THEMIS

THEMIS COMPETITION 2019

SEMI-FINAL C: EU AND EUROPEAN CIVIL PROCEDURE

11–13 JUNE 2019

INSTITUTUL NATIONAL AL MAGISTRATURII

ESCAPING THE MINOTAUR OF DEBT

HOW TO FIND THE RIGHT PATH IN THE LABYRINTH OF INSOLVENCY?

ROMANIAN TEAM

Cristian George IOAN

Andreea Cornelia MURĂTURĂ

Andreea Livia RICU

TUTOR

Amelia ONIȘOR

INTRODUCTION

In one of the most famous works on political theory of all times, "The Prince", Machiavelli stated: "For one change always leaves a dovetail into which another will fit", which essentially means that the change of a thing will cause the change of another one. Of course, Niccolò Machiavelli was born in Florence in 1469 and wrote about the Italian society of those times. However, his words have stood the test of time and are currently quoted to refer to current political changes. This is because Machiavelli drew inspiration from generally valid models taken from the Antiquity, like all Renaissance people of his time. Thus, when we refer to a major political change nowadays, these words remain relevant. For instance, we can expect that the change of a fundamental EU regulation will trigger the change of another one, especially when the scope of the former is closely linked to that of the latter. This is the case when we analyse the relationship between the regulations providing for cooperation in civil and commercial matters, on the one hand, and the regulations governing insolvency proceedings, on the other hand.

Ever since the founding treaties were drafted, European political leaders of those times pursued the creation of an institutional framework that emphasizes cooperation between member states in various fields, one of them being civil and commercial matters. Thus, the 1968 Brussels Convention[1] was adopted with the aim of providing legal certainty to parties, through uniformity, encouraging judicial cooperation and facilitating administration of justice.

Later on, the Treaty of Amsterdam granted the European institutions competence to legislate in the area of judicial cooperation in civil and commercial matters, which enabled them to legislate in this area of practice by means of a regulation. Thus, the Regulation (EC) No 44/2001[2] was adopted in 2000. Ten years later, with the intent of insuring easier and faster circulation of judgments in civil and commercial matters within the EU, this regulation was replaced by Regulation (EU) No 1215/2012[3]. However, there were no significant changes concerning the scope of application of the rules regarding judicial cooperation in civil and commercial matters. Its scope, as it will be further analysed, has to be interpreted in relation to the autonomous concepts of EU law as well as to the other regulations' area of application, like the regulations governing insolvency, which can interfere with its scope.

Insolvency proceedings were excluded from the outset from the 1968 Brussels Convention and following regulations. Council Regulation [EC] No 1346/2000 was adopted in order to insure the proper functioning of the internal market and the efficiency and effectivity of cross-border insolvency proceedings[4]. Mainly, the goals

[1] 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters, OJ L 299, 31.12.1972, pp. 32-42.
[2] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L12, 16.1.2001, pp. 1-23.
[3] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L351 20.12.2012, pp. 1-32.
[4] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, pp. 1-18.

of Regulation 1346/2000 were to streamline cross-border insolvency proceedings, introduce rules for better coordination of debtor's assets measures, and prevent forum shopping[5].

The regulation has been in force for almost 15 years and the regime has been deemed as a positive innovation concerning cross-border bankruptcies. Initially, the scope of the European Insolvency Regulation (EIR), mentioned in Article 1(1), as it was interpreted by the CJEU in *Eurofood* case, provided that the insolvency proceedings must have four characteristics: they must be collective proceedings, based on the debtor's insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator[6]. These four requirements marked the traditional concept of insolvency proceedings. Since the beginning, this definition sounded a little bit old and outdated, given that the regulation was based on a convention signed in 1995.

In its report on the application of the EIR of 12 December 2012, the Commission emphasized the idea that it needed an update (starting with revising the definition on insolvency proceedings) because there were new trends and approaches in this area in the Member States. The scope of the EIR no longer covered a wide range of national proceedings aiming at resolving the indebtedness of companies and individuals. For example, at that time, 15 Member states had pre-insolvency or hybrid proceedings which were currently not listed in Annex A of the EIR. Also, a considerable number of personal insolvency procedures were not covered by the EIR because they did not match the definition provided by Article 1(1) of the regulation. Morover, the scope of the EIR did not cover a wide range of national proceedings due to the economic crisis of 2008-2009 which has had a major impact on the way that Member States regulated their national proceedings regarding insolvency issues[7].

Thus, on 20 May 2015 Regulation [EU] No 2015/848[8] was adopted, also known as the EIR Recast. This regulation has considerably extended the scope of the rules regarding insolvency proceedings, which resulted in a significant modernization of this area of practice.

The demarcation between the scope of the Brussels I Regulations and the EIR/EIR Recast has always been a controversial problem. This issue existed ever since the adoption and entering into force of these regulations and it is not, by any means, new. Yet, it represents a continually evolving issue.

Originally, the Schlosser Report stressed that the Brussels Convention and the proposed Convention of insolvency proceedings "were intended to dovetail almost completely with each other"[9]. Consequently, the

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[5] Paolo MANGANELLI, *The Modernization of European Insolvency Law: An Ongoing Process*, Volume 11, Issue 2, 2016, p. 157, available at https://digitalcommons.law.umaryland.edu/jbtl/vol11/iss2/3/.

[6] CJEC, Judgement of 2 May 2006, *Eurofood IFSC Ltd*, C-341/04, EU:C:2006:281, paragraph 46.

[7] 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, 12.12.2012, COM (2012) 743 final, p. 4.

[8] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L141, 5.6.2015, pp. 19-72.

[9] *Schlosser Report on the Convention of 27 September 1968*, OJ n° C 59, 05.03.1979, paragraph 53, available at https://publications.europa.eu/en/publication-detail/-/publication/8ae9647d-0ed3-4eef-abd3-4b48961bb609/language-en.

CJEU defined the relationship between these two instruments in several decisions[10] as a *"dovetail"* one[11], stating in the *Nortel* case that "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"[12].

However, the CJEU admitted, in the *German graphics* case, that some judgments *"will not fall within the scope of any of these regulations"*[13]. Thus, the problem continued to evolve, since some insolvency related actions were considered as falling in a gap between the EIR and Brussels I Regulation. Practice has shown that a perfect dovetail relationship cannot always be established because there are some obstacles, like the thriving of pre-insolvency and hybrid proceedings, the binding force of Annex A of the EIR and the definition of insolvency related actions.

It is very important to establish whether an action is covered by one of the two regulations, given that this has an impact on recognition and enforcement and on creditor – debtor relationship. The choice of forum can drastically change the outcome of the procedure, as can filing an action in the context of insolvency, rather than based on the general rules of civil or commercial law.

The differences in regulating jurisdiction between the EIR and Brussels I stem from their fundamental provisions. The EIR grants jurisdiction to open the main proceedings to the courts where the debtor's center of main interest is situated (COMI). The law that applies in the main proceedings is determined in the same manner. The Brussels I Regulation, however, establishes jurisdiction based on the debtor's place of domicile, as a general rule. Article 27 of Brussels I provides that proceedings having the same cause of action between the same two parties are brought in the courts of different EU states, then any court other than the one first seized must stay its proceedings until jurisdiction of said court is established. Once jurisdiction is established, the courts will proceed to decline their jurisdiction to the first seized court. This legislative structure can easily be abused however, via the so-called *Italian torpedo*, a method to force the other party into setteling by simply instituting proceedings in a country with a rather slow moving court system[14]. However, the EIR avoids such practices, by establishing that courts other than the first seized may open insolvency proceedings, and a dissatisfied party can only use national appelate remedies[15]. The difference in potential outcomes seems even

[10] CJEU, Judgement of 11 June 2015, *Nortel Networks SA v. Cosme Rogeau*, C-649/13, EU:C:2015:384; see also CJEU, Judgements of 4 September 2014, *Nickel & Goeldner*, C-157/13, EU:C:2014:2145 and of 19 April 2012, *F-Tex SIA v. Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*, C-213/10, EU:C:2012:215.

[11] This means that they should slot into one another leaving no spare space.

[12] CJEU, Judgement of 11 June 2015, *Nortel Networks SA v. Cosme Rogeau*, C-649/13, EU:C:2015:384, paragraph 26.

[13] CJEC, Judgement of 10 September 2009, *German Graphics Graphische Maschinen v Alice van der Schee*, C-292/08, EU:C:2009:544, paragraph 17.

[14] Gerard MCCORMACK, *Reconciling European Conflicts and Insolvency Law*, European Business Organization Law Review, Volume 15, 2014, p. 313.

[15] *Ibidem.*

clearer when analysing the EIR Recast which aims at creating rescue friendly insolvency regime[16], enabling better coordination between practitioners, explicitly regulating the legal status of groups of companies and establishing clear relationships between principal and secondary procedures.

To illustrate how these differences could affect the outcome of a procedure, we can use the following case: Company A, incorporated in Romania, carried on business publishing and selling law books. In January 2016, it published 50.000 copies of "The Treatise on EU Insolvency Law". However, Company A did not take into account that, during the same week, "The Treatise on EU Civil and Commercial Law" was launched. Naturally, the public gravitated towards the latter, since although the two treatises completed each other, the second one was double in size, whilst having the same price. Sadly, in March 2017, Company A applied for the opening of insolvency proceedings, in Romania, and a liquidator, Mr. T. Hemis, was appointed. He soon found out that several of the company's assets were sold one month before liquidation, at one third of their price, to Company B, located in Italy. Naturally, he brought his action before the Bucharest Tribunal and requested to set aside this more than unprofitable transaction.

If the judge appointed to the case decided that the EIR was applicable, since the debtor's actual center of interest was located in Romania, he would have jurisdiction over the case and Romanian legislation concerning insolvency would be applicable. Thus, Mr. T. Hemis would very probably win his case, given that Romanian legislation provides, under Article 117(2) of Law No 85/2014, that any transfers of property that were finalised six months prior to the opening of insolvency proceedings are to be declared void, if the debtor's cost clearly exceed the benefits obtained.

By contrast, if the judge decided that Brussels I Recast Regulation was applicable, with the consequence of establishing Italian jurisdiction on the case, it seems that the situation changes drastically. First of all, the Romanian judge must dismiss the action because of the absence of the Romanian courts' jurisdiction over the case. Second, Mr. T. Hemis must fill another action in Italy in which, for a company already in great debt, the cost of fighting the judicial battle might seem even greater than the fruits of the fight itself. Third, the lenght of the procedure might exceed expected time amounts. Fourth, the legislation that governs the substantial matters of the case might raise uncertainty, since it is not established from the outset (the Italian judge would have to determine the applicable law based on Regulation (CE) nr. 593/2008[17], also known as Rome I). Moreover, Company A will not benefit from special conditions of insolvency substantial regulations concerning protection of assets. Thus, Mr. T. Hemis might think twice before filling such an action.

Given this extremely important consequences, the CJEU's preocupation to demarcate the scope of these regulations persists nowadays, as we may notice from three judgements issued as recently as 2018 and 2019,

[16] Maria-Thomais EPEOGLU, *The Recast European Insolvency Regulation: A Missed Opportunity for Restructuring Business in Europe*, UCL Journal of Law and Jurisprudence, Volume 6, Issue 1, 2017, p. 33.
[17] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, pp. 6-16.

specifically *Feniks*[18], *Wiemer & Trachte*[19] and *NK v. Paribas*[20]. Furthermore, these judgements analyse Regulation 1346/2000 and not the EIR Recast, bearing in mind that the former came into force in June 2017 and was not applicable *rationae temporis* to these particular cases. In the *NK v. Paribas* case, the Court mentions the EIR Recast, analysing the criterion regarding actions which derive directly from insolvency proceedings or which are closely connected with them, criterion explicitly regulated by Article 6 of the EIR Recast. One may wonder if the Court would have had a problem demarcating the scope between the two regulations if the EIR Recast would have been applicable in these particular cases. In order to answer this question, only the future case-law of the CJEU can provide a clear answer. However, based on the present state of both EU law and the current trends concerning its evolution, both interesting insights and potential changes in case-law can be foreseen.

Our paper is structured in three parts, the first one analysing the Brussels I Recast Regulation as common law in civil and commercial matters, on the one hand, and the scope of the EIR recast, on the other hand. The purpose is to observe criteria, stemming from the current provisions and the CJEU's case-law, used in distinguishing actions which fall within the scope of any of these two regulations (**I**). In the second part, a line of demarcation between the area of application of these regulations will be established, using the innovative interpretation provided by the CJEU. We will see that the recent case-law menaged to cristalise and clarify the test that must be used in order to decide which of the two regulations is applicable. In addition, there is enough evidence to believe that the CJEU's case-law evolved due to the interpretation offered on the occasion of *NK v. BNP Paribas* judgement (**II**). In the end, the main purpose of our paper is to establish whether the *status quo* of the CJEU's case-law manages to harmonise the scope of these two regulations and, if not, to propose several improvements to the enforcement of the existings regulations, so that better judicial cooperation will be achieved (**III**).

I. THE TRADITIONAL DEMARCATION BETWEEN THE SCOPE OF THE BRUSSLES I REGULATION AND THE EIR/EIR RECAST

There was always a concern regarding the demarcation of the scope of these two regulations. In order to establish the "border line", we must firstly identify the area of application of the Brussels I Regulations, which benefits from a broad interpretation, according to the CJEU's consistent case-law (**A**). Secondly, we will assess the criteria which entail the enforcement of the EIR and EIR Recast (**B**).

A. The Brussels I Regulations as common law in civil and commercial matters

Regulation 1215/2012, known as Brussels I Bis or Brussels I Recast Regulation, determines its scope according to the criteria that were originally set forth by the previous Regulation 44/2001 and the 1968 Brussels Convention[21]. The concept of civil and commercial matters must be regarded as independent and must be

[18] CJEU, Judgement of 4 October 2018, *Feniks sp. z o.o. v. Azteca Products & Services SL*, C-337/17, EU:C:2018:805.
[19] CJEU, Judgement of 14 November 2018, *Wiemer & Trachte GmbH*, C-296/17, EU:C:2018:902.
[20] CJEU, Judgement of 6 February 2019, *NK v. BNP Paribas Fortis*, C-535/17, EU:C:2019:96.
[21] Regulation (EU) No 1215/2012, cited above, recital (34); see also CJEU, Judgement of 2 July 2009, *SCT Industri AB i likvidation v Alpenblume AB*, C-111/08, EU:C:2009:419, paragraph 24.

interpreted by reference to the objectives and scheme of the regulation and to the general principles which stem from the national legal systems. This conclusion was drawn by the Court of Justice since the *Eurocontrol* case where it stated that the terms used to define the area of application of the Brussels Convention "should not be interpreted as a mere reference to the internal law of one or other of the States concerned"[22].

Moreover, as soon as the Brussels Convention was adopted, it became clear that the concept of civil and commercial matters should not depend on the nature of the courts having jurisdiction on the merits. This idea is well illustrated by the cases dealing with civil actions brought before criminal courts. According to the CJEU, one must distinguish between criminal matters, which are part of public law and evoke the exclusive competence of the State, from civil actions brought before criminal courts, which must be regarded as civil claims that are intended to settle a dispute between private parties. The reason why someone brings a civil action before criminal courts is to receive adequate compensation for the harm they suffered as a result of a fraudulent conduct of someone else. Consequently, the legal relationship between the parties must be regarded as a private law relationship and must fall within the scope of the Brussels I Recast Regulation[23].

Unsurprisingly, the Brussels I Recast Regulation excludes the matters which are neither civil nor commercial, such as revenue, customs or administrative matters or those related to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). What is more, even though the regulation is meant to cover "all the main civil and commercial matters", some well-defined matters fall outside its scope for specific reasons[24]. The Jenard Report identified four principal justifications for the exclusions laid down by the 1968 Brussels Convention. First of all, the report explained that certain aspects of civil and commercial matters (state, capacity, matrimonial regimes and inheritance) were excluded because the domestic laws were so diverse that it was very difficult to reach common ground[25]. Second, some matters were excluded because of the existence of parallel negotiations with a specific purpose. That was the case for bankruptcy which was subject to negotiations for a distinct convention[26]. However, it would take a long time to reach an agreement on the insolvency rules, given the particularities of this field (the size and complexity of insolvency proceedings, the State's concern to maintain the public confidence in the enforceability of obligations, the diversity of approaches of domestic laws: pro-debtor or pro-creditor legal systems, etc.)[27]. Third, social security was not meant to be governed by the Brussels Convention because it was considered a topic related to public law[28]. Finally, the exclusion of arbitration was justified by the existence of specific international conventions, either in force or under negotiation[29].

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[22] CJEC, Judgements of 14 October 1976, *LTU c/ Eurocontrol*, C-29/76, EU:C:1976:137, paragraph 3.
[23] CJEU, Judgements of 22 October 2015, *Aannemingsbedrijf Aertssen NV*, C-523/14, EU:C:2015:722, paragraph 32.
[24] Regulation (EU) No 1215/2012, cited above, recital (10).
[25] *Jenard Report on the Convention of 27 September 1968*, OJ n° C 59, 05.03.1979, p. 10, available at https://publications.europa.eu/en/publication-detail/-/publication/e69d7939-d016-4346-9651-963a63f53381/language-en.
[26] *Idem*, p. 11.
[27] Ian F. FLETCHER, *The Quest for global Insolvency Law: A Challenge for Our Time*, Current Legal Problems, Volume 55, Issue 1, 2002, pp. 429-431.
[28] *Jenard Report*, cited above, p. 12.
[29] *Idem*, p. 13.

Some of these reasons remain relevant nowadays, while the meaning of the others has evolved within the new institutional context of the European Union. This is because the enlargement of the European competence in private international law has led to the enforcement of specialized regulations dealing with a particular subject (inheritance, maintenance obligations, insolvency etc.). Therefore, the scope of the Brussels I Recast Regulation now depends not only on the autonomous meaning of civil and commercial matters given by the Court of Justice, but also on each of the European regulations likely to govern the excluded subject matter.

For instance, when Regulation 44/2001, known as the Brussels I Regulation, was adopted on 22 December 2000, it excluded from its scope of application "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". In the same time, the subjects excluded under Article 1(2)(b) of the Brussels I Regulation formed the scope of application of Regulation 1346/2000 on insolvency proceedings which was previously adopted on 29 May of the same year. Consequently, the area of application of the Brussels I Regulation had to be interpreted in relation to the regulation concerning insolvency proceedings.

In the *German Graphics* case, the Court started from the idea that the two regulations were drafted so as to avoid any overlaps between their scope of application[30]. Since the recitals in the preamble to Regulation 44/2001 indicate the intention on the part of the Community legislature to provide for a broad definition of the concept of civil and commercial matters, the Court held that this instrument must be interpreted as covering the majority of civil and commercial matters, apart from those specifically excluded from its area of application. By contrast, the scope of application of Regulation 1346/2000 should be narrowly interpreted as being limited to insolvency proceedings and judgments which are closely connected with such proceedings[31]. Therefore, the Brussels I Regulations should be regarded as *lex generalis*, while the EIR and EIR Recast act as *lex specialis*[32].

The Court admitted that certain matters may not fall within the scope of any of the two regulations[33]. The consequence is that such cases will be governed by national jurisdictional rules[34] and will be likely to affect the proper functioning of the internal market. The *Radziejewski*[35] case confirms the possibility to find gaps between the scope of the two European instruments. This case concerned the Swedish debt relief procedure which does not entail the divestment of the debtor, with the result that it is not covered by the EIR. Moreover, the debt relief decision was adopted by an administrative authority which cannot be classified as a "court or tribunal", within the meaning of the Brussels I Regulation. Consequently, neither of the two regulations apply to this procedure.

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30 See *supra*.
31 CJEC, Judgement of 10 September 2009, *German Graphics Graphische Maschinen v Alice van der Schee*, C-292/08, EU:C:2009:544, paragraphs 22-25.
32 Bob WESSELS, *The Changing Landscape of Cross-Border Insolvency Law in Europe*, Juridica International, No 12, 2007, p. 116.
33 CJEC, Judgement of 10 September 2009, *German Graphics Graphische Maschinen v Alice van der Schee*, C-292/08, EU:C:2009:544, paragraph 17.
34 Gerard MCCORMACK, *Reconciling European Conflicts and Insolvency Law*, *op. cit.*, pp. 311, 334.
35 CJEU, Judgment of 8 November 2012, *Radziejewski*, C-461/11, EU:C:2012:704.

Furthermore, the vague delineation between the scope of the two instruments has led to the emergence of "border cases", where there were arguments for applying either of the two regulations. These cases required the intervention of the Court of Justice to tilt the balance in favour of one of the regulations. This is why, when the new Regulation 2015/848 on insolvency proceedings was adopted, the drafters took the difficulties of articulating the system of insolvency proceedings with the Brussel I regime into consideration[36]. The following section addresses the scope of the EIR and EIR Recast, given the fact that it can severely influence the borders of the Brussels I regime.

B. The narrow scope of the EIR and EIR Recast

The structure of insolvency legislation in any given state tends to reflect its culture to a larger extent than one might initially expect. A plethora of social, economic and cultural biases are relevant to understand the significant variations in national insolvency legislations. These range from general attitudes towards debt forgiveness and the social stigma associated with defaulting to openness towards using credit, and the political system[37]. These generic assertions lead us to two important conclusions: establishing jurisdiction or the applicable law of one Member State rather than the other can significantly affect the outcome of an insolvency procedure; defining the scope of application of the EIR is no easy task, since clear criteria have to be set in an attempt to harmonize, rather than suppress, the variety of approaches in the EU concerning what insolvency is and how it operates. Thus, neither taking a purely "universalist", nor "territorialist" approach can adequately balance the issues concerning insolvency, leading to the modified universalism solution, which stems from both the EIR and the EIR Recast[38].

More important, the variety in approaches towards insolvency in national legislation explains why the CJEU uses an autonomous definition for insolvency proceedings. No universally compatible definition can be extracted from the national law of any given Member State. This is even clearer when analysing actions that are accessory to insolvency, which raised the most issues thus far. The legislative differences concerning insolvency in the Member States lead to the impossibility of finding a compromise between concentrating all accessory actions in the states where the insolvency procedures where opened or treating them as independent actions. In *Gourdain* case[39], the CJEU proposed two criteria for verification, which remain in use, namely *direct derivation* from the insolvency proceedings and the *close connection* with these proceedings.

In order to determine the scope of the EIR, the first aspect to be considered must be the manner in which the two conditions, namely whether the actions derive directly from insolvency proceedings and are closely connected with them, are addressed in the CJEU's case-law. The best starting point would probably be

[36] Report from the Commission on the application of Council Regulation (EC) No 1346/2000, cited above, p. 10.
[37] Nathalie MARTIN, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, Boston College International and Comparative Law Review, Volume 28, No 1, 2005, pp. 1-78.
[38] Emilie GHIO, *European Insolvency Law: Development, Harmonisation and Reform; A Case Study on the European Internal Market*, Trinity College Law Review, Volume 18, 2015, pp. 161-162.
[39] CJEC, Judgement of 22 February 1979, *Henri Gourdain v Franz Nadler*, C-133/78, EU:C:1979:49.

the *Seagon* case[40], given that it concerns the action to set a transaction aside by virtue of insolvency, which has sufficient contrasts in its legal nature and regime to raise several fundamental issues.

The focal issue was that this type of actions, although taking place in the context of insolvency procedures, are essentially based in the *actio pauliana*, which is a staple of civil law. The Court had previously established in R*eichert* case that the French *action paulienne* is a personal action, which falls under the scope of the Brussels Convention[41]. Thus, the main debate at hand was whether the action to set a transaction aside could be derived or closely linked to insolvency proceedings, since a similar *actio pauliana* could have been successfully brought before a court, regardless of insolvency.

The case in the main proceedings concerned an action to set aside the transfer made by the insolvent company Frick, established in Germany to the company Deko, established in Belgium. Mr. Seagon, in this capacity as liquidator in respect of Frick's assets brought an action requesting to set that transaction aside and the repayment of money.

In its judgement, the CJEU fundamentally argues that the action to set aside transactions falls under the scope of Regulation 1346/2000, since it is related to the goal insuring that insolvency procedures are effective[42]. However, this line of arguing answers the question, without directly addressing the core legal issues, since the CJEU merely states that action must be directly derived and closely linked to insolvency proceedings. It seems to take as granted that these conditions are fulfilled as far as the actions to set a transaction aside is brought by a liquidator and is based on a provision of the Insolvency Code of Germany (Insolvenzordnung).

However, by referencing AG Colomer's conclusions[43] as a starting point, several rules can be derived to help establish that a certain procedure falls under the scope of the EIR, rather than the Brussles I Regulation. Even if a certain action that is filed in the context of insolvency has a correspondent in regular civil actions, it may still be derived from insolvency. In addition to that, as it will be further address, even if an action can be brought before a court both inside and outside of insolvency proceedings, it may still fall under the notion of a derived and closely linked procedure. Essentially, in order to be derived from the insolvency procedure, an action should either have an autonomous nature or gain an autonomous nature in the context of insolvency. Moreover, it is also important to check if the rules applicable to an action are specific to insolvency procedures (*e.g.* different limitation periods, confining the action to the liquidator).

Based on these considerations, it seems that a difference should be drawn between the *collective actio pauliana*, which protects the interest of the general body of creditors, and the *individual actio pauliana*, which merely protects the creditor that brings fraud claims before a court[44]. The first type of actions should fall in the

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[40] CJEC, Judgement of 12 February 2009, *Christopher Seagon v Deko Marty Belgium NV,* C-339/07, EU:C:2009:83.
[41] CJEC, Judgement of 26 March 1992, *Reichert and Kockler v Dresdner Bank*, C-261/90, EU:C:1992:149, paragraph 35.
[42] CJEC, Judgement of 12 February 2009, *Christopher Seagon v Deko Marty Belgium NV,* C-339/07, EU:C:2009:83, paragraph 21.
[43] Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 16 October 2008 in *Christopher Seagon v Deko Marty Belgium NV*, C-339/07, EU:C:2009:83.
[44] Tuula LINNA, *Actio pauliana – actio europensis? Some cross border insolvency issues*, Journal of private international law, Volume 10, No I, p. 70.

scope of the EIR. The second type, due to its individual and general nature, will most likely not, thus being governed by the Brussels I Regulation.

In the *Seagon* case, paragraph 129 of the Insolvenzordnung 1994 provided for an action that, although being conceptually based on an *actio pauliana*, could only be brought before a court in an insolvency procedure. It was only available to the liquidator, protecting the general interest of the creditors. Moreover, it had exceptional limitation periods. In this context, the mere fact that it led to individual, rather than collective proceedings was not sufficient to overturn the conclusion that it is closely linked and directly derived from the ongoing insolvency procedures.

AG Colomer, arguing that the link is both direct and sufficient, makes an assertion that should be further explored. In concluding his remarks, he underlines that the action is closely linked to the judicial declaration of insolvency, which only the liquidator has legal standing to apply for, thereby demonstrating its undeniable connection with the insolvency proceedings[45]. An important issue is inadvertently raised, namely, how important is the fact that the liquidator is part to the proceedings. Is his participation sufficient to determine the conclusion that a certain action falls under the scope of the EIR? This question will be further addressed by CJEU in several cases, as we will see below.

The importance of the two criteria set forth in *Gourdain* case is also illustrated by the fact that one of the main goals of the proposal for a recast insolvency regulation was clarifying that the courts opening insolvency proceedings also have jurisdiction for actions which derive directly from insolvency proceedings or are closely linked with them[46]. Consequently, the wording of recital 6 of Regulation 1346/2000, which referred to proceedings which are *delivered directly on the basis of the insolvency proceedings* has been changed in the EIR Recast. The current form of recital 6 in Regulation 2015/848 now mentions proceedings which are *directly derived from insolvency proceedings*. Although this change might seem minor, it seems to have the purpose of codifying the case-law of the CJEU hitherto. More importantly, Article 6 of the EIR Recast has expressly codified this principle of *vis attractiva concursus*. Thus, it seems to fill the void left open by Article 3 of Regulation 1346/2000, which fostered multiple controversies for the CJEU to address, by virtue of analogy. Nevertheless, there is still no guidance as to what is a *directly or closely linked action*[47]. It seems that the drafters intended to secure that this concept remains broad enough for its meaning to be determined on a case by case basis. This seems compatible with the CJEU case-law thus far, since there were no clear attempts to exhaustively define the notion. Yet, some important principles can be drawn.

In the following section we will analyse these principles through cases where specific actions walk the thin line that separates the EIR and the Brussels Regulations. Several questions can be raised when consulting the relevant case-law, since it seems unclear whether some legal aspects concerning an action can independently deem the EIR applicable. Moreover, some may have a privileged position in balancing the applicable regulation.

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[45] Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 16 October 2008 in *Christopher Seagon v Deko Marty Belgium NV*, C-339/07, EU:C:2009:83, paragraph 57.

[46] Report from the Commission on the application of Council Regulation (EC) No 1346/2000, cited above, paragraph 6.1.

[47] Gerard MCCORMACK, *Reconciling European Conflicts and Insolvency Law*, *op. cit.*, p. 333.

Many actions have multiple facets and a variety of specific characteristics, some specific to insolvency, whilst others, not so much.

II. DIFFUSE BORDER LINES BETWEEN THE APPLICABLE REGULATIONS

Although the Court of Justice established several criteria to distinguish between the scope of the regulations at issue, there conditions proved to be insufficiently clear, given the wide range of actions which can be brought before national courts. In the first sub-section, we will analyse some particular actions which fall within the area of application of the EIR (**A**). In the second sub-section, the focus will be shifted on the actions which did not met the Gourdain's criteria and were thus considered to fit into the Brussels I Regulations (**B**).

A. Particular cases concerning the EIR's scope of application

The aforementioned question, regarding the role of the liquidator and the importance of his participation is also fuelled by the grounds of the *SCT Industri* case. In this case, the CJEU took a different route than the one in *Seagon*, investing more effort to clearly explain the scope of application of the EIR. The case at issue concerned an action regarding the registration of ownership of shares in a company, transferred to a different Member State, which was regarded as invalid since the national courts did not recognise the powers of a liquidator from another Member State. Given that the case was brought in the context of insolvency proceedings it fell under the exception provided by Article 1(2)(b) of Regulation 44/2001. In this sense, the Court used two major arguments. Picking up on AG Colomer's reasoning it was asserted that the shares were transferred on the basis of provisions that derogate from the general rules of private law and, in particular, from property law[48]. It may seem that this aspect would suffice in determining both a direct link and a close relationship to the insolvency procedures.

However, the CJEU went on to invoke a second argument. Namely, it established that significance should be given to the fact that the efforts of the liquidator had a significant impact on the action. In this sense, the Court held that the action in the main proceedings was the direct and necessary consequence of the exercise, by the liquidator – an individual who intervenes only after the insolvency proceedings have been opened – of powers which he derives specifically the law governing such proceedings.

The fact that the action is based on the exercise of powers by the liquidator concerning the administration of the debtor's assets indicates that said action is derived and sufficiently close to insolvency. However, this concerns his substantial contribution to the insolvency proceedings. The question is left open on the relevance of the fact that a certain action is brought by the liquidator, rather than the debtor himself.

This exact issue was addressed by the CJEU in *German Graphics*. In this case, a company based in Germany sold several machines to a buyer in the Netherlands. However, the seller was both prudent enough to instil a reservation of title clause and sufficiently negligent to subsequently fall into involuntary liquidation. Thus, a

[48] CJEC, Judgement of 2 July 2009, *SCT Industri AB i likvidation v Alpenblume AB*, C-111/08, EU:C:2009:419, paragraph 27.

liquidator was appointed. In an attempt to serve the general interest of the creditors, said liquidator applied for protective measures concerning the machines, basing his claim on the reservation of title clause.

The main difference in this case was that, unlike *Seagon*, the action was not only available to the liquidator, and could have been brought before a court before involuntary liquidation. The involvement of the liquidator was not required in order for the claim to be admissible. The fundamental contention on which the CJEU bases its decision is that the scope of application of Regulation 1346/2000 should not be broadly interpreted, as opposed to the notion of civil and commercial matters[49].

Reasoning that the action had an independent nature, since it did not depend on the opening of the insolvency proceedings and was not based on the law of insolvency, the CJEU went on to address the involvement of the liquidator. In this sense, his mere participation, given its conjectural nature was not sufficient to consider that the action was closely linked and derived from the insolvency procedures[50]. It can be further deduced that if the liquidator's participation is tantamount, and not conjectural, to a certain kind of proceedings, most likely, said proceedings will be derived from insolvency. However, this is not because of the participation of the liquidator *per se*. If he intervenes only after liquidation has begun, and the action is only available to him, the legal basis of the action should, most likely, be found in the provisions concerning insolvency. In other cases, where his participation is possible, yet not necessary, it may constitute merely an argument regarding the closeness of the procedures, but cannot, by any means, justify in and of itself, a direct link to the procedures.

Thus, the CJEU shifted the focus from the participation of the liquidator to the legal basis of the proceedings and the dependence on the opening of insolvency. The Court has previously held in a variety of cases, that the mere opening of insolvency cannot *per se* justify the application of the EIR. However, can an action be seen as deriving from and close to insolvency even if its admissibility does not depend on the opening of the procedures?

This issue was analysed in the *H.* affaire[51], which concerned an action brought by the liquidator in the insolvency proceedings against the managing director of that company for reimbursement of some payments deemed as imprudent. The legal basis for such an action, namely Article 64 of the GmbGH, had some very specific characteristics. It enabled bringing a claim against the managing director of a company once it became insolvent or after it had been established that the company's liabilities exceeded its assets. Such an action could have been filed both in and out of the context of insolvency proceedings. Moreover, there were no significant changes in its procedural requirements or effects, specific to being brought in the context of insolvency procedures, rather than not.

The CJEU clearly stated that these aspects, *per se*, do not preclude such an action being characterised as deriving directly from and closely linked to insolvency proceedings as long as it was actually brought in the

[49] CJEC, Judgement of 10 September 2009, *German Graphics Graphische Maschinen v Alice van der Schee*, C-292/08, EU:C:2009:544, paragraph 25.
[50] Michele Angelo LUPOI, *A Report of Recent ECJ Cases on Regulation (EU) NO, 44/2001*, International Journal of Procedural Law, No 1, 2014, p. 296.
[51] CJEU, Judgements of 4 December 2014, *H. vs. HK,* C-295/13*,* EU:C:2014:2410.

context of such proceedings. In order to reach this conclusion, the Court, consistent with its case-law hitherto, went past looking at insolvency from the procedural perspective. It asserted that, although such an action does not depend on the formal opening of insolvency proceedings, it clearly derogates from the common rules of civil and commercial law. Moreover, the Court argued that since this action is similar to the actions to set a transaction aside at issue in *Seagon* and *F-Tex*, treating it differently merely because it can be initiated regardless of the existence of insolvency proceedings would create a double standard.

However, the most important statement the CJEU makes is that the same action, where it is brought outside the context of insolvency proceedings may fall within the scope of Regulation 44/2001. Thus, it seems the same action fulfils the twofold test when it is brought in the context of insolvency proceedings, yet does not when no such proceedings are opened. In such cases the prior opening of insolvency proceedings is a deciding factor in asserting the applicability of the EIR.

Moreover, this should be seen in the context of the CJEU's previous case-law. In the aforementioned case of *SCT Industry*, it was asserted that the link with the insolvency proceedings was not weakened by the fact the insolvency proceedings had been closed when the action was brought before the Austrian courts. As such, the existence of current insolvency proceedings is not able to affect the determination of the applicable regulation.

Thus, the case-law seems to lead to the conclusion that there can never be only one criterion to assert, on all occasions, that an action is derived from insolvency proceedings and closely connected with them. The twofold test cannot be answered on a 'yes or no' basis but on a teleological approach, since small changes to the factual circumstances of any given case can affect the outcome of the test[52].

The participation of the liquidator, in itself, is insufficient to deem the EIR applicable, as shown in *German Graphics*. The opening of the insolvency procedures should, similarly, not be the primary focus, as it has been shown *Nickel & Goeldner Spedition* and *SCT Industry*. Lastly, according to *H.* the fact that an action can be brought outside of insolvency, cannot exclude the EIR's application.

However, with a closer look, a set of clear rules can be inferred. Firstly, if the right or the obligation which forms the basis of the action finds its source in the derogating rules specific to insolvency proceedings, it falls under the scope of the EIR. When an action could not be brought outside the insolvency proceedings and finds its legal basis in those proceedings, it will fall under the scope of the EIR[53]. However, even when an action can be brought both in and out of the context of insolvency proceedings, as long as it derogates from the common rules of civil and commercial law, it still falls under the EIR if it is, as a matter of fact, brought in the context of insolvency proceedings. Otherwise, the action will still fall under Regulations 41/2001 or 1251/2015.

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[52] Maria-Thomas EPEOGLOU, *Down the Slippery Slope: Insolvency Related Actions According to Decisions C-641/16 & C-649/16*, Business Law Review, Volume 39, No 3, 2018, p. 91.
[53] Michele Angelo LUPOI, *op.cit.*, p. 295.

In order to assert its closeness to insolvency proceedings, the focal point should be the nature of the factual analysis, based on the merits of the case, that the national court will have to undergo, in order to reach a decision in the case. In the case of *Valach and others*, the action brought concerned the liability in tort of the members of a committee of creditors which rejected a restructuring plan in insolvency proceedings. The link between this court action and the insolvency proceedings was deemed as sufficiently close, given that in order to settle the dispute, it was necessary that the national courts analyse the extent of that committee's obligations in the insolvency proceedings and the compatibility of the rejection with those obligations. Since such an analysis presents a direct and close link with the insolvency proceedings, it is closely connected with the course of those proceedings[54].

In 2018, the *Wiemer and Trachte*[55] case rekindled the flame of establishing the scope of the EIR concerning an action to set a transaction aside by virtue of the debtor's insolvency. The question aimed to establish whether the jurisdiction to solve such an action, brought against a defendant whose registered office or habitual residence is in another Member State, was exclusive. Before addressing this issue, the Court underlined that according to its previous case-law such an action fell under the scope of the EIR. Reaffirming the principle that concentrating all the actions directly related to insolvency 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 and the goal of avoiding forum shopping, the Court established the exclusive nature of the jurisdiction.

The reasoning was based on the following structure: since actions to set aside a transaction are directly derived and close to insolvency, consequently falling under the EIR, and two of the main goals of the EIR are avoiding forum shopping and *lex fori concursus*, the jurisdiction is exclusive concerning this type of actions. Thus, given the general viability of this line of arguing, the exclusive nature of the jurisdiction should be seen as a general principle, applying to all actions directly derived and close to insolvency or winding up proceedings.

The following section examines the cases where the Court of Justice opted for the application of the Brussels I Regulation and the reasoning behind this choice.

B. The extensive application of the Brussels I regime

The two criteria provided by the *Gourdain* case are quoted by CJEU as the test to be used in order to determine whether a claim falls within the scope of the Brussels I Regulation or of the EIR. However, the Court did not clarify at the outset which circumstances are relevant to assess whether an action derives directly from insolvency proceedings and is closely connected with them. The uncertainty was further increased due to the lack of clarity regarding the logical relationship between those two criteria, as to whether they are cumulative or alternative.

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[54] CJEU, Judgement of 20 December 2017, *Valach and others v. Waldviertler Sparkasse Bank AG*, C-649/16, EU:C:2017:986, paragraph 38.

[55] CJEU, Judgement of 14 November 2018, *Wiemer & Trachte GmbH*, C-296/17, EU:C:2018:902.

Starting with the definition of the jurisprudential criteria, the CJEU explained that, in order to determine whether an action derives directly from insolvency proceedings, 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. Therefore, it must be determined the cause of action in the main proceedings. In other words, one must assess 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[56].

In the *Nickel & Goeldner* case, the action in the main proceedings was brought by the insolvency administrator of the company Kintra who requested for the payment of a debt. The legal basis of that action consisted in the services comprising the international carriage of goods provided by Kintra for Nickel & Goeldner Spedition. The Court found that this action could have been brought by the service provider itself before the opening of insolvency proceedings, because it derives from the contractual relationship between the parties, not from insolvency proceedings. The fact that, after the opening of insolvency proceedings, this action is brought by the insolvency administrator who acts in the interest of the creditors, does not change the nature of the debt requested. As such, because the action at issue is governed by the common rules of civil and commercial law, not by the specific rules of insolvency proceedings, it must fall within the area of application of the Brussels I Regulation[57].

Regarding the second criterion, that is whether the actions are closely connected with insolvency proceedings, the Court insisted on the closeness of the link between a court action in the main proceedings and the opening of insolvency proceedings. However, this definition was not clear enough and, therefore, the national courts felt the need to question whether the link between a specific action and insolvency proceedings was sufficient to justify the exclusion of that action from the scope of the Brussels I Regulation.

A recurrent problem in EU law is finding the rules applicable to an action to set a transaction aside (*actio pauliana*), as it was already mentioned. It must be noted that the answer varies depending on whether the action was filed in the context of insolvency proceedings or outside that context. In the recent case *Feniks*, no insolvency proceedings against the so-called insolvent debtor Coliseum were begun and thus the applicability of the EIR was excluded.[58] However, once the insolvency proceedings are opened, it is not clear whether the link between these proceedings and the *actio pauliana* at issue is sufficient to justify the exclusion the Brussels I Regulation. The legal uncertainty is increased by the diverse classification of *actio pauliana* in the national legal systems. Some Member States conceive *actio pauliana* as a procedure for asset execution, whereas in other States this action is governed by the substantive law applicable to contracts and obligations or it is regarded as a general remedy linked to validity or opposability of legal acts[59].

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[56] CJEU, Judgements of 4 September 2014, *Nickel & Goeldner Spedition v Kintra*, C-157/13, EU:C:2014:2145, paragraph 27, of 11 June 2015, *Nortel Networks SA v. Cosme Rogeau*, C-649/13, EU:C:2015:384, paragraph 28 and of 9 November 2017, *Tünkers France and Tünkers Maschinenbau GmbH v Expert France*, C-641/16, EU:C:2017:847, paragraph 22.

[57] CJEU, Judgement of 11 June 2015, *Nortel Networks SA v. Cosme Rogeau*, C-649/13, EU:C:2015:384, paragraphs 29-31.

[58] CJEU, Judgement of 4 October 2018, *Feniks sp. z o.o. v. Azteca Products & Services SL*, C-337/17, EU:C:2018:805, paragraphs 31-33.

[59] Opinion of Advocate General Michel Bobek delivered on 21 June 2018 in *Feniks sp. z o.o. v. Azteca Products & Services SL*, C-337/17, EU:C:2018:805, paragraph 40.

In *F-Tex* case, for instance, the Court analysed whether the action in the main proceedings was closely connected with insolvency proceedings. The facts of this case refer to NPLC company which, when insolvent, paid the debt to one of its creditors, Jadecloud-Vilma. After the insolvency proceedings were opened, the liquidator assigned to F-Tex all NPLC's claims against third parties, including the right to demand from Jadecloud-Vilma the return of the sums acquired by the latter. The parties agreed that F-Tex was not legally obliged to enforce the claims thus taken over, but if it decided to do so, it would have to pay the liquidator 33% of the proceeds obtained from its action. When F-Tex brought an action before the Lithuanian courts claiming the repayment of the sums acquired by Jadecloud-Vilma, the Court of Justice was asked whether this action is covered by the Brussels I Regulation or whether it should be regarded as a matter excluded from its scope of application.

The Court found that, unlike the liquidator in *Seagon* case[60], F-Tex, acting as an assignee, was not obliged to enforce the claims taken over or to act in the interest of the creditors. On the contrary, the assignee acted in his own interest and for his personal benefit. The fact that F-Tex had to pay the liquidator a percentage of the proceeds obtained from the claims assigned should be regarded only as a method of payment for the assignment. What is more, F-Tex was not bound to set the transaction aside within the insolvency proceedings, as its right could not be affected by the closure of these proceedings. Therefore, according to the Court of Justice, the exercise of the right acquired by an assignee is not closely connected with insolvency proceedings and should not be excluded from the area of application of the Brussels I regime[61].

When it comes to the logical relationship between those two criteria (whether the action derives directly from the insolvency proceedings and is closely connected with such proceedings) there are two main arguments in favour of the cumulative theory. On the one hand, the grammatical interpretation validates this approach, given the fact that the Court uses the conjunction "and" between those criteria. On the other hand, the Court of Justice held that the Brussels I Regulation is applicable only when none of those criteria were fulfilled.

A particular field where the Court analysed both criteria in order to assess whether the Brussels I or the Brussels I Recast Regulation is applicable refers to the actions based on the rules on delict. In *Tünkers France and Tünkers Maschinenbau* case, the action in the main proceedings concerned a request for damages for unfair competition. Expert Maschinenbau manufactured components for the automobile industry, whereas Expert France was granted exclusive distribution rights in France. After the insolvency proceedings regarding Expert Maschinenbau were opened, the insolvency administrator transferred a part of its business to Tünkers Maschinenbau and its subsidiary. Consequently, Expert France brought an action for damages against TM and TF claiming that the two companies attempted to take over its clientele.

The Court found that the action in the main proceedings aimed to establish the liability of TM and TF for the fraudulent acts of unfair competition. According to the Court, the claimant acted exclusively in its own

[60] CJEC, Judgements of 12 February 2009, *Christopher Seagon v Deko Marty Belgium*, C-339/07, EU:C:2009:83.
[61] CJEU, Judgement of 19 April 2012, *F-Tex SIA v. Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*, C-213/10, EU:C:2012:215, paragraphs 42-47.

interests and did not challenge the validity of the assignment carried out in the course of the insolvency proceedings by the insolvency administrator, as opposed to *SCT Industri* case[62]. Therefore, the action at issue was based on the rules on tort of civil and commercial law, not on the rules specific to insolvency proceedings, with the result that the action did not derive directly from insolvency proceedings. Moreover, despite the connexion between the action for damages and the insolvency proceedings against Expert Maschinenbau, that link was considered neither sufficiently direct or sufficiently close so as to exclude the application of the Brussels I Regulation[63].

However, in a recent case *NK v BNP Paribas*[64], one can validly ask whether the Court has operated a revival of its historic jurisprudence regarding the test to be used in order to determine whether a claim falls within the scope of the Brussels I Recast Regulation. The case originated in the malpractice of a Dutch bailiff who embezzled funds of about 200 clients of the bailiff practice, for which he was responsible. The company of which he was the sole shareholder and administrator as well as himself were subjected to insolvency proceedings. In the context of these proceedings NK, the liquidator, brought an action for damages against the Belgian bank, BNP Paribas Fortis, which has allegedly breached its statutory obligations, by cooperating with the cash withdrawals made by the bailiff (*Peeters-Gatzen* action).

According to the opinion of AG Bobek, the Court should reassess its case-law in the sense that the first criterion, that is whether the action derives directly from insolvency proceedings, must be decisive. The second criterion regarding the closeness of the action to the insolvency proceedings should rather serve as a verification tool. He explained that the most important aspect is the cause of action in the main proceedings, namely whether the action is based on the common rules of civil and commercial law (rules on tort, on contract or on unjust enrichment) or on the specific rules of insolvency. According to AG Bobek, the fact that the action is closely connected with insolvency proceedings is not a free-standing criterion. The sufficient link between the action in the main proceedings and insolvency can be assessed by answering to the key question whether that action can be brought in absence of insolvency proceedings. If the answer is yes, there is not a sufficient link so as to justify the exclusion of that action from the scope of the Brussels I Regulation. However, in order to reach this conclusion, the Court need to rely on the legal nature of the claim at issue which is assessed in the context of the first criterion[65].

The Court held that "only actions which derive directly from insolvency proceedings or which are closely connected with them are excluded from the scope of the Brussels Convention"[66]. Even though the Court quoted its traditional case-law, one may wonder whether the use of the word "or" means that the two criteria must be interpreted in accordance with the opinion expressed by AG Bobek. In this respect, it must be noted

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[62] CJEC, Judgement of 2 July 2009, *SCT Industri AB i likvidation v Alpenblume AB*, C-111/08, EU:C:2009:419.
[63] CJEU, Judgement of 9 November 2017, *Tünkers France and Tünkers Maschinenbau GmbH v Expert France*, C-641/16, EU:C:2017:847, paragraphs 22-30.
[64] CJEU, Judgement of 6 February 2019, *NK v. BNP Paribas Fortis*, C-535/17, EU:C:2019:96.
[65] Opinion of Advocate General Michel Bobek delivered on 18 October 2018 in *NK v. BNP Paribas Fortis*, C-535/17, EU:C:2019:96, paragraphs 57-69.
[66] CJEU, Judgement of 6 February 2019, *NK v. BNP Paribas Fortis*, C-535/17, EU:C:2019:96, paragraph 26.

that the Court analysed both criteria, but it gave certain prevalence to the first one. Regarding the first condition, the Court found that Peeters-Gatzen action is an action for liability for a wrongful act which is based on the common rules on torts. Although this action has some particular features when it is brought in the course of insolvency proceedings (the liquidator acts the interests of all the creditors and the proceeds of this actions accrue to the estate), these characteristics form the procedural context of the action and do not change its legal nature. As far as the second condition was concerned, the Court held that the existence of a link with insolvency proceedings was undeniable, but it was not sufficient, given that an action such as the one in the main proceedings may be brought by the creditors individually, whether before, during or after the conduct of the insolvency proceedings[67]. However, the Court relied only on the first criterion when it concluded that the action at issue does not fall outside of the Brussels I Regulation[68]. Only the time will tell whether the case-law had evolved due to the interpretation offered by the Court of Justice on this occasion.

III. CONCLUSIONS

Nowadays, national courts find themselves in a tortuous labyrinth, with two exits at the end: the Brussels I Regulations or the EIR/EIR Recast. When trying to exit this limbo, they need to identify the proper criteria to determine the application of one of these regulations and properly apply them to the facts of the case. Without some clear and predictable conditions, they will decide on a case by case basis, which will result in very diverse and unpredictable case-law. This will impact not only the parties involved in the proceedings, but also the purpose of uniform enforcement of EU law.

Bearing in mind the aim of judicial cooperation, it is clear that a goal to achieve full cross-border legal certainty will always exist. The EU legislative organisms are consistently trying to harmonize through regulations, according to social changes in this area of practice. But this task is very difficult since legislative changes are both varied and frequent in all 28 Member States.

In order to overcome this difficulty, one proposal envisages the **Commission drafting guidelines** to help the Member States comply with the rules on insolvency proceedings. This guide would be a useful instrument for creating a complex mechanism of cooperation between Member States regarding numerous issues in this area. By means of this guide, the Commission could clarify some highly contested issues. Article 6 of the EIR Recast has been both praised, for incorporating the CJEU's case-law into the regulation, and criticized, since it leaves practitioners to deal with issues of interpretation concerning what an action deriving from insolvency is[69]. The guidelines could provide some orientation. It should be a map to help the practitioner exit the labyrinth. Indeed, many answers can be found in the CJEU's case-law, yet systematizing it can create a great difference. There are several examples of this type of practice that have worked, namely in the fields of personal data or competition law. Moreover, in the same manner that Annex 1 of the EIR Recast is drafted,

[67] *Idem*, paragraphs 29-36.
[68] *Idem*, paragraph 37.
[69] Maria-Thomais EPEOGLU, *The Recast European Insolvency Regulation: A Missed Opportunity for Restructuring Business in Europe*, *op. cit.*, p. 58.

with the help of national authorities, an annex to the guideline could be devised. Unlike Annex A, which is exhaustive according to recital 9 of the EIR Recast and the case-law concerning the EIR[70], this non-exhaustive list could contain the procedures that are derived from insolvency according to national law and the CJEU case-law, by enlisting, for example, the actions to set aside a transaction that national laws provide and their legal basis. By doing so, uncertainty will diminish for both insolvency practitioners, when trying to determine jurisdiction in order to file the action, and the national judges, especially when they will have to deal with hybrid actions.

Insolvency rules involve a wide variety of measures, from early intervention before a company finds itself in serious difficulty, to restructuring or liquidation of assets. Bearing in mind that cross-border features of insolvency have increasingly grown in number in the past years, is essential to have a well-functioning framework covering all these measures, given the size and complexity of insolvency proceedings. Another proposal is to create **a central authority for supervising the whole insolvency cases and processes in the EU**, with subsidiaries in all Member States. This authority will collect data regarding insolvency proceedings from its subsidiaries. With all this data base, it will be easier for a national judge to find out if there are several existing insolvency procedures in different EU countries regarding the same company. Furthermore, such an institution may have the competence to help national courts in analyzing the connection between the preliminary questions brought before the Court and the insolvency procedure at issue. In addition to that, based on the Commission guidelines mentioned above, this institution will issue an opinion whether the action derives directly or is closely connected with the insolvency proceeding. National subsidiaries could also draft some guidelines, according to national legislation, for individuals, which must be easily accessible for the public. This written instrument will help them to understand the scope of application of the two regulations, and, more importantly, the consequence of application of Brussels I or EIR, as it was analyzed at the beginning of this paper. Thus, an informed public will not struggle any more in bringing before the national courts a claim which will be more likely to succeed.

Also, a problem which existed under the old regulation, regarding the insolvency of multiple companies which are part of the same corporate group, is somehow solved under the EIR Recast by introducing a new regime called "**group coordination process**". The problem with this regime is that it is voluntary, and the companies are not obliged to follow the plan made by the group. Thus, it is necessary to ensure that the authority envisaged above will facilitate the coordination process between Member States so that this procedure will be considered more appealing for the companies to enter. This institution, or its subsidiaries, will organize **the plan for the entire corporate group**, considering the existing differences regarding national insolvency law, so the companies will follow much easier the recommendations and the plan through a centralized system.

One essential function of the authority could derive from **the power to propose amendments to the Commission regarding the content of Annex A of the EIR Recast**, after public consultation. When

[70] CJEU, Judgment of 22 November 2012, *Bank Handlowy w Warszawie*, C-116/11, EU:C:2012:739.

drafting the content of Annex A, the Commission referred to the Member States[71], which have the power to decide whether a particular procedure is to be included in the Annex[72]. This type of mechanism can create several issues, concerning double standards that do not allow a level playing field and subjective appreciations that can be affected by external pressure. For example, there was consistent lobbying on the part of British insolvency practitioners and lawyers to keep the English Schemes of Arrangement off the EIR Recast Annex A[73]. Although it has been held that the Brussels I is ill equipped to deal with this type of arrangements, leaving their recognition to be uncertain[74], it seems that this is outweighed by the fact that English jurisdiction is left unhampered by the need to establish a company's centre of main interest in England[75]. However, leaving the Schemes of Arrangement out of the material scope of the EIR (since fulfilling the conditions set by Article 1 is not relevant as long as a certain procedure is not enlisted in Annex A, according to recital 9 of the EIR Recast) has been criticised by authors, that have shown that other states, such as Spain, have notified the Commission with concerning similar pre-insolvency procedures[76]. In this sense, while alleging that, in fact, at least some Schemes of Arrangements fulfil the criteria set by Article 1 of the EIR Recast, the contention is made that this situation *fractures the uniform EU treatment of proceedings to safeguard companies*, as a result of the concession driven legislative process[77]. By allowing the central authority to verify and propose amendments to Annex A, uniformity could be insured, both by excluding the procedures that do not actually fulfil the criteria set by Article 1 and including those that, although do, were initially excluded. This would not affect the independent appreciation of each state as much as it seems, since the Central Authority would only entertain an objective test by using the rather clear criteria instilled by the EIR Recast.

In the end, we must admit that the new EIR Recast is unquestionably a text that has benefited from the practical implementation of its predecessor. In addition, it includes important innovations that have been widely welcomed. They will in turn have to undergo the fire of the practice. The effectiveness of insolvency procedures in the EU depends, however, on the harmonization of the scope of application of both the Brussels I Recast Regulation and the EIR Recast. This purpose will be achieved only by stronger cooperation mechanisms between Member States.

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[71] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation EC No 1346/2000 on insolvency proceedings, 12.12.2012, COM (2012) 744 final, p. 6.

[72] Jennifer PAYNE, *Cross-Border Schemes of Arrangement and Forum Shopping*, University of Oxford Legal Research Paper Series, No 68, 2013, p. 11.

[73] Maria-Thomais EPEOGLU, *The Recast European Insolvency Regulation: A Missed Opportunity for Restructuring Business in Europe*, *op. cit.*, p. 57.

[74] *Ibidem*.

[75] Gerrard MCCORMACK, *Something Old, Something New: Recasting the European Insolvency Regulation*, Modern Law Review, Volume 79, Issue 1, 2016, p. 128.

[76] Angel CARRASCO PERERA, Elisa TORRALBA MENDIOLA, *UK "schemes of arrangement" are "outside" the scope of the European Regulation on Insolvency Proceedings. What does "outside" actually mean*?, p. 1, available at https://www.ga-p.com/wp-content/uploads/2018/07/uk-schemes-of-arrangement-are-outside-the-scope-of-the-european-regulation-on-insolvency-proceedings-what-does-outside-actually-mean.pdf

[77] *Idem*, p. 4.