CONFERENCE ON EUROPEAN RESTRUCTURING AND INSOLVENCY LAW

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CERIL Report 2021-1

on identifying annex actions under Article 6(1) of the European Insolvency Regulation 2015

[1] This Report is prepared by CERIL Working Party (WP) 11 on Matters regarding the European Insolvency Regulation 2015 (EIR 2015). The WP that discussed and contributed to this Report consisted, in addition to Stephan Madaus (co-chair) and Bob Wessels (co-chair), of the conferees participating in this WP, see www.ceril.eu/working-parties/wp-11-matters-regarding-the-european-insolvency-regulation-2015. The reporters would like to express their gratitude for their extensive contributions to Zoltan Fabok (Hungary), Nathalie Leboucher (France), Francisco Garcimartín (Spain), Jessica Schmidt (Germany) and Reinout Vriesendorp (The Netherlands). We would also like to express our sincere gratitude to the Research Associate Dr. Chiara Lunetti, PhD in private international law, Università degli Studi di Milano and Université Paris I Panthéon-Sorbonne, for the preparation of a preliminary study and her assistance with drafting the text of this report.

CONTENTS

1 INTRODUCTION

In 2018, the Conference on European Restructuring and Insolvency Law (CERIL) issued a report addressing the need for EU Member States to align as best as possible compatibility between the Insolvency Regulation and these States' domestic rules, realising the Regulation's goals. The Report was prepared by a Working Party co-chaired by professors Stephan Madaus and Bob Wessels.[2] In this new Report 2021-1, the Working Party addresses issues of international jurisdiction for individual legal cross-border actions in case these actions derive directly from public collective insolvency proceedings and are closely linked with them. It was developed between March 2020 and February 2021.

A key component of the Insolvency Regulation[3] relates to the international jurisdiction of a court in a Member State to open insolvency proceedings and the (automatic) recognition of these proceedings and related judgements in other Member States. These rules have also included the jurisdiction for certain insolvency-related actions based on established CJEU case law, which has been translated into Article 6 ('jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them'), subparagraph 1:

> '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.'

Recital 35 provides the rationale:

> 'The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should 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. In contrast, actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings do not derive directly from the proceedings. Where such an action is related to another action based on general civil and commercial law, the insolvency practitioner should be able to bring both actions in the courts of the defendant's domicile if he considers it more efficient to bring the action in that forum. This could, for example, be the case where the insolvency practitioner wishes to combine an action for director's liability on the basis of insolvency law with an action based on company law or general tort law.'

The rule applies to all insolvency proceedings regardless their nature: main, secondary and territorial insolvency proceedings. It establishes a *European vis attractiva concursus* for a certain type of insolvency-related civil litigation, commonly referred to as 'annex actions'. The task of identifying such annex actions in the quantum of civil litigation involving insolvent parties or insolvency law questions has resulted in a significant body of CJEU case law, decisions of national courts and related commentary.[4]

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[2] CERIL Statement 2018-1 on Realisation of the EU Insolvency Regulation (EIR 2015) in the Member States, available at: www.ceril.eu.

[3] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (hereinafter: 'EIR 2015').

[4] B. Hess, P. Oberhammer and T. Pfeiffer, European Insolvency Law, The Heidelberg-Luxembourg-Vienna Report, C.H. Beck – Hart – Nomos 2014, p. 219.

The Working Party has studied recent literature[5] and noticed that the existing case law is held to be inconsistent and difficult to apply to new cases. Related literature offers different ways to construe the definition of annex actions consistently. In addition, the qualification of civil litigation as an annex action needs to reflect provisions in two European Regulations: Article 6(1) EIR 2015 and Article 1(2) lit. b Brussels Regulation (more precisely the Brussels Ibis Regulation, also known as the Judgment Regulation)[6].The existing level of uncertainty leads to time-consuming and costly disputes in civil proceedings, regularly involving the CJEU, regarding international jurisdiction, which is hindering the effective and efficient operation of the Insolvency Regulation.

The interpretation of Article 6(1) EIR 2015 has gained further relevance due to 'Brexit'. For new insolvency proceedings commenced since 1 January 2021, the UK is considered a 'third country' by the remaining EU Member States. However, for insolvency proceedings commenced before that date the pre-Brexit regime will continue to apply, which includes explicitly Article 6(1) EIR 2015.[7] Insolvency proceedings commenced in 2021 or later in the EU might affect UK litigation based on the third state effects of Article 6(1) EIR 2015 at least due to the fact that the annex claim is litigated in a Member State even if the defendant is domiciled in the UK.[8]

The Working Party aims to take stock of the status quo on the application of Article 6(1) EIR 2015 as per December 2020 in *a concise reference work* to promote awareness in the context of each Member State's legal system and to support a proper interpretation and application of Article 6(1) EIR 2015.

In addition, the Report provides recommendations as to, under certain circumstances, which course of action could be taken, or which interests should be taken into account when advising or deciding on matters which fall under the scope of Article 6(1) EIR 2015.

CERIL's present concise reference work is addressed to lawyers, insolvency practitioners (hereinafter: 'IPs') and to judges across Member States through a way of grouping of often occurring practical situations and developing approaches to assess whether a national action falls (or not) within the scope of application of Article 6(1) EIR 2015.

2 BACKGROUND

The commencement of insolvency proceedings may affect any pending litigation involving the debtor as a party in the way provided for by the *lex fori* of the litigation, not the *lex fori*

[5] Moritz Brinkmann (ed.), European Insolvency Regulation. Article-by-Article Commentary, C.H. Beck / Hart / Nomos 2019 (commentary to Article 6 EIR 2015 by Stephan Madaus); Alexander J. Bělohlávek, EU and International Insolvency Proceedings Regulation (EU) 2015/848 on insolvency proceedings, The Hague: Lex Lata 2020, Vol. I, p. 296 et seq.; Geert van Calster, European Private International Law. Commercial Litigation in the EU, 3rd ed., Hart 2021, p. p. 347 et seq. and p. 355 et seq.

[6] 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 (hereinafter: 'Brussels Regulation').

[7] The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('Withdrawal agreement') contains a Title VI ('Ongoing judicial cooperation in civil and commercial matters'), in which Article 67 ('Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities'), paragraph 3(c) provides that in the UK as well as in the Member States in situations involving the UK the EIR 2015 '... shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period'.

[8] See CJEU, 4 December 2014, *H, acting as liquidator in the insolvency of G.T. GmbH v H.K.*, C-295/13, ECLI:EU:C:2014:2410, paragraph 33 and CJEU, 16 January 2014, *Ralph Schmid v. Lilly Hertel*, C-328/12, ECLI:EU:C:2014:6, paragraph 39. See also *infra* 4.1.1.

concursus (see Article 18 EIR 2015). The *lex fori concursus* could, however, modify the manner in which a dispute with the now insolvent debtor may be litigated. Beyond the scope of Article 18 EIR 2015, the applicability of the EIR 2015 may even result in a change of the legal regime applicable to regulate these issues due to its Article 6. Litigation in civil and commercial matters may suddenly be excluded from the general scope of the Brussels Regulation and fall under the scope of the EIR 2015 due to Article 6(1) EIR 2015 and the corresponding 'insolvency exception' in Article 1(2) lit. b Brussels Regulation.[9]

Theoretically, as a result of the progressive implementation of a European Judicial Area, each instrument of EU law should find its place within the common and uniform framework of private international law (in civil matters), leaving no unintentional regulatory loopholes between them, which would be governed by national rules of private international law. The insolvency-related actions covered in this reference work would commonly be regulated by the Brussels Regulation in a cross-border context involving an EU Member State's court unless one of the exceptions in Article 1 apply. The commencement of insolvency proceedings listed in Annex A could invoke the exception in Article 1(2) lit. b Brussels Regulation and, based on Article 6(1) EIR 2015, introduce a new regulatory regime, which would principally include new rules on the international jurisdiction of actions, the effects of pending proceedings and the recognition of resulting judgements.

When addressing these issues, the CJEU has constantly held the view of the mutual exclusiveness between the EIR 2015 and the Brussels Regulation, and by doing so expressing the firm conviction that the two mirror one another.[10] This does not mean, however, that any action arising in the course of the insolvency proceedings on behalf or against the insolvent estate should be governed by the EIR 2015 regime and thus excluded from the Brussels Regulation under its Article 1(2) lit. b. The insolvency regime is confined to 'annex actions', a subclass of civil litigation involving the estate as defined in Article 6(1) EIR 2015.

The specific way in which the scope of the EIR 2015 and the Brussels Regulation are currently designed with regard to insolvency-related actions causes two distinct problems to arise in practice.

The first is a problem of qualification. If a cross-border dispute involves an insolvent party and civil litigation is required to resolve the issue, the potential litigants must assess whether any action filed is an annex action governed by the EIR 2015 regime or not. The first part of this Report provides guidance for this task.

The second is a problem of timing and mootness. If the parties to a cross-border civil litigation had already initiated the litigation under the applicable Brussels Regulation regime before insolvency proceedings commenced for one of them, they need to assess whether the subsequent commencement of insolvency proceedings is able to affect the ability of the court to continue proceedings even if the action would need to be qualified as an annex action due to the new fact of insolvency and new means of defence available only

[9] The exclusion of insolvency proceedings from the scope of Conventions and Regulations governing cross-border civil litigation has been common; see e.g. the 1968 Brussels Convention or the original Brussels Regulation and the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention). See its Explanatory Report by Francisco Garcimartín & Geneviève Saumier, 2020, paras. 49 and 51-53. Recital 7 of the EIR 2015 mirrors the exclusion: '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 the Brussels Regulation.

[10] CJEU, 18 September 2019, *Skarb Pánstwa Rzeczpospolitej Polskiej - Generalny Dyrektor Dróg Krajowych i Autostrad v. Stephan Riel, acting as liquidator of Alpine Bau GmbH*, C-47/18, ECLI:EU:C:2019:754, paragraphs 33 to 34.

under the applicable insolvency law. The availability of such an 'insolvency defence' based on the applicability of Article 6(1) EIR 20215 is addressed in the second part of this Report.[11]

3 IDENTIFYING ANNEX ACTIONS

The identification of a cross-border action or claim as an annex action or claim is the first step in an assessment consisting of two steps:

- First: Ascertain whether a disputed claim may be characterized as an annex claim, leading to an annex action if litigated and an annex judgement if finally decided by a court.
- Second: If the claim is an annex to the insolvency proceedings, the EIR 2015 regime applies. If it cannot be characterized as annex, the regime of the Brussels Regulation applies unless the action does not concern civil and commercial matters[12] or it is excluded from the scope of the Brussels Regulation for another reason.[13] In the latter case, the question of international jurisdiction over the individual legal action would be answered by either another EU Regulation (if any) or, eventually, by the national private international rules of the Member States.[14]

This Report will only address the challenges faced in practice when taking step one by assessing whether litigated claims are annex claims.

3.1 The Gourdain formula and the wording of Article 6(1) EIR 2015

Article 6(1) EIR 2015 allocates the international jurisdiction over an annex actions with the Member State where '… insolvency proceedings have been opened in accordance with Article 3 …'. Article 6(1) EIR 2015 represents an accessory or additional international jurisdiction to that one established by Article 3 EIR 2015. It introduces a *vis attractiva concursus* at the level of EU law by drawing certain actions to the Member State that opened insolvency proceedings within which the action occurs provided that the action drawn 'derives directly from the insolvency proceedings and is closely linked with them'.

The condition precedent for the application of Article 6 EIR 2015 (but also the simplified regime of recognition and enforcement set in Article 32 EIR 2015) is that the action brought in the context of insolvency proceedings is characterized as an action 'which

[11] See *infra* 5.1. The second problem may require a different solution if the later commenced procedure is a restructuring procedure, which meets the definition of 'insolvency proceedings' in Article 1(1) EIR 2015 but is not (yet) listed in its Annex A. The basic premise is that it should be covered by the Brussels Regulation, unless it is excluded in Article 1(2) lit. b *ratione materiae* or *ratione personae*. This topic is not dealt with in this Report.

[12] See, for instance, in *QRS 1 Apps and others v. Frandsen* (1999) 1 WLR 2169 (CA), where the English court deemed that an action brought by the IP acting as nominee for a foreign State, seeking a remedy substantially designed to give extraterritorial effect to foreign revenue law falls within the compass of revenue matters for the purposes of art. 1(1) Brussels Regulation. In CJEU, 9 November 2016, *ENEFI Energiahatékonysági Nyrt v. Direcția Generală Regională a Finanțelor Publice Brașov* (DGRFP), CECLI:EU:C:2016:841, the Court clarified that the EIR does not make any distinction as to 'public law' creditors (*i.e.* tax authorities) and private law creditors.

[13] Because, albeit civil and commercial in nature, the action falls into one of the (other) exceptions under Article 1(2) of the Brussels Regulation. See e.g. BGH, 15. 2. 2012 – IV ZR 194/09, NZI 2012,425 (*Equitable Life*) regarding the recognition of an English scheme of arrangements affecting insurance claims. Because such claims are excluded from the scope of the Brussels Regulation, neither the EIR nor the Brussels Regulation applied.

[14] See again BGH, 15. 2. 2012 – IV ZR 194/09, NZI 2012,425 (*Equitable Life*) applying the autonomous German cross-border rules.

derives directly from the insolvency proceedings and is closely linked with them'. The former part in the sentence hereinafter is also referred to as the 'deriving directly'-criterion, the latter as the 'closely linked'-criterion.

The quoted expression is commonly referred to as the 'Gourdain formula' as it was first introduced by the European Court of Justice (the predecessor of the CJEU) in the 1979 case of *Gourdain v Nadler*.[15]

The Gourdain formula represents an autonomous notion of EU procedural law. It requires a uniform and autonomous European interpretation, especially because the formula effectively defines the scope of application of an EU Regulation.[16] It follows that the test to characterize the action must be applied autonomously and cannot be contingent upon the interpretation of similar terms or expressions under national law, in particular in Member States espousing the *vis attractiva concursus* at the national level. This also means that the interpretation should not be influenced by the *lex fori concursus* or the *lex fori processus* or the *lex causae*. Instead, the interpretation of the Gourdain formula should only be made by reference to the objective and the schemes of the EIR 2015 and other relevant acts of EU law and lawmakers as interpreted by the CJEU.[17]

Two aids for general interpretation of the Gourdain formula flow from the system of the EIR 2015 itself.

First, the text of Article 6(1) EIR 2015 and its rationale as expressed in Recital 35 allow to identify some examples of actions that typically should be qualified as falling within the scope of Article 6(1). These include – following the provision's text – 'avoidance actions'.[18] In light of Recital 35 these actions also include actions relating to 'obligations that arise in the course of the insolvency proceedings' (such as, for example, 'advance payment for costs of the proceedings'). On the other hand, 'actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings' do not 'derive directly from the proceedings' and are excluded from the scope of the EIR 2015.Second, a systematic interpretation flows from the EIR 2015's general position within the EU law framework and leads the CJEU to conclude that the Gourdain formula should be construed narrowly when interpreted in relation to the Brussels Regulation.[19]

Finally, any construction of the Gourdain formula may not simply refer to the list of matters governed by the *lex fori concursus* in Article 7(2) EIR 2015.[20] Actions concerning these issues are commonly insolvency-related, yet the list may neither correctly nor exhaustively describe the quantum of actions covered by Article 6(1) EIR 2015, because the list was never assembled to serve this purpose.

It is noted that Recital 35 refers to 'actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings ...'. The Recital

[15] CJEU, 22 February 1979, *Henri Gourdain v Franz Nadler*, C-133/78, ECLI:EU:C:1979:49, paragraph 4.

[16] S. Bariatti, 'Qualificazione ed interpretazione nel diritto internazionale private comunitario: prime riflessioni', in *Riv. Dir. Int. priv. e proc.*, 2006, p. 368.

[17] Z. Crespi Reghizzi, 'Reservation of title in insolvency proceedings: some remarks in light of the German Graphics judgment of the ECJ', in *Yearbook of International Private Law*, 2010 Vol. XII.

[18] The single reference to 'avoidance actions' has been regarded as insufficient, as many matters may need to be heard in the course of insolvency proceedings. However, providing an exhaustive list has been held impossible as it is impossible to imagine any and all actions that conceivably might be undertaken, see Bělohlávek 2020, Vol. I (see *supra* ft. 5), p. 308.

[19] CJEU, 14 September 2014, *Nickel&Goeldner Spedition GmbH v. «Kintra» UAB*, C-157/13, ECLI:EU:C:2014:2145, paragraph 22 (referring to the CJEU's judgment rendered on 10 September 2009, in *German Graphics Graphische Maschinen*, C-292/08, ECLI:EU:C:2009:544, paragraphs 23 to 25).

[20] CJEU, 19 November 2019, *CeDe Group AB v. KAN Sp. z o.o*, C-198/18, ECLI:EU:C:2019:1001 paragraphs 31 to 35.

seems to make a distinction between the debtor acting 'prior' to the opening of insolvency and the debtor acting post-commencement, as is the case with a post-commencement agreement concluded by the debtor in its role as debtor in possession (DIP), or in the case that a contract is concluded by the IP in the situation that the debtor's powers of administration are suspended. The Working Party believes that such an apparent distinction creates confusion. The Brussels Regulation applies and continues to apply to an action for the performance of contractual obligations after the commencement of insolvency proceedings, , insofar the legal action can be characterised as a civil and commercial law based action, which normally will be the case.

3.2 The Gourdain formula in the words of Article 6(1) EIR 2015

The Gourdain formula adopted in Article 6(1) EIR 2015 comprises two distinct, cumulative conditions referable to specific and separate profiles of the individual legal action at hand: (1) its direct derivation from the insolvency proceedings, and (2) its close link with them.

3.2.1 Actions 'which derive directly from the insolvency proceedings'

The first condition of the Gourdain formula seems to anchor the term of reference for the assessment of the 'direct derivation' to the formal opening of insolvency proceedings. As this event triggers the application of the specific rules of insolvency law, any action in connection to these proceedings could be understood as deriving from them. Such a wide construction[21] would extent the forum of the Member State of insolvency proceedings to all actions regarding the estate, which might be beneficial for its administration, but clearly conflicts with a more restricted approach indicated in Recital 35 where pre-existing claims of or against the estate are expressively excluded from the description of annex claims.

Instead of looking at the procedural context, the CJEU has always connected the 'direct deviation' criterion to the emergency of the specific rules of insolvency law in the moment insolvency proceedings are commenced.[22] It is not the fact that one of the parties to a litigation is insolvent, but the fact that the cause of action is found in insolvency rules. A genetic bond between the substantive claim exercised with the action and the insolvency proceedings must exist. [23] In contrast, where the cause of action remains unaltered by the insolvency of a party, the rules of common civil law litigation continue to apply. These principles lead the CJEU to conclude that one needs to identify whether 'the basis for the action has its source in the common rules of civil and commercial law or in the derogatory rules specific to insolvency proceedings' when interpreting the 'direct deviation' criterion.[24]

If we apply this approach, an action may be considered as 'directly deriving' from insolvency proceedings, in two cases:

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[21] Upheld, *inter alia*, by CJEU, 2 July 2009, *SCT Industri AB i likvidation v Alpenblume AB*, C-111/08, ECLI:EU:C:2009:419 and CJEU, 4 December 2014, *H.,* C-295/13, (see *supra* ft. 8). For literature see A. Leandro, 'The minefield at the interface of the Brussels Ibis Regulation and the European Insolvency Regulation (Recast)', in P. Mankowski, *Research Handbook on the Brussels Ibis Regulation*, Northampton, 2020, p. 188 and ff.

[22] CJEU, 14 September 2014, *Nickel&Goeldner*, C-157/13 (see *supra* nt. 21), paragraphs 24 to 27.

[23] CJEU, 6 February 2019, *NK v. BNP Paribas Fortis NV*, C-535/17, ECLI:EU:C:2019:96, paragraph 29.

[24] CJEU, 9 November 2017, *Tünkers France, Tünkers Maschinenbau GmbH v. Expert France*, C-641/16, ECLI:EU:C:2017:847, paragraph 22 and CJEU, 20 December 2017, *Peter Valach et al. v. Waldviertler Sparkasse Bank AG et al*., C-649/16, ECLI:EU:C:2017:986, paragraph 29.

(a) The underlying claim stems directly and originally from the opening of insolvency proceedings and is part of the *lex fori concursus*. Here the legal right underlying the action would not even exist in an ordinary civil and commercial context as it originates only from the opening of insolvency proceedings itself. The archetype of such a claim is the claim underlying an avoidance action (Recital 35).
(b) The underlying claim has its basis in common commercial or civil law rules but the claim is either substantively preconditioned to the insolvency of the debtor or is affected by the effects of the commencement of insolvency proceedings to such an extent that matters of insolvency law dominate the litigation. The CJEU introduced the 'dominance criterion' only rather recently in two decisions in 2014 and 2015.[25] It is reflected in the *Riel* judgement of 2019.[26] In the first alternative, the basis of the claims effectively forms a part of the *lex fori concursus* although it is found in commercial or civil law statutes. The second alternative is the one that may be more difficult to assess in each case.

It follows that any other action retains its (ordinary) civil and substantive nature even when brought in the course of insolvency proceedings. It would have a mere occasional link with the procedure. The Brussels Regulation would (continue to) apply.

While the assessment of the origin of a legal basis of a claim may seem like a rather straightforward concept at a first glance, the introduction of the 'dominance criterion' introduced a significant level of uncertainty. It is further complicated by the fact that the judgments of the CJEU, rather than providing for a positive clarification of what is a characteristic of 'direct derivation', merely point out features, which are often not decisive, but rather indicative. This court practice has created a significant list of circumstances, which by themselves do not clearly identify an annex claim:

(a) The fact that the IP is a party to the proceedings which was regarded as necessary but not sufficient since the *locus standi* of the IP may result from the divestment of the debtor and is not likely to influence the legal basis of the action.[27]
(b) The fact that the IP is obliged to file the action on behalf of the debtor and that the proceeds of the action are for the benefit of the insolvent estate.
(c) The fact that domestic jurisdiction is attributed to the bankruptcy court.

While these elements may be relevant for the second element in Article 6(1) (close connection), they bear little relevance here.

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[25] CJEU, 10 December 2015, *Simona Kornhaas v. Thomas Dithmar*, C-594/14, ECLI:EU:C:2015:806 and CJEU, 4 December 2014, *H.,* C-295/13*,* (see *supra* ft. 8). Although the opening of insolvency proceedings would bear no influence on the substantive legal position underlying the action (which retains the same essential characteristics either when exercised by the IP on the occasion of insolvency proceedings and when it is brought outside), it would be sufficient that the action derives from the material insolvency of the debtor. The assumption of this reasoning is that since the constitutive elements of the legal foundation of the action (the *causa petendi*) 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. It should be noted that this interpretation has been much criticised by scholars. If taken to its extreme consequences it would entail that every action with a mere occasional link with the insolvency procedure would be attracted to the jurisdiction of the Member State of the COMI. See, *among others,* F. Jault-Seseke, D. Robine, 'Action en remboursement à l'encontre du dirigeant d'une société étrangère en situation d'insolvabilité : la lex concursus est applicable', in *Bullettin Joly des Sociétés*, 2016, p. 3.

[26] CJEU, 18 September 2019, *Riel*, C-47/18 (see *supra* ft. 11), paragraphs 36 and 38. In this case, an action for a declaration of the existence of claims for the purposes of their registration (French: 'enregistrement'; Dutch: 'registratie'; German: 'Anmeldung') in the context of insolvency proceedings was filed in a claim verification process under insolvency laws. The CJEU held that this suffices to conclude that the litigation derives directly from insolvency proceedings and such a claim is an annex action.

[27] CJEU, 14 September 2014, *Nickel&Goeldner*, C-157/13, (see *supra* ft. 21), paragraph 29.

3.2.2 Actions which are 'closely linked with' the insolvency procedure

The second condition in Article 6(1) requires that an action 'is closely linked' with the insolvency proceedings. The close connection criterion designates a functional link between the action and the insolvency proceedings, which can exist in the several forms.

Typical facts establishing such a link are:

(a) the active *locus standi* to exercise the action lies *exclusively* with the IP of the insolvency procedure by virtue of the *lex concursus* in the interest of the entire body of creditors (and not on behalf of the debtor or of a single creditor),[28]
(b) the fact that the proceeds of the action benefit the estate,[29]
(c) whether the exercise of the action depends on the opening of insolvency proceedings and whether the closure of the proceedings affects the exercise of the action by the IP,[30]
(d) the direct competence, at the national level, of the court opening the insolvency procedure,[31]
(e) the application of the procedural rules relating to the insolvency proceedings,[32] or
(f) the fact that the IP is obliged by insolvency law to file the action.[33]

Seen in isolation, these considerations are not decisive. The CJEU instead uses them as building blocks that may create, depending on the facts of the case, the 'close link' required by this criterion.[34]

It should be emphasised, however, that in the majority of the CJEU judgments, the close connection criterion does not seem to be understood as a decisive criterion to characterise the action. It was sometimes not even presented as a condition strictly independent from the prior 'directly deriving' condition.[35] Rather, the close connection criterion has been an additional element of checking the identification of the fundamental criterion. In practical terms, the close connection criterion makes it possible to check whether the assessment based on the legal basis of the action is correct by introducing an 'unless' verification: an action directly deriving from insolvency proceedings should be characterized as an annex action, unless it can be exercised in parallel or independently from insolvency proceedings. In such an exceptional case, the conclusion based on the close connection criterion may prevail over the conclusion made previously in the assessment of the ('directly deriving') criterion.[36]

[28] CJEU, 6 February 2019, *NK*, C-535/17 (see *supra* ft. 25), paragraph 35.
[29] CJEU, 12 February 2009, *Christopher Seagon v. Deko Marty Belgium*, C-339/07, ECLI:CU:C:2009:83, paragraph 17.
[30] CJEU, 4 December 2014, *H.*, C-295/13, (see *supra* ft. 8), paragraph 25 and CJEU, 2 July 2009, *SCT Industri*, C-111/08 (see *supra* ft. 23), paragraph 30.
[31] CJEU, 22 February 1979, *Gourdain v. Nadler*, C-133/78 (see *supra* ft. 16), paragraph 5.
[32] CJEU, 19 April 2012, *F-Tex SIA v Lietuvos-Anglijos UAB Jadecloud-Vilma*, C-213/10, ECLI:EU:C:2012:215, paragraph 42.
[33] *Idem*, paragraph 43.
[34] In the case CJEU, 6 February 2019, *NK*, C-535/17, (see *supra* ft. 25) paragraph 32, the circumstance that it is the task of an insolvency practitioner to administer and liquidate the estate in accordance with the relevant national law and proceeds accrue to the estate is distinguished by the court but only plays a role in establishing the link mentioned under (a).
[35] CJEU, 14 September 2014, *Nickel&Goeldner*, C-157/13 (see *supra* ft. 21).
[36] See prominently CJEU 9 April 2012, *F-Tex*, C-213/10 (see *supra* ft. 34).

4 CLASSIFICATION OF ACTIONS

In the eyes of the Working Party, existing CJEU case law provides for a colourful, yet sufficiently consistent background for the classification of insolvency-related actions with regard to their qualification as an annex action according to Article 6(1) EIR 2015.

The following classification divides civil actions (par. 4.1) in three classes: clear annex actions (par. 4.2); clear non-annex actions (par. 4.3), and actions with relevant uncertainty about their classification (par. 4.3).

4.1 Annex actions

In this category we collected types of claims and actions, where either the EU legislator or the CJEU has already indicated that they fall within the scope of Article 6(1) EIR 2015 as defined by its Gourdain formula.

4.1.1 Avoidance action

Avoidance actions are certainly the archetype of annex actions. The IP may file an avoidance action with the courts of the Member State in which insolvency proceedings are conducted, even if the defendant is domiciled in another Member State[37] or a third State.[38]

Similarly, the action brought by the IP seeking the unenforceability or voidness of the sale of an immovable located in another Member State based on the fraudulent nature of the transfer and the mortgage granted is an annex action.[39] The same can be held for all actions seeking the voidness, voidability or unenforceability of transactions detrimental to the general body of creditors with the proviso that they are brought by the IP based on specific insolvency law rules.

In light of its explicit mention in the provisions of Article 6(1) EIR 2015 and Recital 35, avoidance actions act as a role model for all actions who are specifically provided for by the *lex fori concursus*.

4.1.2 Acceptance action

The CJEU has held that an 'acceptance action' is an annex action. An acceptance action is a type of action that is specifically provided for under insolvency law in order to allow a creditor to respond to the fact that her filed claim was contested regarding its existence, accuracy or ranking in the process of claim verification in insolvency proceedings with the aim of claim verification. The CJEU held that such an action 'constitutes an element of […] insolvency legislation […] intended to be brought in the context of insolvency proceedings by creditors participating in those insolvency proceedings'.[40] While such a claim may be deeply ingrained in a Member State's national insolvency law in its procedural context, the legal basis of the contested claim is often pure commercial or civil law. The Gourdain

[37] CJEU, 12 February 2009, *Seagon*, C-339/07 (see *supra* ft. 31); CJEU, 14 November 2018, *Wiemer&Trachte GmbH v. Zhan Oved Tadzher*, C-296/17, ECLI:EU:C:2018:902.
[38] CJEU, 16 January 2014, *Schmid*, C-328/12, (see *supra* ft. 8).
[39] CJEU, 4 December 2019, *UB v. VA, Tiger SCI, WZ, acting as UB's IP in bankruptcy, Banque patrimoine et immobilier SA*, C-493/18, ECLI:EU:C:2019:1046.
[40] CJEU, 18 September 2019, *Riel*, C-47/18 (*supra* ft. 11).

formula may, therefore, prove difficult to work in favour of such a conclusion at a first glance. It is indeed the 'dominance' of insolvency law involvement in such cases that may carry the classification if we consider that the action stands at the crossroad between the procedural participation of creditors to the filing of claims and the distribution of the debtor's assets (i.e. the aspect of enforcement of an insolvency claim) and the protection of the individual substantive right.

4.1.3 Liability action against the committee of creditors, the IP and other bodies of the procedure

In 2017, the CJEU found that the legal foundation of an action for the liability of a creditor's committee is grounded on insolvency law because the duties incumbent upon the body of the procedure are 'the direct and inseparable consequence of the performance by […] 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'.[41]

In the light of this decision, it seems clear that actions seeking the assessment of the liability (and eventually, the condemnation of *damni*) of the IP or other bodies of the procedure for the breach of duties provided under the applicable insolvency law or for the mismanagement of the estate will be considered as annex actions. In this context, it bears observing that the EIR 2015 adds new duties and obligations upon the IP.[42] Actions concerning the resulting liability of an insolvency practitioner or other bodies of the procedure for the violation of the specific duties and obligations incumbent upon them by virtue of the EIR 2015 should be considered as annex actions.[43]

4.1.4 Director's liability for causing the insolvency of the company or late filing

Already in 1979, in the original Gourdain case, the CJEU held that a insolvency-specific type of liability actions brought by the IP against the (former) directors of the debtor company seeking them to bear the part of the company's liabilities that was caused by mismanagement and led to the insufficiency of the company's assets to satisfy all insolvency creditors should be qualified as an annex action.[44] The action at stake was characterized largely by specific derogatory rules (i.e., the burden of proof and the limitation period) and hence differed from the ordinary civil law regime of directors' liability to an extent that they constituted a separate and specific insolvency regime, which dominated the character of the claim and therefore moved the action within the sphere of the EIR 2015.

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[41] CJEU, 20 December 2017, *Valach*, C-649/16 (see *supra* ft. 26).

[42] See, for instance, Article 36(10) EIR 2015 stating that the IP 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 Article 36 EIR 2015 for giving an undertaking.

[43] This conclusion was put forward by the CJEU in 2015 in the Nortel judgment, where the distribution of the proceeds accrued out of the sale of the debtor's assets was disputed between the main and the secondary proceedings; see CJEU, 11 June 2015, *Comité d'entreprise de Nortel Networks SA et al. v Cosme Rogeau liquidateur de Nortel Networks SA et Cosme Rogeau liquidateur de Nortel Networks SA v Alan Robert Bloom et al*, C-649/13, ECLI:EU:C:2015:384.

[44] CJEU, 22 February 1979, *Gourdain*, C-133/78 (see *supra* ft. 16).

This decision clearly illustrates that the mere fact that litigation was initiated by the IP on behalf of the estate, and thus the creditors' general interest, would not suffice to find an annex action. It requires an assessment of the legal basis of the litigated claim. If this is found in general civil or commercial law, the Brussels Regulation applies unless the claim is insolvency-specific in substance, as found here, or the litigation itself is dominated by insolvency rules (see acceptance claims).

The CJEU applied these principles again in 2017 and found an annex action in a claim brought by the IP in order to obtain the restitution of payments made by directors on behalf of the debtor company after the material insolvency or over-indebtedness has arisen.[45] Although the legal basis of the repayment claims was – at the time – found in common company law (in this case German company law: § 64(1) GmbHG), the Court found that the claim required the substantive insolvency of the debtor and thus effectively only applied in an insolvency situation in order to motivate the timely filing of insolvency proceedings. This insolvency-specific nature led the CJEU to conclude that it is an annex claim.[46]

There is a valid argument that such a claim, though formally found in company law statutes, is actually insolvency specific and thus should be treated as an insolvency law claim for the purpose of Article 6(1) EIR 2015.

This does not mean, however, that all cases concerning the liability of third parties (e.g. directors, shareholders or business partners) in the context of insolvency proceedings are annex actions. Such a conclusion is an exception and requires the careful assessment of the substantive nature of the liability rule which includes its - possibly insolvency-specific – function. Such an assessment would need to reveal whether the action is a mere transposition of the ordinary company or tort law claims into the content of insolvency proceedings or actually an action ingrained in the local insolvency liability regime. Only if the latter is clearly established, it would seem fair to require the defendant to stand trial in the jurisdiction of the insolvency proceedings instead of her 'own' home jurisdiction and courts.

4.1.5 Actions concerning the costs of insolvency proceedings

Recital 35 submits that disputes concerning the advance payment for costs of the proceedings should be included within the list of annex actions. As the legal basis for such payment would be found in insolvency law and such costs only occur after insolvency proceedings have commenced, actions concerning these costs clearly derive directly from the insolvency proceedings and are closely linked with them.

4.2 Non-annex actions

In this category we collected types of claims and actions, where either the EU legislator or the CJEU has already indicated that they do not fall within the scope of Article 6(1) EIR 2015 and its Gourdain formula.

[45] CJEU, 4 December 2017, *H.*, C-295/13 (*supra* ft. 8); CJEU, 10 December 2015, *Kornhaas* , C-594/14, (see *supra* ft. 27).

[46] The CJEU case concerned § 64(2) 1 GmbHG in the version as valid until 31 October 2008. From 1 November 2008 to 31 December 2020, this was § 64 sentence 1 GmbHG. Since 1 January 2021, this is § 15b(4) 1 InsO, therefore included in Germany's Insolvency Act. Therefore, the insolvency context is now clearly evident.

4.2.1 Action brought by the IP on behalf of the divested debtor

Recital 35 expressly excludes any action brought by the IP on behalf of the divested debtor 'for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings' from the application of the Gourdain formula. Such actions are principally regarded as ordinary civil and commercial actions.

Such actions generally concern either rights pre-existing in the debtor's legal sphere before the opening of insolvency proceedings or rights which - although arisen during the proceedings by virtue of the IP's general task of administering the debtor's assets – would have arisen in the very same way outside of the procedure. As a matter of fact, in more than one occasion the CJEU has reinstated the principle that the characterization of the action should not be contingent upon the mere fact that the IP is party to the action and that the proceeds revert to the estate.[47]

The fact that the IP is entitled with the active *locus standi* to bring the action on behalf of the divested debtor after the opening of insolvency proceedings and that the benefits of the IP's action eventually revert to the insolvency creditors 'does not materially change the nature of the claim invoked, which continues to be subject, on the merits, to unchanged legal rules'.[48] Therefore, any action that the debtor *in bonis* could have exercised himself should fall within the scope of the Brussels Regulation unless additional factors arise.

4.2.2 Action brought by a creditor protecting an individual interest

It is also rather obvious that a litigation between a creditor to an insolvent debtor and a pre-commencement purchaser of assets from debtor about the civil law validity of the transfer is not an annex action. This is especially true as long as there are no insolvency proceedings.[49]

4.2.3 Claim to extend the effect of main proceedings

The CJEU further denied the nature of an 'annex action' to the IP's initiative aimed at extending insolvency proceedings already opened against the debtor company to shareholders, directors and other corporate bodies domiciled in another Member State, with the view of including an additional debtor whose assets are inseparable mingled with those from forming the assets in the proceedings of the first (insolvent) debtor already opened. The CJEU ruled that the uniqueness of the proceedings cannot disguise the fact that the extension of the initial procedure to an additional debtor, being a separate legal entity, has the same effects of the decision to open insolvency proceedings. Therefore, such a course of action can only be adopted by the courts of the Member State competent to open such proceedings under Article 3 EIR 2015.[50]

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[47] See, *inter alia*, CJEU, 6 February 2019, *NK*, C-535/17 (see *supra* ft. 25).

[48] CJEU, 14 September 2014, *Nickel&Goeldner*, C-157/13 (see *supra* ft. 21).

[49] CJEU, 4 October 2018, *Feniks Sp. z o.o. v. Azteca Products & Services SL*, C-337/17, ECLI:EU:C:2018:805, paragraphs 28 to 33.

[50] CJEU, 15 December 2011, *Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international*, C-191/10, ECLI:EU:C:2011:838, paragraphs 19 to 28.

4.2.4 Insolvency law actions brought by an assignee (third party or creditor)

The two parts of the Gourdain formula imply that any insolvency law action that fulfils the first part but not the second does not fulfil the definition of Article 6(1) EIR 2015 and are left to fall under the scope of the Brussels Regulation. The relevant second part (the close link with the procedure) has been interpreted by the CJEU as missing as soon as the IP (sold and) assigned the annex claim to a third party. The Court stated that the action lost the ineliminable functional instrumental link with the insolvency proceedings following the transfer to a third party, in particular because any positive outcome are to the exclusive benefit of the third party and not of the entire body of creditors.[51]

4.2.5 Other examples of non-annex actions

The body of CJEU case law provides for further examples of individual cross-border legal actions, which fall within the scope of the Brussels Regulation. These examples are:

(a) The request brought by the IP of the debtor company against a shareholder to obtain the execution of the obligation to pay the contributions not yet fulfilled.[52]
(b) The debt collection action brought by the IP on the basis of a contract of carriage of goods concluded between the *in bonis* debtor and a third party domiciled in a Member State other than the Member State of insolvency proceedings.[53]
(c) The liability actions for unfair competition brought by the IP after the transfer of a business unit to the transferee. The CJEU denied the relevance of the fact that the transfer had taken place in the context of insolvency proceedings and held that the action was not based on 'derogatory rules specific to insolvency proceedings' but on 'common rules of civil and commercial law'.[54]
(d) the action brought by the IP under the ordinary rules of tort law against a third party whose conduct before the opening of insolvency proceedings has damaged the interests of the creditors by diminishing the debtor's assets, thus hindering the possibility to satisfy their claims.[55]

4.3 Unresolved actions

In this category we collected types of claims and actions, where it is rather unclear and sometimes controversially argued whether the claim shall fall within the scope of Article 6(1) EIR 2015 and its Gourdain formula.

4.3.1 Action brought by the IP in relation to the assumption or the termination of executory contracts

Following the divestment of the debtor, the IP is entrusted with the general task of administering the debtor's assets, including the contracts to which the debtor is a party. Insolvency laws commonly contain specific rules for the assessment and continuation or

[51] CJEU 9 April 2012, *F-Tex*, C-213/10 (see *supra* ft. 34).
[52] CJEU, 10 March 1993, *Powell Duffryn plc v Wolfgang Petereit*, C-214/89, ECLI:EU:C:1992:115.
[53] CJEU, 14 September 2014, *Nickel&Goeldner*, C-157/13 (see *supra* ft. 21).
54 CJEU, 9 November 2017, *Tünkers*, C-641/16, (see *supra* ft. 26).
[55] CJEU, 6 February 2019, *NK*, C-535/17 (see *supra* ft. 25).

early termination of such 'executory contracts'. This includes the right of the IP to decide whether to assume or reject performance under such contracts.

Any dispute concerning these rights is certainly resolved by applying the applicable insolvency law. However, such a dispute would often arise in the context of an action for payment or other performance or damages under the contract filed by the other party, often based on an exclusive jurisdiction clause in the contract where the parties chose to litigate disputes in a forum other than the *forum concursus*. Such actions are ordinary civil and commercial actions, in principle, that would be subject to an insolvency-specific defence if the IP decides to reject performance or even terminate the contract.

The application of the case law principles identified above would suggest that the legal basis of these claims is found in civil law. In order to qualify them as annex claims, they must be either insolvency-specific or the overall litigation must be dominated by insolvency law. The first alternative is hardly applicable. The claim itself would be a contract law claim. And even if the rejection or termination results in a damage claim, the assessment of the damages is governed by general civil law and in most systems simply qualified as an unsecured insolvency claim. There is nothing insolvency-specific in the civil law claim.

The second alternative is more difficult to assess, especially in the light of the characterisation of acceptance actions (see 4.1.2.). One could argue that, as with acceptance actions, the legal treatment of executory contracts in the sole interest of the insolvency estate constitutes an element of insolvency legislation intended to be brought in the context of insolvency proceedings by creditors and that the application of insolvency rules therefore dominates these actions to an extent that they should be seen as annex actions. Often, however, it is not the right of the IP but the amount of damages which dominates the dispute. It seems difficult to find that the mere aspect of insolvency law involvement would suffice to turn civil law actions into annex actions. They should be regarded as a general civil claim despite the insolvency law-related defence.

4.3.2 Actions brought by unsecured creditors against the debtor

Actions brought by an unsecured creditor against the debtor, also referred to as 'actions seeking a declaratory relief' are especially relevant when initiated after the commencement of insolvency proceedings in a Member State different from the state of the litigation.

A few delineations should be made at this point. First, a lawsuit already pending prior to the opening of insolvency proceedings against a debtor is *per definitionem* not an annex action. The lawsuit pending in relation to an action in itself simply does not derive directly from the insolvency proceedings opened after the initiation of the lawsuit and is not closely linked with them. Beyond, Article 7 EIR 2015 rendering the *lex concursus* applicable may not have a potential jurisdictional effect on lawsuits pending anyway as such effects of insolvency proceedings on lawsuits pending are governed by the *lex processus* according to Article 18 EIR 2015.

Second, an 'acceptance action', i.e. an action for the declaration of the existence, accuracy or ranking of a claim for the purposes of their registration (or verification) in the context of the insolvency proceedings, have been held to fall within the category of annex actions.[56] Although the subject matter of the action for declaratory relief, on the one hand, and an

[56] *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch) paragraph 42; CJEU, 18 September 2019, *Riel*, C-47/18 (see *supra* ft. 10), paragraphs 32 to 40.

acceptance action on the other, are partially overlapping because both types of actions deal with the existence and amount of a claim, they are also different. An action for declaratory relief does not address in itself any insolvency aspects, i.e. the ranking of the claim in the insolvency proceedings. An acceptance action in the Member State where the insolvency proceedings are opened raises a potential *lis pendens* issue (see *infra* 5.) rather than determines a qualification of such an action. An acceptance action does not absorb an action seeking a declaratory relief but the latter may exist notwithstanding a parallel acceptance action.

In principle, an action for declaratory relief should classify as a non-annex action.[57]

Even further, it might be preferable that the court having jurisdiction for the commercial action against the insolvent debtor retains its jurisdiction pursuant to the Brussels Regulation irrespective of the (prior or subsequent) opening of the insolvency proceedings. If the claimant obtains a money judgement from the litigation forum that money judgement may not be individually enforced against the debtor because the insolvent debtor typically enjoys a protection by the moratorium provided for by the *lex concursus* directly applicable in all Member States via Articles 7, 19 and 20 EIR 2015. However, the claim must be recognised in the state of the opening of the proceedings via Articles 36 ff. of the Brussels Regulation and so the claim will be admitted in the insolvency proceedings.[58]

However, the above simple structure would need to be aligned with the cross-border effects of a moratorium. In some Member States a post-commencement moratorium may prevent not only individual enforcement measures but also any commercial actions against the insolvent debtor. Such a moratorium may further require a claimants/creditor to lodge its claim in the insolvency proceedings and use the remedies available in the framework of those proceedings instead (e.g. an acceptance action). Such a wide moratorium as provided by the *lex concursus* applies EU-wide via Articles 7(2)(f), 19 and 20 EIR 2015. Therefore, a domestic – and wide – *vis attractiva* rule would automatically be promoted into a wide European *vis attractiva* rule despite the fact that the latter rule is supposed to be limited to annex actions and should not include commercial actions against the insolvent debtor (cf. the Gourdain formula and Article 6 EIR 2015).

In court cases and literature two distinct views have been developed concerning the question whether a wide moratorium preventing post-opening commercial actions against the debtor as provided for by the *lex concursus* as the law universally applicable to insolvency proceedings pursuant to art 7 EIR 2015 prevails over the jurisdictional provisions of the Brussel Regulation. The latter regulation, after all, continues to determine the jurisdiction for non-annex actions despite the opening of insolvency proceedings over the debtor. Does the *lex concursus* applicable via Article 7 EIR 2015 have an indirect jurisdictional effect for non-annex actions prevailing over the directly applicable Brussels Regulation?

[57] This is because the limited European *vis attractiva concursus* rule underlying the EIR 2015 (cf. the Gourdain formula and Article 6 EIR 2015) may simply not widened so far that it includes purely civil or commercial claims against a defendant where the only insolvency aspect is that the debtor is insolvent.
[58] Virgós-Garcimartín: The European Insolvency Regulation: Law and Practice, paragraph 83.

What appears to be a majority view[59] is that the *lex concursus* may indeed have jurisdictional effects, i.e. a wide moratorium provided for by the *lex concursus* deprives courts other than the insolvency forum to entertain post-opening actions against the insolvent debtor. The Working Party, however, believes that there are strong arguments against this view. It supports what appear to be a minority view, which suggests that the forum of the civil/commercial litigation retains jurisdiction according to the Brussels Regulation.[60] As a consequence, the commercial judgement (delivered by the litigation forum originally having jurisdiction) would greatly assist[61] the insolvency forum that would so be released from the obligation of dealing with the existence and amount of the claim and should focus only on the insolvency aspects, first of all the ranking.

The Working Party submits that there are several arguments against the indirect jurisdictional effects of the *lex concursus*. In addition (i) to the above mentioned function of assisting the insolvency forum, we find that the legitimate expectation of the parties would dictate that the jurisdiction they have chosen or expected on the basis of the Brussels Regulation is not unnecessarily overwritten by the insolvency of the debtor. Further (ii) the court having jurisdiction pursuant to the Brussels Regulation often coincides with the applicable law; such harmony between the forum and the law should not unnecessarily be interfered by shifting the jurisdiction to the insolvency forum. Moreover (iii) it follows from a sound system of jurisdictional rules that in case of a clear conflict between the direct jurisdictional provisions of the Brussels Regulation and the indirect jurisdictional effects of the *lex concursus* applicable via the EIR 2015 should be resolved in favour of the directly applicable Brussels Regulation. Finally (iv), where the Member States' domestic *vis attractiva* provisions are not harmonised a surprise effect should be prevented. The – in itself undesirable – unilateral promotion of a national rule to an EU wide effect of those national *vis attractiva* rules via the steppingstone of the EIR 2015, could result in fragmentation. Its effects could be the replacement of the directly and uniformly applicable jurisdictional provisions of the Brussels Regulation, because – given the unharmonized differences in national laws – in relation to certain Member States the jurisdiction would shift to the insolvency forum while in other cases the litigation forum would retain jurisdiction.

4.3.3 Actions brought by secured creditors

Creditors with a right *in rem* (or an equivalent right *in personam*) raise different delicate issues. A differentiated approach seems required here:

For the purposes of examining the international jurisdiction regarding the actions brought by such creditors, it is appropriate to analyse separately two different situations: (a) the situation in which the assets encumbered by the right *in rem* are located in a Member State other than the one in which proceedings are opened (Art. 8 EIR 2015 protection

[59] *Commission of the European Communities v AMI Semiconductor Belgium BVBA and Others* (Case C-294/02) [2005] ECR I-2175; EBH2013.G.4. Kúria (Supreme Court of Hungary) Gfv.VII.30.236/2012/5; *Lornamead Acquisitions Limited v Kaupthing Bank HF* [2011] EWHC 2611 (Comm); [2013] 1 B.C.L.C. 73; *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 1864 (Comm); [2015] 2 BCLC 307. *Tchenguiz v Grant Thornton UK LLP* [2017] EWCA Civ 83 paragraphs 31 to 32; Hess, Oberhammer and Pfeiffer, European Insolvency Law, The Heidelberg-Luxembourg-Vienna Report (see *supra* ft. 4) p. 134.

[60] *Gibraltar Residential Properties Ltd v Gibralcon* [2010] EWHC 2595 (TCC); *UBS AG v Omni Holding AG* (In Liquidation) [2000] 1 WLR 916; *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch). It is evident that money judgements acquired from the commercial litigation are declaratory in nature insofar they could be enforced only in a collective way, that is by lodging the claim in the insolvency proceedings.

[61] *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch) paragraph 57.

applies), and (b) the situation in which the assets are located in the Member State in which proceedings have been opened.

(a) Protection of Article 8(1) EIR 2015: In cases where the assets encumbered by a right *in rem* are located in a Member State other than the one in which proceedings are opened, the protection of Article 8 EIR 2015 applies. Hence the opening of insolvency proceedings abroad shall not affect these rights *in rem* of these creditors. Consequently, any action brought by a holder of a right *in rem* enforcing or securing these rights shall remain available and not affected by the foreign *lex fori concursus*. Such actions are not annex action but rather the contrary. The merits of rights *in rem* continue to be governed by the *lex rei sitae*.[62] This reveals the intention of the European legislature to truncate any (material) link between these rights and the insolvency proceedings. As to the close connection with the insolvency proceedings, the IP would act in these cases as a mere procedural substitute of the debtor.

(b) No protection by Article 8(1) EIR 2015: In cases where security rights are not protected by Article 8 EIR 2015, either due to the fact that the creditor holds a right *in personam* (e.g. a guarantee) or a right *in rem* on assets located in the Member State in which the insolvency proceedings are opened, Article 8 EIR 2015 may not give any guidance. Instead, the Gourdain formula applies in the way described above.

An assessment of the legal basis of the security right and how it is affected by insolvency law is required. Usually, the underlying right or claim of the secured creditor is based on civil law (secured transactions law), not insolvency law. The way insolvency law impairs or governs its enforcement in relation to the insolvent debtor could, however, be dominant enough to absorb the action, in particular for rights *in rem* on assets in the Member State of the commenced insolvency proceedings.[63] In contrast, surety and guarantee rights of creditors against third parties may not be affected by insolvency law rules at all.

4.3.4 Action concerning the return of property held by the debtor

If a dispute concerns an asset that forms a part of the insolvency estate, classification of any action is unresolved. Article 7(2)(b) EIR 2015 provides that the law of the State of the opening of the insolvency proceedings (*lex concursus*) shall determine 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.[64] With regard to a dispute concerning the inclusion of certain assets in the insolvency estate, a differentiated approach seems preferable again:

(a) A dispute between the IP and the debtor concerning the extent of the debtor's divestment is solely governed by the *lex fori concursus* and, therefore, a dispute that culminates in an annex action. The underlying action (i.e. the debtor's right to retain control of some assets) stems directly from the opening of the insolvency proceedings, and in particular from his disinvestment and the constitution of the estate under applicable

[62] Recital 68: '… 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 …'.

[63] See CJEU, 9 October 2019, *BGL BNP Paribas SA v. TeamBankAG Nürnberg*, C-548/18, ECLI:EU:C:2019:848 where such a dominance was missed.

[64] To the issue mentioned under Article 7(2)(b) EIR the *lex concursus* applies mandatory, without exception. The query which assets form a part of the estate is to be decided at the time of opening of the proceedings and those acquired during the course of the proceedings, see Article 2(8) jo. Article 2(7) EIR 2015. In this regard attention must be accorded to Article 15 EIR 2015, which determines that trademarks and rights, pursuant to said Article, will only be included in the main proceedings.

insolvency laws. As for the close connection of the action at stake with the insolvency proceedings, it is indisputable that the IP would act exclusively in the interests of all creditors, since the determination of the assets forming the insolvency estate certainly defines the limits of the creditors' satisfaction under the *par condicio creditorum* regime.

(b) When an action is filed by a single creditor or a third-party claiming ownership of assets in possession of the debtor at the time of commencement of the insolvency proceedings (or, conversely, brought by the IP against the creditor or third party for the restitution of some of the debtor's assets), a different conclusion may be justified. Although the right to segregate such assets is often guaranteed in insolvency laws, the core of the claim concerns property rights, which certainly already existed in the legal sphere of the debtor or the creditor/third party before the commencement of proceedings. The nature of these rights is not modified or affected by the opening of insolvency proceedings. Moreover, in the context of an action brought by a creditor (or a third party), the IP acts as a mere procedural substitute for the debtor. While the outcome of such a dispute would affect the volume of the insolvency estate, this impairment is only a reflex of pre-existing rights and does not attain the *par condicio creditorum* principle as these creditors would not benefit from these assets anyway. Overall, the Gourdain formula could well lead to the conclusion that such actions of a creditor or a third party are ordinary civil and commercial actions, which fall within the regime of the Brussels Regulation.

The CJEU seems to support this conclusion. In the German Graphics case, a protective measure anticipating an action for restitution of assets (on the basis of a retention of title clause) was considered to be 'independent of the opening of insolvency proceedings'.[65] The CJEU ruled that this is an independent action, which has no basis in insolvency law and does not require either the opening of such proceedings or the intervention of the IP.

4.3.5 Action brought by the reinstated debtor after the termination of insolvency proceedings

The last type of action concerns a decision by the CJEU in 2009[66] where the court found an annex action and this Working Party would propose the Court to reconsider. The *Alpenblume* case concerned a judgment of a court of Member State A (Austria), which held that a transfer of shares in a company registered in Member State A was invalid because the court did not recognise the powers of a liquidator appointed in Member State B (Sweden) in the context of insolvency proceedings conducted and closed in Member State B. The judgment was issued based on an action filed by the debtor after the termination of insolvency proceedings seeking the declaration of nullity of the transfer shares made by the IP in the course of insolvency proceedings and the ineffectiveness of the registration of the assignee as the legitimate owner of the shares. The CJEU held that such an action is an annex action and should be filed in the Member State of former insolvency proceedings. The Court argued that it concerned the power of the IP to transfer the shares owned by the debtor under insolvency law.

The Working Party would like to point at arguments raised by some scholars[67] that support a different characterisation. Where the option to transfer assets exists in the legal sphere

[65] CJEU, 10 September 2009, *German Graphics*, C-292/08 (*supra* ft. 21).
[66] CJEU, 2 July 2009, *SCT Industri*, C-111/08 (see *supra* ft. 23).
[67] 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; P. Oberhammer, 'Im Holz sind Wege: euGH SCT./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit b. EuGVVO', *IPRax,* 2010, p. 318.

of the debtor irrespective of insolvency proceedings, the nature of such right is not modified or affected by the mere fact that the IP is authorised under insolvency law to exercise such a transfer as a consequence of the divestment of the debtor. Any action concerning the transfer should be characterized as ordinary civil and commercial action.

5 HOW TO HANDLE (POTENTIAL) ANNEX ACTIONS?

The final part of this Report concerns the special problems that arise if insolvency proceedings are commenced only after a cross-border civil litigation has already been filed under the Brussels Regulation regime. Article 6(1) EIR 2015 as well as Article 1(2) lit. b) Brussels Regulation seem to assume that a specific claim would be qualified as annex in the light of already opened insolvency proceedings before being filed with a court. They provide no guidance on how to handle a situation where the sequence of events is reversed.

While a number of the actions identified as annex actions above may only arise once insolvency proceedings have commenced, others may well exist prior to such proceedings. For instance, the payment action against a debtor may be filed weeks before the debtor enters insolvency proceedings where the same litigated claim is not governed by the acceptance regime of insolvency law.

5.1 The principle of mootness (‘*perpetuation fori*’)

As a matter of cause, in such a case the action procedurally follows general principles of civil procedure. Whenever a court is seized with an action, the question of jurisdiction must be addressed immediately. In a cross-border setting such an action should lead to a court assessing its international jurisdiction *ex officio* (of its own motion). A court should not await the commencement of the insolvency proceedings. Often, such a commencement might not even seem possible. Once a court has established its international jurisdiction upon filing of a claim, the court’s decision should not be dependent on any later developments, especially a later insolvency of a party. The mootness from new facts is generally deducted from the principle of *lis pendens*, which is to be respected according to the *lex fori* of the pending lawsuit protected by Article 18 EIR 2015. Accordingly, the subsequent insolvency of a party would neither cast doubt on the jurisdiction of the previously competent court nor allow for a second litigation of the matter in another EU Member State (Article 29 Brussels Regulation). The claim would be litigated, and the final result would be respected in insolvency proceedings under Article 36 Brussels Regulation based on the strict application of the mootness of a (too) late triggering of the ‘insolvency exception’ in Article 1(2) lit. b) Brussels Regulation.

Any different solution would require the court to determine whether the action would be qualified as an annex action if insolvency proceedings were potentially filed with respect to one of the parties of the lawsuit when considering international jurisdiction. Article 6(1) EIR 2015 would apply based on merely potential insolvency proceedings. Such an approach would move lawsuits to the Member State of insolvency proceedings based on Article 6(1) EIR 2015 even if insolvency proceedings do not yet exist. This very result does not seem practicable for cases where the insolvency is not imminent. Hence it cannot work in a larger group of cases and should therefore not become the general solution.

5.2 The need for coordination of multiple annex actions where they remain available

Based on a *lis pendens* mootness, a regular civil law claim may still be affected by a subsequent insolvency of the defendant as the sole fact of the commencement of insolvency proceedings may invoke new means of defence, e.g. objections based on rules of fraudulent transfers, or, as in the Riel case,[68] the payment action would be interrupted under the *lex fori processus* and needs to be continued as an acceptance action according to the *lex fori concursus* (in several jurisdictions).

It should be remembered, however, that the Riel decision concerned litigation that was initiated only after the commencement of parallel insolvency proceedings. The CJEU has not yet indicated whether the *lis pendens* effect protected under Article 18 EIR 2015 would be superseded by a later filing or cause a different result when the sequence of events is different. Only without any *lis pendens* protecting the assessment of the underlying civil law claim in a single civil court and once Article 6(1) EIR 2015 becoming applicable, an annex action is taken from the scope of the Brussels regime and governed solely by the Insolvency regime with the rules of coordination and cooperation in the EIR 2015 as the only tool to secure a coordinated treatment of the underlying claim in several Member States. As a consequence, the CJEU decided that Article 29(1) Brussels Regulation is not applicable to any annex action governed by the EIR 2015, not even by way of analogy.[69] The Nortel judgment already indicated this consequence for competing court assessing the location of assets, expressing that main insolvency proceedings have been opened and subsequently in another Member State secondary insolvency proceedings have been opened the latter court has jurisdiction, concurrently with the courts of the Member State in which the main proceedings have been opened, to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings.[70]

This assessment does not indicate, however, that the mere change of purpose of an action from simple payment to a declaration of the existence of claims for the purposes of their registration in the context of insolvency proceedings does exclude it from the scope of the Brussels Regulation. The new purpose of a claim in the context of insolvency proceedings or the relevance of insolvency law-based new defences would not alter matters of jurisdiction anymore.

6 CONCLUSION

In summary, the study found three types of annex action: (a) clear annex actions, (b) clear non-annex actions and (c) actions with relevant uncertainty about their classification.

The Report sets out in detail the categorisation in (a) and (b).

Under (a) clear annex actions include (i) an avoidance action, (ii) an acceptance action (to allow a creditor to respond to the fact that her filed claim was contested), (iii) a liability action against the committee of creditors, the insolvency practitioner and other bodies in the insolvency procedure, (iv) an action concerning director's liability for causing the insolvency of the company or late filing, and (v) an action concerning the costs of insolvency proceedings.

[68] CJEU, 18 September 2019, *Riel*, C-47/18 (see *supra* ft. 11).
[69] CJEU, 18 September 2019, *Riel*, C-47/18 (see *supra* ft. 11) paragraph 46.
[70] CJEU, 11 June 2015, *Nortel Networks,* C-649/13 (see *supra* ft. 45), paragraph 46.

Under (b) types of 'non-annex' actions include (i) an action brought by the insolvency practitioner on behalf of the divested debtor, (ii) an action brought by a creditor protecting an individual interest, (iii) an action claiming to extend the effect of main insolvency proceedings, and (iv) an insolvency law initiated action brought by an assignee (third party or creditor). The report lists four others of such non-annex actions.

Finally, under (c), actions with relevant uncertainty about their classification have been studied. Interpreting the context of the involved legal rules, weighing involved interests and mindful of assessing the facts of any individual claim, the following outcome is proposed:

(i) An action brought by the insolvency practitioner in relation to the assumption or the termination of executory contracts is to be regarded as a general civil claim (i.e. a non-annex action);

(ii) An action brought by an unsecured creditor against the debtor, also referred to as 'action seeking a declaratory relief', is a non-annex action;

(iii) For an action brought by a secured creditor a differentiation has to be made. In a case where the assets encumbered by a right *in rem* are located in an EU Member State other than the one where the main insolvency proceedings are opened, such an action is not an annex action. In a case where a security right is not protected by Article 8 EIR 2015 (either due to the fact that the creditor holds a right *in personam* (e.g. a guarantee) or a right *in rem* on an asset located in the EU Member State in which the insolvency proceedings are opened, an assessment is to be made of the legal basis of the security right and how it is affected by insolvency law;

(iv) As to an action concerning the return of property held by the debtor, again a distinction has to be made. A dispute between the insolvency practitioner and the debtor concerning the extent of the debtor's divestment is solely governed by the *lex fori concursus*. This culminates in an annex action. In contrast, if an action is filed by a single creditor or a third-party claiming ownership of assets in possession of the debtor at the time of commencement of the insolvency proceedings (or, conversely, brought by the insolvency practitioner against the creditor or third party for the restitution of some of the debtor's assets), such a claim of a creditor or a third party is an ordinary civil and commercial action, and consequently a non-annex action;

(v) An action brought by the reinstated debtor after the termination of insolvency proceedings is an ordinary civil and commercial action. It is suggested that the CJEU (that held that such an action is an annex action and should be filed in the Member State of former insolvency proceedings) should reconsider its view.

The Working Party concludes that the question of jurisdiction may well be answered differently due to the sequence of events. While the identification of annex actions as proposed above under 4 applies to cases where the civil or commercial litigation is initiated and the matter of international jurisdiction is assessed in the light of already commenced insolvency proceedings, the effects of *lis pendens* on finally establishing jurisdiction require a different answer in cases where the action is filed before any insolvency proceedings are commenced.

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