHER, S. ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, 361.

proceedings) the action should not be regarded as an Annex Action [1662]. It was already explained elsewhere in the course of this work, at it will be further addressed afterwards, that when the trustee is a party to an action on behalf of the debtor for claims that pre-existed in his legal sphere, that action is not an Annex Action [1663].

This applies not only to actions seeking the declaratory relief of a monetary claim but to any action whose underlying right or obligation pre-existed to the opening of insolvency proceedings (for instance an action for the early termination of a contract or a tortious action, or even an action for the liability of directors when brought by the company).

Although it is submitted the application of Article 18 RR may be *per se* questioned in such a scenario [1664], its application should raise no particular problems, because it is assumed that the (insolvency) *lex fori processus* in all the Member States would lead to the mere (processual) substitution of the trustee, who would be acting as the claimant on behalf of the divested debtor that initially commenced the action. The jurisdiction of the Member State seised to hear the lawsuit would remain unchanged and continue to be governed by the Brussels Ia Regulation.

On the contrary, when insolvency proceedings are opened *vis-à-vis* the respondent (*i.e.* the debtor to both the individual proceedings and the insolvency proceedings) things are more complicated.

The following hypothetical serves as an illustration.

The debtor, a limited liability company based in Germany, is sued by his supplier in court proceedings before the court of Milan, which was referred to as the court having exclusive jurisdiction under a choice-of-forum agreement in the supply agreement entered into between the parties. The claimant seeks the declaratory relief concerning the payment due for the supply of some goods left unpaid by the debtor.

In the course of the proceedings, insolvency proceedings (*Insolvenzordnung*) are opened *vis-à-vis* the German company. Under German insolvency law, an action concerning a claim that was pending at the time of the commencement of the insolvency procedure must be resumed by the trustee and continues in the ordinary venues (§ 180 InsO). Instead, pursuant to Article 43 l. fall., the action is automatically stayed and where the action seeks the declaration of a monetary claim against the debtor, the proceedings cannot continue before the ordinary court and it is 'transferred' before the insolvency court (Article 43 l. fall. read together with to Article 52 l. fall., concerning the assessment of the insolvency credits [1665]).

Pursuant to 18 RR, the court of Milan should, first, identify the national insolvency proceedings which is more similar to the *Insolvenzordnung*, which is the *Fallimento* and, second, apply the effect that,

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1662 See *infra* in this Chapter, § V.4.4.5.

1663 See *supra* Chapter III, Section 2, *II.3.4*. See for ECJ case law, in particular the *Nickel&Goeldner* case.

1664 Since the action is a civil and commercial action, there would be no reason to apply the Recast Regulation to it. Moreover, the interpretation of article 18 RR seems to be directed to actions brought *against* the insolvency estate and not merely *concerning* it.

1665 See *supra* Chapter I, at § I.2.1 and this Chapter, at § V.4.1.

according to the Italian *lex concursus* (*i.e.* the *lex fori processus*) the opening of insolvency proceedings produces on pending lawsuit. Therefore, it must apply Article 43 l. fall. and declare that the claim cannot continue.

However, in principle such a rule does not establish the jurisdiction over the lawsuit. It was submitted that the characterisation of declaratory relief concerning monetary claims should be characterised as Annex Actions. In this case, German courts (as the state opening insolvency proceedings) would be vested with the exclusive jurisdiction to hear the case, under Article 6 RR and the creditor should be forced to lodge his claim with the insolvency proceedings.

Nevertheless, it was also explained that according to a part of the case-law, actions for declaratory relief may be considered as ordinary and civil actions. In our example, then, the application of Article 18 RR would lead to a paradox. First of all, it is unclear whether Article 18 should apply at all. The fact that an autonomous characterisation leads to the conclusion that the action should be considered as not sufficiently close with insolvency proceedings entails that it would (continue) to be subject to the Brussels Ia Regulation, also with regards to the procedural rules of the *lex fori processus*. Also, in this scenario the comparison between the German and the Italian insolvency proceedings, with a view to determine the effects of the more similar insolvency proceedings over the pending lawsuit would have no more sense. But even assuming that Article 18 RR applies and that the Italian court would still have to declare that the action cannot continue (pursuant to Article 43 l. fall.), it seems a paradox to consider that the claimant should initiate a new proceedings elsewhere (the German court would not be vested with the jurisdiction to hear the action under Article 6 RR because it is an ordinary civil and commercial action governed by the Brussels Ia Regulation).

The opposite scenario may then be considered.

Pursuant to the choice-of-forum clause, the action is commenced by a German supplier before the court of Munich against an Italian debtor. Meanwhile, insolvency proceedings are opened in Italy.

If the action for declaratory relief is considered as an Annex Action, according to the procedural rules of the German (insolvency) *lex fori processus* (namely § 180 InsO) the lawsuit would continue before the court of Munich against the trustee (as a processual substitute on behalf of the devested debtor) before the court of Munich.

If, on the contrary, the action is considered as an ordinary civil and commercial action, again, the question of the applicability of Article 18 RR remains, but the application of § 180 InsO leads to an acceptable outcome, because the court chosen by the parties under the Brussels 1 Regulation would continue to hear the case.

That above example confirms that Article 18 RR is a rule governing solely the (procedural) applicable law and does not constitute a rule on the jurisdiction, which continues to be governed by Article 6 RR.

Moreover, it confirms that, as a rule of thumb, actions for declaratory relief must be considered Annex Actions, which should be attracted to the jurisdiction of the Member State opening insolvency

proceedings. Otherwise, should one consider them as ordinary civil and commercial proceedings, Article 18 RR would ultimately lack of any usefulness because they would continue to be governed by the Brussels Ia Regulation and there would be no need to provide for a derogation from the general applicability of the *lex fori concursus*.

V.4.2.4. Actions brought by secured creditors concerning the right of segregation of assets from the debtor's estate and the right for separate satisfaction

At this point of the reasoning it is necessary to discuss the jurisdiction over actions concerning creditors holding a right *in rem* or an equivalent right *in personam* (*i.e.* a right serving the purpose of securing a credit, either by means of a transaction that formally creates a limited real right in favour of the creditor or in cases where one party retains 'title' to the collateral but does so to secure a monetary claim towards the other party).

The topic raises particularly delicate issues, and requires some preliminary clarifications concerning the applicable law to *rights in rem* under the Recast Regulation.

At the outset it bears recalling that the very reason underpinning security rights (in all legal systems) is to protect the holder's trust in the satisfaction of his credit out of the collateral's value, granting a privilege in the distribution process (both in the context of ordinary enforcement proceedings and in insolvency proceedings). In general, securities are accessory rights with regard to the claim that they guarantee: they do not grant the use of the economic value of the asset until the enforcement of the claim of which they guarantee the payment; their existence, transfer, extinction depends upon the claim of which they guarantee the payment.

As the Virgós-Schmit Report states, security rights « *insulate their holders against the risk of insolvency of the debtor and the interference of third parties. They allow credit to be obtained under conditions that would not be possible without this type of guarantee* » (1666). Therefore, those rights exist not because of, but rather in spite of insolvency proceedings *vis-à-vis* the debtor and they ultimately derogate from the rule of the *pari passu* principle (1667).

Secured creditors are (supposed to be) super-priority creditors in the context (also) of insolvency proceedings. Security must stand up on insolvency which is when it is needed most, as, to use the words of an eminent scholar, « *the end is more important than the beginning* ». (1668)

Considering the pivotal function with regard to credit and the mobilisation of wealth of security rights, national legislations can be classified on the basis of their approach towards security rights:

1666 Virgós-Schmit Report, at [97].

1667 C. WILLEMER, *Vis attractiva concursus*, *cit.*, p. 360.

1668 P. R. WOOD, 'Principles of international insolvencies (Part II)', in *International Insolvency Review,* 1995, p. 126.

some countries are deemed as 'very sympathetic' towards secured creditors [1669] some others are rather hostile [1670].

The wide discrepancies across the Member States towards secured creditors is reflected in the different rules governing the enforcement and realisation of security interests in the context of insolvency proceedings. For instance, some Member States provide that the automatic stay to individual enforcement actions should encompass not only unsecured creditors, but also secured ones, thus precluding to latter to enforce their right outside the insolvency procedure [1671]. Under other systems, on the contrary, there is no automatic stay for secured rights [1672] or the stay is only temporary [1673].

Generally, Member States provide that the trustee is vested with the power to sell (also) the assets concerned by the secured right, upon authorisation of the insolvency court [1674], of other bodies of the procedure (such as the creditor's committee) or the secured creditor directly. In this case, the secured creditors has a right of *separate* satisfaction out of the proceeds of the liquidation, which is safeguarded in many systems through the practical obligation incumbent on the trustee to keep the consideration of the sale of secured assets severed from the proceeds of unsecured assets (in a different bank account) [1675].

However, in other cases the trustee cannot dispose of the secured assets, and the creditor is granted with the power to enforce autonomously his right out of insolvency proceedings, as if his position was not affected by the opening of insolvency proceedings [1676]. This entails that (where the debtor retains the ownership of the secured asset) the secured creditor is vested with a right of segregation (or retention) of the asset, which entitles him to liquidate it autonomously [1677]. On the contrary, where the creditor has the control of the secured asset (this occurs, for instance for secured rights where property or the possession of the asset is transferred for security purposes), to sell

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1669 Such as English-based common law countries and Sweden, Finland and Norway.

1670 Italy and France. The latter country, for instance consent the overriding of security rights by priority unsecured creditors.

1671 The Italian system, for example, provides for the bar of enforcement actions on the part of all creditors (with the limited exception of the (particular) secured creditors under articles 2756 and 2761 c.c. who are granted with a right of retention over the asset if at the moment of the opening of insolvency proceedings they still have possession of it).

1672 See for instance Austria and Finland.

1673 See for instance the Netherlands.

1674 See in France article L. 622-7 Cod. Comm., in Italy, see article 107 l. fall.

1675 See, for the Italian system, article 111-*ter* l.fall. requiring the necessary creation of two different pools. For France, see article L. 622-8 Cod. Comm., providing that the amount necessary to satisfy the secured creditor(s) must be deposited on a special account at the *Caisse des dépôts et consignations* until the end of insolvency proceedings. For Germany see § 48 InsO.

1676 See in the Netherlands article 57(1) fw.

1677 See, for instance, § 173 InsO. Under the Italian system see article 53 l. fall. providing that the pledgee (once that he has lodged his claim and his secured credit is verified and accepted by the insolvency court) may ask the insolvency court to segregate the pledged asset from the insolvency estate, to sell it autonomously.

autonomously the asset. In the latter case, however, it is also possible that the trustee may 'pay-off' the secured creditor in order to regain control over the secured asset [1678].

Acknowledging the impossibility to provide for a uniform treatment of the rules concerning secured rights, (which represented one of the main obstacles to the implementation of a fully universal proceedings throughout all the EU [1679]), the system set by the Recast Regulation grants to foreign creditors holding a right *in rem* or a secured interest over an asset of the debtor a different position compared to those of unsecured and other privileged creditors.

Such a different position is established by Articles 8 and 10 RR. Article 8(1) RR states that « *The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings* ».

Moreover, Article 8(3) RR provides that « *The right, recorded in a public register and enforceable against third parties* […] *shall be considered to be a right in rem* ».

Article 10 RR establishes also a specific provision governing retention of title, which may be regarded *lato sensu* as a security right. Indeed, reservation of title clauses are aimed at securing the creditor's rights. Yet, security in this case does not consist in the ownership of the good itself, but in the set-up of a mechanism whereby the 'ordinary' consequences of the contract of sale as to the transfer of ownership from the seller to the buyer only take place when the price of the goods has been paid. Retention of title, in other words, is a contractual device having a bearing on the transfer of a right *in rem* [1680].

The wording of Article 8 RR is not clear and the exact way in which this provision operates is far from clear. First of all, the Recast Regulation does not provide for a definition of rights '*in rem*'.

1678 See in the Netherlands article 58(2) fw.

1679 See Recital 22 RR, « *This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States* ».

1680 See Z. CRESPI REGHIZZI, *Lex rei sitae e disciplina delle garanzie mobiliari nel diritto internazionale privato*, Milan, 2007, p. 138 ff. With regard to reservation of title, the true usefulness of Article 10 RR seems to rest on the second paragraph, stating that « *The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings* ». Indeed, as noted by some scholars, the first paragraph of said article - providing that « *the opening of insolvency proceedings against the purchaser of an asset shall not affect sellers' rights that are based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of the opening of proceedings* » - seems rather superfluous, as the right to demand the restitution of an asset on the ground of a right *in rem* (such as property, which is the right in *rem* par excellence) is already encompassed under Article 8(2)(c) RR and the protection granted to the purchaser is the same of Article 8(1) RR (See G. CUNIBERTI, 'Règles Matérielles : protection des droits réels', in G. CUNIBERTI, P. NABET. M. RAIMON, *op. cit.*, p. 286.). Therefore, the following observation concerning Article 8 RR apply also to the protection of the purchaser party to a contract including a reservation of title clause under Article 10(1) RR.

It is debated whether the notion of rights '*in rem*' should be considered as an autonomous EU notion [1681] or whether it is deferred to the national law of the Member States. The preamble to the Regulation provides that the basis, validity and extent of rights *in rem* should be determined, normally [1682], according to the *lex situs*, as the law generally pointed by the normal conflict of law rules of the forum [1683]. In this respect the Virgós-Schmit Report states explicitly that the characterisation of a right as a right *in rem* under the Recast Regulation follows a *lege causae* method, since the meaning of right *in rem* must be sought in the national law which, according to the normal pre-insolvency conflict-of-law rules of the seised court, governs the rights *in rem* (normally, the *lex rei sitae*) [1684].

In the light of such a specification, the majority of scholars considers that the concept of right *in rem* is not an autonomous definition, but it is a matter whose definition is left to national laws [1685].

The ECJ has partially confirmed this view in the *SCI Home* case, by establishing that « *the issue of the qualification of the right concerned as a right 'in rem' for the purposes of applying Article 5(1) of that regulation is to be examined having regard to national law* » [1686]. The domestic characterisation of a right as a right *in rem*, therefore, is a condition precedent for the application of Article 8 RR.

Nevertheless, the Court stresses that the EU legislature has stablished some (autonomous) boundaries to the relevance of national rights *in rem* for the purposes of the Recast Regulation. That is because, the Recast Regulation acknowledges that the recent tendency of many national laws seems that of curtailing the scope of the *pari passu* principle (and therefore the collectiveness of national insolvency proceedings) by establishing a number of priority rights to different categories of creditors

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1681 In order to avoid a 'variable geometry' of the notion of rights *in rem*, which is the result of combining the national law of the Member States with the examples provided by article 8(2) RR, several scholars have argued that the notion should be given an autonomous interpretation. See C. PAULUS, 'under article 5', in *Europäische Insolvenzordung*, Frankfurt, 2013, at [6]; R. BORK and R. MANGANO, 'under Article 8', in *European cross-border insolvency law*, Oxford, 2016, at [4.51]. Instead, the fact that Article 8(3) RR provides for an autonomous notion is uncontested by the legal doctrine. See R. DAMMANN, 'Clarification de la notion de droit réel de l'article 5 du règlement CE 1346/2000', in *Dalloz*, 2017, p. 852. K. PANNEN, 'under Article 5', in K. PANNEN, *op. cit.,* at [29].

1682 I specify normally because, the national case law demonstrates that generally the national conflict of law rules that comes into play in the characterisation of rights *in rem* points to the *lex rei sitae*. However, as correctly pointed out by scholars, with reference to the reservation of title and other security instruments based on the transfer of properties it may also be understood that *lex rei sitae* would govern only the proprietary profile of the mechanism entered into between the parties, but not the security as such. Therefore, it should not be excluded that the relevant national conflict of law rules would point also to the *lex contractus*. See on this point Z. CRESPI REGHIZZI, 'Reservation of title in insolvency proceedings: some remarks in light of the German Graphics case'*, op.cit.*, p. 674.

1683 Recital 68 RR reads «*The basis, validity and extent of rights in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings* ».

1684 See Virgós-Schmit, at [100]. See also M. BODGAN, 'under Article 5 EIR', in G. MOSS, I. FLETCHER, S ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, p. 347, fn. 322.

1685 J-L. VALLENS, 'Vers un droit matériel europeén en matière de faillite', in *LPA*, 2003, n. 248, p. 47. F. MÉLIN, *Le règlement Communautaire du 29 mai 2000 relatif auc procedures d'insolvabilité*, Bruylant, 2008, at [199]; K. PANNEN, 'Under Article 5', in K. PANNEN, *op. cit.*, at [7], H.C. DUURSMA-KEPPLINGER, D. DUURSMA and E. CHALUPSKY, *Europäische Insolvenzording, Kommentar*, Vienna and New York, 2002, at [51]; B. WESSELS, *op.cit.*, at [10641].

1686 ECJ, 26 October 2016, Case C-195/15, *SCI Senior Home in administration, v. Gemeinde Wedemark, Hannoversche Volksbank eG*, ECLI:EU:C:2016:804, at [19].

[1687]. In the light of such tendency, and given the strong protection that is provided by Article 8 (and 10 RR) to secured rights, Article 8(2) RR explains, through a number of examples, the (European) notion of 'in rem' [1688] and curtails the scope of the protection afforded by those provisions to the proviso that privileges, guarantees or other secured rights provided under the national law of the Member States to an insolvent debtor's creditors meet certain criteria.

As explained by the ECJ [1689] (as well as the Virgós-Schmit Report), national secured rights, are encompassed in the scope of Article 8 RR (formerly Article 5 EIR) if they fulfil three conditions: *(i)* the right *in rem* must come into existence before the before the opening of insolvency proceedings; *(ii)* the right have a direct and immediate relationship with the asset they cover, which remains linked to the satisfaction of the underlying claim, without depending on the asset belonging to a person's estate or on the relationship between the holder of the right *in rem* and another person; *(iii)* the right has an *erga omnes* effect, in that the holder of the right *in rem* must be able to enforce it against anyone who breaches or harms his right without his consent, the right can resist the alienation of the asset to a third party and that the right can thus resist individual enforcement by third parties and in collective insolvency proceedings (by its separation or individual satisfaction). Moreover, the ECJ has recently clarified that Article 8 RR does not only cover rights *in rem* created in the context of commercial or credit (contractual) transactions, but it also protects all other holders of securities created by operation of law (such as tax authorities and the social security authorities of Member State) [1690]. Therefore, the Recast Regulation pushes towards an autonomous definition of rights *in rem*, by restricting, for the purposes of the Recast Regulation, the national notion of rights '*in rem*'. It must be shared the affirmation of those authors that acknowledge that interpreters are faced with a 'hybrid' notion, which is placed at the crossline between an autonomous notion of European law and national laws [1691].

In the light of the above, it seems fair to maintain that only the national rights *in rem* (or equivalent rights *in personam* securing the credit) that fulfil the conditions set forth by Article 8(2) RR - together

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1687 On this topic with regard to the Italian system see M. FABIANI, 'La par condicio creditorum al tempo del codice della crisi', in *Questione giustizia*, 2/2019. With reference to the U.S. see L. PONOROFF, 'Bankruptcy Preferences: Recalcitrant Passengers Aboard the Fight From Creditor Equality', in *American Bankruptcy Law Journal*, 2016, 90, pp. 329-398.

1688 Article 8(2) and (3) RR reads « *The rights referred to in paragraph 1 shall, in particular, mean: the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage; the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee; the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; a right in rem to the beneficial use of assets. The right, recorded in a public register and enforceable against third parties, based on which a right in rem within meaning of paragraph 1 may be obtained shall be considered to be a right in rem* ».

1689 See *SCI Home*, at [18]. In the same sense see also ECJ, 16 April 2015, Case C-557/13, *Hermann Lutz v.Elke Bäuerle*, ECLI:EU:C:2015:227.

1690 *SCI Home*, at [29]-[32].

1691 In the light of the eclectic method provided by Article 8(2) RR, some Italian authors consider the notion of rights in rem as a hybrid notion between an autonomous EU notion and a national one. See P. DE CESARI and G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa*, *op. cit.*, pp. 136-137.

with rights recorded into a public register as provided by Article 8(3) RR - can benefit of the special protection accorded by Article 8(1) RR. The treatment of all other (privileged) creditors to whom national laws grant other 'reinforced' rights to claim preferential payment, are instead governed by the *lex concursus* under Article 7(2)(i) RR [1692].

For present purposes it is not necessary to analyse the numerous and complex issues of applicable law raised by the provisions governing the rights in *rem* under the system of the Recast Regulation. Suffice here to recall that a delicate profile concerning Article 8 RR is the location of the asset concerned by the right *in rem*, which, for obvious reasons, is determinative for the operation of the rule under discussion and was only partially clarified by the addition of new definitions under Article 2(9) RR [1693].

What needs to be addressed here is the type of protection that is accorded to secured creditors under Articles 8 and 10 RR, because the analysis of that protection is functional to make a distinction between the jurisdiction of actions concerning security rights over assets located in a Member State different that that opening insolvency proceedings and the jurisdiction for actions concerning rights *in rem* over assets located in the Member State of the COMI.

Turning then to the nature of the rule established by Article 8 RR, by arguing with the wording 'shall not affect' [1694], the majority of scholars interprets said provision as a (negative) substantive uniform rule [1695] (and not a mere conflict-of-law rule [1696]) restricting the universal effects that the judgement opening the main insolvency procedure would *in thesi* produce upon rights *in rem* concerning the debtor's assets located in the territory another Member State [1697].

1692 See G. MOSS, I. FLETCHER, S ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, p. 173. R. DAMMANN, 'Clarification de la notion de droit réel de l'article 5 du règlement CE 1346/2000', in *Dalloz*, 2017, p. 852.

1693 On the localisation of assets for the purposes of article 8 RR see, among others, B. LAUKEMANN, 'Regulatory copy and paste: The allocation of assets in cross-border insolvencies – methodological perspectives from the Nortel decision', in Journal of Private International Law, 2016 and R. DAMMANN, 'Clarification de la notion de droit réel de l'article 5 du règlement CE 1346/2000', in *Dalloz*, 2017.

1694 As noted by A. PIEKENBROCK 'Applicable Law - Articles 5-8 EIR' in B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, p. 259, the use of the expression 'shall not affect', differs widely from thy typical wording of a choice of law rule, which use the terms 'shall be governed by the law of' and 'shall be determined by the law of'.

1695 See, among others, S. REINHART, 'Under Article 5' in H-P. KIRCHHOF, H-J. LWOWSKI, R. STÜRNER, *Münchener Kommentar zur Insolvenzordnung*, Munich, 2003, at [13], T. INGELMANN, 'Under Article 5', in K. PANNEN (ed.), *European Insolvency Regulation*, Berlin, 2007, p. 252. H. EIDENMÜLLER, 'Secured creditors in insolvency proceedings', in H. EIDENMÜLLER and E. M. KIENNINGER, *The future of secured credit in Europe*, 2008, p. 271 and 281. For national case-law considering article 5 EIR as a substantive law rule see Court of Malta, 30 December 2011, n. 803/11 (application n. 1136/2011) *Avukat Louis Pullicion v. Il-Bastiment M.V. Beluga.*

1696 See O. LIERSCH, 'Sicherungsrechte im Internationale Insolvenzrecht', in *NZI*, 2002, p. 17.

However, the case-law reveals some inconsistencies. For instance in the mentioned Court of Appeal Antwerp, 23 August 2004, in *TBBR*, 2006, p. 558 (*Stella Europe SA v. Apex International NV*) the Belgian Court of Appeal considered the effects that the French *redressement judiciaire* produces on the 'gage commercial' in order to determine the effects that an equivalent Belgian insolvency procedure would have produced on the enforcement of the secured right. Such an approach clearly reveals that the Court of Appeal did not consider Article 5 EIR or, if it considered it, it deemed it as a simple conflict-of-law rule.

1697 See, among others, G. MOSS, I. FLETCHER, S ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, p. 176.

Under this view, Article 8 RR would not establish that secured creditors holding a right *in rem* are not affected by the opening of insolvency proceedings in the Member State of the COMI more than they would be by the opening of national insolvency proceedings (as would be the case if Article 8 RR was interpreted as a conflict-of-law rule(1698)). The protection accorded to rights *in rem* is stronger than that, as the provision under discussion establishes that the proprietor of the right *in rem* is completely shielded from the opening of insolvency proceedings and is able to continue to assert his right to segregation or separate settlement of the collateral security, as if insolvency proceedings (in the COMI Member State) was not opened (1699).

The overprotection offered by the current text of Article 8 RR (harshly criticised by those scholars supporting the interpretation of Article 8 RR as a simple conflict-of-law rule) can only be understood if one realises that the main aim of this text is to facilitate the administration of the insolvency proceedings.

The protection of security holders is not absolute. In fact, where secondary proceedings are opened in the Member State where the asset is located, the right *in rem* would be subject to the restrictions provided by the *lex concursus* of that Member State (1700).

However, it must be recalled that the opening of secondary proceedings requires the presence of an establishment (as defined by the ECJ case-law) in the territory of another Member State, the mere presence of assets not being sufficient (1701). Therefore, as a rule of thumb, where secondary insolvency proceedings cannot be opened, from the perspective of the secured creditor, the opening of insolvency proceedings represents a neutral event which has no bearings over his right, the satisfaction of which he could continue to enforce pursuant (again, generally (1702)) to the *lex rei sitae*, as the enforcement would be sought where the asset is located (*i.e.* the other member State where the asset is located). The only effect that is produced by the opening of insolvency proceedings would then be a change in the person against whom the right *in rem* may be enforced (*i.e.* the trustee acting as a substitute of the divested debtor).

1698 Nonetheless, rather confusingly, the Virgós-Schmit Report seems to allude so, at [97].

1699 See also the opinion of the Advocate General Szpunar, delivered on 26 May 2016 in the context of the *SCI Home* judgement, ECLI:EU:C:2016:369, at [28], where he states that under Article 5 EIR « *rights in rem in respect of assets situated in other Member States are not affected, which amounts, in principle, to the exclusion of such rights from the effects of insolvency proceedings* ».

1700 This leads in practice that where the conditions to open secondary proceedings in another Member State are met, often the trustee appointed in main insolvency proceedings immediately files for the opening of secondary proceedings in order to prevent the enforcement of rights in rem on assets situated in the Member State of the establishment.

1701 See supra Chapter II, § II.1.3.

1702 The enforcement of security rights *in rem*, the distribution of proceeds and the opposability of the rights *in rem* to third parties (including insolvency proceedings) seems also to be matters to be determined under the law applicable according to the pre-insolvency conflict of law rules of the seised court, which should generally point to either the law of the place where the contract is entered into, or the *lex contractus* or the *lex rei sitae*. See R. DAMMANN, 'Clarification de la notion de droit réel de l'article 5 du règlement CE 1346/2000', in *Dalloz*, 2017, p. 852. J. SCHMIDT, 'under Article 8', in P. MANKOWSKI, M. F. MÜLLER et J. SCHMIDT, *EuInsVO 2015*, Munich, 2016, at [27].

This means that pursuant to the conditions set forth by (presumably) the *lex rei sitae* (but apparently not pursuant to the insolvency law of the Member State where the asset is located), the creditor can obtain, *inter alia*, an order for the compulsory sale of the asset covered by the right *in rem* or sell autonomously the asset in order to be satisfied by the consideration of the sale [1703]. Or, should the *lex sitae* allows so, the creditors can retain the ownership of the asset, where the mechanism entered into with the debtor provided the transfer to the creditor of the property of the asset (for security purposes).

Incidentally it may be noted that the implementation of such principle raises a number of practical issues, which have not yet found an answer. For instance, it is not clear whether the creditor, who is entitled by the *lex rei sitae* to sell the asset outside of insolvency proceedings should inform the trustee of the sale. Also, given that that rights *in rem* are accessory rights with regard to the claim that they guarantee, Recital 68 RR establishes that any surplus on the sale of an asset covered by rights *in rem* should be paid to the trustee in the main insolvency proceedings. However, it is not clear upon whom falls such an obligation. Also, it is still dubious whether any adjustment, reduction or even discharge of the secured claim underlying the security which takes place in the context of insolvency proceedings 'affects' (and if yes, how) the accessory right *in rem* shielded by Article 8 RR.

Also, it must be recalled that the right of the creditor over the asset must be theoretically be kept separated from the ownership of the debtor over that asset [1704]. As correctly stated by the Virgós-Schmit Report, Article 8 RR states that the proceedings shall not affect *rights in rem* in respect of assets located in other Member States and not that the proceedings shall not affect *assets* located in another State. Pursuant to Article 7(2)(b) RR the assets forming part of the estate are determined in accordance to the *lex concursus*. Therefore, it is not excluded that, where, pursuant to the *lex concursus* [1705], a right covered by a right *in rem* forms part of the estate, the trustee appointed in the main proceedings can decide to pay-off the claim guaranteed by the right *in rem* to the creditor, thus satisfying the secured creditor and gaining control of the asset, in order to avoid the loss in value that certain assets could suffer when they are realized separately.

The (rather confusing) scenario described above pertains only the debtor's assets located in a Member State different than that opening insolvency proceedings.

On the contrary, (national) rights *in rem* (as defined by Article 8 RR) covering assets located in the territory of the Member State opening insolvency proceedings and all other secured and preferential

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1703 This is the case of England, where some securities may be enforced without the assistance of the court by appointing a receiver. However, it must be noted that many legal systems still impose realisation of the value of the collateral through public officials.

1704 B. WESSELS, 'under Article 5 EIR', in G. MOSS, I. FLETCHER, S. ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, p. 348.

1705 As noted by G. MOSS, I. FLETCHER, S. ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, p. 163 it is the *lex concursus* that determines whether *(i)* the secured assets are excluded from the estate as a result of the existence of the security right, *(ii)* security rights form part of the estate and they will be subject to the *pari passu* principle, *(iii)* although forming part of the estate, they nevertheless remain subject to the security right.

rights which do not fall within the scope of Article 8 RR, are governed by the (national) effects of insolvency proceedings set forth by the *lex concursus*.

It is submitted that such a distinction, albeit pertaining to the law applicable to secured creditors' rights, is fundamental to establish the jurisdiction over actions concerning secured creditors.

Against this background, indeed, based on the factual distinction between assets located in the member State opening insolvency proceedings or in another Member State, two hypothetical situations can be distinguished to define the jurisdiction over secured creditors' claims. (a) actions concerning security rights on assets located in another Member State and (b) actions concerning security rights on assets located in the Member State opening insolvency proceedings.

V.4.2.4.1. Actions regarding rights *in rem* over assets located in another Member State different than that opening insolvency proceedings.

The sole case addressing explicitly the question of the jurisdiction over a right *in rem* located in another Member State is the *ERSTE Bank Hungary* judgement.

In that case, the claimant seised the Hungarian courts seeking a declaratory relief concerning the existence of his security right over a security deposit located in Hungary owned by the debtor, against whom insolvency proceedings were opened in Austria.

Although the question of jurisdiction was not directly raised by the parties, the Advocate General correctly stressed that the referring court had erroneously assumed his jurisdiction on the basis of Article 5(1) EIR, which however does not determine the court's jurisdiction. The Advocate General stated that said provision does not deal with the conflict of jurisdiction between courts which may arise as a result of the insolvency proceedings. He stated that « *The rule set out in Article 5(1) constitutes a conflict-of-laws rule in the form of an exception to the general principle, laid down in Article 4(1) of the Regulation, that the law of the Member State in which the insolvency proceedings were opened is to apply* ». Therefore, the Advocate General continued, « *it is thus manifestly clear that Article 5(1) of the Regulation is of no use for the purpose of determining whether the Hungarian courts called to rule on ERSTE Bank's action have international jurisdiction* » [1706].

On the basis of this (only partially) correct assumption, the Advocate General concluded that the action brought by the secured creditor was, for jurisdictional purposes, an Annex Action, because « *it relates to a portion of the assets of* [the insolvent debtor] *affected by the decision opening the insolvency proceedings. For that reason, that action follows directly from the insolvency proceedings opened against BCL Trading and is closely connected to those proceedings* » [1707].

It is submitted that the Advocate General has equivocated a double profile in the case under discussion. The first inaccuracy in the Advocate General's reasoning (but also the decision of the

[1706] Opinion of the Advocate General, delivered on 26 January 2012, ECLI:EU:C:2012:37, at [36].

[1707] *Ibid.,* at [36].

Court is ambiguous on this point [1708]) lies with the qualification of Article 8 RR (at that time Article 5 EIR) as a typical conflict-of-law rule. As discussed, that provision seems to lay down a direct and autonomous substantive rule [1709].

The second profile of the reasoning followed by the Advocate General that is contested here is the assumption that the action brought by the secured creditor concerned a portion of the debtor's assets affected by the decision opening the insolvency proceedings. As discussed, the fact that the asset over which the secured right is created forms part of the insolvency estate is a matter governed by the *lex concursus* under Article 7(2)(b) RR, but that is (at least in principle) a different profile than the validity of the security right over that asset. Therefore, it is submitted that the Advocate General was wrong when he submitted that the cause of action of the dispute between the trustee and the secured right was the determination of the assets forming part of the insolvency estate [1710], as it concerned the existence of the secured right of the creditor.

In the light of the above, the *ERSTE Bank Hungary* case does not shed much light on the issue of the jurisdiction of claims regarding secured creditors (whose right concern an asset located in another Member State), if not from the methodological profile that wants the issue of the jurisdiction to be kept separated from the issues concerning the applicable law (*recte* the conflict-of-law rules).

It is then necessary to recur to the Gourdain Formula, in order to assess whether the claim brought by the secured creditor under the scenario under consideration falls within the scope of the *vis attractiva concursus*. It is submitted that the answer to that question should be in the negative.

The answer lies in the very fact that the EU legislature has provided that a (negative) substantive law rule should apply to actions concerning the existence, validity and enforcement of security rights concerning an asset in another Member State.

If the criterion of the direct derivation concerns the legal basis of the action, and assesses the transformation that the substantive right underlying the action undergoes as an effect of the opening of insolvency proceedings, with regards to rights *in rem* falling under Article 8 RR, the Recast Regulation establishes autonomously that they are not affected at all by the opening of insolvency proceedings, as they remain governed by the *lex rei sitae*.

The fact that it was decided that those substantive rights are, by express provision of the Recast Regulation, shielded from the effects of the insolvency proceedings reveals the clear intention of the EU legislature to truncate any (substantive) connection between those rights and the insolvency procedure. Being embedded in a Regulation, that rule becomes necessarily a part of the national law of the various Member States, juxtaposing and even replacing the relevant domestic provisions.

[1708] *ERSTE Hungary*, at [42].

[1709] A. PIEKENBROCK 'Applicable Law - Articles 5-8 EIR' in B. HESS, P. OBERHAMMER and T. PFEIFFER, *op. cit.*, p. 261. attempted at remedy to the (wrong) interpretation in ERSTE Bank Hungary by stating that within the context of the opinion, the French terms *conflit des juridictions* seems to be used in opposition to *conflit de lois*, rather referring to the (pivotal) distinction between conflict-of-law rules and substantive law rule.

[1710] See *infra* this Chapter, at § V.4.3.5.

The close connection condition does not overrule that conclusion. It is rather evident that, under the scenario at stake, the trustee would be acting as a substitute of the debtor. Also, it must be pointed out here that the fact that the outcome of the action affects the insolvency estate - as it *de facto* subtract an asset to the collective enforcement of creditors - defines the limits the individual creditor's rights to participate to the distribution of the debtor's assets, but it does not interfere with the *pari passu* principle, because their execution eludes the application of that principle [1711].

The observations above allows to affirm, at this point, that Article 8 RR, together with the other (few) uniform rules of law provided by the Recast Regulation, constitute a nucleus of rules (embryonic, but yet significant, also in terms of the importance of the matters covered) pushing towards the unique EU insolvency procedure, which Recital 22 RR considers a desirable objective, but still premature [1712].

It would follow that the European *vis attractiva concursus* should not operate in respect of any claim whose cause of action concerns the basis, existence, validity (declaratory relief) and the enforcement of rights *in rem* covered by assets located in another Member State [1713].

Therefore, these secured rights must be adjudicated outside insolvency proceedings likewise typical civil and commercial proceedings. As a consequence, the jurisdiction for those actions must be assessed pursuant to the Brussels Regime. Security rights on immovables would be then subject to Article 24 Brussels Ia [1714]. The jurisdiction concerning security rights on movables, would be allocated pursuant to Article 4 and 7 Brussels Ia and even pursuant to a choice of forum clause.

It can then be assumed that actions brought by the secured creditor in order to obtain the compulsory sale of the asset [1715] (and, conversely, also actions brought by the trustee objecting the autonomous

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1711 See B. LAUKEMANN, 'Jurisdiction – Annex proceedings', *op. cit.*, pp. 195 and 200-201

1712 P. DE CESARI and G. MONTELLA, *Il nuovo diritto europeo della crisi d'impresa*, *op. cit.*, p. 135.

1713 Such a conclusion is also confirmed by the English case *Byers v. Yacht Bull Corp* [2010] EWCH, 133 (Ch), where the declaratory relief regarding the beneficial ownership brought by the trustee was not considered as falling within the Insolvency Regulation. See also *Ashurst v. Pollard* [2001] Ch 595 (action concerning the dispute between the trustee and the debtor and his wife concerning the beneficial interests of the latter over a villa in Portugal).

1714 See C. WILLEMER, *Vis attractiva concursu*s, p. 319.

1715 This is what happened in the SCI House case, where the German local authority applied for the compulsory sale of the real estate properties owned by the French debtor subject to insolvency proceedings in France in order to recover arrears of real property tax before (which under German law, *i.e.* the *lex situs*, is a *right in rem* complying with the requisites of Article 8 RR). A national case on Article 5 EIR, is referred by an Italian author that mentions an unpublished Italian case decided by a (non-specified) court in Tuscany. In that case main insolvency proceedings were opened against an Italian company in Italy. Pursuant to the *lex concursus* the claim for the reimbursement of credit financing granted by the German subsidiary to the Italian mother-company was not considered a right *in rem*. Instead, under German law such a credit seems to be considered as guaranteed by a right *in rem* over the assets located in Germany. Therefore, the *lex rei sitae* (*i.e.* the German law) was considered applicable in the case at stake. It is not clear how the application of the *lex rei sitae* has affected the enforcement of the German subsidiary's claim. It seems that, the location of the secured assets being in another member State, the German creditor had lodged the request for separate satisfaction with the Italian insolvency proceedings, The author merely refers that the court did not apply the *lex concursus*, acknowledging the right *in rem* of the German creditor being governed by German law and, thus, opposable to the insolvency procedure. In the same case, a creditor had obtained by a French court a *nantissement de fonds de commerce* on the indefinite assets as a whole of a French subsidiary. The Italian court considered that the creditor could not invoke the

sale of the of the asset on the part of the creditor) should follow the rules of Brussels Ia. Similarly, actions arising out of the settlement reached by the trustee and the secured creditor, through which the trustee pays-off the creditor to gain the control of the asset in possession of the latter do not represent Annex Actions [1716]. It seems more complicated the assessment of jurisdiction where the trustee violates the rule right of segregation of the secured creditor and sells the asset (located in another Member State) covered by the *right in rem* without paying off the secured creditor.

In this case the specific cause of action of each action must be kept separated. If the purchase price had already been paid to the trustee (*recte* the insolvency estate), the creditor would still have a right to separate satisfaction upon the consideration out of the purchase. Because the action would fall within the scope of the Brussels Ia Regulation, the secured creditor should not have to lodge his claim with the insolvency proceedings, but he could seek the separate satisfaction of his credit in the venue determined under the Brussels Ia Regulation [1717]. The creditor could possibly have, under the *lex concursus*, a claim for damages against the trustee, which as will be demonstrated should be considered as an Annex Action and, as such, should be brought before the court of the Member State opening insolvency proceedings [1718].

V.4.2.4.2. [Segue] The interplay between Article 8 RR and avoidance actions

It must be also recalled that Article 8(4) RR makes it clear that the protection under Article 8(1) RR does not affect the power of the trustee to bring avoidance actions. This means that the *vis attractiva concursus* operates towards actions brought by the trustee challenging the enforceability of a secured

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nantissement (and thus subtract the assets covered by it from the control of the Italian trustee) because the *nantissemen*t was not (erroneously) considered as a right *in rem* falling under the conditions set forth by article 8 RR, but rather as a sort of protective measure freezing the assets, anticipating the enforcement (likewise a seizure of the assets). Therefore, under the bar of enforcement measures provided by the Italian *lex concursus* the *nantissement* was not regarded as opposable to the insolvency procedure. See A. MAZZONI, 'Concordati di gruppi transfrontalieri e disciplina comunitaria delle procedure di insolvenza', in *Riv. dir. soc.*, 2010, p. 562. On the fact that the *nantissement de fonds de commerce* falls within the notion of rights *in rem* under Article 8 RR see R. DAMMANN, 'Clarification de la notion de droit réel de l'article 5 du règlement CE 1346/2000', in *Dalloz*, 2017.

A French case on the application of Article 5 EIR is the *Coeur de Defence* case (T. Paris, 25 February 2010, RG n. 09/22756, Cass. Comm. 8 March 2011, n. 10-13988, 10-13989 and 10-13990. After the set aside of the judgement of first instance T. Versailles, 19 January 2012, R.G. 11/03519). The case concerned the particular company structure labelled as 'Double LuxCo.', which ultimately pursues the objective of sheltering the secured rights covering the assets of the subsidiaries in Luxembourg from the insolvency proceedings opened *vis-à-vis* the French mother-company. See on the Double LuxCo. R. DAMMANN, R. DE GERMAY, 'L'épilogue de l'affaire Coeur Défense: quels enseignements en tirer?', in *Bulletin Joly Sociétés,* 2012, 329, M. LATTARD and F. FAYOT, 'Les structures "double luxco" et leur effet sur la structuration des garanties financières luxembourgeoises', in *Bull. Dorit et Banque*, 2012, n. 49, p. 31.

[1716] Actions may arise in particular when the security is underwater. As highlighted by G. MOSS, I. FLETCHER, S. ISAACS, *op. cit.*, p. 178, if the security credit is 100 and the secured asset's market value at the current time is 80, the secured right could contest the immediate payment made by the trustee to satisfy his claim.

[1717] See B. LAUKEMANN, 'Jurisdiction – Annex proceedings', *op. cit.*, p. 188.

[1718] The analysis carried out by A. PIEKENBROCK 'Applicable Law - Articles 5-8 EIR' in B. HESS, P. OBERHAMMER and T. PFEIFFER, *Heidelberg-Luxembourg-Vienna Report*, Munich, 2003, p. 259 confirms such a solution, although he refers to the applicable law.

right on an asset located in Member State pursuant to rules of the *lex concursus*. Those actions being Annex Actions, they would necessarily fall under the scope of the *vis attractiva concursus* [1719].

This means also that in the course of an action brought by the secured creditor concerning the existence, validity and enforcement of a right *in rem* falling in the scope of Article 8 RR (for instance, an order seeking the enforcement of the secured right) the trustee may raise as a counterclaim the avoidance of the right in rem. In this case, it is submitted that the two actions should be kept separated, because the rule of Article 6(2) RR concerning the related actions does not operate in case of actions brought by the trustee and the creditor.

The issue regarding the interplay between Article 7(2)(m) RR and Article 8 RR was brought up in the Alteco/Mag Import case [1720]. The trustees appointed in the context of Spanish insolvency proceedings *vis-à-vis* two Spanish companies - Alteco Gestión y Promoción de Marcas, S.L. (hereinafter, 'Alteco') and Mag Import, S.L. ('Mag Import') - brought an avoidance action in Spain [1721] against a pledge over shares owned by the debtors in the French listed company Gecina S.A. and held in a security bank account in Luxembourg (the 'Pledge'). The Pledge, which was governed by Luxemburg law and provided for a choice of forum clause in favour of Luxembourg courts, secured the performance of Alteco and Mag Import under a Facility agreement, governed by Spanish law, that the debtors concluded to finance a tender offer. The trustees requested the Spanish tribunal to grant an interim injunction ordering the suspension of the enforcement of the Pledge (because the secured Lenders had parallelly initiated the enforcement of the Pledge). Under the choice-of-forum clause, the secured lenders brought an action before the Luxembourg Tribunal arguing, *inter alia,* that the Spanish interim injunction could not prevent them from enforcing the Pledge and asked the Luxembourg court to order the depositary bank to transfer the pledged shares to them.

With decision dated 29 January 2014 the Luxembourg court stated, *inter alia*, that *(i)* the action for the enforcement the Pledge was independent from insolvency proceedings in Spain; *(ii)* correctly the lenders brought the action before Luxembourg court pursuant to the Brussels Ia Regulation (and in particular Article 3 thereof), under the choice-of-forum clause provided for in the Pledge; *(iii)* the lenders had the right to enforce the Pledge, regardless of the avoidance action brought (*recte* anticipated by the interim injunction) by the trustees. The reasoning of the Luxembourg court on this latter point was the following *(iv)* the law governing the Pledge (*i.e.* the Luxembourg law) was the Law of 5 August 2005 on financial collateral arrangements (the Financial Collateral Act), which implemented in Luxemburg national law the Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements (the Collateral Directive). Pursuant to Article 20(4) of the Luxembourg

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1719 As a general rule the *lex concursus* would govern the law applicable to such actions is the law of the Member State opening insolvency proceedings, subject to the exception of Article 16 RR.

1720 On the Alteco/Mag Import case, see F. BELLIL, 'Articulating the various PIL instruments in the field of insolvency', in J.S. BERGÉ, S. FRANQ and M. S. GARDENS, *Boundaries of European interlational law*, Bruxellses, 2015.

1721 Under article 71 LC.

Financial Collateral Act provides that pledges are valid and enforceable against third parties, receivers, liquidators or similar persons notwithstanding a reorganisation, winding up proceedings or similar national or foreign proceedings and the assets subject to the pledge do not form part of the estate of the insolvent company. In the Alteco/Mag Import case the Luxembourg court re-affirmed the position taken in previous case law whereby article 20(4) Financial Collateral Act must be regarded not only as a mandatory legal provision, but as a true *loi de police* which aims at 'sheltering financial collateral arrangements against any challenges, therefore giving to lenders a fully secured legal framework [1722]. In the light of the above, the Luxembourg Court ordered the enforcement of the Pledge and was, in fact, successfully enforced [1723]. I do not have any knowledge of the developments of the case in Spain [1724].

The Mag/Alteco Import case is illuminating under several profiles.

First, the reasoning of the Luxembourg court as to point *sub (i)-(iii)* above confirms that, as far as the jurisdiction over the enforcement of secured right falling in the scope of Article 8 RR is concerned, Brussels Ia Regulation applies (including Article 23 thereof on the prorogation of jurisdiction), because those actions are not Annex Actions.

Nevertheless, it is submitted that the Luxembourg court's reasoning disregarding the avoidance action brought in Spain lacks persuasiveness. It is indeed true that article 20(4) Financial Collateral Act (which implements Article 8 of the Collateral Directive) shields the financial collateral agreements (such as the Pledge) from certain insolvency law provisions and, namely, certain *automatic* avoidance rules [1725]. The reason underpinning such a protection is evidently that one of ensuring stability of the financial system in the European Union, limiting systemic risk inherent in such systems stemming from the different influence of several jurisdictions. The automatic avoidance of the security, on the sole basis that the relevant financial obligations existed (or that the financial collateral was provided) before a prescribed period (*i.e.* the claw-back period) would ultimately prevent the sound functioning of the internal market as it would disincentive the financing that the security aims at guaranteeing (which is in practice often granted in the framework of restructuring a distressed but still viable companies). It is equally true, however, the Collateral Directive states clearly that such an objective - which in any case is pursued also at the national level by the insolvency law of many legal systems,

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[1722] Apparently, such a view was also upheld by the Luxembourg courts in a former case dated 14 October 2014.

[1723] Latham&Watkins client alerts, n. 1653, February 19, 2014.

[1724] It is understood that controlling shareholder of Alteco brought a criminal action before Spanish Courts some of the creditors who have enforced the Pledge (see Latham&Watkins client alerts, n. 1653, February 19, 2014) but it is not clear whether action was brought on the basis of the enforcement of the pledge or other grounds. It is submitted that even if the Spanish courts rescind the Pledge pursuant article 71 LC, this would bear no practical utility, as it was already enforced. Alteco and Mag Import could perhaps have brought a claim against the secured lenders requesting damages, but I could not find any confirmation of this.

[1725] See in this sense the preamble to the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, in *OJ*, L 168/43, 27 June 2002.

protecting new finance provided in pre-insolvency restructuring proceedings against avoidance in subsequent insolvency proceedings, after these restructuring efforts have failed [1726] - does not prejudice the possibility of questioning that the security was granted to the detriment of the other creditors (this occurs, *inter alia,* where the security was granted for fraudulent purposes) [1727]. It follows that Article 8 Collateral Directive must be read together with Article 8(4) and 16 RR. According to Article 8(4) RR, the assessment of the (residual) grounds for the challenge of the security by means of an avoidance action are governed by the *lex concursus* (subject to the exception of Article 16 RR) [1728]. Therefore, the reasoning of the Luxembourg court was inaccurate when it considered *sic et simpliciter* that the avoidance action brought by the trustees of the Spanish insolvency proceedings did not affect the action for the enforcement brought by the lenders.

The true deadlock lies in the fact that nor had the Luxembourg court jurisdiction to hear the avoidance action (because it is an Annex Action, subject to the exclusive jurisdiction of the Spanish court), neither the rules of Article 6(2) RR, derogating from the *vis attractiva* concursus, could apply in a similar case governed by the Recast Regulation, because the rules on related actions established therein pertains solely to the cumulation of actions brought by the trustee. Therefore, imagining that the Mag/Alteco Import case was brought today, under the rules of the Recast Regulation, the avoidance action could not be brought by the trustee as a counterclaim before the Luxembourg court, because it would lack jurisdiction over it. Nevertheless, it is submitted that the trustee could invoke the ground to set the security aside (provided by the *lex concursus*) as a mere defence. In this scenario, the best solution would be that the Luxembourg court stay the proceedings before it, and await for the decision of the Spanish court on the avoidance action. Should the latter court dismiss the action - because, for instance, it deems that the security was not fraudulent [1729] - the lender could assuredly enforce their secured right.

At the present such a solution, however, seems to be not feasible, because of the (stubborn and inexplicable) impossibility to apply by way of analogy the rules on the *lis pendens* set forth by Article 29(1) Brussels Ia Regulation in relation to actions falling, respectively, in the scope of the Recast Regulation and the Brussels Ia Regulation, which was recently confirmed by the ECJ [1730].

1726 See, for instance, the Italian article 67(3)(d) l.fall., shielding from avoidance actions certain acts (including securities) made in the context of restructuring procedures preceding the opening of insolvency proceedings. See also Article L. 650-1 Cod. Comm. on the *soutien abusif du credit.*

1727 See Recital 4 of the Collateral Directive, stating that This Directive is in line with the general pattern of the [Recast Regulation] and is not opposed to it. « *Indeed, this Directive complements these existing legal acts by dealing with further issues and going beyond them in connection with particular matters already dealt with by these legal acts* ».

1728 See in this respect ECJ, 16 April 2015, Case C-557/13, *Hermann Lutz v. Elke Bäuerle*, ECLI:EU:C:2015:227. For literature, see G. MOSS, I. FLETCHER, S. ISAACS, *The EU Regulation on insolvency proceedings*, *op. cit.*, p. 179.

1729 It must be noted that the Spanish court would be equally bound by the provision under Article 7 Collateral Directive, because it is assumed that all member States have implemented it in their national system).

1730 See *Riel*, at [44]-[45], where the Court held « *Moreover, such an application would disregard the scheme of* Regulation *No 1346/2000 and would therefore undermine the effectiveness of the provisions of that regulation, in particular in that, in accordance with Articles 3 and 27 of that regulation, read in the light of recitals 12, 18 and 19 thereof, secondary insolvency proceedings may be opened in parallel with the main insolvency proceedings, which Article 29(1) of* Regulation *No 1215/2012*

V.4.2.4.3. Actions for the determination of rights *in rem* covering assets located within the Member State opening insolvency proceedings and other secured (and preferential) rights not falling under Article 8 RR.

The second scenario that must be taken into account concerns the 'residual position' of *(i)* all secured creditors whose right covers assets located in the Member State opening insolvency proceedings (irrespective of whether the security falls within the notion of rights in rem under Article 8 RR) and *(ii)* secured creditors whose right covers an asset located in another Member State, but does not match the examples provided under Article 8(2) RR.

The *lex concursus* of the Member State opening insolvency proceedings would govern the various (procedural and substantive) effects of the opening of insolvency proceedings over the rights of those subjects, including *inter alia (i)* the bar of enforcement actions and lawsuits on the merits [1731]; *(ii)* the procedural rules governing the verification of the claim; *(iii)* the ranking of the secured creditor, *(iv)* the order of the distribution of the proceeds.

Unlike actions for the determination of unsecured claims, in respect of which the *petitum* of the action is always the same (*i.e.* the payment of a monetary claim) and the possible *causae petendi* (*i.e.* the legal foundation) of the action is easily detectable and thus assessable, in respect of the action of secured creditors the picture is quite puzzling for the interpreter who wishes to gather an overall picture in order to provide for a schematic solution and illustrative examples (and the lack of national case law in this area does not help). The aforementioned differences between Member State, indeed, would require to take into consideration too many different scenarios influenced by the variable geometry of the rules across Member States on the bar for enforcement action (affecting also secured creditors in some Member States, excluding *de plano* secured creditors in other Member States, being only on an interim basis in others), the modalities of satisfaction of the security right (right of separate satisfaction over the proceeds out of the sale of the asset, which generally requires the lodging of the claim with the insolvency procedure, right of segregation, right of retention), the powers of the trustee to sell the asset or, conversely, the power of the creditor to sell it autonomously, and so on.

However, as far as jurisdiction is concerned, the fact that the *lex concursus* governs those (substantive and procedural) profiles of the law governing the action is, again, not decisive for the characterisation of those actions as Annex Actions.

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does not permit. Furthermore, as the Commission has argued in its written observations, with regard to Regulation No 1346/2000, Article 31 of that regulation makes it possible to avoid the risk of irreconcilable judgments by laying down rules on information and cooperation in cases of parallel insolvency proceedings ». See also, the Nortel judgement, already discussed in Chapter III, Section 1, at § I.8.

[1731] Court of Appeal Antwerp, 23 August 2004, in *TBBR* 2006, p. 558. See also *Re Flightlease (Ireland) Ltd* [2005] IEHC 275, where the Irish court considered the relationship between articles 4(2)(f) and 15 EIR and stated that the effects of insolvency proceedings on individual enforcement actions are governed by the law of the State opening insolvency proceedings.

From an objective standpoint, the reasoning to be followed with a view of assessing the jurisdiction of actions concerning those creditors is not dissimilar from that of unsecured creditors: the *lex concursus* even where related to the procedural rules to be applied does not affect the jurisdiction of the action.

Therefore, proceeding by theoretical assumptions, in case the *lex concursus* imposes also for secured creditors the bar of enforcement actions and the *procedural* rules governing the verification of credits covers also the verification (on the merits) of those credits, the automatic recognition of the judgement opening insolvency proceedings would produce a *de facto vis attractiva*. The court erroneously seised by the (secured) creditor could dismiss the claim as inadmissible, but this would not deprive them of the jurisdiction *stricto sensu*.

Yet, the jurisdiction over the action of secured creditors must be assessed pursuant to the autonomous test of the Gourdain Formula in order to determine whether the action brought by the secured creditor must be attracted to the jurisdiction of the Member State opening insolvency proceedings, which takes on relevance in particular where the Member State opening insolvency proceedings does not provide for the bar of enforcement actions in relation to their claims.

Some scholars have considered that the application of the Gourdain Formula would lead to the conclusion that actions concerning either the assessment of the merits or the enforcement of security rights are to be encompassed in the scope of the Brussels Ia Regulation, irrespective of whether - pursuant to the *lex concursus* - the creditor is granted with the right of segregation (*i.e.* the right of the secured creditor to recover an asset on the basis of his right *in rem* or an equivalent right *in personam*) and the right of separate satisfaction (*i.e.* the right to obtain full payment of the claim underlying the security out of the liquidation proceeds) [1732].

The main argument supporting this view is that the legal basis represented by the secured right (*i.e.* the right to protect the holder's satisfaction out of the collateral's value) would not be substantially amended by the opening of insolvency proceedings [1733]. The security right would not derive directly from insolvency proceedings (first condition), but rather it would exist in spite of insolvency proceedings, as the specific objective of securities is that of shielding their holder form the default of the debtor [1734]. In this respect it may be noted that, according to some authors, secured creditors are

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1732 B. LAUKEMANN, 'Jurisdiction – Annex Actions', *op. cit.*, p. 201. See S. REINHART, 'Under Article 25', in H-P. KIRCHHOF, H-J. LWOWSKI, R. STÜRNER, *Münchener Kommentar zur Insolvenzordnung: InsO*, vol. 1, Munich, 2003. 3.

1733 The Virgós-Schmit Report is often quoted as a pro-argument for this conclusion, especially at [196], where it states that « *actions to recover another's property the holder of which is the debtor* ». It is respectfully submitted that such a statement of the Virgós-Schmit Report cannot apply to security rights as in this case the debtor is not a mere holder of the asset, but actually he is the owner. Such an affirmation of the Report must be applied in respect to actions for the recovery of assets which are not part of the estate, see *infra* at § V.4.3.5.

1734 See C. WILLEMER, *Vis attractiva concursu*, p. 366. B. LAUKEMANN, 'Jurisdiction – Annex Actions', *op.cit.*, p. 187 explicitly states that, although some modifications to the legal basis of the security right may occur as an effect of the opening of insolvency proceedings (he mentions time-limits preclusions), such modifications do not amend the *essence* of the legal basis of the action.

not to be considered as insolvency creditors *stricto sensu* because their right is not affected by the *pari passu* principle. The secured creditor would not be gaining an advantage over other creditors, in violation of the *par condicio creditorum*, as they would still be the bearers of an independent right to segregate an asset or obtain separate satisfaction.

As to the close connection (second condition), although the segregation of an asset and the separate satisfaction of the secured creditor affect to a certain extent the satisfaction of unsecured creditors, as they ultimately reduce the slice of the pie to be distributed between the unsecured creditors, it does not functionally interfere with the *pari passu* principle (rather it derogates from it). Also, the fact that other creditors are generally not entitled to contest the right of separate satisfaction would demonstrate that the trustee acts as a substitute of the divested debtor and not on behalf of the whole body of creditors [1735].

Should this conclusion be correct, (foreign) secured creditors [1736] would be entitled to seek the declaratory relief (and the enforcement of their right [1737]) in all the venues set forth by the Brussels Ia Regulation.

This conclusion seems to be (implicitly) supported by the *German Graphics* case, in which the Court considered that an action brought by the seller, party to a contract covered by a reservation of title clause, seeking the recovery of the assets sold (and still owned by it under the reservation of title clause for the failure to pay the purchase price) to the insolvent purchaser is a claim that is independent of the opening of insolvency proceedings, because it concerns exclusively the ownership of certain machines (located in the Member State opening insolvency proceedings) [1738].

Although it is submitted that the *German Graphics* case is more pertinent to draw conclusions on actions concerning the (ownership of) assets forming part of the estate [1739] – and this seems the view

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1735 L. HÄSEMEYER, *Insolvenzrecht*, Cologne, 2007, at [18.73].

1736 The ranking and the order of distribution with respect to creditor should be determined according to the *lex concursus*, under article 7(2)(i) RR. However, as noted by Z. CRESPI REGHIZZI, 'Reservation of title in insolvency proceedings: some remarks in light of the German Graphics case', *op. cit.*, p. 674, the approach adopted by the ECJ in *German Graphics*, refusing to give any relevance to article 4 EIR seems imply also that, in performing the Gourdain test when the action is brought by the secured creditor, one should take into consideration the insolvency regime of the State in which the action is commenced to determine whether it is sufficiently linked to insolvency proceedings, rather than that where insolvency proceedings are opened, in which the decision will have to produce its effects. That would be in contrast with the universal applicability of the *lex concursus*. Therefore, should one wish to follow the jurisdictional approach that places under the umbrella of the Brussels Ia Regulation actions brought by secured creditors, one should also recognise the characterisation problems that such an approach would entail.

1737 Naturally, article 24 Brussels Ia would still point to the Member State opening insolvency proceedings as the State Member State in which the judgment obtained by the secured creditor is to be enforced.

1738 As noted by McCormack, the judgement made no reference to the universal application of the bar for enforcement actions under The judgment makes no reference to Article 4(2)(f) EIR, presumably because in the Netherlands (national) secured creditors are shielded from the opening of insolvency proceedings and may autonomously enforce their right. See G. MCCORMACK, 'Reconciling European Conflicts and Insolvency Law', in *European Business Organization Law Review*, 15, p. 325.

1739 Indeed, the Court makes reference to article 4(2)(b) EIR, concerning the assets forming part of the insolvency estate. M. BRINKMAN, 'Der Assonderungsstreit im internationalen Insolvenzrecht – Zur Abgrenzung zwischen EuGVVO und EuInsVO', in *IPRax*, 2010, p. 324 and ff. seems to share this view when

of the Court as well, since it focused its attention exclusively on the ownership of the right (correctly, because under a reservation of title clause both seller and purchaser are 'true owners' of the assets and deserve to be considered as such) – many scholars extend the approach adopted by the Court on that occasion to other kinds of securities *in rem*, since the reservation of title clause may be regarded as a contractual mechanism securing the credit of the seller (and property may also be considered as the 'right in rem' par excellence) [1740].

According to some scholars, the interpretation bolstered by the ECJ in that case fosters the conclusions that the independence of the claim of the secured creditor would entitle the latter to initiate an action concerning his right according to the jurisdictional rules of Brussels Ia, including a clause for the prorogation of the forum [1741].

Such a view seems to have been followed by the Landgericht Saarbrücken in the main proceedings giving rise to the recent *TeamBank AG Nürnberg* judgement [1742]. Briefly explained, a Luxembourg national, domiciled in Germany concluded when *in bonis* two loan agreements respectively with TeamBank and BNP, both secured by the assignment of the same attachable share of her current and future claims to wages and salary. The employer of the assignor was informed of one assignment but not of the other.

Insolvency proceedings were opened *vis-à-vis* the debtor in Germany by the *Amtsgericht Saarbrücken* (District Court, Saarbrücken, Germany). In that context, the appointed trustee in insolvency proceedings received, from the debtor's employer in Luxembourg, a share of the debtor's salary and the trustee deposited that amount with a court in Germany, because he was uncertain as to the identity of the creditor of the said amount, each of the two banks asserting preferential rights relating to the assigned claims. TeamBank and BNP brought, respectively, an action and a counterclaim before the Landgericht Saarbrücken (Regional Court, Saarbrücken, Germany), requesting the lifting of the deposit made by the trustee in respect of the entire amount. That court upheld TeamBank's action and dismissed BNP's counterclaim. The dispute was brought before the Court of Appeal, which

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he affirms that the conclusions reached by the ECJ in German Graphics should not apply with respect to other securities, such as the German security transfer of title ('Sicherungsübereignung'), the 'lenghtened' reservation of title (the 'verlängerter Eigentumsvorbehalt') and the 'enlarged' reservation of title (the 'erweiterte Eigentumsvorbehalt') because in this case security creditors, despite being formally the owner of the title, are such for security purposes, which would only vest them with a mere right of preference in the insolvency procedure.

1740 H. DUURSMA-KEPPLINGER, 'Under Art. 25, in H. DUURSMA-KEPPLINGER, D. DUURSMA, E. CHALUPSKY, *EuInsVo,* Berlin, 2002, at [55]; J. HAUBOLD, 'Europäisches Zivilverfahrensrecht und Ansprüche im Zusammenhang mit Insolvenzverfahren, in *IPRAX*, pp. 157, 163. J. KROPHOLLER, *Europäisches Zivilprozeßrecht*, Frankfurt am main, 2005, p. 72. P. MANKOWSKI, 'Under Article 1 Brüssel VO', in Rauscher (ed.), *Europäisches Zivilprozeßrecht*, Munich, 2006, at [21]. *Contra Oberster Gerichtshof*, 22 April 2010, 8 Ob 78/09t, RdW 2010, p. 633, where the court considered that an action for the restitution in relation to a claim that was verified by the insolvency proceedings falls under Article 3 EIR.

1741 Z. CRESPI REGHIZZI, 'Reservation of title in insolvency proceedings: some remarks in light of the German Graphics case'*, op.cit.*, p. 674.

1742 ECJ, 9 October 2019, Case C-548/18, *BGL BNP Paribas SA v. TeamBank AG Nürnberg*, ECLI:EU:C:2019:848

referred to the ECJ a preliminary ruling concerning the application of the Rome I Regulation to third-party effects in the event of multiple assignments and not an issue of jurisdiction.

Although the question referred to the Court are of no interest for present purposes, the judgement states that the referring Court of Appeal established its jurisdiction on the basis of Article 26 Brussels Ia, alluding that the claim brought by Teambank in Germany was initiated on the basis of the Brussels Regulation and the jurisdiction was not challenged by BNP, bringing the counterclaim.

Therefore, leaving aside the question of the opposability of the multiple assignment, the right of separate satisfaction of the secured creditors was regarded as a civil and commercial matter for the purposes of the jurisdiction, which supports the interpretation that they do not fall in the *vis attractiva concursus*. Following this reasoning, should the assignments contain a choice of forum clause, it is likely that the banks would have brought their claim and counterclaim concerning the lifting of the deposit before the selected court.

The soundness of such an interpretation, which is nevertheless coherent with the application of the Gourdain Formula, is however weakened if one considers, as noted by some other scholars, that the recognition and (above all) the enforcement of the judgement obtained by the creditor may encounter some difficulties in the Member State opening insolvency proceedings, where ultimately judgement must be enforced.

With particular reference to rights *in rem*, many Member State require particular forms of publicity in order to oppose the right *in rem* to third parties [1743]. It was maintained by some scholars that the compliance with those requirements may entail a *loi de police* rule or a case to invoke the public policy exception, thus preventing the recognition of the judgement adjudicating the security right of the creditor [1744].

But even assuming that the judgement obtained in another Member State would be recognised, still the judgement must be enforced in the Member State opening the insolvency proceedings, according to its national rules, and, therefore the *lex concursus* (including the ranking of his credit). In other words, where the asset concerning the security right is located within the Member State opening the procedure, the secured creditors, even where granted with a judicial enforcement title, would still have yield to the *lex concursus* to enforce his right of separate satisfaction or segregation, according to the procedural rules of that Member State [1745]. The *res judicata effect* of the foreign judgement could

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1743 For instance, the Italian system requires under Article 1524 c.c. that the reservation of title is subject to particular form of publicity in order to make it opposable to third party.

1744 See F. DIALTI, 'Giurisdizione in materia di azione del venditore fondata nei confronti dell'acquirente che versa in situazione di fallimento', in *Diritto del commercio internazionale*, 2010, pp.202-215. See also R. LUZZATO, 'commento all'art. 55', in F. POCAR, T. TREVES, S.M. CARBONE, A. GIARDINA, R. LUZZATO, F. MOSCONI, R. CLERICI, *Commentario del nuovo diritto internazionale privato*, Padua, 1996, pp. 262, 263.

1745 As confirmed by the Court in the *TeamBank* judgement, article 14 Rome I Regulation applies to various aspects of the assignment of cross-border claims, and indicates that the law governing the claim that is the subject of the assignment (*i.e.* in that case respectively by the German and Luxembourg law) is to determine the assignable nature of the claim, the relationship between the assignee and the debtor, the conditions on which the assignment is to be effective against the debtor and whether the debtor's obligations have been

only shield the creditor from contestations regarding the validity and the existence of the security (assessed pursuant to the relevant applicable law governing those profiles), but not all the other aspects relating to its opposability and enforcement *vis-à-vis* the insolvency proceedings [1746]. It follows that even if the judgement formally ordered the insolvent (and divested) defendant to perform the security right, the judgement recognised in the Member State opening insolvency proceedings would be considered as a declaratory one because the only way to enforce the judgement are those provided by the *lex concursus*.

Should this interpretation turn to be correct, one may well wonder whether it is actually more convenient to exclude the actions at stake from the *vis attractiva concursus*, and not to defer them to the exclusive jurisdiction of the Member State opening insolvency proceedings.

A rigorous application of the Gourdain Formula would militate against such a conclusion. However, the objective of efficacy and effectiveness of the procedure, here relating only to the necessary enforcement of those actions with the insolvency estate [1747] (the distribution of the proceeds to unsecured creditors, in facts, would be 'kept in check' until the secured creditor had not obtained the judgement concerning his credit and recognise it in the Member State opening insolvency proceedings) could militate towards their jurisdictional attraction to the Member State of insolvency proceedings.

V.4.2.5. Actions for the determination of assets forming the insolvency estate

Among the actions that are brought in the course of insolvency proceedings, actions concerning the assets forming the insolvency estate deserve a separate mention from actions concerning security rights, as they concern the right *in rem* par excellence, which is not ancillary to a separate (secured) claim.

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discharged. However, the Court further notes that article 14 of the Rome I Regulation does not refer to the third-party effects of an assignment of a claim and that that under EU law as it currently stands, the absence of rules of conflict expressly governing the third-party effects of assignments of claims is a choice of the EU legislature. Although the Court does not expressly state it, it is submitted that in that case the opposability and the enforcement of the assignments should have been governed by the *lex fori concursus*.

1746 M. MENJUCQ, 'L'efficacité des sûretés à l'épreuve des procédures transfrontalières', in *Rev. proc. coll.,* 2009, n. 12, p. 21. See J.L. VALLENS, 'l'action en revendication ne s'insère pas dans la procedure collective', in *Dalloz,* 2009, p. 2782 who observes that *« la revendication intéresse au premier chef la procédure d'insolvabilité, non seulement parce que le syndic est partie, et qu'il doit intervenir contrairement à l'opinion de la Cour, mais surtout parce que la restitution d'un matériel, d'un immeuble ou d'un outillage atteint directement le débiteur dans ses capacités productives et qu'elle peut contrecarrer un plan de redressement ou plus généralement porter atteinte aux intérêts collectifs des autres créanciers par la réduction de leur gage.* […] *Selon la Cour, le seul fait que le défendeur ou le demandeur soit un organe de la procédure collective n'est pas suffisant pour en déduire qu'il s'agit d'une action connexe. Cette affirmation n'est pas convaincante* ». C. LEGROS, 'Procédure d'insolvabilité : application et détermination d'une action s'insérant étroitement dans la procédure', in *Revue critique de droit international privé*, 2015, p. 207.

See also M. MONTANARI, 'esclusività del procedimento di verifica dello stato passive e ordine pubblico processuale', in *Fallimento*, 1, 2019.

1747 Those actions cannot be defined as the core of insolvency proceedings, because unsecured creditors they do not entail the participation to the distribution of the debtor's asset pursuant to the *pari passu* principle.

As was explained, one of the main effects of the opening of insolvency proceedings *vis-à-vis* the debtor is his divestment, *i.e.* the deprivation of the power to manage and dispose of his assets.

Article 7(2)(b) RR provides that the *lex concursus* governs « *the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings* ».

As a consequence, the insolvency estate is formed, pursuant to the *lex concursus*, considering all the assets which are in the control of the debtor at the time when the proceedings are commenced and those that the debtor acquires during the proceedings [1748].

Therefore, it may well happen that disputes arise concerning the ownership of certain assets that are in the control of the debtor at the moment of the opening of the procedure, and accordingly, their inclusion into the insolvency estate. In this respect, two types of proceedings can be distinguished

V.4.2.5.1. Actions brought by the debtor against the trustee (or *vice versa*) for the determination of assets forming the insolvency estate

In many legal systems, the divestment of the debtor singles out certain well-determined personal assets of which the debtor remains free to dispose of. In principle, those assets are essential to ensure the debtor's statutory right to a reasonable standard of living a decent day-to-day life. However, it is understood that the *lex fori concursus* could also determine that assets that pertain to a different business activity carried out by the debtor do not form part of the insolvency estate [1749].

Where a dispute arises between the trustee and the debtor concerning the extent of the divestment of the debtor, claims concerning the assets forming the insolvency estate, for jurisdictional purposes, should be regarded as Annex Actions [1750].

By applying the Gourdain Formula, it emerges clearly that the right underlying the action (*i.e.* the debtor's right to retain the control property over those assets against the insolvency estate) undoubtedly stems directly from insolvency proceedings, an in particular from his divestment and the formation of the insolvency estate.

As to the litmus test of the close connection, it is undisputed that in the context of those claims, the trustee would be acting exclusively in the interest of all the creditors, as the determination of the assets forming the insolvency estate surely defines the limits of the satisfaction of insolvency claims pursuant to the insolvency liability regime.

An argument confirming the foregoing may be found also in the Virgós-Schmit Report, where it mentions as an example of actions which are based on (and not only affected by) insolvency law,

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1748 With regard to the legal system examined in Chapter I see in particular § 35(1) InsO (Germany), article 42 l. fall. (Italy), article L. 641-9 Cod. Comm. (France), article 40(2) LC (Spain).

1749 See for Germany, § 35(2) InsO.

1750 See B. LAUKEMANN, 'Jurisdiction – Annex Proceedings', in B. HESS, P. OBERHAMMER and T. PFEIFFER, *op. cit.,* pp- 195-196. R. BORK and R. MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 61.

whose exercise is possible only possible during insolvency proceedings « *disputes between the liquidator and the debtor on whether an asset belongs to the bankrupt's estate* » [1751].

Therefore, irrespective of where the assets under dispute are located, those claims should be brought before the courts of the Member State opening insolvency proceedings and will be governed, as to the substantive profiles, by the *lex concursus*, which determines the assets forming the insolvency estate.

V.4.2.5.2. Actions brought by creditors or third parties for the determination of assets forming the insolvency estate

On the contrary, actions brought by the trustee or by creditors or third parties claiming the ownership over assets in possession of the debtor (or, conversely, by the creditor) at the moment of the opening of insolvency proceedings should be treated differently.

Under the proviso that the right underpinning the action does not concern the ownership transferred by way of security [1752], the application of the Gourdain Formula leads to the conclusion that property claims invoked by a creditor (or a third party) are ordinary civil and commercial actions, which fall under the Brussels Regime, as they are not insolvency creditors, and insolvency proceedings cannot affect the property right of a subject other than the debtor [1753].

Indeed, actions regarding property rights over the debtor's assets are claims already existing in the legal sphere of both the debtor and the creditor, whose nature is not amended by the opening of insolvency proceedings. Also, in the context of a property claims brought by a creditor (or a third party), the trustee acts as a mere processual substitute of the debtor. Of course, the outcome of those dispute would affect the capacity of the insolvency estate, but only indirectly.

Those observations should apply to both the scenarios where either the claimant of the property action is the creditor acting against the debtor (*recte* the trustee) or, symmetrically, the trustee acts for the restitution of an asset held by a third party the owner of which is the debtor [1754].

The Virgós-Schmit Report also advocates for the exclusion of those claims from the material scope of application of the Recast Regulation [1755].

The ECJ case-law has confirmed this view in the *German Graphics* judgement, where a preservative measure anticipating an action seeking the restitution of assets was deemed as « *independent of the opening of insolvency proceedings* » [1756].

1751 See Virgós-Schmit Report, at [196].

1752 Because in this case the right over plays the role of securing an underlying credit, which entails a different situation from the from the ownership over that asset. See *supra* § V.4.3.4.

1753 See in this sense *Oberlandesgericht Wien*, 30 October 2006, 10 Ra 47/06i, in *ZIK*, 2007, p. 165.

1754 See the French Supreme Court 29 September 2004, commented by F. MÉLIN, in *JDI*, 2005, p. 378. See also the Circulaire of the French Ministry of Justice dated 17 mars 2003, p. 12939

1755 The Virgós-Schmit Report, at [196], states that « *actions to recover another's property the holder of which is the debtor* » are ordinary civil and commercial claims which are subject to the recognition regime of the Brussels Regulation.

1756 *German Graphics*, at [31].

As mentioned before, the action at stake in the *German Graphics* case concerned a reservation of title clause, which is a contractual mechanism conferring upon the seller a certain degree of security in the event of insolvency of the buyer. As such, one may object that the case under discussion concerned the claim of a secured creditor. Nevertheless, it seems fair to acknowledge that on that occasion the Court has specifically concerned itself with the facet of that contractual mechanism concerning the retention of the ownership of the sold assets with the seller (rather disregarding the different profile that the reservation of title clause has a security function of the seller's credit). Indeed, the Court stated that the claimant had « *requested the recovery of assets owned by it and that the only question before the court relates to the ownership of certain machines* » [1757]. That judgement may therefore be considered as pertaining to disputes concerning the *right in rem* par excellence (*i.e.* property), which the ECJ characterised as an ordinary civil and commercial action.

To reach that conclusion, the Court applied the Gourdain Formula, which was 'enriched' on that occasion with the new element that the application of the Insolvency Regulation to actions brought in the course of insolvency proceedings must be regarded as an exception to the general rule of the applicability of the Brussels Regulation [1758]. The Court found that the right underpinning a claim for restitution of an asset owned by the claimant « *constitutes an independent claim, as it is not based on the law of the insolvency proceedings and requires neither the opening of such proceedings nor the involvement of a liquidator* » [1759].

On the basis of that assumption the Court classified an action for the restitution of an asset upon a reservation of title clause as an ordinary civil claim, whose jurisdictional regime is governed by the Brussels Ia Regulation. The same conclusion was also bolstered by the English case law in several occasions [1760].

It follows from the foregoing that disputes arising between the trustee and a creditor (or a third party) about the ownership of an asset purportedly forming part of the insolvency estate should not be regarded as an Annex Action, but as a civil and commercial claim. Therefore, the Brussels Regime should govern both the allocation of its jurisdiction and the rules concerning the recognition and enforcement of the judgements rendered in connection with those actions.

1757 *German Graphics*, at [31].

1758 It bears recalling that in *German Grapichs* the Gourdain Formula was still interpreted as entailing a single condition, *i.e.* whether the legal foundation of the action stems directly form insolvency proceedings or it is modified to such an extent in its nature that it may be regarded as inextricably linked to it. See *supra* Chapter II, Section 2, § II.3.2.1.

1759 *German Graphics*, at [32].

1760 See for instance *Re Hayward* [1997] Ch 45, where Ratter J considered that proceedings brought by a trustee seeking a declaration that the debtor's interest in foreign land formed part of the estate do not fall within the Insolvency Exception of the Brussels Regulation; *Derek Oakley v. Ultra Veichle Design Ltd* (in liquidation), where the trustee sought an order that he was entitled to the debtor's interest in real property of a vehicle in Spain. *UBS AG v. Omni Holding AG*, [2000] 1 WLR 916.

Where the action of the owner (trustee or creditor) is an ordinary petition seeking the restitution of the assets hld by the debtor (or *vice versa*) the relevant provisions of the Brussels Regime may be Article 24 Brussels Ia (*i.e.* the exclusive jurisdiction for immovable properties) or Article 23 Brussels Ia, concerning the prorogation of jurisdiction made by the parties through a choice-of court clause. Indeed, those type of actions being governed by the Brussels Regime, choice-of-courts agreements should be in principle opposable to the trustee. Also, as Brussels Ia provides for no exclusive forum for movables, Article 4 and 7(1) Brussels Ia maybe also called into question to determine the jurisdiction over actions concerning those assets [1761].

[1761] The above leads to some further observations on the application of the Brussels Regime, where the claimant seeks preservative measures (even before the opening of insolvency proceedings), anticipating the action for the restitution of the assets of which he claims the restitution. That was the case in the *German Graphics* case, where the seller had addressed the Dutch courts for the recognition of a preservative measure obtained in Germany against assets located in the Dutch premises of the insolvent defendant. On that occasion it must be assumed that the relevant jurisdictional provision was Article 31 Brussels I (although the judgement does not expressly clarify this point). The Court did not concern itself with the fact that the claimant was seeking the enforcement of a protective measure. Yet, it may be worth recalling that the applicability of the Brussels Regime to the recognition and the enforcement in the Netherlands of the preservative measure obtained by *German Graphics* in Germany would shave raised some concern. It is not possible to address in detail the interesting issues raised by the rules on protective measures under the Brussels Regime. Suffice here to say that, under the former regime of Brussels I, pursuant to the ECJ's case-law, preservative measures could be granted by the courts of a Member State provided that the territorial jurisdiction of the courts of that State had a 'real connecting link' with the subject-matter of the measures sought. Under such a construction, the extraterritorial effectiveness of preservative measures would be easily bypassed by the party against whom preservative measures are directed. For instance, another court having jurisdiction could be seised with a negative declaratory relief, thus preventing the claimant to seise the court granting the preservative measure of the merits of the dispute as in that case the mechanism of *lis pendens* would prevent him to do so. With reference to measures regarding rights *in rem*, such a link was generally acknowledged with the location of the assets which are the subject matter of the measure, in the State where the recognition is sought. The majority of scholars have interpreted the 'real connecting link' test for preservative measures as depending upon the content of the measure requested. Therefore, it was submitted that in the *Denilauler* (ECJ, 21 May 1980, Case C-Case 125/79, *Bernard Denilauler v SNC Couchet Frères*, ECLI:EU:C:1980:130) and *Van Uden* (ECJ, 17 November 1998, Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, ECLI:EU:C:1998:543) judgements, the ECJ did not limit the effectiveness of preservative measures to the *forum loci executionis* necessarily considered as the place where assets are located. In effect, what had to be assessed was whether, on the basis of the nature of the measure requested, other connecting factors could be relevant. As such, for protective measures *in rem* the real connecting link certainly refers to the location of the assets, whereas in case of protective measures *in personam* (*i.e.* concerning orders to act or abstain from an act) the real connecting link could not be that of the location of the assets, but rather the link with the person against whom the measure is sought, in order to ensure that the court seised for the measure would be in the position to enforce the measure against that person in case of non-compliance to it). The interpretation provided by the Court of the exorbitant forum set forth by Article 31 Brussels I (formerly Article 24 Brussels Convention) led to the conclusion on the part of some scholars, that under the Brussels I Regime ultimately preservative measures could have only a territorial effects in the *forum loci executionis* or, at least, that they could circulate with the proviso that the conditions set forth by the ECJ case-law were fulfilled (*i.e.* the real connecting link between the territorial jurisdiction of the court granting the measure and its enforcement, the *interim* and protective nature of the measure). In the light of the above, it may be observed that in the *German Graphics* case, it is questionable that the protective measure sought in Germany by *German Graphics* had a real connecting link with the subject matter of the measures, not because of the insolvency proceedings, but because the assets concerned by the measure were located in the Netherlands. It may be also worth briefly recalling that the Brussels Ia Regulation has introduced significant amendments to the rules concerning the circulation of preservative measures. Indeed, according to Article 2(a) Brussels Ia, provisional measures, including protective measures ordered by a court or tribunal which by virtue of the Brussels Ia Regulation has jurisdiction as to the substance of the matter, may freely circulate. On the contrary, the effects of those measures granted under the *lex fori* of a Member State which does not have the jurisdiction on the merits, must be limited to the territory of that

V.4.3. The 'other' actions brought in the context of insolvency proceedings

The actions analysed in the previous paragraphs served to determine the 'core' of insolvency proceedings, because they regard claims arisen before the opening insolvency proceedings brought by creditors *against the debtor* subject to insolvency proceedings.

However, as explained, in the course of insolvency proceedings other types of actions may arise, and they are typically brought by the insolvency trustee (although nothing excludes that negative declaratory relief may be commenced by the creditors).

In the light of the ECJ case-law, the characterisation of some actions seems to be quite clear by now. For some other actions (and in particular director's liability and actions for the reinstatement of the insolvency estate) the inconsistencies of the ECJ leaves still room for doubts.

V.4.3.1. Avoidance actions

Actions to set a transaction aside represents the archetype of the instruments aimed at giving effect to the principle of the *par condicio creditorum*.

The underlying policy is to protect the general body of creditors against a transaction which confers an unfair or improper advantage on the other party. It is therefore an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors should be amenable to adjustment or avoidance [1762].

The action implements the 'dynamic collectiveness' that was described at the beginning of this work as one of the key features characterising insolvency proceedings and the common pool problem they deal with [1763].

The rationale underpinning transaction avoidance is based on the idea that when insolvency proceedings are opened, they do not involve exclusively those subject which at the time of the opening are actually creditors of the debtor (as it happens in ordinary enforcement proceedings

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Member State. In that constellation, for present purposes the regime of *ante causam* measures should be duly taken into account. Indeed, it is not entirely clear the functioning of the new provisions requiring that the court granting the protective measure has the jurisdiction as to the substance of the matter, where proceedings concerning the merits have not yet been commenced. In particular, the question arises as to what happens if the protective measure is granted by a court having in principle jurisdiction under one of the alternative *fora* provided by the Brussels Regime as to the substance of the matter (e.g. the general forum of the defendant's domicile), and subsequently a court in another Member State is actually seised as to the substance of the dispute (on the basis of another of the special forums provided for in Article 7 Brussels I.) Brussels I makes neither reference to the necessary commencement of proceedings on the merits prior to the request of the protective measure, nor it requires that such proceedings are commenced within a specified period of time. See on this profile, inter alia, N. NISI, 'Provisional measures in the new Brussels I Regulation', in *Cuadernos de Derecho Transnacional,* 2015, 7, pp. 128-141.

1762 I. FLETCHER, *Law of Insolvency*, London, 2009, at [26.002]; R. GOODE, *Principles of Corporate Insolvency Law*, London, 2011, at [13-03]. See also a US case, *In re Condor Insurance Ltd*, 601 F 3d 319, 326 (5th Cir 2010), where avoidance actions were defined « *Avoidance laws have the purpose and effect of re-ordering the distribution of a debtor's assets* […] *in favor of the collective priorities established by the distribution statute* [and] *must be treated as an integral part of the entire bankruptcy system* ».

1763 See *supra* the Preface.

involving more than one creditor attacking the same debtor's asset) but they involve wider range of subjects - whose creditors that have already been satisfied and third parties - in the consequences of the debtor's collapse.

Such an infringement of the (former) creditor's legitimate expectation in the stability and continuity of the right acquired is only justifiable in the context of insolvency proceedings, and rests on the tenet principle of the *pari passu* principle, as it will be demonstrated in few lines below.

At present, the characterisation of (insolvency) avoidance actions as Annex Actions leaves little room for doubts in the light of the ECJ case-law, which has been wholly confirmed in the Recast Regulation as witnessed by the fact that actions to set a transaction aside are the only ones expressly mentioned in Article 6 RR [1764].

In this respect it is worth recalling the opinion of the Advocate General Ruiz-Jarabo Colomer, where it is submitted that, despite the differences across the legal systems of the Member States, the solutions offered against transactions detrimental to the principle of the *paritas creditorum* have all a 'common genetic code' [1765].

Such a conclusion is further bolstered by authoritative comparative studies carried out in in recent years, which highlight that, irrespective of whether avoidance actions are designed broadly or narrowly in each legal system, they are consistently aimed at the implementation of the *pari passu* principle [1766]. Indeed, all insolvency laws provide for statutory actions directed to reverse (depending on the legal system concerned, the effect of the avoidance action can be the voidness, voidability or unenforceability) unfairly detrimental juridical acts infringing the *paritas creditorum*.

Such detrimental acts, may be grouped in (a) transactions with the intent of defrauding creditors, (b) transactions at undervalue or gifts, (c) transactions with a creditor for which no enforceable obligation existed, (d) transaction directed at the creation of a secured rights to secure a pre-existing obligations, (e) transactions with a creditor after the filing of insolvency proceedings [1767].

1764 See, *ex multis*, Y. BRULARD and J. MATERNE, 'Les Actions Annexes', *cit.*, p. 125, G. CUNIBERTI, 'La competence des tribunaux de la faillite', in G. CUNIBERTI, P. NABET and M. RAIMON, *op.cit.*, p. 168. In the case BGE, 15 December 2004, 131 III 227 S. 235, concerning the jurisdiction of the Swiss court opening insolvency proceedings to decide an action to set a transaction aside, that was challenged by the defendant, domiciled in Poland) the Federal Supreme Court decided conformigly to the *Gourdain* case-law, ruling that an action to set a transaction aside « *trouve donc son fondement dans la faillite, avec laquelle elle est en étroite connexité. Elle ne pourrait être intentée sans la faillite, dans la liquidation de laquelle elle est d'ailleurs insérée* […] *l'action révocatoire après faillite du droit suisse fait aussi partie des procédures analogues à la faillite exclues du champ d'application de la Convention de Lugano*». The Court stated that the trustee had brought correctly the action before the court opening insolvency proceedings (in application of the Swiss insolvency law, presumably under article Article 289, SchKG). Similarly, Bundesgerichtshof, 6 June 2003, BGE 129 III 683 S. 684.

1765 All jurisdictions are presumed to have special rules on transactions avoidance. As a general rule, their statutory provision are included in the respective insolvency statute. See, for instance, article 67 and ff. l. fall. (Italy); ss. 238-246, 423-425 IA 1986 (England and Wales); articles L. 632-1 - 632-4 Cod. Comm. (France); §§ 129-147 InsO (Germany) articles 71-73 LC (Spain); articles 42-51 fw (Netherlands).

1766 S.C.J.J. KORTMAN, W. W. MCBRIDE, A. FLESSNER, *Principles of European Insolvency Law*, Deventer, 2003, p. 53. See also P. WOOD, *Principles of international Insolvency*, London, 1995.

1767 P. WOOD, *Principles of international Insolvency*, London, 1995, p. 137 and ff.

Once established the *vis attractiva concursus* within the scheme of the Insolvency Regulation by the ECJ in the *Seagon* judgement, the inclusion of avoidance actions brought by the trustee in the scope of the jurisdiction of the Member State opening insolvency proceedings has never been put into question by the ECJ, which has restated it (albeit hastily) on many occasions [1768].

To be precise, it bears observing that, as to actions to set a transaction aside, the ECJ has never really properly applied the Gourdain Formula, as if it deemed superfluous ascertaining whether those actions meet the twofold criterion of the direct derivation and the close connection with insolvency proceedings. As mentioned, the Court contented itself with observing that avoidance actions are brought exclusively by the trustee in the event of insolvency and that they are solely directed at protecting the interest of the general body of creditors [1769]. It has been explained, however, that both the *locus standi* of the trustee and the fact that the body of creditors benefits of the action are elements subsumable under the second condition of the Gourdain Formula (the close connection with insolvency proceedings, *i.e.* the procedural context of the action). They do not refer, in fact, to the criterion of the direct derivation of the cause of action from insolvency proceedings - which was never expressly examined by the ECJ with reference to actions to set a transaction aside - and, to split hairs, they were also considered as not determinative to characterise and action as falling within the concept of Annex Action [1770].

From an Italian perspective, the legal foundation of actions to set a transaction aside has created a lively doctrinal debate among scholars, of which it is possible here to give only minimal - and admittedly superficial - hints, as the characterisation of avoidance actions is contingent not upon one or another.

Under a first construction, the 'monistic' theory, the legal foundation of avoidance actions would not stem directly form insolvency proceedings [1771]. The historical developments of the statutory provisions governing insolvency avoidance actions would demonstrate that its cause of action is rooted in the ordinary civil *actio pauliana* [1772]. Under such a construction the ordinary civil *actio pauliana*

1768 See *Seagon*, *Schmid*, *H. v. H.K.*, *F-Tex*.

1769 See *Seeagon*, at [16].

1770 See F. CORSINI, *op. cit.*, p. 13.

1771 See, among others, A. ROSAPEPE, 'La revocatoria fallimentare', in *Giur Comm.*, 2012, II, p. 475; U. NATOLI, 'Azione revocatoria fallimentare', in *Enc. dir.*, IV, Milan, 1959, p. 908. B. QUATRARO and A. FUMAGALLI, *Revocatoria ordinaria e fallimentare*, Milano, 2002, p. 888; R. NICOLÒ, 'Dell'azione revocatoria', in Scialoja e Branca (eds.), *Commentario del codice civile*, Bologna, 1953, p. 260; C. PECORARO, A. DI AMATO, *La revocatoria fallimentare in generale*, in L. PANZANI (ed.) *Il fallimento e le atre procedure* concorsuali, II; Turin, 1999; G. RAGUSA MAGGIORE, *Contributo alla teoria unitaria della revocatoria fallimentare*, Milano, 1960, p. 12; G. TERRANOVA, 'Effetti del fallimento sugli atti pregiudizievoli ai creditori', in F. BRICOLA and F. GALGANO, *Commentario Scialoja-Branca. Legge Fallimentare*, Bologna-Rome. 1993. M. ARATO, *Operazioni bancarie in conto corrente e revocatoria fallimentare sulle rimesse*, Milano 1995, p. 39 ss. C. CONSOLO, 'La revocatoria ordinaria nel fallimento fra ragioni creditorie individuali e ragioni della massa', in *Riv. dir. proc.*, 1998, 393. The monistic theory seems to have been espoused by the Italian Supreme Court in Cass., 7 June 1999, n. 5562, in *Fallimento*, 2000, p. 741.

1772 S. SOLAZZI, *La revoca degli atti fraudolenti in diritto romano*, Napoli, 1934; V. PIANO MORTARI, *L'azione revocatoria nella giurisprudenza medievale*, Milano, 1962.

and the insolvency avoidance action would have the same ontological nature, structure and purpose [1773].

Under this perspective, from the creditor's standpoint, the very nature of the action would be essentially tortious, as the debtor, by disposing of an asset or assuming new obligations towards third-parties, would reduce the value of the assets acting as collateral for the claims of his creditors (the monistic theory, therefore, assumes that the detrimental act provokes a material damage to the creditors, and therefore is labelled as an 'indemnity' theory). The fundamental nature of the action would not be put into question by the fact that it is exercised by the trustee in the context of insolvency proceedings, as in any case it would be grounded on the precondition that the detrimental transaction would infringe the insolvency liability regime of creditors.

Nevertheless, the opening of insolvency proceedings would essentially affect the features of the action exercised by the trustee. Apart from the exclusive *locus standi* of the trustee and the circumstance that the action is brought in the interest of all creditors, among the elements that reveal a difference between the two actions there would be the fact that the *actio pauliana* would request the claimant to demonstrate the *consilium fraudis* of both the debtor and the third party. Another marked difference which is symptomatic of the 'transformation' of the right underlying the insolvency avoidance action is represented by the fact that, for example, payments already overdue would be revocable (which is not possible for the creditor when exercising an ordinary *actio pauliana* [1774]) and that the enforcement of the claim of the successful claimant of the *actio pauliana* would still be subordinated to the full satisfaction of those creditors with a right of enforcement on the same asset of the debtor [1775].

According to a second opinion, the s.c. 'dualistic theory' (which is here supported [1776]), the opening of insolvency proceedings would lead to the creation of a new right underpinning the action to set a transaction aside. The trustee's right to reverse a valid and effective transaction for the mere fact that it was undertaken during the suspect period by the insolvent undertaking would stem directly from the opening of insolvency proceedings, because what takes on relevance would be the fact that the transaction is entered into when the debtor was on the edge of (material) insolvency (and not the

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1773 See *infra*, at § V.4.4.2.1.

1774 See Article 2902(3) Italian Civil Code.

1775 See Article 2902(2) Italian Civil Code.

1776 Among the supporters of the dualistic theory see, *ex multis*, M. FABIANI, 'La concorsualità dell'azione revocatoria ordinaria nel fallimento', in *Giur. Comm.*, 2013, p. 985; ID. 'Revocatoria fallimentare: tra nostalgie e nuove inquietudini', in *Foro.*it, 2000, p. 102. A. JORIO, 'Le crisi d'impresa. Il fallimento', in Iudica-Zatti (eds.), *Trattato di diritto privato*, Milano, 2000; S. SATTA, *Diritto Fallimentare*, Padova, 1996; F. D'ALESSANDRO, *La revocatoria dei pagamenti nel fallimento*, Milano, 1972. More recently the Italian Supreme Court seems to bolster this approach. See, for instance, Cass., 28 March 2006, n. 7028, in *Foro.*it, 2006, p. 1718 and Cass., 12 January 2001, n. 1342, Cass. 30 March 2000, n. 3878, in *Fallimento*, 2001, p. 206.

mere circumstance that the transaction could be invalidated because it has contributed to the insolvency of the debtor) [1777].

While the ordinary *actio pauliana* represents a statutory instrument available to the creditors *uti singuli* aimed at protecting the liability regime secured by the assets of the debtor *in bonis*, on the contrary, the insolvency avoidance action intervenes in a moment where the 'common pool' problems have already arisen and therefore it would be a statutory response to those specific problems, which is attributed solely to the trustee in the interest of the whole body of creditors [1778].

In this respect, it must be borne in mind that the dualistic approach is an 'anti-indemnity' theory: an act would be detrimental to the general body of creditors regardless to the fact that it actually diminishes the economic value of the assets of the debtor. A transaction would be deemed detrimental also when the consideration of that act has increased the collateral available to the other insolvency creditors, as it would still have provided an unduly advantage to one creditor, thus infringing the *paritas creditorum*. Therefore, the *eventus damni* of the insolvency avoidance action would be significantly different from that of the *actio pauliana.* As to the former, the damage would consist in the infringement of the *par condicio creditorum* [1779]. As to the latter, the damage would consist in the material reduction of the debtor's assets serving as collateral for the individual claim.

Therefore, the insolvency avoidance action would underpin a right 'ontologically' different from that one underlying the ordinary *actio pauliana*, that would not exist outside the insolvency proceedings. The (insolvency) avoidance action would aim at protecting the *pari passu* principle, which is a specific statutory regime that intervenes in the context of insolvency proceedings, irrespective of whether the ordinary civil law provides for other mechanisms ensuring the liability regime outside of insolvency proceedings [1780].

Regardless of which of the two theories is preferred, the avoidance action would be inextricably linked to insolvency proceedings, if only because, should one want to adhere to the first 'monistic'

1777 S. SATTA, *op. cit.*, p. 209.

1778 See among others, A. JORIO, *op. cit.*, p. 411 and M. FABIANI, *Il diritto della crisi e dell'insolvenza*, Turin, p. 194.

1779 In *Re Condor Insurance Ltd*, 601 F 3d 319, 326 (5th Cir 2010), the Court of Appeals for the Fifth Circuit said that: « *Avoidance laws have the purpose and effect of re-ordering the distribution of a debtor's assets* […] *in favour of the collective priorities established by the distribution statute* […] [and] *must be treated as an integral part of the entire bankruptcy system* ».

1780 For foreign scholars supporting the dualistic theory see B. LAUKEMANN, 'Jurisdiction – Annex Actions', in *op. cit.*, p. 188. L. HÄSEMEYER, *Insolvenzrecht*, Cologne, 2007, at [21.03].

approach [1781], the Gourdain Formula would still confirm the characterisation of insolvency avoidance actions as an Annex Action [1782].

Yet, any doctrinal criticism has lost its relevance in the light of the inclusion of avoidance actions within the text of Article 6 RR which allows to consider that (national) insolvency avoidance actions, notwithstanding the different features in each legal system, are subsumable under the autonomous prototype of Annex Action.

Indeed, despite the ECJ has been often concerned with the German action under § 129 and ff. InsO, the common DNA of avoidance actions entails that any other similar action - such as, for instance, the French *actions en nullité de la période suspecte* under Article L. 632-1 Cod. Comm., the Italian *revocatoria fallimentare* under Article 67 l. fall., the Spanish *acciones de reintegración*, under Articles 71-73 L.C. - fall within the European (autonomous) notion of avoidance action [1783].

It is noteworthy that the characterisation of avoidance actions as Annex Actions entails that they are attracted to the exclusive forum of the Member State opening insolvency proceedings not only where they are brought by the trustee, but *in thesi* also when they are commenced by the creditor (or the third party) seeking a negative declaratory relief that the transaction entered into with the debtor is excluded from the effects of insolvency proceedings [1784].

Also, as explained above, it seems that the *vis attractiva concursus* precludes that an avoidance action is brought by the trustee as a counterclaim (but the trustee may rise the ineffectiveness of the transaction as a mere defence) in the context of an ordinary civil and commercial action brought by a (secured) creditor, as the avoidance action should be brought to the exclusive forum of the Member State

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1781 Incidentally it is noteworthy that Advocate General Ruiz-Jarabo Colomer in *Seagon* seems to adhere to the monistic theory, where he states that « *Over time, there have been significant changes to the actio pauliana in the sphere of insolvency proceedings. The first alteration was to the name, since in insolvency law it took the title 'action to set a transaction aside'. The fundamental difference between the action to set aside in civil law and the action in the context of an insolvency to set a transaction aside lies in the effects which each action produces, since, under the general rules, those effects are confined to the individual creditors who have brought the action, whereas, under the insolvency rules, the effects apply to the whole of the assets and therefore benefit all the creditors, a typical feature which has become a general principle of insolvency law under the Latin maxim par conditio creditorum* ». Yet, in the light of the transformations which the action undergoes in the context of insolvency proceedings, the Advocate General comes to the conclusion that the insolvency avoidance action represents an 'autonomous action'. See the opinion delivered on 16 October 2008 (ECLI:EU:C:2008:575), at [27] - [28].

1782 For the sake of completeness, however, it bears observing that before the *Seagon* judgement, a minority part of Italian scholars adhering to the monistic theory have argued that insolvency avoidance actions would fall within the scope of application of the Brussels Regime, highlighting the fact that, despite some differences, the consistency between the common *actio pauliana* and the insolvency avoidance action would exclude the *vis attractiva* of the courts of the Member State opening insolvency proceedings. See C. HONORATI, 'Revocatoria fallimentare e Convenzione di Bruxelles del 27 settembre 1868', in *Riv. dir. internaz. priv. e proc.*, 1989, p. 600.

1783 G. CUNIBERTI, 'La competence des tribunaux de la faillite', in G. CUNIBERTI, P. NABET and M. RAIMON, *op.cit.*, p. 169 states expressly that « *le terme actions révocatoires doit être compris dans ce cadre comme générique et se référant aux équivalents fonctionnels connus dans les autres États Membres* [the term avoidance actions should be understood in this context as generic and referring to functional equivalents known in other Member States] ».

1784 On this point see R. BORK, *Annexzuständigkeiten nach Art. 6 EuInsVO,* in *Festschrift für Siegfried Beck,* München, 2016, p. 55. C. THOLE, 'Negative Feststellungsklagen, Insolvenztorpedos und EuInsVO', in *ZIP* 2012, p. 605; W. G. RINGE, 'under Article 6', in R. BORK, K. VAN ZWEITEN, *Commentary on the European Insolvency Regulation*, at [6.21].

opening insolvency proceedings under Article 6(1) RR [1785]. For instance, an action for the declaratory relief concerning the validity of a right *in rem* over an asset located in another Member State (which, as seen, does not constitute an Annex Action) could be contrasted by the trustee requiring the declaration of ineffectiveness of the security right, as it was constituted during the suspect period. Recalling what was said above, in this case the rule on 'related actions' under Article 6(2) RR would not operate, as the condition that it should be the trustee to bring together the Annex Actions and the ordinary civil and commercial action would not be met. It is however unclear whether in such a circumstance both actions should be attracted before the *forum concursus* or the two actions should be treated separately [1786].

V.4.3.2. [Segue] Avoidance actions assigned to a third party or to a creditor

The conclusions drawn in the paragraph above seem to suffer a significant exception in the event that the trustee assigns (insolvency) avoidance actions to creditors and third parties, where the *lex concursus* of the Member State opening insolvency proceedings allows him to do so.

The possibility that the trustee assigns (also) avoidance actions to third parties is not uncommon in the legal system of Member States.

From the *F-Tex* judgement it is understood that under German law « *the right to have a transaction set aside may be assigned provided that that assignment takes place for consideration which is regarded as equivalent, for the benefit of the general body of creditors* » [1787].

The Italian insolvency law expressly provides under Article 124 l. fall. that in the context of insolvency proceedings (both the *fallimento* and the *concordato preventivo*) under certain conditions avoidance actions, together with the 'actions of the estate' [1788], may be assigned in return for payment to a third party or one or more creditors (but not to the assumptor, or to other third subjects guaranteeing the debtor's obligations to fulfil the composition plan in the context of insolvency proceedings [1789]).

The Austrian Supreme Court has recently found that insolvency related avoidance claims can be sold, although there is no express provision of such a possibility under the Austrian insolvency law and it is understood that the majority of the scholars had expressed a contrary opinion [1790].

1785 P. MANKOWSKI,'Under Article 6' in P. MANKOWSKI, M. MÜLLER, J. SCHMIDT, *EuInsVO 2015*, Munich, 2016, at [11].

1786 See *supra*, at § V.4.3.4.2.

1787 *F-Tex*, at [31]-[32].

1788 See *supra* Chapter I, at § I.2.3.

1789 In essence, the reasons underlying such an exception rest on the fact that the debtor would benefit of the effects of the avoidance action. See L. STANGHELLINI, 'Under art. 124', in A. Jorio and M Fabiani (eds.), *Il nuovo diritto fallimentare*, Bologna, 2006-2007, p. 1989; L. GUGLIELMUCCI, 'sub artt. 124-141', in *Codice commentato del fallimento*, Milano, 2008, p. 1225; F. DE SANTIS, '*La cessione delle azioni di massa'*, in *Fallimento*, 2008, p. 1121

1790 Austrian Supreme Court, 11 October 2019, OGH 17 Ob 6/19k. « *The assignment (in return for payment) of rescission claims under the* [Austrian insolvency law, 'IO'] *is in any case effective if, in addition to the claim to the shaping of law (invalidation in terms of § 27 IO), it also includes a claim to benefits based on this shaping of law (§ 39 IO). This shall not*

The rationale underpinning the possibility that some Member States bestow upon the trustee to assign avoidance actions mainly rest on reasons of procedural effectiveness and cost-saving expediency.
By assigning avoidance actions, the trustee is able to immediately monetise the (expected) outcome of avoidance actions and, in particular, of uncertain or high-risk avoidance actions which the trustee will most likely choose not to exercise in situations where the insolvency estate does not provide for enough funding to finance avoidance actions.
Where the avoidance action is sold or assigned to an unrelated third party or to a creditor, the implementation of the *par condicio creditorum* through the 'elimination' of the preferential treatment received by a creditor, is achieved through a different modality, represented not by the direct exercise of the avoidance action by the trustee, but rather through the payment by the third of the price relating to the assignment of the avoidance actions. The assignment price (a fixed sum or a percentage of any sums recovered) is generally calibrated upon the proceeds that the trustee expects that he would have obtained if he had brought the avoidance action himself. Therefore, the right underlying the avoidance action (which, as stated, represents a right that stems directly from the opening of the insolvency proceedings and that may be ultimately referred to the right of the creditors to the orderly and equal satisfaction of their claim in the context of insolvency proceedings) is still *exercised* by the trustee, acting on behalf of the creditors, but in a different manner.
Therefore, for present purposes, the assignment of avoidance actions may be considered under two different perspectives, which lead to identify two different actions that are related to it:
(i) having regard to the conduct of the trustee and adopting a perspective that may be defined 'internal' to the insolvency procedure (I say internal because the 'collective' holder of the right underlying the action is the general body of creditors and the right is exercised on behalf of the general body of creditors by the trustee, acting as a body of the procedure), the assignment of avoidance actions may give rise to actions concerning the liability of the trustee. The assignation of avoidance actions could be disputed on the ground that it is not allowed under the *lex concursus*, and therefore the trustee assigning avoidance actions had acted beyond his powers. In anticipation of what will be explained afterwards, those actions are Annex Actions [1791].
(ii) adopting an perspective that, for now, may be defined 'external' only on a provisional basis, the assignation of avoidance actions to a third party raises the delicate issue whether the avoidance action exercised by the assignee may still be considered as an Annex Action and retains the close connection with the procedure that is essential to attract the action to the jurisdiction of the Member State opening insolvency proceedings.

apply if such an assignment is made improperly or contrary to the purpose of insolvency. The reasonableness of the assignment price is irrelevant ».

[1791] See *infra* this Chapter, § V.4.3.3.

Of that necessary distinction was well aware also the ECJ when decided the *F-Tex* case. In the guise of a didactic premise [1792], the Court considered important to clarify that the action exercised by the assignee (which was under discussion on that occasion) must be kept conceptually separated from the action concerning the validity of the assignment granted by the trustee and the and the trustee's power to assign his right to have a transaction set aside.

When tackling that second issue in the *F-Tex* case, the ECJ adopted a practical approach, and merely focused its attention on the fact that the assignment of the avoidance action to a third party breaks the ties (apparently) only of the close connection between the action and the insolvency procedure (*i.e.* the second condition of the Gourdain Formula).

However, as explained, the second condition of the 'close connection' was defined on many occasions by the Court as non-decisive and non-sufficient to determine whether an action can be characterised as an Annex Action. Nevertheless, the Court expressly decided not to answer to the fundamental question whether the right underlying the action (exercised by the assignee) derives directly form insolvency proceedings or, to be more precise, whether it remains the same right directly deriving from insolvency proceedings that would have been exercised by the trustee.

It remained unsolved, therefore, whether the object of the assignation is *(a)* the mere *ius agendi*, the right to bring the judicial action (but not the right underlying it) or whether *(b)* the assignment concerns both the action and the substantive right exercised through it and, should this be the case, whether *(c)* the substantive right, once acquired by the assignee retains the same essential features or it is 'transformed' as an effect of the assignation.

On the basis of the sole second condition of the Gourdain Formula, the Court concluded that an avoidance action, when assigned to a third party or a creditor, falls within the scope of the Brussels Ia Regulation. Therefore, the assignee should sue the third party benefitting of the detrimental act to the *par condicio creditorum* before the courts of his domicile under Article 4 Brussels 1, or according to the special *forum* set forth by Article 7(1)(a) RR [1793], but reasonably not pursuant to a choice-of-forum clause agreed upon the trustee and the assignee, which would not be opposable to the third party [1794].

Some authors have contented themselves with the solution adopted by the Court, merely stating that - albeit admittedly an 'odd' decision - the *F-Tex* judgement leads to the conclusion that as, a general rule, avoidance actions are Annex Actions when they are brought directly by the trustee, whereas if they are brought by a third party, acting as the assignee of the action, the avoidance action would be

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1792 TH. MASTRULLO, 'L'action exercée par le cessionnaire du droit de révocation que le syndic tire de la lex concursus relève de la matière « civile et commerciale » au sens du règlement « Bruxelles I »', in *Revue des procédures collectives,* November, December, 2012, com. 184.

1793 As recently established concerning the ordinary *actio pauliana* in ECJ, 4 October 2018, Case C-337/17, *Feniks sp. z o.o. v. Azteca Products & Services SL*, ECLI:EU:C:2018:805.

1794 See, explicitly the Italian Supreme Court Cass., 3 November 2017, n. 26145, Cass., SS.UU., 5 May 2006, n. 10312; Cass., SS.UU. 27 July 1999, n. 515.

an ordinary civil and commercial action [1795]. In essence it is accepted that avoidance actions would change their intrinsic nature depending on subject acts as a claimant (the trustee or an assignee).
Such a pragmatic approach might perhaps be convincing, but it does not seem to consider that in *F-Tex* the Court did not address the first condition of the Gourdain test mainly because in that case the assignee was also the sole creditor of the debtor. For this reason, other authors have attempted to curtail the interpretative value of *F-Tex* submitting that it is confined to its own specific facts (*i.e.* the circumstance that the assignee was the sole creditor of the debtor) alleging that it does not provide much in the way of general guidance for the assessment of the jurisdiction over Annex Actions [1796].
It is submitted that if one wants to put the Gourdain Formula through its paces and determine if the solution adopted in *F-Tex*, if shared, applies *in general* whenever avoidance actions are exercised by the assignee, in the context of a typical insolvency procedure, involving more than one creditor, one should attempt to solve the question of the legal foundation of the action assigned to the third party/creditor.
Few hints that may guide the reasoning can be grasped by some swaths of the *F-Tex* judgment, which seems to exclude the first possibility mentioned above that only the right of claim is assigned to the third party [1797].
The Court indeed states that « *that the question arises* [but that in *F-Tex* remained unsolved] *whether the right acquired, once it becomes owned by the assignee, retains a direct link with the debtor's insolvency* » [1798]. Therefore, the assignee does not bring a derivative action, acting as a mere substitute of the trustee and thus on behalf of the general body of creditors. The Court states that the assignee acts « *in his own interest and for his personal benefit* » [1799].
The alternative therefore remains between considering that the assignee exercises in his own name and for his own interest the same right underlying the action that the trustee would have exercised or considering that such right, as a result of the assignment, should be regarded as a new and different right.
The doctrinal debate that animated Italian scholars concerning the nature of the assignation, could perhaps provide some hints that may be transposed also in the present analysis.

1795 P. DE CESARI AND G. MONTELLA, 'la revocatoria fallimentare in bilico tra il regolamento n. 1346/2000 e quello n. 44/2001', in *Fallimento*, 2012, 8, 1008.

1796 Some authors have attempted to curtail the interpretative value of *F-Tex* submitting that it is confined to its own facts which does not provide much in the way of general guidance. See G. MCCORMACK, *op. cit.* p. 323. O. CASAOLA, 'The transaction avoidance regime in the recast European insolvency regulation: Limits and prospects', in *Int Insolv Rev.*, 2019, 28, pp. 1–21.

1797 Such an approach was supported by G. RAGUSA MAGGIORE, *Istituzioni di diritto fallimentare*, Padua, 1994, p. 509 and with regard to the Italian system, and the assignment of avoidance actions under Article 124 l. fall. G. T. LIUZZI, 'Cessione delle azioni di massa nel fallimento', in *Fallimento*, 2009, p. 510.

1798 *F-Tex*, at [40].

1799 *F-Tex*, at [44].

A difference in the substantive right acquired by the assignee has been maintained by those authors assuming that the assignation would represent a (fictional) anticipated sale (to the assignee) of the proceeds deriving out of the liquidation of the asset recovered by the insolvency estate through the avoidance action [1800]. Such an approach is grounded mainly on the assumption that, being onerous in nature, the assignment would represent a sale to the assignee of the asset that would have existed in the insolvency estate if the transaction (to be set aside) had not occurred. The assignee would then acquire, following the exercise of the avoidance action, the ownership of the asset (or the claim, or the different legal position) that is the subject matter of the avoidance action [1801].

Despite the different legal consequences referred to avoidance actions across the Member States (reflected in the wording of Article 7(2)(m) RR, 'voidness, voidability or unenforceability'), the predominant situation concerning the Member States that were taken into account in this study seems to be that the typical effect that avoidance actions achieve is to *invalidate* the transaction infringing the creditors' right [1802]. Avoidance actions, however, do not always produce automatically the effect that the asset must be returned to the insolvency estate. The further effect of the restitution of the asset is devolved to a different claim (generally introduced by trustees simultaneously with the avoidance action), specifically seeking an order for the restitution of the asset.

In those Member States, where avoidance actions do not produce automatically the transfer of the asset to the insolvency estate, the doctrinal approach equating the nature of the assignation of avoidance actions to an anticipated (fictious) sale of the asset subject to the avoidance action could perhaps to lead to the conclusion that the legal basis of the action exercised by the assignee would be substantially different from that one exercised by the trustee [1803]. The former would substantially bring the action to protect his (anticipated) ownership over the asset that was the object of the

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1800 The *fictio iuris* justifies the assignation imagining that the avoidance action has already been successfully carried out, the transaction has already been declared ineffective, the enforcement action to obtain control of the asset transferred with the transaction has already taken place, the asset has already been liquidated and the proceeds of this liquidation have been sold to the assignee. P. PAJARDI, *Codice del fallimento*, Milano, 2004, p.1024. L. DEVOTO, *L'assuntore e la cessione delle revocatorie*, Milano, 1980, 19. F. DI SABATO, *L'assuntore del concordato fallimentare*, Naples, 1960, p. 25; SATTA, *Diritto fallimentare*, Padua, 1996, p. 374. DI CATALDO, *Il concordato fallimentare con assunzione*, Milan, 1976, p. 76, L. PANZANI, *Circolazione dei crediti, cessione delle revocatorie e concordato fallimentare*, in *Dir. fall.*, 2009, p. 29.

1801 This seems the solution which the Court seems vaguely to allude to, as it refers to the « *method of payment* » and the fact that « *the proceeds of the action which [the assignee] brings become owned by him personally* ». *F-Tex*, at [44] - [45].

1802 for France, see A. HARMAND-LUQUE, *Recherches sur l'action paulienne*, Paris, 1995, p. 263 ss, p. 268, fn. 612 ss., attesting that, although the alternative between nullity and unenforceability of the transaction is debated among scholars, the case law reveals a proneness to consider that the effects of avoidance actions are those of impede the opposability of the transaction to the insolvency estate, while it remains valid between the parties. The non-opposability to the insolvency estate seems to be the typical effect of the avoidance action also in Spain and for this reason scholars qualifies the action as 'rescissory' (F. RIVERO, *España: la acción pauliana*, Madrid, 2000, p. 48).

1803 See for Italian case-law Cass. 26 April 2003, n. 6587, with observations by di M. FABIANI, 'La cessione delle azioni revocatorie nel fallimento', in *Foro it.*, 2003, I, 3027, and Cass. 24 November 1981, n. 6229, in *Dir. fall.*, 1982, II, 291, with observations by G. RAGUSA MAGGIORE.

transaction. The latter would bring the action to invalidate the transaction (and only separately seek the return of those assets).

Such a solution, however, is extremely debatable.

First, the *fictio iuris* of the anticipated sale would assume that the trustee could assign a right different from and 'superior' to the right that he could have exercised (*i.e.* the ownership over the assets vs. the *invalidation* of the transaction). The third party, defendant in the action brought by the assignee, would be faced with an action whose effects would be more burdensome (as it would seek directly the return of the asset and not the mere invalidation of the transaction) for the sole fact that the claimant differs upon the assignment of the avoidance action [1804].

Second, such a construction would reveal no significant difference between the action exercised by the trustee and that of the assignee when applied in the context of other legal systems, such as Germany and Spain, where the effects of an avoidance action include automatically the conviction that the third party return the assets concerned [1805].

In that Member States, where avoidance actions produce *ex lege* the effect of invalidate the transaction *and* automatically transfer the ownership of the asset to the subject exercising the action, the approach that equates the nature of the assignation of avoidance actions to an anticipated (fictious) sale of the asset subject to the avoidance action leads to the conclusion that, once acquired, the right underlying the avoidance action undergoes no significant transformations, if not for the fact that the execution of that right would be entrusted to the ordinary form of (individual) enforcement and not the collective distribution.

It emerges from the above that the issue is particularly complex and delicate, which has not yet found a satisfying answer and seems rather neglected when the issue arises in the transational context.

It is submitted here that the mere fact that the claimant is the assignee cannot amend the essential nature of avoidance actions. Therefore, an avoidance action assigned to a third party would still be an action 'deriving directly from insolvency proceedings' (first condition of the Gourdain Formula).

What could be discussed is the fact that the exercise of the action seems to imply a sort of 'de-collectivisation' of the *locus standi* to bring the action, which is ultimately transferred from the general body of creditors (represented by the trustee) to the assignee. If the avoidance action exercised by the trustee is an action aimed at protecting a shared and common right of all the creditors to invalidate transactions infringing the *pari passu* principle, the assignment of such a right to a subject that is not a body of the procedure breaks the *functional* tie of the right with the insolvency procedure, as the assignee would acts in his own interest. However, such a modification in my opinion cannot serve as

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[1804] M. FABIANI, 'La cessione delle azioni revocatorie nel fallimento', *cit.*, 3033.

[1805] See Article 143 InsO « *any property of the debtor which is sold, given away or relinquished by means of the avoidable act must be returned to the insolvency estate. The provisions regulating the legal consequences of unjust enrichment where the recipient was aware that there were no legal grounds for the performance apply with the necessary modifications* ». For Spain see *supra* Chapter I, § I.3.2.1.

an argument to neglect that the substantive right underpinning the action remains a right which arises in insolvency proceedings and which must be governed by insolvency law.

Such a conclusion does not seem to change for the fact that the assignee is the sole creditor of the debtor. Indeed, the assignment of avoidance actions to a creditor does not satisfy the insolvency claim of the latter, rather it pursues the objective reinstate the *par condicio creditorum* and immediately monetise the resources available for the orderly distribution of the proceeds out of the liquidation of the debtor's assets. This hold true even where the creditor is only one, because, as explained in the Preface of this work, the concept of collectiveness within insolvency proceedings is not a synonym of multi-party procedures, but it entails that the satisfaction of the creditor(s) is regulated in an orderly manner, following a ranking system provided by insolvency law [1806].

In the light of the foregoing it is submitted that the conclusion reached by the ECJ in the *F-Tex* case demonstrate that the conditions set forth by the Gourdain Formula are cumulative. In other words, it would not be enough that the right underlying the action 'derives directly' from insolvency proceedings. It must also retain the *functional* close connection with the latter. Such a solution seems consistent with the narrow interpretation of the *vis attractiva concursus* which is aimed at preserving the procedural efficiency of the insolvency procedure. However, it must be highlighted that the exclusion of assigned avoidance actions from the scope of the *vis attractiva* overlooks the efficiency of the assigned avoidance action, which remains directly deriving from insolvency proceedings. The inclusion of the assigned avoidance action under the umbrella of the Brussels Ia Regulation conceals the serious consequence that the court would have to decide the merits of the avoidance action applying the *lex concursus* of the Member State opening insolvency proceedings. Indeed, nothing in the Recast Regulation indicates that the court seised according to the jurisdictional regime of the Brussels Ia Regulation should not apply the *lex concursus* under Article 7(2)(m) RR [1807].

The application of a foreign insolvency law - which is a field of law fraught with technicalities that in many Member States require the creation of specific departments of courts where operate equipped with a specific expertise - may prove to be arduous for the foreign (civil and commercial) judge [1808].

1806 O. CASAOLA, *op. cit.*, p. 17. Reverting to the *F-Tex* case, then, the 33% of the proceeds possibly obtained by the assignee/sole creditor from the assigned avoidance actions, which pursuant to the terms of the assignment would have been paid to the trustee, would then have increased the value of the insolvency estate to be distributed following the insolvency order (in that case, first, the super priority debts of the estate, such as the expenses of the procedure, and then, the sole creditor).

1807 M. MONTANARI, 'La sottrazione al reg. N. 44/2001 della materia concorsuale e gli incerti confini delle azioni a tale materia riconducibili', *cit,* p. 120.

1808 S. MADAUS, 'Artikel 6 - Zuständigkeit für Klagen, die unmittelbar aus dem Insolvenzverfahren hervorgehen und in engem Zusammenhang damit stehen', in B. M. KÜBLER, H. PRÜTTING, R.BORK, in *KPB InsO, Kommentar zur Insolvenzordung*, Cologne, to be published in September 2019. The author highlights that, on the basis of the *F-Tex* case-law, it would still be possible for the trustee to influence the jurisdiction of the Member State opening insolvency proceedings even in case of assignment of avoidance actions. The trustee may initiate himself the avoidance action pursuant to article 6 RR, thus establishing the jurisdiction of the Member State opening the insolvency procedure and only subsequently assign the avoidance action to the third party, who would be forced to continue the action id the venue 'chosen' by the trustee. In contrast, the assignment before the filing of an action opens up the possibilities for the application of the Brussels Ia.

However, this seems to be a typical issue of private international law, that should not influence the inclusion of those action under the scope of Article 6(1) RR.

V.4.3.3. Actions for the liability against the trustee, the committee of creditors and other bodies of the procedure

As a rule of thumb, in carrying out the insolvency-specific duties vested upon him by the national insolvency law, the trustee (or any other body of the procedure, such as the creditor's committee) must conform his conduct to the standard duty of care of a prudent and conscientious person appointed for that role.

Therefore, the insolvency administrator shall be liable for damages to all parties to the proceedings if he intentionally or negligently breaches the duties incumbent upon him under the *lex concursus* (1809). Actions concerning the liability of the trustee for the breach of legal obligations under the applicable insolvency law or for mismanagement of the insolvency estate should be considered as an Annex Action (1810). Indeed, the right and the obligations underlying those actions stem directly from insolvency proceedings, as the trustee's duty to manage the debtor's assets derives from the opening of the procedure.

The *locus standi* to bring such actions may be vested upon a variety of subjects, depending on the *lex concursus*. They are generally brought by a newly appointed trustee seeking the compensation of the damage (collectively) suffered by the general body of creditors (1811), but national laws may also allow that the creditor *uti singulo* may sue the trustee for the harm directly caused by the trustee's activity (1812).

The characterisation of those actions as Annex Actions seems to be undisputed by scholars (1813) and ECJ case-law. In the *Valach* case, the ECJ found that the legal foundation of an action for the liability of the creditors' committee is grounded on the insolvency law, because the duties incumbent upon the body of the procedure are « *the direct and inseparable consequence of the performance by the committee of*

1809 As noted by an author, the liability of the trustee represents an incentive for the proper exercise of the duties established by insolvency law and the efficient administration of insolvency proceedings. C. WILLEMER, *Vis attractiva concursus und die Europäische Insolvenzverordnung*, Tubingen, 2006, p. 384.

1810 Advocating in favour of this solution also Article 17 of the Preliminary Draft Convention and Article 15 Daft Convention.

1811 See for instance in the Italian system, article 46 l. fall.

1812 See for instance, § 60 InsO providing the secured creditors with a claim for damages against the trustee in case the latter has sold the asset covered by the secured right and has already received the purchase price, but the consideration of the purchase is not severable by the insolvency estate. See, on this point, B. LAUKEMANN, *Die Unabhängigkeit des Insolvenzverwalters, Eine rechtsvergleichende Untersuchung*, Tubingen, 2010, p. 350.

1813 G. CUNIBERTI, 'La compétence des tribunaux de la faillite', *op. cit.*, p. 170. B. LAUKEMANN, 'Jurisdiction – Annex Proceedings', *cit.*, p. 196; C. WILLEMER, *Vis attractiva concursus und die Europäische Insolvenzverordnung*, Tubingen, 2006, pp. 388 and 392. G. LUKE, 'Das Europäische internationale Insolvenzrecht', in *ZZP*, 111, 1988, p. 275.; L. CARBALLO PIÑEIRO, in *Il diritto fallimentare e delle società commerciali*, 2010, p. 360; R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018, p. 432. C. PAULUS, 'Under Article 6', in C. PAULUS, in *Europäische Insolvenzordung*, Frankfurt, 2013, at [6].

creditors, a statutory body established when insolvency proceedings are opened, of the task specifically assigned to them by the provisions of national law governing such procedures » [1814].

National jurisprudence seems also inclined to consider such actions as falling in the scope of the European *vis attractiva concursus* [1815].

Moreover, it bears also noticing that the Recast Regulation adds new duties and obligations upon trustees, confirming the existence of (procedural) EU insolvency law. For instance, Article 36(10) RR provides that « *The insolvency practitioner shall be liable for any damage caused to local creditors as a result of its non-compliance with the obligations and requirements set out in this Article* ».

Therefore, also actions concerning the liability of the trustee for the violation of the duties and the obligations incumbent upon him by virtue of the Recast Regulation should be considered as Annex Actions as well. That conclusion was put forward in the *Nortel* case, where the ECJ stated that an action concerning the distribution of proceeds accrued out of the liquidation of the debtor's assets (under a coordination protocol) between main and secondary proceedings are Annex Actions [1816].

V.4.3.4. Actions relating to debts of the estate arising after the opening of insolvency proceedings

Recital 35 RR states that « *actions concerning obligations that arise in the course of insolvency proceedings, such as advance payment for costs of the proceedings* » are Annex Actions. The basic assumption underpinning such a characterisation seems to be that the rights and obligations underlying those actions did not exist in the legal sphere of the debtor before the opening of insolvency proceedings. Therefore, they would be right 'deriving from insolvency proceedings'. However, at a closer look, the solution proves to be over simplistic and not always aligned with the ECJ case-law and the Gourdain Formula. Considering that such a provision is included in a Recital, whose binding regulatory value may be questionable, it is not clear whether the characterisation of those actions as falling within the *vis attractiva concursus* represents a reasoned choice of legislative-policy expediency (and therefore should be binding for the interpreter) or whether the interpretation of the action could lead to different results.

V.4.3.4.1. Actions relating to contracts entered into by the trustee

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1814 See *Valach*, at [35]. Similarly, also *F-Tex*, at [37].

1815 See, for English case-law, *High Court of Justice*, Queen's Bench Division (Comm.), 17 November 2011, *Polymer Vision R&D Ltd. V. Van Dooren* [2012] I. L. Pr., at [67] (the case concerned the personal liability of the Dutch trustee, for fraudulent misrepresentation and breach of an agreement concluded by the bankruptcy trustee with individual creditors. The English court declined its jurisdiction on the basis of the Insolvency Exception). For French case-law see Cass. soc., 10 January 2017, n. 15-12284, in *Bull. Joly Soc.*, 2017, p. 187 (a liability action was brought by an employee against the trustee challenging the opening of insolvency proceedings). It is worth mentioning the recent case *Paul Holgate v Addleshaw Goddard (Scotland)* [2019] EWHC 1793 (Ch), where a claim for damages for breach of contract, negligence and breach of fiduciary duty was brought against the solicitor assisting the trustee of an insolvency procedure. In this case the European *vis attractiva* was excluded on the basis that the defendant's purely advisory role meant it was not responsible for the internal management of the administration or the conduct of the trustee appointed in the context of insolvency proceedings.

1816 *Nortel*, at [29].

Following the divestment of the debtor the trustee is entrusted with the management of the debtor's assets. As explained, one of the profiles that differentiate the ordinary rules of enforcement law from insolvency proceedings, understood as the statutory response to the common pool problems, is represented by the fact that it involves a market participant, whose assets are considered as a going concern. Therefore, with a view of maximising the satisfaction of the creditors, and minimise the losses due to the material insolvency of the debtor, many legal systems provide that the trustee is empowered to continue on an interim basis the business activity of the debtor [1817], in order to preserve the going concern value of the assets, which must be efficiently reallocated in the market, to then distribute the proceeds out of the liquidation between the creditors.

It follows that, according to the powers provided by the *lex concursus*, the trustee may enter into any kind of contractual agreements with third parties, for the purpose of preserving the going concern of the business before its liquidation. Also, the obligations arising in the course of insolvency proceedings may be also relate to contracts concluded by the debtor *in bonis* prior to the opening of insolvency proceedings, that continue to be executive by express provision of the *lex concursus* or by explicit choice of the trustee.

In analysing the actions concerning those obligations, scholars and case-law (likewise Recital 35 RR) often support a comprehensive approach and reach opposite conclusions.

According to one part of the legal doctrine, claims arisen after the opening of insolvency proceedings for acts and transactions undertaken by the trustee are subject to the Brussels Ia Regulation [1818].

Other authors, instead, consider that those claims do not exist before the opening of insolvency proceedings, because they are performed by a body of the procedure, whose powers of management of the debtor's assets derive directly from insolvency law. Therefore, they must be regarded as *genetically* bound to the procedure. On this ground, it is argued that they are Annex Actions [1819].

Such an approach seems to have been adopted also by the ECJ in the *Alpenblume* case, where the Court held that an action concerning the transfer of shares made by the trustee after the opening of insolvency proceedings was an Annex Action, *inter alia*, because the trustee derives his powers from insolvency law. The Court seems to believe that the mere fact that the *lex concursus* provides that, in the case of insolvency proceedings, debtors lose the right freely to dispose of their assets and the trustee has to administer the assets in insolvency on behalf of the creditors (which includes effecting any necessary transfers), the general rules of private law and, in particular, from property law, are derogated [1820].

1817 See, for instance, article 104 l. fall.

1818 R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018, p. 441; P. MANKOWSKI, M. MULLER, J. SCHMIT, 'Under Article 6', in *EuInsVO 2015*, Munich 2016, at [15].

1819 See S. SCARAFONI, *Il processo civile e la normativa comunitaria*, p. 396; F. DE SANTIS, 'Le azioni civili che derivano dal fallimento', *op. cit.*, p. 50.

1820 *Alpenblume*, at [27].

Such a reasoning of the Court, however, lacks persuasiveness [1821].

Indeed, the purported derogation to the ordinary rules of property law is only apodictically affirmed, but the ECJ does not clarify what kind of deviation the transfer of shares would undergo from its typical scheme when undertaken by a trustee. As explained, the direct derivation entails that the facts and the interests concerning the right underlying the action must be assessed by applying the specific insolvency law rules, which cannot be affirmed *sic et simpliciter* in relation to obligations arising in the course of insolvency proceedings for the mere fact that chronologically they arise after the opening of insolvency proceedings. Rather, the right underlying each claim should be specifically considered. The mere fact that the trustee is a party to the transaction as a consequence of the divestment of the debtor (and, subsequently, to the action arising out of it) does not affect the substance of the transaction (nor any relevance should be given to the fact that the price of the transaction benefits the insolvency estate [1822]).

Moreover, the reasoning of the ECJ in *Alpenblume* seems also to be contradicted by the *Nortel* judgement, where the Court alludes that a dispute concerning the interpretation of protocols entered into between the procedural bodies of main and secondary proceedings (thus rights and obligation arising after the opening of the procedure) may also fall under the umbrella of the Brussels Ia Regulation, depending on the subject matter of the protocols [1823].

In the light of the above, as regards contracts entered into by the trustee and in general obligations arising after the opening of insolvency proceedings, I tend to agree with those authors submitting that a distinction should be made on the basis of the different types of actions relating to claims arising following to the opening of insolvency proceedings [1824]:

(a) actions brought by the third party for the satisfaction of the credit arising out of the contract - being directed at preserving the business' value in the interest of the creditors, the obligations arising out of the interim management of the business represent debts of the insolvency estate (and not insolvency claims) and are generally granted a super-privileged status. In principle, national insolvency laws provide that they are paid in full and in precedence over insolvency claims [1825]. Therefore, they would not interfere with the *pari passu* principle as they would rather be independent from it. In respect of those types of actions it is possible to refer to the conclusions concerning the insolvency claims of secured creditors

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1821 See in particular *German Graphics*.

1822 See F. CORSINI, 'Le azioni (indirettamente) derivanti, *op. cit.*, p. 1085.

1823 See *Nortel*, at [26]-[30]. See also B. LAUKEMANN, 'Regulatory copy and paste: The allocation of assets in cross-border insolvencies – methodological perspectives from the Nortel decision', in *Journal of Private International Law*, 2016, f. 21.

1824 C. THOLE, 'Under Article 3', in *EuInsVO 2000*, in H.P. KIRCHHOF and H. EIDENMÜLLER (eds.) *Münchener Kommentar zur Insolvenzordnung*, at [127].

1825 See, for Germany § 55(1)(1) InsO « *Liabilities that arise through the acts of the insolvency administrator or in any other way through the administration […] of the insolvency estate without forming part of the costs of the insolvency proceedings* ».

already illustrated previously [1826]. This further confirms that the Gourdain Formula may prove to be inadequate when dealing with claims brought by creditors against the insolvency estate.

(b) *actions brought by the trustee for the satisfaction of the credit arising out of the contract and action seeks the declaration of nullity, annulment or early termination of the contract* - where the trustee brings an action to obtain the enforcement of a claim arising out of the contract concluded in the context of insolvency proceedings (or its performance), the characterisation of the action as Annex Action must be assessed on the basis of the subject matter of the contract.

As a general rule, it seems reasonable to maintain that if the trustee enters into a contract with a third party (or a creditor) for the preservation of the going concern of the business (*i.e.* regular business transactions), the legal foundation of the action would not undergo any substantive amendment, nor the condition of the connection with insolvency proceedings seems to be fulfilled. The trustee would be acting (albeit in the interest of the creditors [1827]) as the debtor would have done, prior to the opening of insolvency proceedings. Those actions should not be decided pursuant to the specific rules of insolvency law, as the mere fact that the trustee is a party to the contract does not substantially deviate from the ordinary scheme of the relationship entered into with the third party, which follows the ordinary rules of civil and commercial law (the fact that the contract is concluded in the context of insolvency proceedings would rather be a preliminary question to the merits of the claim).

The jurisdiction over those claims would then be subject to the Brussels Ia Regulation, including choice-of-forum agreements [1828]. Moreover, unlike actions brought by the creditor of the insolvency estate, the enforcement of the judgement possibly obtained by the trustee would not encounter any difficulties relating to the application of the *lex concursus*. Therefore, it is submitted that those actions should be considered as ordinary civil and common claims. Similar conclusions should apply where the action seeks the declaration of nullity, annulment or early termination of the contract or the agreement entered into by the trustee.

On the contrary, should the contract entered by the trustee be a protocol with a secondary proceedings concerning rights deriving from insolvency proceedings, or an agreement concerning the s.c. 'synthetic proceedings' under Article 36 RR (*i.e.* an undertaking made between the trustee and local creditors in the Member State in which secondary insolvency proceedings could be opened, that it will comply with the distribution and priority rights that said creditors would have in respect of the assets located in the Member State in which said secondary insolvency proceedings could be opened), the relative actions should be regarded as Annex Actions.

[1826] See *supra* in this Chapter § V.4.2.4. See also for jurisprudence *Oberlandesgericht Zweibrücken*, 30 June 1992, 3 W 13/92, EUZW 1993, p. 165 (case regarding the execution of a claim deriving from a contract entered into by the trustee and the debtor).

[1827] In this respect, the trustee gathers together the position of both the debtor (as a party to the contract) and the representative of all the creditors.

[1828] C. WILLEMER, *Vis attractiva concursus und die Europäische Insolvenzverordnung*, Tubingen, 2006, p. 372.

(c) *actions contesting the trustee's power to conclude the contract* - in case the subject matter of the action concerns the exercise of the powers of the trustee according the *lex concursus*, the action should be considered as an Annex Action, similarly to the liability actions against the body of the proceedings [1829]. For instance, an action could arise if the trustee enters into the contract without the necessary authorisation of the insolvency court, where required by the *lex concursus*.

Arguments in support of this view may be found in *Alpenblume*, where the third argument put forward by the Court to ground the applicability of the Brussels Regulation was that the transfer of shares had been declared void because the trustee lacked the power of disposal over the transferred shares located in another country. Although it is contested that in *Alpenblume* the purported lack of powers of the trustee was contingent upon the fact that the Insolvency Regulation was not yet applicable, and no other bilateral Convention regulated the recognition of the trustees powers abroad (therefore the lack of powers was not directly deriving from the *lex concursus*), it is submitted that in the event where the *causa petendi* of an action lies with the powers of the trustee this should be considered as an Annex Action.

Such a conclusion is (implicitly) confirmed also in *Tünkers*, where the Court excluded the applicability of the Insolvency Regulation on the basis that the action at stake did not concern the « *the validity of the assignment carried out in the course of the insolvency proceedings opened by the Amtsgericht Darmstadt* » [1830].

V.4.3.4.2. Actions deriving from the costs of insolvency proceedings

Recital 35 RR submits that a dispute concerning (the advance payment) for costs of the procedure must fall within the *vis attractiva concursus* and the majority of commentators do not dispute such a statement [1831]. The attraction of those actions to the jurisdiction of the Member State opening insolvency proceedings entails the synchronisation of *forum* and *ius*, since Article 7(2)(l) RR provides that the subjects upon whom the costs of insolvency proceedings are incumbent fall under the scope of the *lex concursus* [1832].

In order to demonstrate that the strict application of the Gourdain Formula is not an appropriate test for claims exercised against the debtor subject to insolvency proceedings or *vis-à-vis* the estate (as is the case for actions concerning the costs of the procedure) an alternative (but provocative) construction is suggested.

Credits for the cost insolvency proceedings chronologically stem directly from the opening of insolvency proceedings, which may lead one to consider that actions concerning those credits are 'directly deriving' from insolvency proceedings. Under many national systems, those claims have a

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1829 *See* supra, § V.4.3.3.

1830 *Tünkers*, at [23].

1831 See, *ex multis*, G. CUNIBERTI, 'La compétence des tribunaux de la faillite', *op. cit.*, p. 170.

1832 See § 54 InsO, « *The costs of the insolvency proceedings are: 1. The court costs for the insolvency proceedings; 2. The remuneration and the expenses of the preliminary insolvency administrator, the insolvency administrator and the members of the creditors committee* ». See also article 111 l. fall. See also art. 2331 French Civil Code et art. L. 622-17 Cod. Comm.

preferential right to the full satisfaction of their claim, in that they are not 'insolvency creditors', but creditors of the estate. As such, those credits are equitable to actions for separate satisfactions brought by the secured creditor, which according to the *German Graphics* case-law, fall within the scope of the Brussels Regulation. Indeed, the creditor of cost of insolvency proceedings does not hold a claims *vis à vis* the debtor, but against the bankruptcy estate. Also, the action concerning the costs of proceedings does not functionally interfere with the insolvency liability regime, nor its execution is governed by the *pari passu* principle. Besides, the insolvency creditors, are not entitled to contest an alleged right to separate satisfaction, as the dispute over those claims takes place solely between the trustee and the cost-of-insolvency-proceedings-creditor. In this respect, then, the mere fact that those actions diminish the insolvency estate value, is not relevant to determine the characterisation of an Annex Action.

In the light of the above, there would be sound arguments to maintain that those action fall within the scope of the Brussels Ia Regulation. It must be highlighted, however, that in practice this should not entail a great problem: the estate should be generally regarded as domiciled in the State where insolvency proceedings are opened, therefore the dispute would still be attracted (via the Brussels Regime under Article 4 and 7(1) thereof to the courts of the State of the COMI.

The above does not aim at putting in discussion the characterisation of the actions at stake as Annex Actions (which is perfectly reasonable). It serves only to demonstrate that viewed in isolation the test represented by the Gourdain Formula does not have much explanatory power and that, in particular, the characterisation of actions brought by creditors against the estate as Annex Actions respond to different reasons (the very participation to the distribution of the assets or mere reasons of political legislature expediency), that should be taken into account for each specific action.

V.4.3.5. Actions brought by the trustee against a creditor or a third party seeking the payment of a debtor's claim arisen before insolvency proceedings

As often mentioned elsewhere in the present work [1833], the ECJ has stated that the mere fact that the trustee in a party to the action and that the proceeds of the action benefit the insolvency estate does not entail that the action falls within the scope of the *vis attractiva concursus*. Therefore, any action brought by the trustee acting as a mere processual substitute of the divested debtor are not Annex Actions.

Such a conclusion is based generally on the *Nickel &Goldner* judgement, where the Court found that the actions which the debtor could have brought independently from the opening of insolvency proceedings (in that case the payment arising out of a carriage contract) should not be considered as Annex Actions [1834]. Indeed, the legal foundation of the action is not subject to substantive

[1833] See *supra*, Chapter II, Section 2, § II.3.4. And in this Chapter see § V.4.3.4.

[1834] See *Nickel &Goldner*, at [28].

amendments for the sole fact that insolvency proceedings are opened against the party to the contract who is entitled to receive the payment arising out of the contract. Nor their nature is essentially transformed for the *locus standi* of the trustee.

The characterisation of those actions seems rather uncontested under national case-law and scholars [1835] and it is further confirmed by Recital 35 RR.

Examples of those actions may be *(i)* actions for the recovery of a credit of the debtor [1836], *(ii)* actions for the enforcement of a guarantee concluded in favour of the debtor with a third party before the opening of insolvency proceedings [1837], *(iii)* actions for the recovery of undue payments [1838], *(iv)* actions for the recovery of sums deposited in a bank [1839], *(v)* actions concerning a contract entered into between a third party and the debtor prior to the opening of insolvency proceedings [1840], *(vi)* or actions enforcing foreign decisions condemning a debtor of the undertaking subject to insolvency proceedings [1841].

V.4.3.6. Actions relating to the continuation or the termination of pending contracts

Traditionally, the opening insolvency proceedings affects also the course of the pending legal relationship of the insolvent debtor. In principle, the ordinary civil and commercial rules are substituted with a different statutory regime (stemming directly from the opening of insolvency proceedings) especially as regards the execution of the synallagmatic contracts entered into between

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1835 Y. BRULARD and J. MATERNE, 'Les Actions Annexes', *op. cit.*, p. 126; F. MÉLIN, *Le règlement Communautaire du 29 mai 2000 relatif aux procedures d'insolvabilité*, 2008, ed. Bruylant, p. 201.

1836 Cour de Cassation 24 May 2005 n. 03-14099, with observation by A. LIENHARD, in *Dalloz*, 2005, p. 1553 F. MÉLIN, in *JCP E*, 2005, p. 1097, the action concerned the recovery of a credit brought by the trustee against certain shareholders of the company subject to insolvency proceedings. See for English case law *Oakley v Ultra Vehicle Design Ltd* [2005] EWHC 872 (Ch), [2006] BCC 57, Lloyd LJ (sitting as an additional judge of the Chancery Division) said, at [42] « *it has been held that a claim by a liquidator to recover pre-liquidation debts, although made in the course of the winding up and so, in a sense, relating to it, does not derive directly from it and is therefore not excluded from the Brussels Convention (and therefore now not from the [Brussels I] Regulation) by article 1.2(b)* ». *UBS AG v Omni Holding AG* [2000] 1 WLR 916.

1837 Cass., 14 April 2008, n. 9745, in *Dir comm. Internaz.*, 2008, p. 477 (the case concerned an action brought by the trustee for the exercise of the warranty for defects relating to a construction contract entered into between the *in bonis* debtor and a third party). See also, T. Milano, 30 January 1989, in *Fallimento*, 1989, p. 1132.

1838 Cass., 27 March 2009, n. 7428, in *www.ilcaso.it.*

1839 App. Milano, 5 May 1987, in *Riv. Dir. Interaz. Priv e proc.*, 1987, p. 803.

1840 Italian Cass., SS.UU., 19 March 2009, n. 6598, in *Riv. Dir. Internaz. Priv e proc.*, 1, 10, p. 117 (case where the supply of goods had been carried in favour of the bankruptcy proceedings, the Italian Supreme Court ruled that since this was a dispute which the bankrupt could have brought regardless of the bankruptcy proceedings the Brussels Regulation could apply). See also, concerning the Insolvency Exception under the Lugano Convention, Bundesgericht, 23 December 1998, BGE 125 III 108 S. 109 the Swiss Federal Court found that an action brought by the trustee of a French company in *redressement judiciaire* seeking the payment of sums due under a contract in the field of building construction in Libya (and providing for an exclusive choice of court agreement in favour of the Court of Geneva) is excluded from the insolvency exception under article 1(2)(2) Lugano Convention. Similarly, also the French Supreme Court, 18 December 2017, n. 06-17610, in *Bull. Civ.*, IV, n. 266.

1841 French Cour de Cassation, 13 April 1992, in *Rev. crit DIP*, 1993, p. 67, with observation of J.P. REMERY.

the *in bonis* undertaking and third parties the execution of which was commenced but have not yet been fulfilled at the moment of the opening of insolvency proceedings.

At the outset, it bears observing that a common feature to the majority of the Member States' insolvency law regarding pending contracts is the ineffectiveness of any contractual clause providing that the mere event that a counterparty is insolvent and insolvency proceedings are opened against him may represent a ground for the early termination of the contract [1842].

Pursuant to Article 7(2)(e) RR the *lex concursus* determines the effects of insolvency proceedings on current contracts to which the debtor is party.

By generalising, to different extents, the possible statutory effects on the contracts provided by the insolvency law of the Member States may be grouped as follows

(i) insolvency proceedings do not affect *per se* the validity and performance of contracts with reciprocal obligations, but it would somewhat affect the right of early termination of the contract (*e.g.* on grounds of breach of the contractual) [1843].

(ii) trustee may be vested with the right to choose whether to continue or terminate the pending contract [1844];

(iii) certain types of contracts may have to be mandatorily be continued *ex lege* (thus preventing the trustee from terminating the pending relationship, generally to the protection of some specific counterparties [1845]);

(iv) other types of contracts are *de iure* terminated with the opening of insolvency proceedings.

Against this backdrop, with regard to actions arising out of the performance (or the termination) of pending contracts, a distinction must be made.

It is correctly submitted by scholars that any action concerning the specific effects of the opening of insolvency proceedings on pending contracts (such as the right of the trustee to choose between the continuation or the termination of the pending contract, or its termination or continuation *ipso iure*)

1842 See Article L. 622-13-I Code de Commerce, Article 73 l. fall., Article 61(3) *Ley Concursal*, § 119 InsO.

1843 See, for instance Article 64 of the *Ley concursual*, which substituted to the *ius electionis* of the trustee the general rule of the *pacta sunt servanda*, as the Spanish legislature deemed a more flexible approach towards pending synallagmatic contracts as better serving the interests of both insolvency proceedings and the *in bonis* counterparty.

1844 See Article L. 622-13-II Code de Commerce, « *L'administrateur a seul la faculté d'exiger l'exécution des contrats en cours en fournissant la prestation promise au cocontractant du débiteur* ['The administrator alone has the right to demand the performance of current contracts by providing the promised service to the debtor's contracting partner] ». See also, § 103(1) InsO « *Ist ein gegenseitiger Vertrag zur Zeit der Eröffnung des Insolvenzverfahrens vom Schuldner und vom anderen Teil nicht oder nicht vollständig erfüllt, so kann der Insolvenzverwalter anstelle des Schuldners den Vertrag erfüllen und die Erfüllung vom anderen Teil verlangen.* [If a reciprocal contract has not been performed or has not been fully performed by the debtor and the other party at the time when insolvency proceedings are commenced, the insolvency administrator may perform the contract in place of the debtor and demand performance from the other party] ».

1845 See § 108 – 116 InsO, article 72 and ff. l. fall.

should be regarded as Annex Actions [1846]. Indeed, by applying the Gourdain Formula, it is inferable that the opening of insolvency proceedings profoundly amends the situation underpinning those kinds of actions. In general, it is fair to acknowledge that, despite the differences between the laws of the Member States, as a result of the opening of insolvency proceedings, the contract suffers a deviation from its typical scheme resulting from the application of the specific statutory rules of insolvency law.

Therefore, for instance, a claim where the continuation of the contract is contested as the trustee has not communicated within the time limit set by *lex concursus* the choice to continue the contract to the *in bonis* counterparty, should be subjected to the jurisdiction of the courts of the Member State opening insolvency proceedings. Similarly, disputes concerning the exercise of the trustee's discretionary power to terminate the contract should be considered an Annex Actions.

It seems questionable whether the dispute concerning the performance of acts ancillary to the termination of the contract (such as actions seeking the restitution of assets or security deposits connected with the contract) would have to be regarded as Annex Actions as well [1847].

On the contrary, actions concerning the performance, termination or contractual breaches of the contract which relate to a moment prior to the opening of insolvency proceedings, must be treated as ordinary civil and commercial actions [1848].

V.4.4. [Segue] *Actions in a 'grey zone'*

1846 R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018, p. 432; C. PAULUS, 'Under Article 6', in C. PAULUS, *EuInsVO - Europäische Insolvenzverordnung*, 2017, at [6.11]. R. BORK, *op. cit.*, p. 60.

1847 In a recent dispute relating to Alitalia's *amministrazione straordinaria,* the Italian Supreme Court has found that the action brought by the trustee seeking the restitution of a security deposit held by the English lessor following the termination of the lease agreement of some aircraft fell within the scope of the Brussels Regulation (see Cass. SS.UU., 9 May, 2017, n. 4731). In particular, the Supreme Court invoked the *Profit Investment* judgement (ECJ, 20 April 2006, Case C-366/13, *Profit Investment SIM SpA v. Stefano Ossi et al.*, ECLI:EU:C:2016:282) to maintain that Italian courts had jurisdiction pursuant to article 5(1)(a) Brussels I to hear the action of Alitalia's trustee. In the light of that decision, the Italian Supreme Court thus stated that the action for the restitution of the security deposit deriving from the termination of the lease contract falls within the scope of matters relating to a contract pursuant to the Brussels Regime. The reasoning of the court was grounded on the fact that if there had not been a contractual relationship freely assumed between the parties, the obligation would not have been performed, and there would be no right to restitution. Nevertheless, the Supreme Court did not mention the fact that in the *Profit Investment* case the breach of the contract (and the notice of its termination) occurred before the opening of insolvency proceedings against Profit Investment (subsequently subjected to insolvency proceedings in Italy). Therefore, as was explained, the application of the Brussels Regulation on that occasion was justifiable for the fact that the breach of the contract was not attributable to the statutory effects of the opening of insolvency proceedings, and thus the action exercised by the trustee in that occasion was not an Annex Action. It follows from the foregoing that the Italian Supreme Court should have considered that, differently from the *Profit Investment* case, in the *Alitalia* case at stake the action for the restitution for the security deposit derived from the termination of the lease agreement upon the choice of the trustee. The latter being an Annex Action, the Italian courts would have jurisdiction as the courts of the Member State opening insolvency proceedings according to article 3 EIR (and not under article 5(1)(a) Brussels I Regulation).

1848 For actions on the performance, termination and other claims arisen after the opening of the procedure, concerning the 'regular' existence of the pending contract continued *ex lege* or by express choice of the trustee see *supra*, § V.4.4.4.1.

At this point of the reasoning account must be given of some types of actions whose characterisation still raises a great degree of uncertainty, not only because they fall in the cracks between company law, civil law and insolvency law, but because as regards those actions the ECJ has adopted inconsistent solutions, which - in a field yet fraught with perils due to the lack of systematic and harmonised solutions - more than solving, have rather created further uncertainties.

It, therefore, seems appropriate to recall here the need for the interpreter to take a firm position *a priori* towards the systematic value to be attributed to the European *vis attractiva concursus* and that the position supported here is that of attributing a narrow scope to the Gourdain Formula.

As said, a systematic reading seems to lean towards the impression that the *vis attractiva concursus* has been resized by the Recast Regulation, if not for the mere fact that the objective of the efficiency and the effectiveness of the procedure seems to be pursued by means of an 'extractive' concentration, derogating to the mandatory nature of the *vis attractiva*, and not, on the contrary, an 'inclusive' one [(1849)].

Therefore, with a view of attempting to provide for a systematic jurisdictional classification of those actions [(1850)], trying to propose a solution that seems most consistent with the objectives set forth by the Recast Regulation, a bit of a 'stretch' is inevitable, because it is inevitable to take the distance from some of the solutions bolstered by the Court when adopting a merely functional approach.

Bearing the above in mind, with a view of attempting to provide for a systematic reading (if any) of the ECJ case-law and allocate the jurisdiction under either the Brussels Regime or the Recast

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1849 L. CARBALLO PIÑEIRO, 'Towards the reform of the European Insolvency Regulation: codification rather than modification', in *Nederland International Privaatrecht*, 2014, p. 215.

1850 The determination of the jurisdiction over those actions is relevant insofar as it determines that the *lex fori concursus* would apply. Yet, the identification of such a law does not seem at all conclusive, because the Recast Regulation does not provide for a conflict of law rule relating to claim under corporate law in the vicinity of insolvency. Therefore, unless the action could not be characterised as encompassed within the scope of Article 7 RR (as manages to do the ECJ in the Korhnaas judgement), the jurisdiction and the applicable law would not necessarily be synchronised, where the national applicable law characterises the action as a 'civil and commercial' action. That would entail that, even assuming that, for jurisdictional purposes, an action 'based on insolvency law' is characterised as an Annex Actions, attracted to the jurisdiction of the Member State opening insolvency proceedings, this would not automatically solve the issue of the applicable law, given the absence of an autonomous EU conflict of law rule on those issues. A solution that was suggested by some scholars was to add an indent to Article 7(2) RR regarding matters concerning the liability of directors. Clearly, such a solution has not been retained by the EU legislature, with the consequence that, at present, once jurisdiction is established in a Member State (pursuant to the Brussels Ia Regulation or the Insolvency Regulation), the forum courts must characterise the cause of action of the director's liability action and assign the set of facts to the appropriate legal category so as to determine the appropriate choice of law rule to apply. Until harmonisation is not reached in this field, the misalignment of directors liability provisions in various Member State would still create inefficiencies. L. CARBALLO PIÑEIRO, 'Towards the reform of the European Insolvency Regulation: codification rather than modification', in *Nederland International Privaatrecht*, 2014, p. 215, who recognises that the (narrow) *vis attractiva concursus* represents a jurisdiction rule that helps to overcome the enforcement problem, but « *reference to this liability rule laid down in* [article 6(2) RR] *does not end the controversy surrounding the characterization issue related to it, for which reason a further indent in Article 4(2) is to be advocated* ». See also P. OBERHAMMER, C. KOLLER, K. AUERING, L. PLANITZER, in B. HESS, P. OBERHAMMER, S. BARIATTI et al., *Implementation of the New Insolvency Regulation*, Baden-Baden, 2017, p. 224, suggesting to use for the purposes of the law applicable to insolvency proceedings and their effects, a test resembling the Gourdain Formula to delineate the scope of the *lex fori concursus* and the *lex societatis*.

Regulation, following the indications of Recital 35 RR, for the sake of the present analysis actions have been divided between: *(i)* corporate actions (*i.e.* actions brought by the trustee against a director, a shareholder or another body of the company, concerning the conduct of the latter subjects referring to the management of the business which could give rise to their personal liability towards the company or the creditors); *(ii)* other actions brought by the trustee on behalf of the creditors.

V.4.4.1. Corporate actions and directors' liability

The starting point of the reasoning concerning corporate actions should be the (only) textual indication provided by the Recast Regulation.

Recital 35 RR seems to allude that liability actions *vis à vis* directors must be distinguished on the ground that they are based on insolvency law or company law or general tort law [1851]. The former actions would fall within the scope of the European *vis attractiva* of the Recast Regulation. The latter ones would be subject to the provisions of the Brussels Regime.

Viewed in isolation, the expression 'based on insolvency law' proves, however, to have not much explanatory power to characterise the kind of actions under discussion (nor, in fact, for any other). Assuredly, the reference to insolvency law cannot be deemed as concerning the location of the statutory provisions governing the action, as it should be discarded at once the idea that the location of statutory provisions could be *per se* suggestive of the 'insolvency-related' nature of the action. With reference to any action that arises in the course of insolvency proceedings - even those linked by a mere occasional relationship with the procedure - insolvency law would always come into play and govern some aspects of the actions, whereas civil or company law could remain applicable to others. Therefore, being governed by different areas of law, those actions cannot be clearly qualified on the basis of one subject matter or on the basis of a formalistic approach, as they would more correctly be subject to a double qualification [1852].

It seems more accurate to consider that when Recital 35 RR refers to actions 'based on insolvency law', rather than posing a criterion for the (autonomous) characterisation of the action, it points to the result that such a characterisation should be aimed at, *i.e.* characterising the action as an 'insolvency-law' matter.

If considered under this perspective, the indication provided by Recital 35 RR is anything but superfluous as it establishes an important methodological premise for the interpretation to be carried out by the practitioner when faced with a national actions *vis-à-vis* directors (or other corporate bodies): it clarifies that one should concern himself in the first instance with the legal foundation (*i.e.* the basis, the substantive underlying right) of the action. It follows that between all the possible

1851 The same expression is provided by the Virgós-Schmit Report, where it mentions the personal liability of directors based upon insolvency law, at [196].

1852 S. GROMPE, *Die vis attractiva concursus im Europäischen Insolvenzrecht, Ein Instrument zur Konkretisierung des Insolvenzstatuts, cit.*, p. 170.

criteria pursuant to which corporate and liability actions against directors could be characterised, one should first assess whether the action 'derives directly' from insolvency proceedings, within the meaning of the Gourdain Formula test, as interpreted by the ECJ (purportedly the *Nickel&Goeldner* judgement).

Keeping that in mind, it is submitted that a further methodological aid is provided by the mention made by Article 6(2) second subparagraph RR, where it refers to actions brought 'on behalf of the creditors'. In order to assess whether the actions at stake have to be characterised as Annex Actions it should be verified whether the *(i)* corporate action (including liability actions against directors) are brought by the trustee on behalf of the company (*i.e.* as a mere processual substitute of the divested debtor) or whether *(ii)* the liability action against directors is brought by the trustee acting as a body of the collective procedure, on behalf of the *whole* body of creditors [1853].

V.4.4.1.1. Actions brought on behalf of the company

As discussed in Chapter I, within the legal system of all the Member States which were analysed in this work, the breach of the duties imposed upon the directors and the shareholders by virtue of the (civil and commercial) laws and the company's by-laws give right to the company to claim *vis-à-vis* the director or the shareholder the compensation for the damages arising out the violation of such duties. Moreover, when insolvency proceedings are opened against the company, the general *locus standi* to bring the actions on behalf of the debtor lies with the trustee by virtue of specific provisions of insolvency law, attributing to the latter the general task of administering the debtor's assets [1854]. The succession of the trustee to the position of the company represents by definition one of the effects of the divestment of the debtor, which entails that the latter is precluded to be a party to judicial actions (as both a claimant and a respondent).

1853 It cannot be shared here the 'unitary' interpretation adopted by Costa in relation to the Italian system, claiming that liability actions under articles 2392, 2393 and 2394 c.c. (*i.e.* respectively the action on behalf of the company and on behalf of the creditors) should be regarded as new actions directly deriving from insolvency proceedings when exercised by the trustee in the context of insolvency proceedings on the basis of the exceptional *locus standi* vested with him by article 146 l. fall. should be regarded as a different action, because two actions would be 'merged' in one. A. G. COSTA, 'Le procedure concorsuali transfrontaliere nel contesto extraeuropeo: le azioni che derivano dalla procedura', in *Il Diritto fallimentare*, 2017, p. 804. Article 146 l. fall. is a rule merely concerning the person entitled to bring the action, but it does not amend the autonomy of the two claims, whose legal basis must be assessed separately even if brought together by the trustee (see the case-law cited in Chapter I, § I.2.3.3.2.). Therefore, the sole criterion to be taken into consideration is whether the substantive right underpinning the specific claim brought by the trustee is substantially amended in its essential features by the opening of insolvency proceedings. As will be demonstrated, under the Italian legal system, neither the liability action on behalf of the company, not the action on behalf of the creditor is subject to such a 'metamorphosis' that it should be regarded as an Annex Actions.

1854 For Italy, article 43 l. fall.; for France, L. 641-9, for Germany, § 92 InsO. In this respect it may be also added that a similar provision is also encompassed in the Dutch fw, at article 43. Articles 40 and ff. LC provide for a special regime, according to which in case of voluntary insolvency the debtor may retain the powers of administration and disposition over their assets, and the exercise of these shall be subject to the intervention of the bankruptcy administrators, through their authorization or compliance. In this case the debtor's capacity of being a party to judicial proceedings shall not be modified. In case of compulsory proceedings, the debtor will be divested.

Liability actions against the directors of a company (as any other corporate action) are a legal actions that originate from the civil and commercial regime, already existing in the legal sphere of the debtor, and which are transposed in the context of insolvency proceedings, with a number of adjustments concerning the rules governing some (procedural) aspects of them (*i.e.* the *locus standi* to bring the action and, possibly, the territorial competence of the national court to adjudicate the action).

Against this background, a rigorous application of the Gourdain Formula (in the narrow acceptation supported here) would rather simplify the characterisation of those kinds of actions, because neither the direct derivation, not the close connection would be fulfilled.

It being excluded that the legal foundation of the action stems directly from the opening of insolvency proceedings (as evidently the action exists also in ordinary civil and commercial situations) what needs to be assessed, rather, is whether the right underpinning the action is significantly amended in its essential *substantive* features by the opening of insolvency proceedings, to the extent that the facts and the interests subsumed in the right must be assessed with the specific insolvency law rules.

It seems that tendentially the question should be answered in the negative. The fact that the trustee is acting on behalf of the company does not affect the legal foundation of the corporate action, but merely the procedural context. Indeed, in the context of those actions, the trustee acts as a mere processual substitute of the divested debtor (the company) by virtue of the *locus standi* vested upon him by specific rules of insolvency law. As demonstrated by the comparative research carried out in Chapter I, the substantive regime of the action remains governed by the general civil and company law. Statutory provisions of insolvency law would come into play merely to establish the *ad hoc* general) entitlement of the trustee to act on behalf of the debtor, but this would not affect the substantive profile of the action, nor it is symptomatic of a transformation of its essential features. In other words, when exercised by the trustee, the corporate action would be the very same action that the company would have brought where it was not subject to insolvency proceedings [1855].

Therefore, the *genetic* tie (*i.e.* the first condition of the Gourdain Formula), which Recital 35 requires to focus particularly the attention on with a view of assess whether the liability action is an Annex Action or not, seems to be unfulfilled.

Recital 35 RR does not mention the second condition of the Gourdain Formula test (the *functional* close connection with insolvency proceedings), which could lead one to stop the reasoning here, since the conditions of the Gourdain Formula test must be regarded as cumulative [1856].

Yet, to further confirm the conclusion that corporate actions brought on behalf of the company are not Annex Actions, it could be highlighted that also the second condition of the Gourdain Formula

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[1855] See K. PANNEN, 'Under Art. 3', in K. PANNEN, *European Insolvency Regulation*, Berlin, 2007, at [114] who excludes (without specifying whether actions are exercised on behalf of the company or on behalf of the creditors) « *actions arising from managing directors liability, in particular for delayed filing for insolvency and for equity replacing shareholder's contributions or shareholders liability* ».

[1856] See *supra* Chapter II, Section 2, § II.3.3.

is not met. There is of course a connection with the procedure, but such a functional link cannot be deemed to be close, precisely because the trustee would not be acting on behalf on the creditors.

This view was implicitly supported by the ECJ in the *Powel Duffryn* case [1857], where the trustee of a German insolvency company brought an action against the English shareholder of the company (Powell Duffryn), seeking the fulfilment of the obligation to make the payment of the shares subscribed by the latter, due in respect of the increases in capital. The trustee also sought to recover dividends purportedly had been wrongly paid to Powell Duffryn.

The fact that the action was brought by the trustee in the course of insolvency proceedings was not even considered by the Court, and the action was considered as falling within the scope of the insolvency exception [1858]. Also, a part of national case law seems to adhere to such an approach [1859].

1857 ECJ, 10 March 1992, Case C-214/89, *Powell Duffryn plc v. Wolfgang Petereit*, ECLI:EU:C:1992:115.

1858 In particular, on that occasion, the Court deemed that a clause contained in the statutes of a company conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

1859 See in this sense (albeit implicitly) the Italian Supreme Court in the decision Cass., 21 February 2017, n. 3398. In that case the director domiciled in Germany and Austria, raised the question of the jurisdiction of the Italian courts for an action brought in Italy by the trustee under Article 146 l. fall. on behalf (also) of the company, without even mentioning the Insolvency Regulation. The respondent's argued that they should have been sued in the country of their domicile, pursuant to article 4 Brussels Ia. The exception was rejected as it was tardively raised by the respondents. However, the Court in an *obiter dicta* confirmed the jurisdiction of the Italian court, on the basis of Article 7 Brussels Ia, thus implicitly excluding the applicability of the Recast Regulation. For Dutch case law confirming such a view see Rechtbank Amsterdam, LJN: BR5020, 27 July 2011 ECLI:NL:RBAMS:2011:BR502 (action brought by the trustees in behalf of a Belgian company subject to insolvency proceedings in Belgium, against the a director and a legal advisor of the company domiciled in the Netherlands, based on article 1382 of the Belgian Civil Code and also on the liability of directors according to article 263 of the Belgian Company Code. The Court stated at [6.2.] « *These claims relate to civil (and/or corporate) claims which may also be made outside the bankruptcy and by others other than the liquidator and are therefore not based on bankruptcy law* [De vorderingen van de Belgische curatoren zijn allereerst gegrond op onrechtmatige daad (artikel 1382 Belgisch Burgerlijk Wetboek) en voorts op bestuurdersaansprakelijkheid (artikel 263 Wetboek van Vennootschappen van België). Deze vorderingen betreffen de civielrechtelijke (en/of vennootschapsrechtelijke) vorderingen die ook buiten faillissement en door anderen dan de curator kunnen worden ingesteld en zijn dus niet gebaseerd op het faillissementsrecht] ». Moreover Dutch actions under 2:9 DCC (governing the liability of directors for breach of properly perform the duty entrusted to him towards the company) exercised by the trustee are not Annex Actions (see Amsterdam Court of Appeal, 16 September 2008, in *JOR*, 2008/30, with observations of B. WESSELS and N. TOLLENAAR). See also OBL Wien, 18 April 2008, 4 R 20/08b, in *ZIK* 2009, 67 (an action under § 25, 81 GmbHG, seeking the compensation of a limited liability company against its directors falls within Brussels I). The same should hold true also for the French action under Article L. 223-22 and L. 225-251 du code de commerce when exercised by the trustee on behalf of the company.

For actions concerning maintenance of capital requirements, see Landgericht Essen, 30 September 2010, 43 O 129/09, in *BeckRS*, 2011, 213 and OLG Munich, 6 June 2006, 7 U228/06, in *IPrax*, 2007, pp. 212 – 2013 (actions brought under articles §§ 33, 31 GmbHG, concerning the reimbursement of shareholders' payoff of resources necessary to maintain the capital requirements fall within Brussels Ia Regulation). Also actions under article 2:207c DCC seems to be excluded from the Recast Regulation (see L. LENNARTS, 'The review of the eu insolvency regulation – time to recognize the ties that bind company law and insolvency law?', in M. L. LENNARTS and F. GARCIMARTIN (eds), *The Review of the EU Insolvency Regulation: some Proposals for Amendment*, in *Report NACIIL*, 2012, p. 78).

It follows from the above that the corporate actions which the trustee brings on behalf of the company should fall within the umbrella of the Brussels Regulation, as their legal foundation remains unchanged by the opening of insolvency proceedings [1860].

Their attraction to the courts of the Member State opening insolvency proceedings would bear no influence on the efficiency and effectiveness of the procedure, as the substance of the claim would be governed by the ordinary civil and company rules, that could be applied by the courts having jurisdiction pursuant to the regime of the Brussels Ia Regulation [1861].

In this respect, it must be recalled, however, that on two occasions the ECJ took the different (more inclusive) *functional* approach towards *corporate* actions which involve the material insolvency of the debtor as an essential element of their legal basis, *i.e.* director's liability actions in the vicinity of insolvency.

In the *H. v. H.K.* (and *Kornhaas*) case the Court considered that an action under § 64(1) GmbhG holding directors liable for the payments made to third parties after the company is materially insolvent or overindebted falls within the notion of Annex Actions (or, to use the wording of Recital 35 RR, they would be liability actions 'based on insolvency law'). Therefore, it seems that the ECJ assumes that provisions aimed at creditor's protection in the vicinity of insolvency (under German law) should be characterised as insolvency law.

As explained above, however, the German action under § 64(1) GmbhG is an action whose characterisation as an 'internal liability' or an 'external liability' is controversial, as it may be regarded as setting forth a protectionary rule (*schutzgesetz*) within the meaning of §§ 823(2) or 826 BGB. Therefore, where insolvency proceedings are not opened (§26 InsO), the action could be exercised, according to the prevailing opinion, also by creditors [1862].

That does not exclude that there are also sound arguments (*in primis*, the wording of § 64(1),(2) GmbHG referring expressly to 'the company') that militate towards the conclusion that the action is brought on behalf of (or directly by) the company, to the indirect benefit of creditors.

Therefore, for sake of clarity, the jurisdictional regime of this claim will be treated here assuming that the action is brought on behalf of the company [1863].

1860 See in this sense (albeit implicitly) the Italian Supreme Court in the decision Cass., 21 February 2017, n. 3398. In that case the director domiciled in Germany and Austria, raised the question of the jurisdiction of the Italian courts for an action brought in Italy by the trustee under Article 146 l. fall. on behalf of both the company and the creditors. The respondent's argued that they should have been sued in the country of their domicile, pursuant to article 4 Brussels Ia. The exception was rejected as it was tardively raised by the respondents. However, the Court in an *obiter dicta* confirmed the jurisdiction of the Italian court, on the basis of Article 7 Brussels Ia, thus implicitly excluding the applicability of the Recast Regulation.

1861 See also L. LENNARTS, 'Directors in the Twilight Zone - Kornhaas and "Beyond" – some Observations from a Dutch Perspective', in J. GANT (ed.) *Harmonisation of European Insolvency Law*, Nottingham, pp. 113-132.

1862 On the debate concerning the liability arising out of § 64(1) GmbhG, see *supra* Chapter I, § I.5.3.

1863 It is not clear whether the Court in *H.v. H.K.* considers that an action under § 64(1), (2) GmbHG represents an action brought by the trustee on behalf of the company, as an 'internal liability' of directors or, rather, as an action brought on behalf of the creditors as an 'external liability'. It merely refers to the fact that the action is brought in the interest of the creditors (which would consider the effects of the action, but not the *locus standi*).

It is submitted that if the Gourdain Formula must be uniformly applied and the test is intended as (exclusively) concerning the relationship between the legal basis of the action and the *formal* opening of insolvency *proceedings*, the mere fact that the cause of action relates to the material insolvency of the debtor should be irrelevant.

If those actions can be brought also outside of insolvency proceedings, irrespective of whether they are brought by the creditors or by the company, in 'regular' liquidation procedures for the dissolution of the company (for instance, when, for whatever reason, insolvency proceedings have not (yet) been opened or cannot be opened) the fact that they may be exercised only when the debtor is materially insolvent, does not influence the legal foundation of the action, which remains unaltered in its substance, following the opening of formal insolvency proceedings [1864]. The mere fact that the action is brought in the context of insolvency proceedings by the trustee thus represents only an occasional link with insolvency proceedings.

In the abovementioned cases, however, the Court made a different (and arguable) evaluation [1865]. Albeit acknowledging expressly that the conditions of the Gourdain Formula were not met [1866] – the Court considered that the German action fell within the ambit of the Insolvency Regulation, irrespective of the fact that its legal basis does not undergo any substantive amendments following the opening of the procedure. The fact that the substantive right underpinning the action concerned the material insolvency of the debtor was regarded as if it was based *de facto* on provisions derogating from the ordinary civil and commercial regime [1867].

In the *Kornhaas* decision as well the statements of the ECJ are ambiguous on this point. It is submitted that such a distinction would rather clarify the scenario for the determination of the jurisdiction. The conclusions drawn in this paragraph, however, would not change should one wish to consider that the action is brought on behalf of the creditors, as it would still be a tortious action whose legal basis is not amended in its essential features by the opening of insolvency proceedings. See *infra,* § V.4.4.1.2.

1864 D. ROBINE, 'Les actions connexes', *cit.*, p. 75. F. JAULT-SESEKE et D. ROBINE, 'Champ d'application du règlement insolvabilité (29 mai 2000) : entre répétitions et precisions', in *Bullettin Joly des Sociétés*, 2015, 2, p. 95.

1865 L. BOGGIO, 'Pagamenti illeciti anteriori alla dichiarazione di insolvenza (internazionale) tra lex societatis e lex concursus: azioni restitutorie e azioni di responsabilità al bivio', in *Giur. It*, 2016, 7, p. 1644.

1866 See *H. v. H.K.*, at [21].

1867 See the recent *Agder lagmannsrett - Kjennelse* (Court of Appeal), 20 March 2019, LA-2019-16503, refusing to recognize according to the Lugano Convention a judgement for directors' liability under § 64 GmbHG on the basis of the *German Graphics* and *H. v. H.K.* case-law. See also Norwegian Supreme Court, 28 June 2017, HR-2017-1297-A (*ING Bank v. The Bankruptcy estate of Bergen Bunkers*), who expressly referred to the Gourdain Formula to determine whether an action brought in the context of insolvency proceedings is sufficiently insolvency-related to fall within the scope of the Lugano Insolvency Exception. Supporting the decision of the Court for literature. Similarly, BGE 8 May 2014, BGE 4A-740/2012 (*Sabena* case) the Federal Swiss court rejected the recognition via the Lugano Insolvency Exception of a judgement holding the mother company (SAirLines AG) liable of the insolvency of Sabena SA. R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', *cit.*, p. 423. The majority of scholars were instead rather critical on the decision of the ECJ. See, *ex multis*, D. BUREAU, 'Procédure d'insolvabilité : mise en place d'une action contre un défenseur domicilié dans un État tiers', in *Rev. crit. DIP*, 2015, p. 462, who considered as somewhat a paradox that the ECJ maintains that the action derives from insolvency proceedings, while stating at the same time that it also exists independently from the opening of the procedure. P. NABET, 'Sanction du dirigeant d'une société en procédure d'insolvabilité selon le règlement (CE) n° 1346/2000 et liberté d'établissement', in *Revue critique de droit international privé*, 2016, p. 544. L. BOGGIO, 'Insolvenza internazionale - la revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', in *Giur. It.*, 2017, p. 2140.

The choice of the ECJ was motivated on the ground that

> « *An interpretation of Article 3(1) of Regulation No 1346/2000 to the effect that an action based on Paragraph 64 of the GmbHG, brought in insolvency proceedings, is not an action deriving directly from insolvency proceedings and closely connected with them, would therefore create an artificial distinction between that action and comparable actions, such as the actions to set transactions aside* » [1868].

Essentially, the Court equated actions under Article 64(1) GmbhG to avoidance actions, by taking into consideration the comparable *effects* produced by both actions.

The ECJ stated expressly that

> « *An action based on that provision seeks to preserve the distributable assets of a limited liability company which has suspended all payments, in the interest of all its creditors. Accordingly, the joinder of that action and of the insolvency proceedings meets the objective of improving the efficiency and speed of insolvency proceedings* » [1869].

It is undeniable that, under a functional approach, avoidance actions and director's liability actions against directors for payments or distribution of assets made when the company is already materially insolvent present common features. Indeed, both actions are aimed at restoring the insolvency estate, thus reinstating the *status quo ante* before the payment and transactions entered into by the (insolvent) debtor occurred.

Also, both actions seem to be 'anti-indemnitary actions' [1870], as they do not concern the damage provoked through the payment, but they are referred to any type of payment or transactions irrespective of the fact that they diminish the company's assets [1871].

However, there are also considerable differences between the two actions which make the parallelism made by the Court somewhat questionable.

The legal consequences pursued by the two actions are different. Avoidance actions are aimed at the invalidation, voidness or inefficacy of the transaction to the benefit of the insolvency estate, in order to reinstate the violated *par condicio creditorum*, which operates (exclusively) within insolvency proceedings. On the contrary, the action under § 64(1) GmbhG represents a 'regular' action seeking the assessment of the liability of the director towards the company. The mere fact that *quantum* of

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D. ROBINE, 'Les actions connexes', *cit.*, p. 75. F. JAULT-SESEKE et D. ROBINE, 'Champ d'application du règlement insolvabilité (29 mai 2000) : entre répétitions et precisions', in *Bullettin Joly des Sociétés*, 2015, 2, p. 95.

1868 See *H. v. H.K.*, at [24].

1869 See *H. v. H.K.*, at [16].

1870 See *supra* in this Chapter, at § V.4.4.1

1871 BGHZ 146, 264, in *NJW* 2001, 1280, where it was stated that of the tax authorities with regards to tax debts represents an illicit transaction under § 64(1) GmbhG, since from the moment in which the material insolvency matured. See also L. BOGGIO, 'Pagamenti illeciti anteriori alla dichiarazione di insolvenza (internazionale) tra lex societatis e lex concursus: azioni restitutorie e azioni di responsabilità al bivio', in *Giur. It.*, 2016, 7, fn. 16.

the indemnification provoked by the unlawful conduct of the latter corresponds to the amount paid to the third party should not conceive the different nature of the remedies [1872].

It is not questionable that ultimately the rationale underpinning such an action aims at encouraging the abandonment of a management based on the logic of the going concern, leaning towards a management marked by the (envisaged) preservation of the *par condicio crditorum*.

It is also true, however, that it does not *directly* aim to restore the violated *paritas creditorum* (which is a principle that operates only in the context of formal insolvency proceedings).

The indirect objective of the action is limited to the preservation of the value of the company's assets on the date on which the director should have stopped disposing of them. The action - which is surely relevant in terms of 'internal' organisation of the company - has undoubtedly a protective purpose with respect to creditors [1873], but this protection is entrusted with the application of the ordinary civil and commercial rules, as witnessed by the fact that the action stands also outside of insolvency proceedings.

I must stress 'indirect objective' because it must be kept in mind that the action is primarily exercised on behalf of the company, and only indirectly benefits the creditors: as also acknowledged by the Court, the action represents a 'penalty' incumbent upon the managing director who has failed to comply with his obligations *towards the company* under § 64(1) GmbHG [1874].

In addition to the fact that it seems at least illogical to argue that an action stems from insolvency proceedings, if it does not even require the opening of proceedings [1875], the condition of the 'direct derivation' must be excluded since the assessment of such an action, when brought in the context of insolvency proceedings, does not require the application of the specific rules of insolvency law.

1872 The difference between avoidance actions and director's liability *vis-à-vis* the company on the verge of insolvency is acknowledged by the Court in *Korhaas,* where the ECJ in the (poorly persuasive) attempt to 'fit' the rule under article 64(1) GmbhG in the scope of article 7 RR, could do anything but admit that « *appears at least similar to a rule laying down the 'unenforceability of legal acts detrimental to all the creditors' which, under Article 4(2)(m) of Regulation No 1346/2000* », at [20].

1873 With reference to the German debate on the frictions between article 64(1) GmbhG and articles Article 49 TFEU and Article 54 TFEU see G. BITTER, 'Haftung von Gesellschaftern und Geschäftsführern in der Insolvenz ihrer GmbH – Teil 1', in *ZInsO*, 2010, p. 1512, T. BACHNER, *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse*, Cambridge, 2008, p. 188 and ff. , S. VON THUNEN, 'Directors'duty for the benefit of creditors', Gottingen, 2011, p. 309.

1874 See *Kornhaas*, at [18].

1875 P. NABET, 'Sanction du dirigeant d'une société en procédure d'insolvabilité selon le règlement (CE) n° 1346/2000 et liberté d'établissement', *cit.*, p. 544. F. JAULT-SESEKE et D. ROBINE, 'Champ d'application du règlement insolvabilité (29 mai 2000) : entre répétitions et precisions', *cit.,* p. 95 « *le seul fait qu'une action soit habituellement exercée en présence d'une telle situation ne devrait pas être suffisant pour la faire échapper au domaine du règlement Bruxelles I. La solution est néanmoins gênante. Peut-on considérer qu'une action trouve son origine dans le droit des procédures d'insolvabilité dès lors que seule une situation d'« insolvabilité matérielle » est exigée pour qu'elle puisse être exercée ? La Cour de justice semble avoir conscience de la difficulté puisqu'elle ajoute un argument d'opportunité. L'exclusion de l'action de l'article 64 du GmbHG du champ d'application du règlement entraînerait « une différenciation artificielle entre cette dernière action et des actions comparables, telles que les actions en révocation ». Cependant, la solution retenue par l'arrêt commenté est elle-même génératrice d'une différence de régime qui n'est pas dénuée d'artifice* ».

Also, it must not be neglected that the proceeds of the action, should one exclude the direct exercise of the action by creditors [1876], would only indirectly benefit the creditors. Indeed, whenever insolvency proceedings are not opened, the proceeds of the action would revert to the asset of the company, to the indirect benefit of the creditors, which will be satisfied pursuant to the 'regular' order established by the German civil procedure.

It seems thus fair to acknowledge that, should a connection with insolvency *proceedings* must be established, this should be referred to the fact that an action under § 64(1) GmbHG, rather than directly affecting the orderly and equitable distribution of the assets which takes place in the context of insolvency proceedings, aims at preserving the sound (future and possible) application of those rules, in the event that insolvency proceedings are opened.

It follows from the above that liability actions under § 64 GmbHG can be equated to avoidance actions only as regard the effects that they produce (*i.e.* the reinstatement of the insolvency estate). Moreover, such an equation seems to be possible only as regards the German system, where the action for the payments made by directors when the company is materially insolvent does not require an actual damage, as the action is anti-indemnitary. But in other Member States the parallelism between avoidance actions and liability actions against directors for the payments made when the company is materially insolvent may prove to be impossible where the action requires the actual damage to the company's assets [1877].

Should the functional approach bolstered by the ECJ be regarded as the determinative criterion to characterise Annex Actions, it would likely lead to the conclusion that quite all actions brought by the trustee on behalf of the debtor should be attracted to the jurisdiction of the Member State where insolvency proceedings have been opened, as they all protect the creditors.

Even without reaching such an exacerbated conclusion, trying to mitigate the approach of the Court in the *H. v. H.K.* and *Korhnaas* judgements, one should consider, than, that the *vis attractiva concursus* should encompass all corporate actions in the vicinity of insolvency that necessarily assume (in their statutory basis?) the material insolvency of the company, assuming (more or less explicitly) a duty of the directors to orient their conduct for the benefit of creditor's right to the preservation of the company's assets (therefore not only actions for the 'recovery' of payments made subsequent to or causing [1878] illiquidity or over indebtedness, but also actions concerning the recovery of equity-replacing loans [1879], actions concerning the duty to file the request for the opening of insolvency

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1876 I recall that according G. H. ROTH and H. ALTMEPPEN, 'under §64', in G. H. ROTH and H. ALTMEPPEN (eds.), *Gesetz betreffend die Gesellschaften mit beschra¨nkter Haftung, GmbHG*, Munich, 2005, at [9]. creditors may benefit of the liability regime established under Article 64, only after they have acquired enforceable writ against the Gmbh.

1877 See L. LENNARTS, 'Directors in the Twilight Zone', *cit*, p. 121 on the Dutch action under article 2:216(3) DCC.

1878 See § 64(3) GmbHG, payments to shareholders (Germany).

1879 Article 2:216(3) DCC (Netherlands)

proceedings [1880], actions based on rules serving the maintenance of capital requirements seeking to hamper the company's operation [1881], and the like).

Such an option seems however to be far from the purpose underpinning the *vis attractiva concursus* and would entail a significant uncertainties with respect to all those Member State that, contrary to Germany and France, do not provide for an explicit shift of director's duties in proximity of insolvency proceedings, with the risk of creating (another kind of) 'artificial distinction' and unduly allocate ordinary civil and commercial claims outside the scope of the Brussels Ia Regulation [1882].

In the light of the above, it is submitted that any corporate action brought by the trustee *on behalf of the company* should not be considered for jurisdictional purposes as Annex Actions. They undeniably present a connection to insolvency proceedings, but since they do not derive directly from the formal opening of insolvency proceedings within the meaning from the Gourdain Formula, they cannot be considered to be inextricably linked to insolvency proceedings [1883].

V.4.4.1.2. Actions brought on behalf of the creditors

The reasoning is quite different when shifting the attention to actions brought by the trustee on behalf on the (general body of) creditors, which are generally actions based on tort law.

Needless to say, the key difference between those actions and corporate actions examined in the previous paragraph rests on the different subjects on behalf of whom the trustee brings the action.

Another difference, however, deserves to be highlighted. It was explained that, when bringing corporate actions, the trustee acts on behalf of the company by virtue of the *locus standi* that he derives

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1880 Article 15 InsO (Germany), Article L. 651-2 Cod. Comm, (France), article 367 LSC.

1881 Article 2497 c.c. and 146 l.fall.

1882 A. ESPINELLA MENÉNDEZ, 'Under Article 11', in J. SÁNCHEZ-CALERO, V. GUILARTE GUTÍERREZ (eds.), *Comentarios a la Législación Concursal, Valladolid*, p. 329 and ff. *2004*, p. 346-347, C. WILLEMER *op. cit.*, p. 212-312.N. BERMEJO GUTTIÉRREZ, E. RODRÍGUEZ PINEAU, 'Normas de protécción de accreedores: entre el deecho de sociedades y el derecho concursal', in *InDret*, 2006, pp. 12-18.

1883 As to the applicability of the Brussels Regulation, the relationship which established between the company, its shareholders, directors, and members of the audit committee (if any) must be regarded as the same of an undertaking freely consented to by one of the parties to the other in a contract. Therefore, its jurisdiction should follow such a characterisation. In particular, in ECJ, 10 September 2015, Case C-47/14, *Holterman Ferho Exploitatie BV [and oth.] v. Friedrich Leopold Freiherr Spies von Büllesheim,* ECLI:EU:C:2015:574, the Court has recently specified that, for the purposes of establishing the jurisdiction, the contractual relationship between the directors and the company may be characterised as (i) an employment contract, in case the director for a certain period of time performed services for and under the direction of that company in return for remuneration and was bound by a lasting bond which brought him to some extent within the organisational framework of the business of that company (at [45]). (ii) In case the director had the ability to influence the company, for instance when he is also a shareholder of the latter, to determine specifically whether Article 7(1) or (3) Brussels 1 must apply, the Court clarifies that the characteristic obligation of the legal relationship between the manager and the company being managed requires a particular activity in return for remuneration, that activity must be classified as a 'provision of services' within the meaning of the second indent of Article 7(1)(b) Brussels Ia (at [58]). The Court further observed that, inasmuch as national law makes it possible to base a claim by the company against its former manager on allegedly wrongful conduct, such a claim may come under 'tort, delict or quasi-delict' for the purposes of the jurisdiction rule set out in Article 7(3) Brussels Ia, only if it does not concern the legal relationship of a contractual nature between the company and the manager (at [70]). Prorogation clauses in the company's by-laws seems also to apply.

from the provisions assumedly set forth in each national insolvency statute. In principle, following the divestment of the debtor, the trustee is vested with the general task of managing and disposing of the debtor's assets (understood in the broadest meaning including also rights and legal relationships). As a corollary, the trustee is vested also with the general *locus standi* to act on behalf of the divested debtor, as both the claimant and the respondent.

On the contrary, it seems that not all the legal systems taken into account in this study establish a *general* rule governing the *locus standi* of the trustee on behalf of the creditors (corresponding to the abovementioned provision regarding the debtor) [1884].

It must be assumed, therefore, that the trustee may not have *sic et simpliciter* an indistinct and generalised power to act on behalf of all the creditors, but he is vested, on the basis of specific and typical statutory provisions or legal and jurisprudential theories, with the (not always exclusive) *locus standi* to bring those actions which are aimed at obtaining in, the interest of the creditors, the reinstatement of the debtor's assets.

Such a preliminary remark - which naturally explains also the *locus standi* of the trustee as regards avoidance actions [1885] - represents the pivotal steppingstone to analyse the actions that the trustee brings to 'actively' increase the insolvency estate [1886].

Among those kinds of actions are typically encompassed actions brought by the trustee (on behalf of the creditors) for the liability of directors on behalf of the creditors (which will be illustrated in the present paragraph), but also other actions, that will be dealt with afterwards [1887].

What is essential to keep in mind, is that those actions are all equated by the fact that they are directed at the compensation of the damage suffered by the creditors due to the conduct of third parties (*i.e.* separate legal entities from the company subject to insolvency proceedings, including directors and creditors), for the pauperization of the debtor's assets.

The statutory recognition of the *locus standi* of the trustee to bring, on behalf of the creditors, those actions towards third parties raises a particular question.

In fact, there are two possible solutions that have been proposed in the various Member States with regard to those actions:

1884 This is surely excluded in Italy (See *supra* Chapter I, § I.2). In Spain § 71(7) LC vests the trustee to bring only actions action seeking the invalidation of acts and transactions (*Acciones de reintegración and acción rescisoria*, see *supra* Chapter I, § I.3.2.1). France and Germany, instead, seem to vest the trustee with a general *locus standi* to bring (any) action on behalf of the creditors. See *supra*, Chapter I, § I.4.3. (France), article L. 622-20 Code Comm and Chapter I, § I.5.3. (Germany) § 92 InsO.

1885 See *supra* in this Chapter, § V.4.4.1.

1886 Avoidance actions are actually 'recovery' actions, aimed at the restitution of something that illegitimately exited the assets of the debtor. Instead, the actions that I am about to address are actions that seek the 'enrichment' of the insolvency estate, without involving a restitution.

1887 See *infra* in this Chapter, § V.4.5.2.

(i) either the actions under examination represent a derivative action, where the (individual) creditor acts by way of subrogation on behalf of the company [1888]. In this case the *locus standi* of the trustee would reflect the same legislative policy choice as that of attributing to the trustee the general *locus standi* on behalf of the divested company. Under this scenario the action would certainly be out of the range of action of the *vis attractiva concursus* and fall within the category of corporate actions described above.

(ii) Otherwise, the specific statutory recognition of the *locus standi* of the trustee on behalf of *all* the creditors postulates an autonomous right of the creditors, which in the context of insolvency proceedings is exercised by the trustee.

At this point of the reasoning it must be acknowledged the difficulty to explain what is the actual right that the general body of creditors have towards the directors.

Under what right should the creditors, with no direct relationship with the directors, be entitled to hold the director liable? What is the right of the creditors that the director would infringe?

An attempt of explanation to that question will be provided shortly, when some final considerations will be drawn about actions brought by the trustee in the interest of the general body of creditors. For now, it is sufficient to assume that the reverse side of the coin of the principle pursuant to which the debtor is liable towards the creditors with all his assets, present and future - which is common to all legal systems - is the shared and common interest of the indistinct mass of creditors to the preservation of the value of the debtor's assets, in so far as they satisfy all their claims.

The existence of such a right - and its conceptual distinction from the right of the individual creditor that suffers a direct prejudice from the conduct of the third party - further explains the uncertainties that under some legal systems (and the express provision allowing so under other Member States [1889]) concerning the possibility that, lacking a specific provision attributing to the trustee the exclusive prerogative to bring the action *vis-à-vis* the directors, a single creditor or a group of creditors may autonomously bring tortious actions *uti singuli*, in the course of the insolvency proceedings, where they demonstrate that they have suffered a direct and specific prejudice from the conduct of the director [1890]. Indeed, in some Member States creditors may bring actions on their own behalf in

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1888 As is the case in Spain regarding the action under article 240 LCS, in Chapter I, at § I.3.2.2.

1889 See in the Netherlands article 2:248 DCC read in conjunction with article 6:126 DCC, the s.c. Baklamel norm. Similarly also Article 2:139 DCC for misleading annual account which legitimates 'new creditors' (those creditors whose claims have arisen after the company became materially insolvent) to autonomously bring a tortious action against directors during the course of insolvency proceedings, claiming the compensation for 'loss reliance', *i.e.* the reliance on the sound economic and financial situation of the company fraudulently induced by the conduct of the directors. Analogously § 64(1) GmbH read in conjunction with § 823 BGB, made by 'new' creditors, who have entered into agreements with the company after the company was materially insolvent.

1890 See, for instance, the debate in Spain concerning article 241 LSC, illustrated above in Chapter I, at § I.3.2.2. Where national laws allow the individual creditors to bring individually an action against the director during insolvency proceedings, the action falls within the Brussels Ia Regulation, regardless of the fact that the conduct of the director concerns the insolvency of the company. Such a conclusion is supported by the ÖFAB case where a Swedish creditor of a Dutch limited company brought an action against a member of the board of

relation to their own losses, and the actions exercised autonomously against the third party (especially the director or the shareholder of the insolvent company) are excluded from the scope of the European *vis attractiva concursus* [1891].

Against this backdrop, and reverting specifically to liability actions brought by the trustee on behalf of the (general body of) creditors, as was explained in Chapter I, the insolvency law of many Member States provide for specific provisions (or case-law based principles [1892]) under which, in the context of insolvency proceedings, the trustee is vested with the exclusive *locus standi* to bring liability actions against directors on behalf of the creditors [1893].

It is the existence of the abovementioned right to the preservation of the debtor's assets that would justify the liability action against the director on behalf of all the creditors (and not only some of them), where his conduct infringes such a right.

An additional observation is necessary regarding the reason why under some legal systems creditors (unless it is not otherwise expressly established by the national legislature) do not seem entitled to autonomously bring the action against the directors. All in all, the director is a separate legal entity

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directors and one of that company's shareholders (presumably domiciled in the Netherlands), seeking to hold them liable for the company's debts as they have allowed it to continue to carry on business although it was undercapitalised and was forced to go into liquidation (it is understood that a restructuring plan had failed and insolvency proceedings were not yet opened). The request for a preliminary ruling concerning inter alia the jurisdiction of the action brought by the creditor, the Court briefly tackled the issue of the exclusion of those actions from the scope of the Brussels Regulation, under the Insolvency exception. The Court stated that « *As a preliminary point, it is necessary to examine the argument* […] *that the actions brought against [the director] are excluded from the scope of Regulation No 44/2001 pursuant to Article 1(2)(b) thereof, since they are based on provisions of Swedish law according to which limited companies with insufficient capital must be put into liquidation.* […] *As is clear from the documents submitted to the Court and the submissions made by the Swedish Government at the hearing, the actions in the main proceedings do not constitute insolvency proceedings but were brought after [the company] had been subject to a company reconstruction order. In any event, it must be held […] that those actions do not concern the exclusive prerogative of the liquidator to be exercised in the interests of the general body of creditors, but of rights which ÖFAB is free to exercise in its own interests* ». ECJ, 18 July 2013, Case C-147/12, ÖFAB, *Östergötlands Fastigheter AB v. Frank Koot, Evergreen Investments BV*, ECLI:EU:C:2013:490, at [25]. Similarly, in the Hochtief case, a creditor (a Hungarian bank), brought a liability action against the German controlling shareholder of a company subject to insolvency proceedings in Hungary, under Article 292 of Act CXLIV of 1997 Hungarian commercial law, providing that the controlling shareholder who has failed to declare to the Commercial Court the acquisition of the majority controlling shares in due time, shall be fully and unlimitedly liable, in the context of the liquidation of the controlled company - where the assets of the controlled company are not sufficient to satisfy the creditors - for the debts of the latter until it has complied with the abovementioned obligation. In that case (which is available only in French) the ECJ stated that « l*e recours [du creancier] ne paraît pas directement fondé sur les règles applicables dans le cadre de cette procédure d'insolvabilité et ne semble pas, dès lors, s'insérer étroitement dans la procédure d'insolvabilité à laquelle la société débitrice est soumise, ce qu'il appartient toutefois à la juridiction de renvoi de vérifier* ». ECJ, 17 October 2013, Case C-519/12, *OTP Bank Nyilvánosan Müködö Részénytársaság v. Hochtief Solution AG*, ECLI:EU:C:2013:674.

[1891] See, for instance, the action brought by the *Neugläubiger* in Germany (*supra* Chapter I, § I.5.3.). See also Portugal and Slovenia.

[1892] See in the Netherlands, Dutch Supreme Court, 14 January 1983, in NJ, 1983, p. 597. Article 6:162 in the event that the loss caused by the tortious behaviour has been suffered by the creditors collectively, the trustee has the right to bring the action against the tortfeasor.

[1893] See, for instance the article 146 l. fall., remitting to article 2394 c.c. (Italy). Article 172 *bis* LC (Spain). Article L. 223-22 or L. 225-251 Cod. Comm. (France). It must be recalled that in case of inertia of the trustee, under particular circumstances and within a certain specified period of time, national insolvency law may vest a group of creditors with the power of acting on behalf of all the body of creditors and bring the liability action against the trustee. See for instance the *action en comblement du passif*. See also in Spain, article 172 LC.

that is not shielded from individual actions by the bar provided by insolvency law, which covers only the individual actions directed against the debtor. Therefore, the bar of individual enforcement actions does not clarify the preclusion for creditors to act against the directors, and the explanation must be found elsewhere.

The exclusion of the concurrent *locus standi* of the single creditor, rather that based on specific legal arguments, is the outcome of legislative policy choices, ultimately referable to the implementation of the *par condicio creditorum*.

Indeed, attributing to the creditors the uncoordinated right to attack the assets of the third party whose conduct has infringed the creditor's right would lead to the undesirable result that *(i)* some creditors would obtain the full satisfaction of their claim, avoiding the allocation of losses within the insolvency proceedings; *(ii)* the same creditor could receive a double satisfaction of the same claim, since in practice it is likely that the creditor would both lodge his insolvency claim with the insolvency procedure and parallelly sue the director and *(iii)* the possibility of actual satisfaction of the general body of creditors through the action brought by the trustee would be severely jeopardised. The individual creditor would inevitably be quickest and most assertive compared to the trustee, with the risk that the assets of the third party would probably not be enough to satisfy the claim brought by the trustee on behalf of the creditors, after that the individual creditors have exercised their rights.

It follows that the practical expediency of the concentration of the *locus standi* responds to the orderly enforcement of the insolvency claims within the procedure governing the common pool problem, but it does not affect at all the legal nature of the claim brought by the trustee on behalf of the creditors.

Against this background, it bears now questioning whether, on the basis of the Gourdain Formula, the actions brought by the trustee on behalf of creditors *vis à vis* directors may be regarded as Annex Actions, keeping in mind that the main focus must be on the *genetic* condition.

Regarding the 'direct derivation' criterion, it seems clear that the substantive right underlying the action does not stem directly from insolvency proceedings.

The liability action exercised by the trustee on behalf of all the creditors conceptually finds its origin in the common (or company) tortious rules that in an ordinary civil and commercial scenario (*i.e.* when formal insolvency proceedings are not opened) legitimate the creditor to bring against the director, either pursuant to the general principle of the *neminem ledere* of civil law or under an express provisions of company law.

Such an argument seems to have been overlooked by the Court in the *Kornhaas*, decision (where the ECJ seems more prone to consider the action under § 64(1) GmbHG as an 'external liability action'). The Court considered that actions triggering liability of directors for payments made when the company is materially insolvent are an Annex Action on the basis, *inter alia*, of the close interaction

with such a liability with the duty to file the petition for the opening of insolvency proceedings under Article § 15 InsO [1894].

However, as discussed, equating the legal foundation of the duty to file to the liability arising out of the infringement of such a duty may turn to be over-simplistic.

The Recast Regulation (as well as § 15 InsO) is concerned with the *conditions* for the opening of formal insolvency proceedings, *i.e.* the procedural aspect of the opening (the subject entitled to file the petition, the forms, the time-limit, and the like), which are undoubtedly to be characterised as matters of insolvency law. Inferring *automatically* that the legal foundation of the liability of the directors towards creditors for the infringement of such a duty - which would arise by the joined reading of § 15 InsO and § 832(2) BGB - would equally be a matter of insolvency law does not seem such a straightforward conclusion. And that seems to be tritely demonstrated by the fact that the same fact (the non-filing of the petition for insolvency proceedings), which gives rise to the (tortious) liability of directors *vis à vis* directors in Germany should be treated differently where it concerns the *Neugläubiger* (the new creditors) and the *Altgläubiger* (corporate creditors). Also, another argument that militates against the syllogism according to which if the duty to file constitutes a matter of insolvency law, then also the liability deriving form it should be considered as such, is the treatment of such liability actions in Spain, where the creditors entitled to bring an action against directors under Article 367 LSC is suspended in the course of insolvency proceedings [1895].

Indeed, irrespective of the different conducts that may trigger the director's liability towards creditors *also* in the vicinity of insolvency (*i.e.* late filing of the petition for the opening of insolvency proceedings or conducts that create the material insolvency of the company, or deepens the material insolvency of the company as directors continue undergoing transactions with new creditors), the liability of directors for the harm caused to the creditor exists also, outside of insolvency proceedings, in a common civil and commercial scenario. The legal nature of the action brought by the trustee on behalf of the creditors should be considered as tortious, in that, in principle, the relationship between the creditor and the director is not based on an undertaking freely consented to by one of the parties to the other, but rather it stems from the unlawful conduct of the director that harms the creditor's rights, pursuant to the principle of the *neminem laedere*.

Therefore, those actions, even where they are related with the material insolvency of the debtor, cannot be regarded as 'directly deriving' from insolvency proceedings, because the formal opening of the procedure does not affect the substantive legal foundation of the action, which remains unaltered in its essential features.

[1894] See *Kornhaas*, at [28], stating « *personal liability of the managing directors of a company on the basis of the first sentence of Paragraph 64(2) of the GmbHG is related* […] *to the fact that, in essence, the managing directors of such a company have made payments at a stage when they would have been required, under Paragraph 64(1) of the GmbHG, to apply for the opening of insolvency proceedings* ».

[1895] See *supra* Chapter I, § I.3.2.2.

Yet, the action seems to be affected to a certain extent from the opening of insolvency proceedings. Indeed, the action would differ from that one of the single creditor directly prejudiced by the director, because the trustee would be acting on behalf of the *collective* body of creditors, seeking the compensation of their shared and common interest.

Where exercised in the context of insolvency proceedings, the *locus standi* of each single creditor to seek the compensation of his individual right (the precise features of which will be addressed below) against the director seems to be 'channelled' in the *locus standi* of the trustee, acting to the benefit of the entire body of creditors.

This is certainly an important 'metamorphosis' of the action [1896], which however does not seem to concern to the substantive right of the creditor (or of the body of creditors) to the restoration of the damage suffered. Rather, the 'collectivisation' of the *locus standi* to bring the action, together with all the other procedural adjustments required by the fact that the action is exercised in the context of insolvency proceedings (such as, for instance, the shift of the functional allocation of the competence to the insolvency court) concern the procedural context of the action.

It is submitted that, as a rule of thumb, and (only partially) overruling the conclusions of the ECJ in the Gourdain case, the substantive right underlying the action does not undergo sufficient substantive amendments to maintain that the substantive profile of the action is modified to such an extent that it could be deemed as protecting a different and new right.

Although it is not denied that some modifications to the legal basis of the right may occur as an effect of the opening of insolvency proceedings (for instance, liability actions are often subject to a different time-limits preclusion running from the opening of insolvency proceedings), I deem that such modifications do not seem to amend the essence of the legal basis of the action, whose merits would ultimately continue to be decided, in terms of the substance of the matter, pursuant to the ordinary civil and commercial law, and not by a substantive rule of insolvency law.

Confirmation of the above may be found, tritely, in the fact that the statutory provision located in insolvency statute generally remit to the application of the ordinary common and civil rules and merely establish the *locus standi* of the trustee [1897].

Regarding the 'close connection' condition, the liability action undoubtedly reveals a close connection with the procedure. Not only for the abovementioned profile of the *locus standi* of the trustee, but also for the fact that, if one looks at the effects of the action, the proceeds of the tortious action would benefit all the insolvency creditors. In this respect, then, it may be affirmed that the 'metamorphosis' or the 'collectivisation' of the action concerns also its effects: the proceeds of the

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[1896] S. AMBROSINI, G. CAVALLI, A. JORIO, 'Il fallimento', in A. COTTINO (ed.), *Trattato di Diritto Commerciale*, Padua, 2009, p. 405. An author effectively speaks of a 'chemical reaction' that the action undergoes when it comes into contact with bankruptcy proceedings. See G. MILANO, 'applicabilità del termine di decadenza ex art. 69 bis l.fall. alla revocatoria ordinaria', in *Fallimento*, 11, 2017, p. 1190.

[1897] See D. ROBINE, *op. cit.,* p. 97, about the *action pour le soutien abousif du credit* (see *infra* at § V.4.5.2.3

action would revert to the s.c. 'corporate creditors' whose position is directly prejudiced because their claim had already arisen when the unlawful conduct of the director occurred but also the s.c. 'new creditors' would benefit of the distribution of the proceeds of the action, notwithstanding the fact that their claim had arisen after the unlawful conduct, and hence could not be considered as directly harmed by it.

Yet, the above significant modifications concern the procedural context of the action, which - it is restated here once again - the characterisation of the action should not be contingent upon.

In the light of the above, it is submitted that, on the basis of the (correct application) Gourdain Formula, as a general rule liability actions brought on behalf of creditors should not be regarded as Annex Actions, and their jurisdictional regime should fall within the umbrella of the Brussels Ia Regulation [1898]. This is the case, for instance, of the Italian action under article 2394 c.c., which is exercised by the trustee pursuant to Article 146 l. fall. [1899] or the French actions under article 1850 Civil Code, and articles L. 223-22 or L. 225-251 Cod. Comm. [1900].

Once it has been clarified that the general rule should be that of the exclusion of liability actions from the Recast Regulation, it is now possible to highlight that for some *limited* exceptions the substantive right underlying the action would reveal a sufficient deviation to consider those actions as directly deriving from insolvency or, as Recital 35 RR labels them, 'based on insolvency law'.

These are residual hypothesis where the national legislature has evidently deemed it appropriate to attribute to the opening of insolvency proceedings the effect of significantly modify the substantive right underpinning the action brought against the director. It is submitted that the common features of those actions rest on the fact that the liability of the directors assumes in the context of those actions a sort of 'punitive' nuance [1901].

That was the case of the *action en comblement du passif* set forth by Article 99 Law n. 67-563, which was the action decided in the *Gourdain Nadler* case. As was explained, that action - whose condition precedent is the judicial assessment of the (company's) assets' shortfall to satisfy the insolvency creditors - provided for a simplified regime of a double presumption (*iuris tantum*), concerning the director's negligent conduct and the causal link with damage. The director would have been liable for all or some of the corporate liabilities, but the judge could reduce *ex officio* the amount of the damages. Moreover, under certain circumstances, the insolvency procedure against the company could be

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1898 Supporting this view Rechtbank 's-Gravenhage, 21 December 2011, ECLI:NL:RBSGR:2011:BV1495 (action brought by the trustee on behalf of all the creditors against a director who was considered as concurring in the attempt of fraudulently transfer some corporate's assets on the basis of Article 6:162 DCC).

1899 See *supra* Chapter I, § I.2.3.3.2.

1900 See *supra* Chapter I, § 1.4.2.2.

1901 I am not going so far as to say that those are punitive damages, but I am referring only to an apparent greater severity to which the director is patently exposed in the context of insolvency proceedings than in civil and commercial matters.

extended to the director. The action was considered by the majority of the scholars as a '*sanction*' [1902] and such a profound difference with the ordinary civil regime of director's liability led the French case-law to allow that the trustee could bring together an action *en comblement du passif* and an ordinary liability action based on civil and company law.

Another comparable action that was 'based on insolvency law' was the Spanish *acciòn de responsabilidad por deudas sociales* under Article 172 *bis* LC, which, until the reform of 2011, required that - after the insolvency of the debtor is assessed to be 'culpable' within the (accessory) phase of the *clarificación* - the director could be ordered to bear some or all the liabilities of the company. As explained the nature of the liability of the directors under Article 172 *bis* LC was extremely debated, but the majority of the case-law was prone to consider it not as a mere compensation, but rather as a different (and difficult to square into national categories) *ex lege* liability which was qualified as '*responsabilidad por deuda aliena*' [1903].

It is submitted that those actions had to be considered as Annex Actions because the liability of directors could not be equated to the mere compensation for the damages suffered by the general body of the creditors (as is the case with the other actions brought by the trustee against the directors), but having a look at their systematic regulation, they reveal a sort of disciplinary *leitmotiv*.

With regard to those two specific actions, however, the evolutions in the French and Spanish system require some further observations.

As explained in Chapter I, following the reforms respectively of 1985 in France and in 2011 in Spain, the current regulation of the *action en comblement du passif* (now renamed *action en responsabilité pour l'insuffisance de l'actif*) and of the *acción de responsabilidad pour deuda aliena* reveal the legislative trend to 'depenalise' the actions brought by the trustee against directors in the interest of the creditors.

Under both systems, although to a different extent, the reforms have significantly weakened the 'punitive' nuance referred above, in that the judgements under both Article L. 651-2 Cod. Comm and Art. 172 *bis* LC cannot be regarded anymore as 'sanctioning' the directors, but rather they are much more comparable to an ordinary (and here purportedly civil and commercial) compensation of the damage suffered by the general body of creditors [1904]. And, in fact, the trustee cannot cumulate anymore the two actions.

Therefore, it is submitted that should the ECJ be faced today with an *action en responsabilité pour l'insuffisance de l'actif*, as amended further by the latest reforms, it should conclude on the very basis of

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1902 C. MASCALA, 'Le comportement fautif du chef d'entreprise: de la sanction à la réparation?, in La loi du 25 janvier 1985 a 20 ans! Entre bilan et réforme', in *RLDA*, March 2005, p. 71.

1903 Cass. Comm., 20 June 1995. See also M.-C. PINIOT, 'Responsabilité civile des dirigeants sociaux. Non-cumul des actions du droit des sociétés et du droit des procédures collectives', in *RJDA*, 7, 1995, p. 639.

1904 For the details of the amendments brought to those actions see *supra* Chapter I, at § § 1.4.2.2. (France) and § I.3.2.2. (Spain)

the Gourdain Formula that the action would be excluded by the scope of the *vis attractiva concursus* of Article 6 RR, but rather under the Brussels Regime [1905].

Such a solution should be less surprising if one considers that since the Gourdain judgement, the panorama of insolvency proceedings has considerably changed, and the stigma of insolvency has been weakened, giving the way to the 'fresh start' culture. The sternness of national legislature towards directors has often been appeased also to incentivise the recourse to pre-insolvency proceedings.

However, this does not eliminate the fact that there are still actions (sometimes of very recent introduction) that may reveal a *lato sensu* sanctioning nature.

According to Dutch scholars, (apparently [1906]) this the case of Article 2:138/248 DCC [1907], pursuant to which it is understood that there is a double presumption, and the directors can be held liable on the ground of an improper performance of duties which took place in the period of three years preceding the company's insolvency proceedings. Moreover, when the director is unable to pay the debt which has arisen as a consequence thereof, the trustee may, on behalf of the liquidation estate, nullify by means of an extrajudicial declaration all juridical acts which have been performed by the director without any legal obligation to do so, and which have harmed the recovery rights against his own property, if it is plausible that these juridical acts have been performed only or mainly with the intention to harm these recovery rights.

Again, disqualification measures against liable directors that are envisaged only following the assessment of the director's liability in the context of insolvency proceedings may be considered as a symptom of the 'afflictive' nature of the measure which the legal system links to the liability of the administrator [1908].

1905 Of the same opinion M. BODE, Le groupe international de sociétés: le système de conflit de lois en droit comparé français et allemande, Bern, 2010, p. 584. C.T. EBENROTH and M. KIESER, 'Die Qualifikation der "action en comblement du passif" nach Art. 180 des neuen französischen Insolvenzrechts', in *KTS*, 1988, p. 19-48, p. 41-44; C. WILLEMER, *Vis attractiva concursus und die Europaïsche Insolvenzverordnung,* Tübingen, 2006, p. 124-138. *Contra*, Cass. Comm., 5 May 2004, n. 01-02041, in *Dalloz*, 2004, p. 1796, with observation by J.L. VALLENS and P.-M. LE CORRE, in *Rev. dociété*, 2004, p. 715. See also Cass. Comm., 14 March 2000, M. MENJUCQ, in *Bull. Joly Sociétés*, 2000, p. 600 and T. Nanterre, 24 October 2013 (*Alkor* case), in *Dalloz*, 2013, p. 2641; OBL Hamm, 26 February 1993, 20 W 3/93, in *EuZW, 1993, p. 519, the* action en comblemend du passuf under Article 180 loi 1985 falls within the Insolvency exception. (see *supra* Chapter III, Section 1, § I.1.).

1906 L. LENNARTS, 'The review of the EU insolvency regulation – time to recognize the ties that bind company law and insolvency law?', *op. cit.*, p. 78 maintains that the characterisation of the action would derive from the fact that the claim can only be brought by the trustee in behalf of all the creditors and that compensation must be paid to the estate. I don't think that those profiles are sufficient to encompass such an action within the scope of the *vis attractiva concursus*. However, the action seems to have an 'hybrid' character between an avoidance action and a director's liability action. Therefore, it may be perhaps argued that or this reason it seems that the substantive right is amended.

1907 S. M. VAN DEN BRAAK, 'Migratie in het zich van insolventie: het comi nader beschouwd', in *TvI*, 2010, p. 233 and N.W. A. TOLLENAAR, Bestuurdersaansprakelijkheid en IPR*,* in *FIP*, 2009, p. 177. Rechtbank' S-Hertogenbosch, 8 June 2011, No. LJN: BQ7552, ECLI:NL:RBSHE:2011:BQ7552, available at www.Jure.nl; Rechtbank Breda, 25 March 2009, *Luchtman/Ermer Beheer B. V.*, LJN: BH9042.

1908 See, for instance a disqualification action under Article L. 653-1 Cod. Comm., which was considered as an Annex Action by the French Supreme Court in Cass. Com., 22 January 2013, n. 11-17968 (*NOB* case).

Similarly, should the future Italian case-law interpret the innovations brought by Article 378 of the Italian *Codice della crisi e dell'insolvenza* to Article 2486 c.c. as introducing a presumption *iuris et de iure* [1909], this would lead to a complete overturning of the responsibility action compared to the previous system, which would probably imply its subjection to the European *vis attractiva concursus* [1910].

In the light of the above, it may be worth reflecting if it would not be more adequate to restrict the inclusion of (national) liability actions on behalf of the body of creditors within the scope of the RR only to those actions where it emerges clearly that the director is not only held liable for the damages provoked for the infringement of the collective and shared creditor's right to the preservation of the debtor's assets value, but that a systematic interpretation of the action reveals a sort of 'sanctioning' profile, which requires that the merits of the matter, in terms of substantive rules governing the right underpinning the claim, must be assessed pursuant to a particular and specific regime of *substantive* insolvency law, that for the foreign judge could prove to be difficult to apply.

In all the other cases, where the substantive right that is exercised through the action undergoes some amendments (likewise those relating to the limitation period) that would not require a specific technical competence of (foreign) insolvency law of the court hearing the case, the Gourdain Formula seems to confirm the application of the Brussels Regime.

V.4.4.2. Liability Actions against creditors and third parties

Conclusions similar to those illustrated above may be applied with reference to other tortious actions brought by the trustee against third parties, whose conduct has harmed the shared interest of the body of creditors. Those actions may be substantially equated to liability actions brought by the trustee against the director on behalf of the creditors. Indeed, the director's position may be equated substantially to a third party as they represent a separate legal entity from the insolvent company [1911].

Among the judicial initiatives brought by the trustee in the context of insolvency proceedings, tortious actions brought against third parties by the trustee play an important role, as they are aimed at the reinstatement of the insolvency estate and maximize the satisfaction of insolvency creditors [1912].

1909 G. FAUCEGLIA, *Il nuovo diritto della crisi e dell'insolvenza*, Turin, 2019, p. 241. A. BARTALENA, 'Le azioni di responsabilità nel codice della crisi d'impresa e dell'insolvenza', in *Fallimento*, 2019, p. 307.

1910 It is recalled that the last sentence of article 2486 c.c., adds a specific provision concerning exclusively liability actions exercised in the context of insolvency proceedings, reading « *if insolvency proceedings have been opened and the annual accounts are missing or if, due to the irregularity of the accounts or for other reasons, the net assets cannot be determined, the damage shall be settled to the extent of the difference between the assets and liabilities established in the proceedings* ». See *supra* Chapter I, § I.2.3.3.2.

1911 For a comparison between liability actions against the directors on behalf of the creditors and the iactio pauliana exercised by the trustee see L. BOGGIO, 'La revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', in *Giur. It.*, 2017, p. 2150.

1912 Y. BRULARD and J. MATERNE, 'Les Actions Annexes', in Y. BRULARD, L.-C. HENRY, V. MARQUETTE, J. MATERNE, M. MENJUCQ, D. ROBINE, V. RUELLE, J-L. VALLENS, P. WAUTELET, B. WESSELS (eds.), *L'insolvabilité nationale, européenne et internationale*, Paris, 2017, p. 126., p. 126.

The main difficulty in characterising those actions derives from the wide discretion of the interpreter when assessing the 'metamorphosis' that the action (and the underlying right) undergoes when brought in the context of insolvency proceedings. The problem here concerns not *whether* the action can be regarded as modified by the opening of the procedure (because it is obvious that some changes occur) but rather *to what extent* these changes can be considered sufficient to consider the action as deviated from its typical scheme. This issue plagues also the domestic debate on the characterisation of those actions at national level, which are far from having precisely defined when those actions fall within the (national) *vis attractiva concursus* or not.

The case-law of the Court of Justice has certainly not contributed to creating certainty, since it has too often adopted contrasting approaches. In addition, the classification is rendered more arduous for the fact that those actions are not always typical actions, provided with a statutory rule, but in some cases the 'action' is nothing but a customary application of a jurisprudential or legal theory, which lacks a true normative basis and precise contours as to the specific features of the action.

In the following paragraphs it is only possible to analyze some types of action, which reveal all a common core that should allow to suggest a criterion for the jurisdictional allocation of all tortious actions, irrespective of the specific hypothesis concerned [1913].

V.4.5.2.1. The (ordinary) *actio pauliana* brought by the trustee

One of the most common remedies available under civil law for creditors seeking the preservation of the value of the debtor's assets is the (ordinary) *action pauliana* [1914]. The notion of *actio pauliana* is described as a « *series of techniques for granting protection to creditors in cases where the debtor diminishes his seizable assets to avoid paying his debts* » [1915]. As lucidly explained by Advocate General Ruiz-Jarabo Colmer, the *actio pauliana,* whose ancient origins must be traced back to Roman law [1916], constitutes a remedy which is provided under the vast majority (if not all) the legal systems of the Member States, allowing a creditor with the possibility to have an act declared ineffective with respect to that creditor, that act

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1913 1913 Y. BRULARD and J. MATERNE, 'Les Actions Annexes', *op. cit.*, p. 126 places indistinctively those actions under the Brussels Regime.

1914 See art. 2901 Italian Civil Code, article 1167 French Civil Code, art. 1.111, Spanish Civil Code, art. 12 German Anfechtungsgesetz.

1915 I. PRETELLI, 'Cross-Border Credit Protection Against Fraudulent Transfers of Assets: Actio Pauliana in the Conflict of Laws', in *Yearbook of Private International Law,* 13, 2011, p. 590. T. LINNA, 'Actio Pauliana - "Actio Europensis?" Some Cross-Border Insolvency Issues', in *Journal of Private International Law,* 10, 2014.

1916 Cicero mentions the '*actio restituito in integrum'* in, *Ad Atticum*, I, 1, 3. On the historical evolutions of the *actio pauliana* see A. VAQUER, *From Revocation to non-opposability : modern developments of the Paulian action*, in *Regional Private Laws and Codification in Europe*, in H. L. MAC QUEEN, A. VAQUER, S. ESPIAU ESPIAU (eds.), Cambridge, 2003. G. IMPALLOMENI, *'Azione revocatoria (diritto romano)',* in *Nov. Dig. It.,* II, Turin, 1968, S. SOLAZZI, *La revoca degli atti fraudolenti nel diritto romano, 2,* Naples, 1945. J. A. ANKUM, *De geschiedenis der "actio pauliana": (l'histoire de l'action paulienne), Zwolle, Uitgevers-Maatschappij, Tjeenk Willink, 1962.* A. VAQUER, *From Revocation to non-opposability : modern developments of the Paulian action*, in *Regional Private Laws and Codification in Europe*, in H. L. MAC QUEEN, A. VAQUER, S. ESPIAU ESPIAU (eds.), Cambridge, 2003, V. PIANO MORTARI, *L'azione revocatoria nella giurisprudenza medievale,* Milano, 1962.

having been carried out by a debtor to diminish its assets by passing them on to a third party. From a procedural point of view, the action is brought against a third-party who has acquired the disputed asset, although the debtor is frequently named so that the judgment given may be enforced against him.

Although the rules governing the *actio pauliana* throughout member State highlights several differences (which, as recently stated by Advocate General Bobek concern the applicable law and the qualification of the action as an *actio in rem* or *in personam*), for present purposes the common features that equate the different regulations of the *actio pauliana* under the legal systems Member States are relevant.

The first common element is the triangular relationship between the three parties based on *(i)* the existence of a debt between a debtor and a creditor, *(ii)* a transaction between the debtor and the third party [1917], and *(iii)* the existence of an 'intent to defraud' on the part of the debtor, as well as the transferee's awareness of that fact. In this triangular relationship, the function of *actio pauliana* is essentially 'protectionary' in all systems: limiting the legal effects *vis-à-vis* the creditor of the disposal of the debtor's assets where such a disposal hinders the creditor's possibilities of collecting the debt. Therefore, rather all Member State acknowledge that the fundamental tenet of the instrument is not compensation but rather the preservation of a creditor's rights over a debtor's assets [1918].

1917 The transactions that may be subject to the *actio pauliana* vary to a great extent across Member State. France and Italy have a more comprehensive approach towards the objective profile of the action, and consider that any reduction in the debtor's assets may be subsumed under the concept of 'transaction', including anomalous forms of payment (*datio in solutum*) or the novation of previous obligations, the assignment of a claim and all acts through which the debtor diminishes its assets. Also, the transformation of liquid resources in real estate properties (which are illiquid) may be regarded as a transaction subject to the *actio pauliana* because it makes the enforcement more burdensome for the creditor. See on this point, among others, M. BIANCA, *La responsabilità*, in M. BIANCA, *Diritto civile*, 5, Milano, 1994., p. 439. It is understood that Germany evaluates more strictly the transaction, requiring a more stringent demonstration on the part of the creditor that the transaction has genuinely compromised the creditor's possibilities of enforcing his right or made enforcement objectively more difficult.

1918 The 'protectionary' function of the *actio pauliana* has progressively outdistanced such an action from its original conception as an enforcement measure. The difference between the enforcement of the creditor's claim and the protection represented by the right to invalidate transactions that impair or make more difficult for the creditor to exercise such an enforcement is mirrored, *inter alia*, by the breath of the conditions under which legal systems vest creditors with such a protective remedy. In France and Italy, for instance, creditors may exercise an *actio pauliana* even where their claim is, for instance, a conditioned claim or subject to a time-limit or where the claim is not liquid or not yet fallen due (see article 2091 codice civile and art 1167 *code civil*). Under those systems, therefore, the remedy of the *actio pauliana* may be regarded as an anticipated protection of the debt collection. See A. MAFFEI ALBERTI, *Il danno nella revocatoria*, Padua, 1970, p. 7 ss. However, it must be mentioned that in Spain and Germany the *actio pauliana* seems still rather anchored to the enforcement of the credit, rather than to the (preliminary) protection of the enforcement of such a credit. In this respect it is noted those jurisdictions require that the creditor demonstrates the certainty, liquidity and enforceability of his claim but also the insufficiency of the debtor's assets (see Article 1.111 *Codigo civil* and § 12 AnfG). See on this point, for Spain F. RIVERO, 'España: La acción paulian en Derecho español', in J. J. FORNER DELAYGUA (ed.) *La protección del crédito en Europa*, Barcelona, 2000, p. 50 and for Germany W. MAROTZKE, *Insolvenzrecht und Anfechtungsrecht*, in *Zeitschrift für Gesetzgebung*, 1989, p. 139. N. HOFFMANN, 'Die Actio Pauliana im deutschen Recht: Gläubigeranfechtung nach dem Anfechtungsgesetz und der Insolvenzordnung', in J. J. FORNER DELAYGUA (ed.) *La protección del crédito en Europa*, Barcelona, 2000, p. 153, W. GERHARDT, *Die systematische Einordnung der Gläubigeranfechtung*, Göttingen, 1969. Another profile that witnesses the departure of the *actio pauliana* from the domain of enforcement law concern its legal consequences. While in Italy and France the *actio pauliana* merely produces the unenforceability of the transaction entered into between the debtor and the third party *vis-à-vis* the creditor, but the transaction remains valid between the parties (and for this reason the effects

A second - and here fundamental - common feature is the distinction of the ordinary civil *actio pauliana* form (insolvency) avoidance actions [1919]. It is assumed that avoidance actions are conceptually different actions from a civil *actio pauliana*, although both instruments pursue the same objective, *i.e.* the protection of the creditors' interest to preserve the assets of the debtor, as the general collateral for their claims [1920]. It is not possible to dwell extensively on the doctrinal differences between avoidance actions and the common *actio pauliana*, as the issue is extremely complex to attempt to summarise it in few words. Only a few superficial observations can be made here.

A first (less significant) difference concerns the regime of the proof gathering. When brining the *actio pauliana*, the claimant must demonstrate the subjective intention of both the debtor - who undertakes the act with the view to detriment his creditors, subtracting his assets from their attachment (*consilum fraudis*) - and the third party (the *partecipatio faudis*). On the contrary, the rules generally regulating avoidance actions facilitate the trustee, providing that both the subjective elements are presumed and that the burden of proof lies with the respondent.

The most marked difference, however, is that, as already explained, as regards the profile of the harm, avoidance actions must be considered as 'anti-indemnification' actions. The transaction can be set aside simply because it violates the *par condicio creditorum*, even if it has ultimately increased the value of the insolvency estate. It is for this reason, in essence, that avoidance actions may be considered to be actions whose legal basis stems directly from the insolvency proceedings [1921]. Instead, the *actio pauliana* is fully an indemnification action, as it requires that the transaction concluded between the debtor and the third party actually produces a harm, actually diminishing the debtor's assets. In other words, it is not sufficient (as is the case for avoidance actions) that the debtor concludes a transaction

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of the *actio pauliana* are considered twice as relative, since it affects the transaction for the exclusive benefit of the proceeding creditor - it is unenforceable in relation to the creditor - and paralyses only some of the effects of the transaction - it affects only the (future) enforcement proceedings on that assets, but leaves untouched the validity of the transaction -). See M. FABIANI, 'Revocatoria fallimentare, attualità dell'istituto e aspetti processuali', in *Fallimento*, 1996, pp. 105 ss. See in this sense also ECJ, 26 March 1992, Case C-261/90, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG* (Reichert II), ECLI:EU:C:1992:149. With regards to the effects of the *actio pauliana*, in France, the alternative between the validity of the transaction and the simple unenforceability is still debated among scholars, but the case-law seems more prone to the latter solution. A. HARMAND-LUQUE, *Recherches sur l'action paulienne*, Paris, 1995, p. 263. In Spain, the *acción paulian* produces the unenforceability of the transaction. F. RIVERO, *op. cit.*, p. 48. In Germany, on the contrary, the still close bound between the *actio pauliana* and debt collection is witnessed in the fact that it automatically produces the effect of convicting the third party to perform or tolerate the performance of obligation in favour of the creditor (see § 11 AnfG). In particular, the asset may be directly be attached by the judgement creditor, for the satisfaction of his claim (see § 10 AnfG). See MAROTZKE, *Insolvenzrecht und Anfechtungsrecht*, in *Zeitschrift für Gesetzgebung*, 1989, p. 141.

[1919] See *supra* § V.4.4.1. On this aspect see G. MCCORMACK and R. BORK, *Security Rights and the Insolvency Regulation*, Cambridge/Antwerp/Portland, 2017.

[1920] I shall go back on the affirmation that the debtor's assets represent the general collateral for the satisfaction of the creditor's claim at § V.4.5.2.3.

[1921] See *supra* in this Chapter, at § V.4.4.1.

that entails a preference for a creditor, but it is necessary that that transaction diminishes the debtor's assets or makes it more difficult for the creditor to enforce his claim.

A significant expression of this difference, at least in the Italian legal system, is represented by the fact that with the *actio pauliana* the creditor cannot challenge the transaction by means of which the debtor extinguishes a debt that have already fallen due (as it does not harm the creditor's right). On the contrary, with the avoidance action, the trustee may challenge also the payment of debts already fallen due, thus involving in the insolvency procedure also those third parties who were not (anymore) creditors of the debtor [1922].

Against this background, it should be clear that avoidance actions do not represent the 'insolvency upgrade' of the *actio pauliana*, as the two actions are not only different under the profile of the proof gathering, but because the very idea of the harm caused by the third party is profoundly different under the two actions.

In the light of the different regime described above, it is nothing by uncommon that, in addition to avoidance actions, national legislatures provide that the (ordinary) *actio pauliana* may be exercised against the third party in the context of insolvency proceedings [1923].

The reason underpinning the possible accumulation of the two actions is essentially of a practical nature: while avoidance actions provide that only transaction performed during the s.c. 'suspect period' (generally rather limited in time) may be set aside, the ordinary *actio pauliana* allows the challenge of transactions performed over a longer period of time.

In this case, the insolvency law vests the trustee with the *locus standi* to bring the same actions that individual creditors could have brought *uti singuli* before the opening of insolvency proceedings.

The interpreter is then faced with three actions: at the two antipodes there are *(i)* (insolvency) avoidance actions (which, as explained represent the archetype of Annex Actions) and *(ii)* civil *action pauliana* exercised outside of insolvency proceedings by the single creditor. In the middle, there is the *(iii) actio pauliana* brought by the trustee in the context of insolvency proceedings, in respect of which - for the jurisdictional purposes under discussion - it must be assessed whether the opening of insolvency procedure affects the right underpinning the action to such an extent that it may be characterised as an (insolvency) *tertium genus* of action and, thus, an Annex Action.

It is undoubted that when exercised in the context of insolvency proceedings the *action pauliana* is subject to the same 'metamorphosis' that was already described above in relation to liability actions against directors brought on behalf of the general body of creditors. In the context of insolvency proceedings, the *locus standi* of each creditor is 'channelled' in the *locus standi* of the trustee. Again, the

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[1922] See in this respect the Preface.

[1923] Art. 66 l. fall. (Italy), art. L. 1341-2 Code Civil (France). See also ss. 423-425 IA 1986 (England and Wales). This is not the case of the German system, where, unlike the Italian system, the opening of insolvency proceedings determines the availability of the ordinary *action pauliana* or (insolvency) avoidance actions. G. MCCORMACK, A. KEAY, S. BROWN, *European Insolvency Law – Reform and Harmonization*, Cheltenham, Northampton, 2017, p. 130 and ff.

reasons behind the exclusive entitlement of the trustee lies with the fact that concurrent actions brought by individual creditors would determine the risk of an unequal treatment of the creditors, and thus the infringement of the *par condicio creditorum* [1924], as well as the likely uselessness of the action brought by the trustee against the third party, which would prove to be impecunious following the individual actions of creditors.

Form a procedural standpoint, it bears noticing that in national systems where the in the context of the (ordinary) *actio pauliana*, the debtor (*in bonis*) must be necessarily be part to the action, the exercise of the action by the trustee in the context of insolvency proceedings may entail the odd situation where the *locus standi* of the trustee cumulates at the same time both the role of body of the procedure, acting as a claimant on behalf of the creditors and the processual substitute of the divested debtor, party to the action as the (additional) respondent (the 'main' respondent being the third party with whom the debtor has entered with the transaction).

Also, regarding the effects of the action, they undergo the same 'collectivisation' of the *locus standi*, in that the proceeds of the action ultimately benefit all the creditors, also those ones whose claims arose after that the transaction was undertaken.

Alike liability actions against directors on behalf of the creditors, it may occur that some substantive elements are modified (and, generally, such modifications pertain to the limitation period [1925]).

In that constellation it is fair to acknowledge that the *action pauliana* exercised by the trustee has autonomous and functional features that distinguishes it from the action brought by the creditor.

Should said amendments that the action undergoes as an effect of its exercise in the context of insolvency proceedings be regarded as sufficient to consider that it is an Annex Action?

In the recent case *Feniks v. Azteca Products*, the ECJ answered to that question in the positive [1926]. The ECJ stated an *actio pauliana* pursuant to Article *527* of the Polish Civil Code, brought by a creditor of a materially insolvent debtor (against whom, however, not insolvency proceedings were opened) is not « *at all connected with proceedings for the liquidation of assets or composition proceedings* […]. *In so far as the action aims to preserve the creditor's own interests and not to increase the assets of* [the individual creditor bringing the action] *it falls within the notion of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012* » [1927].

It must be inferred from the reasoning put forward by the Court that the elements upon which the characterization of an *actio pauliana* as an Annex Action are *(i)* the fact that in the context of insolvency

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1924 See L. CARBALLO PIÑEIRO, *acciones de reintegración de la masa y Derecho concursal internacional*, colección de Conflictu Legum, Santiago de Compostela, 2005, pp. 169-172.

1925 This leads to the further observation that the amendments as to the limitation period and other substantive profiles of the action may not be expressly provided by the law and their application could be the subject matter of vivid doctrinal debates as it happens in the Italian system as to the application of the limitation period specifically provided for (insolvency) avoidance actions to the *actio pauliana* under article 66 l. fall.

1926 ECJ, 4 October 2018, Case C-337/17, *Feniks sp. z o.o. v. Azteca Products & Services SL*, ECLI:EU:C:2018:805.

1927 *Feniks*, at [32]-[33].

proceedings the trustee brings the action on behalf of all the creditors and not in the interest of a single creditor *(ii)* the aim pursued by the action is the reinstatement of the insolvency estate, to the benefit of all the creditors.

A similar conclusion was drawn in the recent case *Deiulemar*, where the Italian Supreme Court considered that an *actio pauliana* exercised by the trustee against a subject domiciled in another Member State under Article 66 l. fall. falls within the scope of the European *vis attractiva concursus* [1928]. On the contrary, other national case-law seem more prone to consider that the *actio pauliana* should not be considered as an Annex Action [1929]. This latter approach seems to me the correct one [1930].

The solution bolstered by the ECJ and the Italian Supreme Court proves to run counter the already mentioned principles established by (a part of) the previous ECJ's case-law, and which seems to be reaffirmed by the Recast Regulation, pursuant to which the determinative criterion to allocate the jurisdiction is the deviation of the substantive legal foundation of the action from the ordinary civil and common rules and not the procedural context of the action (*i.e.* whether the action is brought by the trustee and the proceeds revert to the estate).

In the *Feniks* judgement the Court seems to completely overlook whether the legal foundation of the action undergoes substantive amendments with regards to its essential features and seems focuses its attention, instead, on the procedural context of the action, undoubtedly subject to a 'metamorphosis' due to the fact that the action is exercised in the context of insolvency proceedings, which, however seems not to be sufficient to attract the action to the jurisdiction of the insolvency forum.

Even more surprisingly, the decision is in stark contrast with the *NK* judgment, which is almost contemporary with the *Feniks* judgment.

V.4.4.2.2. The Dutch Peeters Gatzen action

When the NK case was examined in Chapter III, for the sake of an orderly discussion, the legal background of the Dutch action brought to the attention of the Court in that case was not explained.

1928 See on this point Cass., 4 April 2017, n. 8680. *Contra* Cass. SS.UU. 18 April 2008, n. 9745. I recall that The Italian case-law is not unanimous in considering whether, in the context of purely domestic disputes, the *actio pauliana* exercised by the trustee represents an action substantially different from that exercised by the single creditor. See on this point also M. PORZIO, 'Effetti del fallimento sugli atti pregiudizievoli per i creditori', in V. BUONOCORE and A. BASSI (ed.), *Tratt. Dir. Fall.*, Padua, 2010, p. 333. The predominant opinion excludes the nature of 'action deriving from insolvency proceedings' and rather qualifies it as an 'action of the estate'. However, it must be pointed out that such a doctrinal dispute has no bearings on the internal allocation of competence as the Italian *legge fallimentare* attributes *ex lege* the competence with the insolvency court.

1929 See *Ladislav Hornan (as the liquidator of Baillies Limited) v. James stuart Baillie & Ors.*, [2012] EWHC 285 (Ch), where Purle QC J at [13] stated that proceedings under s. 423 Insolvency Act 1986 seeking to set aside transactions that defraud creditors (thus an action comparable to the *actio pauliana*) were not insolvency proceedings under the European Regulations. He pointed out that the provision was applicable, irrespective of whether there was a liquidation or some other form of insolvency proceedings, and any creditor could have brought the proceedings at any time. See also *Jyske Bank v. Spejeldnaes*, [2000] BCC 16, and *TC Bank PLC v. Katz*, [1997] BPIR 147.

1930 Of the same opinion, see L. BOGGIO, 'La revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', in *Giur. It.*, 2017, p. 2150.

Nor was it possible to give any account of it in the Chapter I, since the Dutch system was not chosen between the national legal systems analysed for comparative purposes in this work. However, in order to highlight the similarities between the *actio pauliana* and the action of Dutch law, it is necessary to provide here a synthetic reconstruction of the characteristics of the action [1931], so as to be able to demonstrate that it falls among the actions that are being examined in this paragraph.

The action is named after the parties to the original judgment of 1983 [1932], in which the Hoge Raad (the Dutch Supreme Court) recognised the possibility that the trustee brings an action for damages, according to the common rules of tort law, against a third party whose conduct, before the opening of insolvency proceedings, has violated the collateral represented by the assets of the debtor, in that the third party hindered the possibilities for creditors to satisfy their claims in the context of insolvency proceedings [1933]. The fact that a third party - who may not even be in direct contact with creditors - is sued to compensate creditors for the damages produced in respect of the debtor's assets [1934] is explained by the fact that Dutch law imposes a 'social' duty of care upon the third party, who, in the context of its relationship with the debtor, is required to act in such a way as to prevent any unlawful transaction by the debtor, prejudicing the latter's assets, which would make it more difficult for creditors to satisfy their claims [1935].

1931 On the Peeters Gatzen action see, among others, V. VROOM and L. KERSTENS, *Wie de botte bijl hanteert komt de man met de hamer tegenover (ruim) dertig jaar Peeters/Gatzen-vordering*, in W. SCHREURS, J. REIZIGER, E. TEN BERGE et al. (eds.), *De gereedschapskist van de curator*, *Insolad Jaarboek*, Deventer, 2015.

1932 In the case from which the action takes its name, the insolvent debtor, Mr. Van Rooy, had fraudulently transferred the matrimonial house to his wife, Mrs. Gatzen, who offered it for sale at undervalue. The trustee, Mr. Peeters, given the impossibility to cumulate the ordinary *actio pauliana* with protective measures (lacking the sufficient link of instrumentality between the two actions), brought an action against Mrs. Gatzen, seeking an order to pay compensation for the damages caused to the general body of creditors of Mr. Van Rooy, represented by the sale of the house at a price lower to its current market value. See HR, 14 January 1983, in *NJ*, 1983, p. 597.

1933 From an objective point of view, it is considered that, for the purposes of the Peeters Gatzen action, the infringement of the shared interest of creditors may be represented by either an act reducing the debtor's assets (as occurred in the case of 1983 or in HR 27 February 2009, in *JOR*, 2009, p. 104, case *Stichting Waaldijk v. Aerts q.q.*) or an act in violation of the principle of the *pari passu principle*, such as, for example, a preferential payment (see Rb. Utrecht, 12 December 2007, in *LJN BB*, 9709, *Ceteco*; Rb. Rotterdam, 25 January 2012, NL:RBROT:2012:BV1859, in *JOR*, 2012/167 and Rb 's-Gravenhage, 15 February 2012, NL:HR:RBSGR:BV9142, in *JOR*, 2012/372). It is discussed whether an increase of the debtor's indebtedness in the context of a situation of distress could be subsumed under the objective element of the damage. A more restrictive reading seems to exclude it, considering that, in this case, the action to be brought should rather constitute an action of liability under Art. 2:248 BW, which is available only to the new creditors and not to the trustee (s.c. Beklamel norm). According to others, a Peeters Gatzen action could also be grounded on the increase of the debtor's indebtedness (see M. JANSSEN and G. BOEVE, 'Enkele aspecten van de Peeters/Gatzenvordering', in *FIP*, 2009, 4,120).

1934 According to the opinion of prevailing scholars, then reflected into a legislative proposal dated 2007 where it was suggested to provide for a statutory legal basis to the action at stake, for the Peeters Gatzen action to be exercised, the conduct of the debtor must also constitute an unlawful act (see HR, 13 October 2006, in *NJ*, 2008, p. 529, *Vie d'Or*). However, a minority of Dutch doctrine considers that the unlawful conduct of the debtor is not a necessary element of the action, since it would be sufficient for the conduct of the third party to be detrimental to the creditors' rights. (See S. KORTMANN and N. FABER, *Reactie op: Notarissen/Curatoren THB*, 1998, 4, 268-274).

1935 The unlawful conduct of the third party is therefore represented by the fact that the third party, intentionally or negligently, violates a legal provision or technical regulations - albeit not mandatory, but of current use -

In other words, the creditors would be the bearers of a shared an common right over all the debtor's assets (which remain, in any case, property of the debtor) serving as a collective and general collateral for the creditor's claims, the injury of which by the third party would constitute an indemnifiable unlawful act [1936].

The Peeters Gatzen action is, therefore, an instrument available for the trustee, whose effects aim at the reinstatement of the insolvency estate. The Dutch legislature juxtaposes such an action to the range of other typical remedies provided by the *burgerlijk wetboek* (the Dutch Civil Code, hereinafter the 'BW') and the *faillissementswetgeving* (the Dutch Insolvency Act, 'fw'), pursuing the same objective [1937]. With the peculiarity that, in the case of the Peeters Gatzen action, the reinstatement of the insolvency estate takes place through the compensation which the third party is condemned pay for the damages provoked by his conduct. It must be concluded, therefore, that the result of the action benefits the general body of insolvency creditors, since the compensation for the damage reconstitutes the bankruptcy estate, the consideration of which is distributed, following to its liquidation, to the creditors, according to their ranking [1938].

In the light of the foregoing, it is understood that in the Peeters Gatzen action the trustee does not act on behalf of the debtor, who - as a result of the opening of insolvency proceedings - is divested and loses the capacity to be a party to the action [1939]. The action does not seek, as explained, the compensation for damage suffered by the debtor from the third party's conduct. The *locus standi* of the trustee derives, instead, from its role of body of the procedure [1940], representing the shared interest of the creditors, *i.e.* the preservation of the collateral represented by the debtor's assets. Therefore, the insolvency creditors bring, through the trustee, the action against the third party, for the prejudice caused by the latter (albeit indirectly) to the assets of the debtor against whom insolvency proceedings are opened, even where the debtor himself would not be entitled to bring an action against the third party.

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aimed at avoiding or preventing the violation of the general collateral represented by the assets of the debtor. In the NK case, for example, the offence ascribed to BNP Paribas Fortis BV, as explained, was the violation of the supervisory rules laid down in its articles of association.

1936 That confirms that the Peeters Gatzen action represents a remedy for the judicial protection of the general principle established by art. 3:276 BW, pursuant to which the creditor may act to obtain satisfaction of his claim on all the assets of his debtor. Moreover, art. 3:277 BW provides that creditors have an equal right to be satisfied with the proceeds from the sale of the debtor's assets, subject to the order of preference provided by the law.

1937 Among others, the avoidance action provided for by art. 42 fw, and the liability action brought by the trustee *vis-à-vis* the directors set forth by art. 2:248 BW.

1938 The amount of the damages, indeed, is determined by taking into account the percentage of satisfaction that the creditors would have obtained at the moment in time when the (unlawful) act of the third party occurred. See HR, 21 December 2001, in *NJ*, 2005, p. 95 (*Lunderstädt/de Kok*). See for literature, W. VAN ANDEL, 'De Peeters/Gatzen-vordering', in W. VAN ANDEL EN F. VERSTIJLEN, *Materieel faillissementsrecht: de Peeters/Gatzen-vordering en de overeenkomst binnen faillissement*, *(Preadviezen 2006, uitgebracht voor de Vereniging voor Burgerlijk Recht)*, Deventer, 2006, 43 and M. JANSSEN and G. BOEVE, *op. cit.*, p. 122.

1939 The divestment of the debtor is provided by art. 23 fw.

1940 The trustee's standing is derived by way of interpretation from art. 68 fw, which attributes to the trustee, as the body of the procedure, the task of administering and liquidating the debtor's assets.

The fact that the action is brought on behalf of the insolvency creditors (i.e. those creditors whose claims have arisen even after the undertaking of the unlawful act), is of no minor importance, since - despite the action taken by the trustee does not suffer any exception from the substantive requirements of an ordinary tort action under art. 6:162 BW [1941] - the necessity that the trustee acts in the interest of the general body of creditors also have important repercussions on exercise of the Peeters Gatzen action. Indeed, the trustee seeking the compensation of the damage suffered by the insolvency creditors under the Peeters Gatzen action has the burden of proving that the conduct of the third party has damaged the shared interest of *all* creditors and not only of a group of corporate creditors [1942]. Should the trustee fail to prove the 'collective' damage suffered by the body of creditors, the action would be declared inadmissible.

Moreover, the fact that the *thema decidendum* corresponds to the violation of the common interest of insolvency creditors entails, from a procedural point of view, that the third party cannot invoke all the defenses which, on the basis of the common rules of civil law, it would have against each individual creditor [1943].

Eventually it must be highlighted that the exclusive nature of the trustee's *locus standi* in the Peeters Gatzen action is highly debated. According to majority of scholars and case law, the absence of a statutory legal basis would prevent the case-law to exclude the concurrent *locus standi* of the individual creditor who demonstrates that he has suffered a direct prejudice for the conduct of the third party [1944]. It is submitted that Article 1 of the First Protocol to the ECHR militates against that possibility, since the limitation of the right to bring judicial actions would constitute an infringement of the right of property. Therefore, the fact that the creditors (*uti singuli*) are not precluded from initiating or continuing a tortious action against the third party even when the insolvency proceedings is pending must be traced back to the absence of a specific statutory norm [1945]. In order to by-pass the impossibility to vest the trustee with the exclusive locus standi to bring the action, and provide for a remedy to the inevitable violation of the *par condicio creditorum*, deriving from the fact that the single creditor, acting individually, can obtain a complete satisfaction of his own claims (because acting against the third party the creditor neutralises the allocation of the losses and the reduction of his claim in the context of insolvency proceedings), the Dutch case-law has provided for a procedural expedient. Although the opening of insolvency proceedings does not constitute formally an event *litis*

1941 Indeed, insolvency proceedings do not affect in any way the substantive elements constituting the legal basis for the action, even in relation to the limitation period, which remains unchanged.

1942 HR, 8 November 1991, NL:HR:1991:ZC0401, in *NJ*,1992/174, *Nimox v. Van den End q.q.*; HR, 16 September 2005, NL:HR:2006:AT7997, in *JOR*, 2006/52, *De Bont/Bannenberg q.q.*; HR, 14 January 2011, NL:HR:2011:BN7887, in *NJ,* 2011/366, *Butterman q.q./Rabobank*.

1943 HR, 15 September 1995, NL:HR:1995:ZC1801, in *NJ*, 1996/629, *Notarissen./Curatoren THB*.

1944 In this case as well, the cause of action of the individual action brought by the creditor should be traced back to article 6:162 BW.

1945 The rule establishing the exclusive *locus standi* of the trustee was provided for in the legislative proposal of 2007.

ingressus impediens, in the event that the trustee brings a Peeters Gatzen action against the third party, the court should impose a temporary stay to the individual action initiated by the creditor, which, in order to be decided, must await the fate of the claim made by the trustee [1946] .

In the light of the features of the action illustrated above, it is not surprising that Dutch scholars define the Peeters Gatzen action as an action 'painted with the colors' of the *action pauliana* [1947]. The same comparison was put forward also by Advocate General Bobek, in his opinion delivered in the context of the NK judgement [1948].

Indeed, the two actions present multiple profiles of similarity.

Despite the marked difference that in the *actio pauliana*, the initiative of the trustee is directed to the declaration of ineffectiveness of the acts performed by the debtor and the third party to the detriment of the insolvency estate, whereas with the Peeters Gatzen action the compensation of the damages provoked by the third party is sought, both actions constitute a remedy at the service of insolvency creditors, whose ultimate aim is to restore the debtor's assets, *i.e.* the general collateral for insolvency claims. It is for this very reason that both actions are exercised by the trustee on behalf of the general body of creditors, and the proceeds of the action revert to the estate, to the benefit of all the creditors.

What emerges from the analysis carried out is that the *action pauliana* and the Peeters Gatzen action are both actions whose legal foundation existed prior to the opening of insolvency proceedings, in that in an ordinary context (*i.e.* outside of the procedure), pursuant to the common civil and commercial rules they are remedies available to the individual creditors, whose claims arose before the act concerning the debtor's assets. Both actions, as a result of the opening of the insolvency procedure, suffer a deviation from their typical scheme set forth by civil law. In particular, they are directed at protecting the shared interest of the body of creditors that the value of the debtor's assets is not undermined. For this reason, the positive outcomes of the action benefit the entire body of creditors (and not the single creditor) and the *locus standi* to bring the action is entrusted with the trustee, acting as a body of the procedure. The assessment of the essential elements of both actions, on the other hand, remains substantially unchanged with respect to those of the action brought by the individual creditor.

When faced with the characterisation of the Peeters Gatzen action brought *vis à vis* a defendant domiciled in another Member State, the ECJ did not limit itself to note that it is brought by the trustee on behalf of all the creditors (and not in the interest of a single creditor) and that the aim pursued by the action is the reinstatement of the insolvency estate, to the benefit of all the creditors (which was

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1946 HR, 21 December 2001, in *NJ*, 2005, 95, *Lunderstädt/de Kok* and HR, 21 December 2001, in *NJ*, 2005, 96, *Sobi/Hurks*, with observations of S. KORTMANN. F. VERSTIJLEN, *De onrechtmatige daadsvordering wegens de benadeling van schuldeisers binnen faillissement: één voor allen én ieder voor zich*, in *WPNR (Weekblad voor Privaatrecht, Notariaat en Registratie)*, 2002, 617-624.

1947 F. VERSTIJLEN, *De faillissementscurator. Een rechtsvergelijkend onderzoek naar de taak, bevoegdheden en persoonlijke aansprakelijkheid van de faillissementscurator*, Deventer, 1998, 54-55.

1948 Opinion of Advocate General Bobek in the case NK, delivered on 18 October 2018, ECLI:EU:C:2018:850.

the approach bolstered not only by the ECJ case in the *Feniks* judgement with regards to the *action pauliana*, but also by the Dutch case-law concerning the Peeters Gatzen action when involving cross-border elements [1949]).

Instead, the in-depth analysis of the Court highlighted a 'bundle' of seven characteristics of the Peeters Gatzen action - referring both to the substantive profile and to the procedural context of the action - which the Court considered as symptoms of the influence of the insolvency procedure over the legal regime regulating the action.

The CJE noted, therefore, that the Peeters Gatzen action, *(i)* although based on the common rules of tort law, *(ii)* is brought in the course of insolvency proceedings *(iii)* (also) by the trustee, pursuant to his tasks of administering and liquidating the insolvency estate, (iv) with a view to reinstate the insolvency estate to the benefit of the creditors (thus implying that the condition precedent for the exercise of action include that the creditor's right was infringed). Furthermore, the Court acknowledged that *(v)* in order to decide over such an action it is not necessary to examine the individual position of each insolvency creditor, and that *(vi)* the third party against whom the action is brought cannot rely on defenses that would be available in the context of an action brought by the individual creditor.

The set of those characteristics, which the CJE considers to be attributable to the procedural context of the action - and which, one could add, all refer to the fact that the action brought for the compensation of the breach of the creditor's right to preserve the value of the collateral for their claims (*i.e.* the debtor's assets) - is defined by the CJE as symptomatic of a certain degree of deviation from the general rules of tort law. It is not clear whether the CJE deemed that those characteristics alone are not sufficient to characterise the Peeters Gatzen action as an ordinary 'civil and commercial' action. The Court limits itself to specifying, ambiguously, that « *the existence of a link with the insolvency procedure is undeniable* » [1950], but in the light of the concessive tone of the Court's affirmations, the impression is that the ECJ could have stopped here the analysis of the action to conclude that it fell under the Brussels Ia Regulation.

The element that was (perhaps hastily) decisive was the further circumstance that *(vii)* the action, seeking the compensation of the damage suffered by the creditors, « *may be brought by the creditors individually, whether before, during or after the conduct of the insolvency proceedings* […] *so that it does not fall under the exclusive competence of the liquidator, and it is independent of the opening of insolvency proceedings* » [1951].

1949 Rb Midden-Nederland, 23 May 2018, NL:RBMNE:2018:2163; Rb. Oost-Brabant 28 February 2018, NL:RBOBR:2018:880, *PlanB4you*; Gerechtshofte 's-Hertogenbosch (Amsterdam), 16 September 2008, ECLI:NL:HR:2011:BN7887, JOR 2008/30, with observations of B. Wessels. See also B. WESSELS, 'Insolvency Regulation or Brussels I Regulation, that's the question', in *Global Restructuring Review*, available at www.globalrestructuringreview.com; N. TOLLENAAR, 'Bestuurdersaansprakelijkheid en IPR', in *FIP (Tijdschrift Financiering, Zekerheden en Insolventierechtspraak*) 2009, p. 177.

1950 See *NK*, at [35].

1951 See *NK*, at [35] – [36].

It is therefore because of the creditor's concurrent entitlement that the seems to Court consider that the Peeters Gatzen action cannot be regarded as a direct and indissociable consequence of insolvency proceedings.

That conclusion, however, seems to conceal a certain inconsistency in the Court's reasoning. And, in fact, of the two alternatives, one should be chosen: either it is considered that when the trustees exercises the Peeters Gatzen action, the common rules of tort law suffer a sort of 'metamorphosis' due to the fact that the action is brought on behalf of the 'collectiveness' of creditors (therefore the question that arises is whether such a metamorphosis is sufficient to characterise the action as an Annex Action) or it must be concluded that there is an almost perfect overlap between the legal foundation of the action brought by the individual creditors and that (parallel) action brought by the liquidator, who acts as a mere procedural substitute for the former.

The second hypothesis, however, should be discarded at once, because it has been explained that the reasons underlying this competing legitimacy are certainly not attributable to the fact that in the two actions the triad of *petitum*, *causa petendi* and subjective profile are perfectly coincident (as is confirmed by the fact that the action of the trustee, in the Netherlands, is declared inadmissible if the latter does not prove to be acting in the interest of the general body of creditors).

Regardless of the correctness of the reasoning followed by the CJE (which is arguable), the result is that the Dutch Peeters Gatzen action does not fall within the category of Annex Actions, so that the trustee will have to sue the third party domiciled in another Member State according to the rules provided for in the Brussels Ia Regulation.

V.4.4.2.3. The action for abusive credit financing

Another specific type of action brought by the trustee in the interest of the general body of creditors is represented by the abusive concession of credit by a third party. As explained in Chapter I, national systems may provide for a typical action of the trustee, or a jurisprudential construction may entitle him to do so [1952], who is entitled to bring an action against the third party that has in any way financially benefitted the debtor (when the latter was already materially insolvent and the third party knew or should have known such a circumstance), thus contributing to a fictitious representation of the economic and financial situation of the company. The damaged creditors are, in this case, the s.c. 'new creditors', whose claims arose after the lending of new finance to the debtor. The illusory

[1952] It is worth recalling that the Italian supreme court has constantly denied the possibility for the trustee to bring an action against the lender (generally the bank or a credit institution) on the basis of tort law. The insurmountable obstacle for a direct tortious action against the (abusive) money lender would be that the bank would cumulate the position of creditor and tortfeasor. Therefore, the 'victim' of the harm provoked by the abusive credit financing could not be the general body of creditors, but only a part of it (the others, except the bank). See Cass. 12 May 2017, n. 11798 in *Giur. Comm.*, 2018, 2, II, p. 236. Cass. 28 March 2006, n. 7030, in *Fallimento*. Yet, the case law has managed to hold the abusive lender liable for abusive credit financing by considering him as jointly liable with directors for the worsening of the financial situation of the distressed company., 2006, p. 1128. See *supra* Chapter I, § I.2.3.3.3.

situation of economic and financial soundness of the business, is considered as harming those creditors' rights, as they are 'fraudulently' induced to enter into business relationships with a debtor who, on the contrary, should only exercise its (distressed) activity with a view to minimize the losses already suffered by the (previous) corporate creditors, rather than increasing its liabilities by contracting with other new parties.

The ECJ has not yet ruled on this specific action, but the issue of its (autonomous) characterisation as Annex Action in cross-border cases is particularly vivid in France, where, not by chance, the legislature provides the trustee with a typical action (namely the action *pour soutien abusif du credit* under Article L. 650-1 Cod. Comm. [1953]).

The debate among French scholars was fueled by a recent decision of the French Supreme Court [1954], where it was established that

> « *while the liability of a creditor for the lending he has granted to a debtor may be engaged outside the debtor's insolvency proceedings and Article L. 650-1 of the Commercial Code only limits the implementation of this liability, when the debtor is the subject of collective proceedings, by laying down conditions which are not specific to this procedure, so that this action does not derive from the insolvency procedure nor it is subject to its legal influence, the Court of Appeal has infringed Article R. 662-3 of the Commercial Code, together Article L. 650-1 of the same Code* [*alors que la responsabilité d'un créancier à raison des concours qu'il a consentis à un débiteur peut être engagée en dehors d'une procédure collective de ce dernier et que l'article L. 650-1 du code de commerce se borne à limiter la mise en oeuvre de cette responsabilité, lorsque ce débiteur fait l'objet d'une procédure collective, en posant des conditions qui ne sont pas propres à cette procédure, de sorte que cette action n'est pas née de la procédure collective ou soumise à son influence juridique, la cour d'appel a violé l'article R. 662-3 du code de commerce, ensemble l'article L. 650-1 du même code*] ».

Therefore, the Supreme Court has excluded that an action for abusive credit financing falls within the scope of the (national) *vis attractiva concursus*, on the ground that the legal foundation of the action is not affected by the opening of insolvency proceedings.

The conclusions reached by the *Cour de Cassation* are debated among French scholars.

Not only because the French court denied the attraction of the action to the insolvency court at national level (which is *per se* irrelevant for the characterisation of the action at the European level), but because it clearly stated that the right underpinning the action does not derive from insolvency

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1953 For a detailed analysis of the *action pour soutien abisif du credit*, see *supra* Chapter I, § I.4.3.1.

1954 Cass. comm. 12 July 2016, n. 14.29429 (*Rue le Bec*), with observation of D. ROBINE, 'Article L. 650-1 du code de commerce et compétence juridictionnelle : un précieux, mais partiel, éclairage de la Cour de cassation', in *Dalloz*, 2016, p. 2554, TH. MASTRULLO, 'Responsabilité civile et droit des procedures collectives', in *Resp. civ. et assur.* n. 5, May 2017, doss. 9. N. FRICERO, 'Article L. 650-1 du code de commerce : questions de compétence', in *Act. proc. coll.*, 2016., Repère 212. See also Cass. 27 March 2012, n. 10-20077 FS-P+B+R+I, with observations by R. DAMMANN and A. RAPP, 'La responsabilité pour soutien abusif de l'article L. 650-1 du code de commerce : la fin des incertitudes', in *Dalloz*, 2012, p. 1455. A. LEHINARD, in *Dalloz*, 2012, p. 870; D. ROBINE, in *RLDA 73/2012 n. 4119*. *Contra* (in favour of the domestic competence of the insolvency court) see Cass. Comm. 26 Jaunary 2010, in *Rev. proc. coll.*, 2010, n. 95.

proceedings, which is (or should be) the determinative element for the characterisation of the *soutien abousif du credit* as an Annex Action, in case the action is brought against a defendant domiciled in another Member State.

According to some scholars, the *Rue la Bec* decision confirms that the action provided under Article L. 650-1 Cod. Comm. should not fall within the scope of application of Article 6 RR. [1955]

The main argument put forward by the supporters of this view is that, despite the action undergoes a certain metamorphosis as an effect of the opening of insolvency proceedings (namely the regime of 'irresponsibility, which curtails the exercise of the action to the specific hypothesis of the fraud the interference in the management of the debtor's business activity and the disproportioned constitution of securities granting the loan [1956]), the amendments are not sufficient to consider that the action derives from insolvency proceedings [1957].

Such an interpretation seems to adhere to the teachings of *Nickel&Goeldnr* case-law, pursuant to which the element that is considered as pivotal for the characterisation of the action is its legal foundation. The *causa petendi* of the *soutien abusive du credit* lying with the ordinary rules of tort law, it would be an action civil law exercised in the context of insolvency proceedings.

Another part of the French scholars argues, however, that the *action pour soutien abusif* derogates '*de manière très notable*' from the ordinary rules of tort law [1958]. In addition to the beforementioned inversion of the principle of responsibility, which is itself considered as symptomatic of a sufficient deviation from the ordinary rules, the supporters of the characterisation of the *soutien sbousif* as an Annex Action highlight that the action is brought by the trustee on behalf of the creditors and that it is aimed at the reinstatement of the insolvency estate and that it safeguards the *pari passu* principle.

Ultimately, the authors arguing for the inclusion of the the *soutien abousif* within the Recast Regulation, generally equate it to the action *en comblement du passif* or to an avoidance action having regard to the 'collectivised' effects of the action, following the approach bolstered by the ECJ in the *H. v. H.K.* judgement [1959].

1955 D. ROBINE, 'Les actions connexes', *op. cit.*, p. 77. ID. ' l'article L. 650-1 du Code de Commerce: un Janus à deux visages', in *Mélanges en l'honneur du Professeur Paul Le Cannu*, Dallo-LGDJ-Lextenso, 2014, p. 621.e TH. MASTRULLO, 'Responsabilité civile et droit des procedures collectives', in *Resp. civ. et assur.* n. 5, May 2017, doss. 9. Y. BRULARD and J. MATERNE, 'Les Actions Annexes', in Y. BRULARD, L.-C. HENRY, V. MARQUETTE, J. MATERNE, M. MENJUCQ, D. ROBINE, V. RUELLE, J-L. VALLENS, P. WAUTELET, B. WESSELS (eds.), *L'insolvabilité nationale, européenne et internationale*, Paris, 2017, p. 126.

1956 See *supra,* Chapter I, § I.4.3.1.

1957 D. ROBINE, 'Article L. 650-1 du code de commerce et compétence juridictionnelle : un précieux, mais partiel, éclairage de la Cour de cassation', *op. cit.*, p. 2556.

1958 P.-M. LE CORRE, 'Droit et pratique des procédures collectives', in *Dalloz,* 2017-2018, n. 834.13. R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', in M. SENCHAL, R. DAMMANN, *Le droit de l'insolvabilité*, Paris, 2018, p. 435. C. Legros, 'les actions annexes', *op. cit.*, p. 134.

1959 R. DAMMANN, V. RAPP, 'Nuovelles clarifications quant au champ d'application matériel du RO relatif aux procédures d'insolvabilité transfrontalières', in *BJE* May/June 2015, p. 139.

However, those arguments, as should already be clear at this point, must not be considered as decisive for encompassing the action in the scope of the European *vis attractiva concursus*.

A decisive argument for the characterisation of the action as an Annex Action may be found, instead, in the second paragraph of Article L. 650-2 Cod. Comm., establishing that the court may annul or reduce the guarantees assisting the credit financing granted by the liable creditor, which seems to fall within the concept of 'punitive' nuance that was suggested above [1960].

V.4.4.2.4. The transplant of the Italian notion of 'actions of the estate' at the European level and their uniform treatment

In addressing the first (and practically more relevant) type of tortious actions brought by the trustee on behalf of the general body of creditors, *i.e.* director's liability actions, it was mentioned that the recognition of the *locus standi* of the trustee on behalf of *all* the creditors postulates an autonomous right of the creditors, but the explanation of such an affirmation has always been postponed.

At this point of the reasoning an attempt must be made to explain the general body's right underlying all the actions described above.

As it emerges from the paragraphs above, from the standpoint of the general body of creditors, the Peeters Gatzen action, the abusive credit financing, the directors' liability and the *actio pauliana* may be all traced back to the general category of tortious actions. Needless to say, pursuant to the general principle *neminem laedere*, all legal systems are presumed to provide for remedies ensuring the compensation for the prejudice suffered for the violation of a subject's right caused by the conduct of a third party.

The harm of which right may legitimate the general body of creditors to claim for compensation from a subject (including a single creditor and a director) that, in respect of the general body of creditors, stands as third party with no legal relationship?

The answer lies, at a fist instance, in the general principle, universally acknowledged by the Member States, according to which the relationship between the debtor and his creditors rests on the assumption that the debtor is liable towards his creditors with all his assets present and future.

Such a general obligation of the debtor - the existence of which is apparent and uncontested - would be counterbalanced by a shared potestative right of creditors, the recognition and framing of which has raised extremely delicate issues and still have nebulous contours [1961].

1960 R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', *op.cit.*, p. 435. Robine, who supports the competence of the ordinary civil court for the liability action under the first paragraph of article L. 650-1 Cod. Com. admits that the competence for the action stemming from the second paragraph of that provision is problematic and it should be attracted to the competence of the insolvency court, as the link with insolvency proceedings seems closer in that case. D. ROBINE, 'Article L. 650-1 du code de commerce et compétence juridictionnelle : un précieux, mais partiel, éclairage de la Cour de cassation', *op. cit.*, p. 2556.

1961 See, among French scholars, J. CARBONNIER, 'les obligations' in *droit civil*, IV, 1994, p. 637, E. BARTIN, *rincipes de droit international privé selon la loi et la jurisprudence françaises,* I-III, *Paris*, 1930-1935. For Spain, F. RIVERO, *op.*cit, p. 46. For Italian literature Italy see M. BIANCA, 'La responsabilità' in *Diritto civile*, Milan, 1994, pp. 422-

I am referring to a right which is somewhat independent and 'protectionary' of the creditor's right to enforce his claim and which is identified in the the creditor's potestative right ('*Rechte des rechtlichen Könnens*' (1962) or, 'diritto potestativo') that the value of the debtor's assets is not diminished, as it serves the function of a general collateral for the creditor's claim (1963).

Such a right ('diritto alla preservazione della garanzia patrimoniale' or, as defined by French scholars a 'droit de regard' in respect of the debtor's assets (1964)) may be regarded as an autonomous interest of the creditor (1965), a prelude to his right of enforcement, because it seeks to prevent and avoid that the creditor is impaired from satisfying his claim, or that such a satisfaction is made more difficult (1966).

It seems then possible to postulate that each system, in addition to the creditor's right to the satisfaction of his credit, provides for an undifferentiated (quasi-)right of all the creditors on the assets of the debtor (1967). Such a right would confer to the creditors a sort of right of control over the management of the debtor's assets, a right of criticism of the acts carried out by the debtor, or, a 'droit de regard', aiming at securing the future enforceability of claims, without however affecting the debtor's ownership over those assets (1968). Therefore, some authors recognise that the right of the

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437, G. RAGUSA MAGGIORE, *L'azione revocatoria appartiene ai diritti potestativi*, in *Studi in onore di Pietro Rescigno*, IV, Milan, 1998, p. 511. For German literature see N. HOFFMANN, 'Die Actio Pauliana im deutschen Recht: Gläubigeranfechtung nach dem Anfechtungsgesetz und der Insolvenzordnung', in J. J. FORNER DELAYGUA (ed.) *La protección del crédito en Europa*, Barcelona, 2000, p. 166.

1962 The originary theory of the *Rechte des rechtlichen Könnens*' it owed to E. ZITELMANN, '*Rechte des rechtlichen Könnens*', in *Internationales Privatrecht,*, II, I, 1987- 1998, p. 1914 and p. 32.

1963 See, on this point H. HASSMANN and R. KRAAKMAN, 'Property, contract, and verification: the numerus clausus problem and the divisibility of rights', in *Journal of legal studies*, 2002, p. 404, who mention explicitly the existence of the shared interest of creditors, in addressing security interests in general. The authors state that « *In effect, the law simply presumes, as a default rule, that all of a person's creditors are granted a security interest in all of the person's assets and that those security interests will all have equal priority. Thus, every time a person enters into a contract, she is presumed to grant to her promisee a security interest in all her property as a bond for performance. Failure to perform will result in a money judgment that can be satisfied by levying on any of her assets. This rule substantially mitigates the notice problem among creditors. Any potential creditor can assume that all of a debtor's assets are burdened with potential claims by all of that person's creditors and that those claims will limit the security interest that the potential creditor can obtain in those assets* ».

1964 J. CARBONNIER, *op. cit.*, p. 637.

1965 See M. BIANCA, *op. cit.*, p. 437. The author, however, specifies that he does not deem that the sufficiency of the debtor's assets may be regarded as an autonomously protected legal value, but recognises the possibility for the creditor to invoke its protection. Therefore, under the reconstruction supported by this author, the content of the creditor's potestative right (which he recognises as existent) would remain unexplained. The author has explained the right as a potestative right with a mere procedural content (*i.e.* the right to seek the protection of the future enforcement). Similarly, G. RAGUSA MAGGIORE, *L'azione revocatoria*, 1998, p. 514.

1966 The autonomous nature of this right emerges when one considers that those actions are not directed at obtaining the enforcement the creditor's claim towards the debtor, but rather they generally seek the restore the possibility to enforce the claim, through the unenforceability of the transaction, or the order that the third party performs an obligation (or the compensation) towards the creditor or tolerate the performance of any appropriate action from the creditor.

1967 I. PAGNI, 'Le azioni di massa e la sostituzione del curatore ai creditori', in *Fallimento*, 2007, p. 1039.

1968 See, for instance, H. HASSMANN and R. KRAAKMAN, 'Property, contract, and verification: the numerus clausus problem and the divisibility of rights', in *Journal of legal studies*, 2002, p. 404, who mention explicitly the existence of the shared interest of creditors, in addressing security interests in general. The authors state that « *In effect, the law simply presumes, as a default rule, that all of a person's creditors are granted a security interest in all of the person's assets and that those security interests will all have equal priority. Thus, every time a person enters into a contract, she is*

creditors to invoke the preservation of the value of the debtor's would correspond a symmetrical obligation of the debtor to preserve it when disposing of his assets [1969].

That being said, it must been acknowledged that national legislatures provides for a range of remedies at the disposal of creditors to react whenever the integrity of the debtor's assets is impaired by the third party's and the debtor's conduct, whose transaction infringes the shared and common right of the indistinct collectiveness of creditors upon the debtor's assets.

Indeed, when the debtor is *in bonis*, the protection of the creditor's right to the preservation of the value of the debtor's assets is entrusted with ordinary civil and commercial remedies that are available to creditors against the third parties (the *actio pauliana* being the archetype of those remedies, but reference is made here, as far as the Italian system is concerned, also to preservative seizure of assets where there is the risk of fraudulent concealing or actions by way of subrogation [1970], where the creditors brings a derivative action against the *debtor debitoris* on behalf of his debtor, but in its own interest). Therefore, in an ordinary civil and commercial scenario, where the debtor is still *in bonis*, the right under discussion may be protected individually by each creditor, with advantages for his own, but also indirectly for other creditors [1971].

On the contrary, when insolvency proceedings are opened against the debtor, the *locus standi* to bring those actions is transferred to the trustee, who acts on behalf of the general body of creditors seeking the compensation of the harm caused by the third party's conduct to their shared interest in the preservation of the debtor's assets.

One thus has the impression that those remedies seeking the assessment of the liability of third parties for the infringement of the shared creditors interest, albeit conjugated in different forms across the Member States (the *actio pauliana*, the Peeters Gatzen action, the abusive credit financing, but also the action of responsibility of the social creditors *vis-à-vis* directors) are nothing but the expressions of the general principle according to which the opening of insolvency proceedings entails the transfer to the trustee of the shared right over debtor's assets regarded as a general collateral to the outstanding claims of which the creditors are the bearers. The trustee would therefore be able to exercise all the remedies that the recognition of such a right allows creditors to invoke outside of insolvency proceedings.

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presumed to grant to her promisee a security interest in all her property as a bond for performance. Failure to perform will result in a money judgment that can be satisfied by levying on any of her assets. This rule substantially mitigates the notice problem among creditors. Any potential creditor can assume that all of a debtor's assets are burdened with potential claims by all of that person's creditors and that those claims will limit the security interest that the potential creditor can obtain in those assets ».

1969 A. CICU, *L'obbligazione nel patrimonio del debitore*, Milan, 1948, pp. 232 s.

1970 R. SACCO, Il potere di procedere in via surrogatoria, Turin, 1955.

1971 The action brought by the individual creditor ultimately seeks that the equity of the debtor's assets is kept above the liabilities, which ultimately benefits indirectly also all the other creditors.

The analysis conducted shows that, despite the differences, all the actions described above are comparable for the fact that they are all directed at the protection of a shared and common right of the indistinct collectiveness of creditors upon the debtor's assets.

In the light of the above, it is submitted that in approaching the liability actions brought by the trustee on behalf of the creditors for the reinstatement of the insolvency estate, rather than stressing the differences (many are the specific features that each of those actions shows across national systems for those who try to make a systematic reconstruction), the interpreter should try to highlight the minimum common denominator that equates those actions.

Should this approach turn to be correct, the minimum common denominator of those actions seems to be, then, the 'collectivisation' of the described right of the single creditor towards the debtor's assets, whose exercise in the context of the insolvency procedure is transferred to the trustee, who exercise it with a view of benefitting all the creditors.

Pushing the reasoning one step further, it is submitted that since those actions can all be traced back to the same category of actions (which the Italian legal system defines as 'actions of the estate'), it seems reasonable that the jurisdictional fate of such actions should be homogeneous. Therefore, either they are encompassed in the scope of the Brussels Ia Regulation or they are covered by the Recast Regulation.

This conclusion may perhaps seem overly simplistic, and, as it was already mentioned, may suffer some temperament. Nonetheless, it is believed that there is a need to address the issue of Annex Actions with more systematic perspective, since the approach adopted hitherto, which ultimately defers the characterisation of each national action to the analysis of the ECJ, reveals an excessive uncertainty, as also witnessed by the opposing conclusions reached by national scholars and case-law.

All in all, the inconsistencies highlighted in the paragraphs above in respect to the actions of the estate are anything but surprising considering the contrasting solutions proposed by the ECJ.

There is a clear conflict between the European Court decisions in this area: the *NK* and *German Graphics* approach, on the one side, and *Fenix* and *H. v. H.K* approach, on the other [1972].

The former interpretation focuses on the legal foundation and considers that the characterisation of an action as Annex Action is contingent upon a sufficient deviation of the essential features of the right from the ordinary rules of civil and common law. Inevitably, such a construction leads, to some extent, to a higher degree of uncertainties. Whether the 'metamorphosis' that the right undergoes as an effect to the opening of insolvency proceedings is sufficient to consider that it derives from insolvency proceedings is an evaluation necessarily affected by the interpreter's discretion.

The latter interpretation, instead, bolsters a teleologic approach, focusing on the effects of the action and, namely, that the action pursues the objective of reinstating the insolvency estate and its proceeds revert to the estate, thus benefitting the general body of creditors. That approach is undoubtedly

[1972] But also the ÖFAB case.

simpler to be applied, as eventually it takes into account the procedural context of the action which is immediately detectable by the interpreter. However, it seems to lead to a too broad scope of application of the European *vis attractiva concursus* that goes beyond the intentions of the legislature, as it would attract also those actions whose legal foundation is not governed by the substantive rules of insolvency law, but that are bound with insolvency proceedings only by an occasional link.

The European *vis attractiva* being a mere rule on the jurisdiction, which does not in itself determine the law applicable to the substance of the dispute, it is necessary to take a clear-cut position: either one espouses the functional approach [1973] or one focuses on the legal foundation of the action (and then applies the close connection as a litmus test to determine the functional link with insolvency proceedings) [1974].

In the light of the considerations above, it is submitted that the former authorities are to be preferred and the Recast Regulation seems to confirm such a view in Recital 35 RR [1975].

The uncertainties mentioned above, which are mainly due to the subjective evaluations of the interpreter (should the uniform list to be added within Article 6 RR not be considered a valuable option [1976]), may be somewhat dispelled by keeping in mind that two principles seem to be traceable in the ECJ case-law.

The first, is the general favour of the application of the Brussels Ia Regulation. As already explained, the *vis attractiva concursus* should be narrowly construed as it ultimately represents an exception to the Brussels Regulation constrains the defendant's due process right. Therefore, where the legal basis of the action is affected to some extent by the opening of insolvency proceedings, but it is doubtful whether such amendments are sufficient to attract the jurisdiction of the Member State of the COMI, the Brussels Regime should be applied.

The second principle is closely related to the fundamental reason underpinning the European *vis attractiva concursus*. The *vis attractiva concursus* reflects, at a jurisdictional level, the substantive

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1973 R. DAMMANN, 'Les actions annexes à une procedure d'insolvabilité au sens de l'article 6 du règlement insolvabilité', *op.cit.*,p. 403, W. G. RINGE, 'under Article 6', in R. BORK, K. VAN ZWEITEN, *Commentary on the European Insolvency Regulation*, at [6.20]. More nuanced, G. CUNIBERTI, 'La compétence des tribunaux de la faillite', *op. cit.*, A. G. COSTA, 'Le procedure concorsuali transfrontaliere nel contesto extraeuropeo: le azioni che derivano dalla procedura', in *Il Diritto fallimentare* adopts the functional approach in relation to the Italian private international law rules concerning extra-EU disputes.

1974 S. MADAUS, 'Artikel 6 - Zuständigkeit für Klagen, die unmittelbar aus dem Insolvenzverfahren hervorgehen und in engem Zusammenhang damit stehen' *op. cit.,* 'La revocatoria ordinaria nell'insolvenza internazionale nell'evolversi del diritto UE', *cit.*, F. MÉLIN, Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité, Bruylant, Bruxelles, D. ROBINE, 'Les actions annexes', *op. cit.*, p. 79.

1975 See recently C. THOLE, The distinction between EIR and Brussels Ia-reg. with respect to damage claims against third parties based on damages incurred by the general body of creditors, in *conflictoflaws.net* « *The recent judgment of the ECJ shows* [NK]*, once again, the difficulties in distinguishing between civil matters (falling within the scope of the Brussels Ia Regulation) and actions within the meaning of Art. 6 EIR which derive directly from the insolvency proceedings and are closely linked to them* […] *the ECJ is trying to more and more confine the criteria relevant under Art. 6 EIR to a sole criterion, i.e. the legal basis of the action* ».

1976 Suggesting the uniform list also L. CARBALLO PIÑEIRO, 'Vis attractiva concursus in the European Union: its development by the European Court of Justice', in *InDr*et*,* 3, 2010.

'metamorphosis' that the underlying right which the action seeks the protection of undergoes as an effect of the opening of insolvency proceedings. In other words, the action is attracted to the competence of the Member State opening insolvency proceedings because the claim must be decided pursuant to the specific (substantive) rule of insolvency law. This is the fundamental reason why the ECJ insists on the substantive legal basis of the action and states that the procedural context should not be determinative for the characterisation of the action: the *locus standi* of the trustee, or the national competence of the insolvency court, or again the fact that the proceeds of the action revert to the estate are uninfluential over the substance of the claim. Nor the *vis attractiva concursus* should be regarded as merely establishing a *forum actoris* to easy the trustee's task. Albeit a valuable argument, this would not legitimate the deviation from the general tenet of the *actio sequitur forum rei.*

As regards the actions of the estate, it seems rather common that the substantive legal basis remains overall unchanged, as it essentially remains governed by the same civil, commercial and tortious rules that would regulate the action that the individual creditors would have brought outside of insolvency proceedings. Even where some changes as to the substance occur, for instance as to the limitation period or the inversion of the burden of proof, they are not considered enough to establish a sufficiently close link with insolvency proceedings. Therefore, as a general rule, it seems to me that the actions for the liability of third party should *tendentially* be traced back to the Brussels 1 a Regulation.

As far as liability actions on behalf of all creditors are concerned, the impression is that, as a general rule, national legislatures have merely transposed in the domain of insolvency law the ordinary remedies of the civil liability regime, amending them for the purposes of 'fitting' in the (true) collective dimension of insolvency proceedings, dealing with the common pool problems.

In some cases, however, the liability regime in the context of insolvency regime may prove to be more severe, which may be considered to be truly regulated by substantive insolvency rules are those actions which reveal a sort of 'punitive' character.

It is submitted that such an increased severity cannot be related to single specific features of the action, autonomously considered, but it must be assessed according to a comprehensive and flexible approach taking into consideration the systematic location of the action. Nevertheless, the following symptoms of the 'punitive' nuance have been singled out *(i)* presumptions *iuris tantum* (or *de jure*) concerning the unlawfulness of the conduct or the existence of the causal link between the conduct of the third party and the harm provoked by it *(ii)* presumptions concerning the harm caused to the general body of the creditors, when it is equated (even on the *interim basis*) to the difference between the insolvency claims and the assets of the company, revealing the insufficiency of the latter to satisfy the creditors; *(iii)* the impossibility for the trustee to cumulate the 'insolvency' liability action with the ordinary one *(iv)* the condition precedent of the action is a procedural phase of the procedure specifically aimed at evaluate the debtor's conduct and assessing whether the insolvency of the debtor may be attributable to wilful or negligent conduct of the corporate bodies *(v)* special criteria for the

computation of the *quantum* of the compensation *(iv)* possibility for the judge to decrease the quantum of the damage *ex officio*. Also, it may be relevant that when the third party is held liable, other measures can be taken against him, likewise *(vi)* disqualification measures, *(vii)* the extension of insolvency proceedings *(viii)* the decrease of the value or the annulment of security rights or other privileges.

It is submitted that the overall evaluation of the systematic context and the specific rules governing the substantive profile of the action should reveal that the action is not a mere transposition in the domain of insolvency law of the corresponding ordinary civil tort action which may be brought by the creditors outside of insolvency proceedings (also in situations involving the material insolvency of the debtor). Instead, the liability incumbent of the respondent is more severe, thus assuming the character of an insolvency liability regime, which would not correspond to a comparable action of the creditor outside of insolvency proceedings.

In those (limited) cases, the related action should be attracted to the jurisdiction of the Member State opening insolvency proceedings, because the right underpinning those actions is in facts governed by substantive insolvency law.

Of course, the solution is far from certain and national case-law does not seem to have a clear view on those type of actions, that fall between the cracks between company law, civil law and insolvency law. A major objection to this argument could be that all liability regimes represent *lato sensu* a sanction, and that such an approach would not eliminate the problem represented by the discretion of the interpreter, intrinsic to the narrow application of the Gourdain Formula, which may lead to unpredictable results. However, the approach proposed would minimise this risk at least by curtailing those hypotheses to exceptions to the general rule.

All in all, the major concern seems still to be the need for some uniform approach as far as the substantive EU insolvency law is concerned.

In this constellation, however, it must be recalled that the new provision of Article 6(2) RR is likely to weaken significantly the difficulties described above. The fact that the trustee is vested with the possibility to bring together ordinary civil and commercial actions and Annex Actions against the directors before the court of the Member State of the defendant's domicile, reduces the delicate characterisation of the actions brought by the trustee against the directors, as the latter will in practice cumulate the actions.

CONCLUSIONS

Some closing reflections. In the present work, an attempt has been made to demonstrate that the (European) *vis attractiva concursus* represents a rule that is progressively acquiring the role of an autonomous notion of European private international law.

After almost a decade that it is on the test bench of the European Court of Justice, the *vis attractiva concursus* has been enshrined in Recast Regulation. Indeed, with the introduction of Article 6 RR, the European legislature has, in facts, made explicit its ambition to provide for an autonomous rule, with its own specific scope and functioning, which should be interpreted independently of the corresponding rule (if any) provided by the domestic law of the Member States.

The prudence (and the difficulties) with which the European legislature has always proven to be acting in respect of the phenomenon of the cooperation crisis between the debtor and its creditors (and its regulation at the EU level) is due, on the one side, to the fact that in no domain of law as in insolvency law, the procedure is so closely interrelated with substantive profiles. Sometimes, the underlying substantive rights and the exercise of procedural tools pursuing their protection are so closely intertwined that it is difficult to distinguish whether a rule represents a provision of a purely procedural nature or a substantive right.

On the other hand, the fact that in the context of the statutory responses to the common pool problem are involved so many interests and of a such composite and multi-layered nature (all subject to extremely different range of assessments across the laws of the Member States, influenced by historical, political and social factors) has led so far to deny the possibility of achieving a harmonised and uniform solutions at European level of this branch of law.

Rightly, many authors have pointed out that the Recast Regulation still proves to be resistant to the idea of harmonising insolvency rules at EU level and its goal is still selecting competent venues and applicable insolvency regimes (it is sufficient to recall what is stated in Recital 22 RR).

Yet, the recent fervent activity of the European institutions regarding an approximation of the laws of the Member States on certain aspects concerning this domain (I am referring in particular to the Directive dated 20 June 2019) would seem to increasingly militate in favour of the impression that the time is ripe to move towards a new interpretation of the provisions of the Recast Regulation, pushing the idea that it is possible to identify a 'hardcore' of an autonomous (for the moment only) procedural principles of EU cross-border insolvency law.

Rather than giving universal value to specific national insolvency proceedings, the analysis carried out has identified that certain preconditions exist for starting to talk about a European (procedural) insolvency law, with its autonomous and independent principles wich, at the present time, rather than

replacing those of national laws, are juxtaposed to them, contributing to shaping the administration and the management of cross-border insolvency proceedings.

In the future, a dogmatic approach to the common principles of the various Member States could lead the EU Regulation on cross border insolvencies to come more and more closer to the 'new generation' of European instruments, which tend to the implementation of a comprehensive policy of the European Judicial Area, rather than only providing for a traditional private international instrument. This is certainly a long-term objective, which still requires thorough consideration by the European legislature and national scholars.

A common principle-based approach seems to be feasible and desirable in this field, even in the acurrent bsence of a harmonised substantive EU insolvency law, at least as far as some procedural profiles are concerned, such as jurisdiction. Should one agree with the conclusions reached in this research, the examination of the specific topic of the *vis attractiva concursus* at the European level appears to be a fragment of this new approach.

Up to now, the analysis of the foundations of the legal systems of the Member States has led to the acknowledgement that, in addition to the essential phases aimed at the compulsory collective satisfaction of insolvency creditors, the autonomous notion of (truly collective) insolvency proceedings encompasses also other possible individual actions 'directly deriving' from and 'closely linked' with the procedure (which is a feature of insolvency law common to the majority of Member States, but not to all of them).

The concrete functioning and 'operational' features of the *vis attractiva concursus* seem to be nowadays *jus receptum* and should not pose particular problems.

The trustees appointed in the context of both main and secondary proceedings are vested with the possibility (*recte* the duty) to bring before their own jurisdictions Annex Actions against respondents domiciled in another Member State, by identifying the competent venue on the basis of their national procedural law. It may be recalled that some ambiguities of the text of the Recast Regulation may leave room to doubt as to whether the trustee has to observe the exclusive jurisdiction of the Member State of the COMI (or of the establishment) even when bringing the Annex Action *vis à vis* a third state defendant. However, as stated, the EU legislature seems to have primarily codified the ECJ case-law, which would confirm the applicability of the *vis attractiva concursus* even beyond the EU.

A more significant problematic profile concerning the operational level of the *vis attractiva concursus* that could emerge in practice and that was recently put under the spotlight of the ECJ, is the compatibility of such a principle, considered as a mere procedural rule for the allocation of international jurisdiction, with some provisions set forth by the Brussels Ia Regulation.

In particular, that profile has been raised with reference to the applicability of Article 29 Brussels, governing the *lis pendens* of Annex Actions parallelly brought in the context of both main and secondary proceedings. However, the coordination of the two instruments could also take on

relevance for other questions, such as the application of Article 32 Brussels with the view to determine when a lawsuit is pending for the purposes of Article 18 RR.

It was argued that the stubborn hostility on the part of the ECJ concerning the legal transplant of such kind of provisions in the context of *all* matters falling within the scope of the Recast Regulation conceals a fundamental confusion of the Court between the nature of what has been labelled as the 'core' of insolvency proceedings (*i.e.* the collective compulsory complex procedure involving the insolvency creditors and aimed at the distribution of the debtor's assets) and that of Annex Actions. It seems fair to maintain that precluding the applicability of the Brussels regime to matters falling under the umbrella of the Recast Regulation is justifiable only with reference to the 'collective' procedure, whose parallel commencement would instead be governed by the specific priority rule established by the ECJ in relation to pending requests for the opening of insolvency proceedings.

On the contrary, I see no valid reason that would contradict the compatibility of some principles established in relation to civil and commercial matters which would turn to be valid also in relation to Annex Actions. Indeed, although exercised in the context of insolvency proceedings, those actions retain the typical structure claimant vs. respondent.

The above leads to further conclusive observations, concerning the Gourdain Formula, which ultimately still represents the Achilles heel of the rules on the European *vis attractiva concursus*.

The approach adopted hitherto by the Court has revealed that an autonomous interpretation of the *vis attractiva concursus* has been only partially achieved, since what is interpreted independently from the national law of the Member States are only the two conditions of the test used to determine whether a national action should be characterised as an Annex Action.

In addition to the fact that an autonomous interpretation of the 'direct derivation' and of the 'close connection' may actually be questioned, as it does not yet prove to be clear in the light of the irreconcilable approaches bolstered by the ECJ, it is submitted that the current *modus procedendi* - which is contingent upon the specific features of each national action - leads to a fragmented and uneven application of Article 6 RR,.

A principle-based approach would instead allow to identify a *jus commune europeaum* of functionally similar types of actions across the Member States, with a view to determining, for jurisdictional purposes only, a uniform notion of types of Annex Actions included within the scope of the Recast Regulation.

In this respect, however, two main concerns have arisen in the course of the researches.

The first concern refers to the fact that the vague and general concepts embedded in the Gourdain Formula seem to be ill-equipped to be comprehensively applied to any kind of action that may arise in the course of insolvency proceedings.

It is suggested that an effective starting point to address the issue of the jurisdiction within the Recast Regulation could be that of differentiating actions on the basis of the interest which they are directed at protecting. It follows that three main categories of actions may be singled out: *(i)* actions brought

on behalf of individual creditors, *(ii)* actions brought on behalf of the divested debtor and *(iii)* actions on behalf of the general body of creditors.

The first type of actions refers ultimately to claims of insolvency creditors (both unsecured and priority ones), directed at the (collective) satisfaction of their credit against the debtor. Irrespective of the fact that the dispute may concern either the existence or the accuracy of the claim, or the right of their holder to participate to the distribution of the proceeds out of the liquidation of the debtor's assets or, again, the right of segregation or separate satisfaction of the creditor, it is submitted that - for different reasons - those actions should fall within the umbrella of the Recast Regulation when they are directed against the debtor subject to insolvency proceedings.

Yet, the jurisdiction of the Member State of the COMI in this case would not derive from the application of the *vis attractiva concursus*, because the conditions set forth by the Gourdain Formula do not seem to match with those type of actions. Rather than 'deriving from' insolvency proceedings, in facts, they represent the condition precedent for it, as they are the core of the common pool problem. Therefore, their jurisdiction should be referred to the head of jurisdiction set out Article 3 RR.

Such a distinction between the 'core' of insolvency proceedings and the 'other' actions brought in the course of insolvency proceedings, makes it possible to curtail the scope of the *vis attractiva concursus* to those actions which are typically left to the initiative of the trustee.

In respect to those actions - both falling under *(ii)* and *(iii)* above – the case-law of the ECJ provides for another specification that further allows to exclude from the scope of the *vis attractiva concursus* actions brought by the trustee on behalf of the divested debtor, concerning rights that pre-existed in his legal sphere before the opening of insolvency proceedings. Under this perspective one can fully appreciate the relevance of the often-reinstated affirmation of the Court that the characterisation of actions should not be contingent upon the mere fact that the trustee is a party to the action and that the proceeds revert to the estate.

In respect to the residual group of actions that remain, the Gourdain Formula should then be applied to determine whether an action falls within the notion of Annex Action. It is worth recalling that the autonomous character of the European *vis attractiva concursus* is echoed by the fact that not only the Gourdain Formula requires a *genetic* link between the action (*recte* of its legal foundation) and the insolvency procedure, but it is also necessary that the action retains in the course of the procedure a *functional* connection with it.

Against this backdrop, the second concern, mentioned above, arises.

For some actions, the application of the Gourdain Formula does not seem to entail particular uncertainties (for instance as regards avoidance actions, but also as to actions concerning the termination of contracts upon the exercise of the specific powers vested upon the trustee by insolvency law, or, again, disputes referring to the extent of such powers, for instance, when the trustee enters into a contract with third parties after the opening of insolvency proceedings).

The analysis carried out, however, demonstrates that, as regards other kind of actions, the current formulation of the Gourdain Formula leads to opposite and contrasting interpretations, both supported by decisions of the ECJ and textual indications provided by the Recast Regulation. In this respect, it was suggested that a clear stance should be taken by the interpreter (preferably the ECJ or, even better, the EU legislature) on the objectives that the *vis attractiva concursus* should be aimed at achieving within the European system of cross-border insolvencies.

As illustrated at the very beginning of this work, a rigorous and 'puristic' approach towards the phenomenon of the *vis trahens* of the insolvency forum should limit the operation of such a principle only in respect to those actions whose legal basis must be decided according to the specific rules of insolvency law, regarded as the autonomous domain (of any legal system) providing for the statutory response to the common pool problems. Therefore, only those actions which would genetically be anchored to the orderly satisfaction of the creditors and to the reinstatement of the *par condicio creditorum* should be encompassed in the jurisdictional sphere of the Member State opening insolvency proceedings.

However, different interests could underlie the desirable attraction of other kind of actions to the Member State of the COMI, despite the fact that their solution does not require the application of specific rules aimed at protecting the insolvency liability regime. The jurisdictional regime for those actions, however, should clearly result within the Recast Regulation, and should not be deferred to the Court 's interpretation activity. This is not the case under the current European regulation.

The ECJ's inconsistent interpretation in respect to the topic of Annex Actions could perhaps be explained precisely considering that the Recast Regulation's own objectives may lead to consider desirable to include other actions within the scope of the European *vis attractiva concursus*. And yet, in the light of the actual terms of the Gourdain Formula, the Court could only but force the interpretation of the conditions of the direct derivation and the close connection, in order to 'artificially' attract some actions - albeit not perfectly matching with the twofold test of the direct derivation and the close connection - to the jurisdiction of the State opening insolvency proceedings. This is ultimately a choice of legislative policy nature, that perhaps deserves a further reflection on the part of the EU institutions.

Meanwhile, it is submitted that one should not but acknowledge that the majority of the ECJ' case law, as well as a systematic interpretation of the Recast Regulation, seems to bolster a rigorous and narrow interpretation of the Gourdain Formula, focused on the legal foundation of the action. As such, save for the limited mitigations which have been suggested in the last Chapter, the 'actions of the estate' and liability actions *vis-à-vis* the company's corporate bodies appear to be generally excluded from the sphere of operation of the European *vis attractiva concursus*.

At a practical level, in any case, it is reasonable to consider that many of the problems that have been faced by the Court in those ten years of application of the *vis attractiva concursus* seem substantially

lessened by the provision of Article 6(2) RR, the effectiveness of which will only be revealed by its concrete application.

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