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The Jurisdictional Paradox in the Insolvency Regulation

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Introduction

1 This paper examines one question in the context of the European Insolvency Regulation[1] (the "EIR"). This question is this: is it possible to initiate legal proceedings against an insolvent debtor in a Member State of the European Union ("EU") that is different from the Member State where the (main) insolvency proceedings against the defendant have been opened if the *lex concursus* (that is, the insolvency law of the state where the insolvency proceedings have been opened) provides a final moratorium prohibiting or suspending litigation against the debtor outside the framework of the insolvency proceedings? In other words, how does the principle of *vis attractiva concursus*[2], a principle followed by the domestic insolvency laws of several Member States of the EU, affect foreign post-insolvency litigation against the debtor? Should the foreign court before which the claimant brought an action against the debtor company, refuse to hear the case if the applicable insolvency law of the Member State where the insolvency proceedings have been opened provides that no such litigation is permitted outside the framework of the insolvency proceedings? Or should the foreign court, which has jurisdiction to hear the case on the basis of the Brussels I Regulation[3] (the "BR"), decide the case

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[1] COUNCIL REGULATION (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160/1). Where applicable, REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast) (OJ 2015 L141/19) is referred as the "recast EIR". Denmark is not bound by or subject to the application of either the EIR nor the recast EIR, see recital (33) EIR and recital (88) recast EIR.

[2] By virtue of the *vis attractiva* principle the court which opens the insolvency proceedings has within its jurisdiction not only the actual insolvency proceedings but also all the actions arising from the insolvency. See Miguel VIRGOS and Etienne SCMIT, 'Report on the Convention of Insolvency Proceedings' (the "Virgós-Schmit Report" or "Report") at paragraph 77. On the *vis attractiva* principle in the context of the EIR see C. Willemer, *Vis attractiva concursus und die Europäische Insolvenzordnung* (2006, Mohr Siebeck, Tübingen); L. C. Piñeiro, "Vis Attractiva Concursus in the European Union: Its Development by the European Court of Justice" (2010) 3 *InDret* 1.

[3] With the general abbreviation "BR", unless the opposite appears from the text, I refer alternatively to the 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 (recast) (OJ 2012 L351/1) (the "recast BR") and to its predecessors, the

even if the judgment to be passed will necessarily be of a declaratory nature, given that the litigation court can only rule on the existence and amount of the claim but not about the enforcement of the claim? This is because, in such a case, enforcement will fall within the scope of the insolvency proceedings and the prevailing party will need to lodge his claim with the liquidator in the state of the opening of the insolvency proceedings. As will be discussed, the case law supports both possibilities. However, as this paper seeks to demonstrate, there is no really good answer to this question within the current legal framework.

2 In order to attempt to answer the initial question, it is necessary first to clarify the scope of the proceedings where the above question is relevant. Thus, the concept of foreign litigation for the purposes of this paper should be delimited from the so-called "insolvency-related actions" on the one hand and from the pending lawsuits on the other. Second, it is submitted that a clear and consistent separation between jurisdiction and the applicable law is of utmost importance in order to understand the core of the initial question. Third, the interpretation of Article 4(2)(f) of the EIR[4] must be considered. This states that the *lex concursus* shall determine, among other things, the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending. Fourth, some of those cases will be examined where the courts refused to decide on the merits of the case due to ongoing insolvency proceedings in another Member State the effects of which (particularly the imposition of a moratorium on new proceedings outside the insolvency) were to be governed by the *lex concursus*. Fifth, by contrast, an English law case will be considered in which the court having jurisdiction for the litigation on the basis of BR endeavoured to entertain the case. The final section of this paper will draw some conclusions and make some suggestions.

Delimitation issues

Insolvency-related Actions are out of Scope

3 The starting point for a discussion of the concept of the insolvency-related actions must be the so-called "insolvency exception" in Article 1(2)(b) of the recast BR. The BR deals with the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Accordingly, the insolvency exception states that the BR shall not apply to bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. The predecessors of the current BR, the Regulation 44/2001 and the 1968 Brussels Convention employed the same exception.[5] In a case as early

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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 2001 L12/1) and the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(01) */ (OJ 1972 L299/32).

[4] Article 7(2)(f) recast EIR.

[5] Article 1(2)(b) of the Regulation 44/2001; Article 1(2) of the 1968 Brussels Convention.

as 1979, well before the entry into force of the EIR, the Court of Justice of the EU (the "Court") ruled that those actions which derive directly from the insolvency proceedings and are closely linked with them are to be considered falling within the insolvency exception of the Brussels Convention (thus outside the scope of that convention).[6] This "Gourdain formula" has been maintained and confirmed several times in the past decades.[7]

4 Apparently inspired by the Gourdain judgment, the European legislator used the same formula in the Convention on Insolvency Proceedings which, after three-decade long struggle, was eventually born in 1995.[8] Without the 1995 Convention ever entering into force, it was transformed, without any material changes, into the EIR with effect from May 2002. Recital (6) EIR suggests that the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. This is somewhat surprising, because the recitals were drafted during the process of transforming the 1995 Convention into the EIR[9] thus by that time it must have been clear that the regulation would not consist of any (explicit) provisions regarding the international jurisdiction over insolvency-related actions. Article 3(1) of the EIR[10] only addresses the jurisdiction regarding the opening of main insolvency proceedings by providing that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. By contrast, Article 25(1)(2) of the EIR[11] indeed addresses the question of recognition and enforcement of the insolvency-related judgments extending the automatic recognition pursuant to Article of the 16 EIR[12] to these type of judgments and referring the enforcement to the BR while eliminating, however, the grounds for refusal provided for by BR thus setting up a simplified recognition and enforcement

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[6] *Gourdain v Nadler* (Case 133/78) [1979] ECR 733; [1979] 3 CMLR 180.

[7] *SCT Industri AB i likvidation v Alpenblume AB* (Case C-111/08) [2009] ECR I-5655; *Seagon v Deko Marty Belgium NV* (Case C-339/07) [2009] ECR I-767; *German Graphics Graphische Maschinen GmbH v van der Schee* (Case C-292/08) [2009] ECR I-8421; *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'* (Case C-213/10) [2013] Bus LR 232; *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB* (Case C-157/13) [2015] QB 96; *H, acting as liquidator in the insolvency of GT GmbH v HK* (Case C-295/13) [2015] OJ C 46/9; *Hayward (Deceased), Re* [1997] Ch 45; [1996] 3 WLR 674; [1997] 1 All ER 32; [1997] BPIR 456; *UBS AG v Omni Holding AG (in Liquidation)* [2000] 1 WLR 916; [2000] 1 All ER (Comm) 42; [2000] BCC 593; [2000] 2 BCLC 310; [2000] ILPr 51; *Derek Oakley v Ultra Vehicle Design Limited (In Liquidation), Behlke Electronic GmbH* [2005] EWHC 872 (Ch); [2006] BCC 57; [2005] ILPr 55; [2006] BPIR 115; *Polymer Vision R&D Ltd v Van Dooren* [2011] EWHC 2951 (Comm); [2012] ILPr 14; *Byers v Yacht Bull Corp* [2010] BCC 368 [2010] ILPr 24.

[8] For the genesis of the EIR see P. Omar, European Insolvency Law (2004, Ashgate) at 49-86; I. Fletcher, "Historical Overview: The Drafting of the Regulation and its Precursors" Chapter 1 in G. Moss, I. Fletcher and S. Isaacs (eds), *EU Regulation on Insolvency Proceedings* (3rd ed) (2016, Oxford University Press, Oxford) at 1-19; M. Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 *Am. Bankr. L.J.*, 489-494.

[9] See Omar, ibid, at 89.

[10] Article 3(1) recast EIR. See, however, Article 6 recast EIR.

[11] Article 32(1)(2) recast EIR.

[12] Article 19 recast EIR.

system in the context of the EIR.[13] Beyond, it is also clear from Article 4 of the EIR[14], which is a conflict of laws provision determining the domestic insolvency law (*lex concursus*) that universally applies for the insolvency proceedings, that the insolvency-related actions are typically subject to the *lex concursus*.[15]

5 The general view is, supported by the Virgós-Schmit Report (the "Report")[16], the academic literature[17] and the case law[18] that the both regulations – BR and EIR – are intended to be mutually exclusive. As the Report puts it, to avoid unjustifiable loopholes between the two instruments those actions excluded from the Brussels Convention (now BR) by virtue of the Gourdain formula were subject to the Insolvency Convention (now EIR) and to its rules of jurisdiction. In *Nickel & Goeldner*[19] the Court held:

> "[…] that regulation [BR] and Regulation No 1346/2000 [EIR] must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-

[13] MG Probud Gdynia sp z o.o (Case C-444/07) [2010] ECR I-417, at paragraphs 26-34.
[14] Article 7 recast EIR.
[15] In contrast, Bariatti is of the view that from the text of the EIR is clear that the law applicable to the act detrimental to creditors is not the *lex concursus*. See S. Bariatti, "Filling in the Gaps of EC Conflicts of Laws Instruments: The Case of Jurisdiction over Actions Related to Insolvency Proceedings" in G. Venturini and S. Bariatti (eds), *Liber Fausto Pocar* (Giuffre Editore 2009), at 36.
[16] At paragraph 77.
[17] M. Virgós and F. Garcimartín: The European Insolvency Regulation: Law and Practice (2004, Kluwer Law International, The Hague) at 56-57; G. McCormack, "Reconciling European Conflicts and Insolvency Law" (2014) 15 *E.B.O.R.* 309, at 334. By contrast, T. Linna remarks that a certain gap between the two instruments necessarily exists: "The problem arises as the EIR (or the Brussels I Regulation) does not enact that *all the excluded* [italics in original] proceedings fall within the scope of the EIR. Instead, Article 1(1) EIR provides *independent criteria* [italics in original] for insolvency proceedings. The scope of the EIR is formed in accordance with these criteria. In other words, the gap is there because the scope of the EIR is not a mirror image of the scope of the Brussels I Regulation. Recital 7 in the EIR reform proposal [now the recast EIR] refers to the list of exclusions in Article 1(2)(b) of the Brussels I Regulation and notes that these proceedings should be covered by the present EIR and that the interpretation of the EIR should as much as possible avoid regulatory loop- holes between the two instruments. Even if this recital text supports a flexible interpretation of the conditions pertaining to the scope of the EIR, the basic problem still remains." See Tuula Linna, "Actio Pauliana - »Actio Europensis«? Some Cross-Border Insolvency Issues" (2014) 10(1) *Journal of Private International Law* 69, at 74. Regarding the gap see also *German Graphics Graphische Maschinen GmbH v van der Schee*, above note 7. As to the boundaries between the two institutions see P. J. Omar, "The Insolvency Exception in the Brussels Convention and the Definition of »Analogous Proceedings«" (2011) 22(5) *I.C.C.L.R.*, 172.
[18] See *Polymer Vision R&D Ltd v Van Dooren,* above note 7, at paragraphs 46-47; *Derek Oakley v Ultra Vehicle Design Limited (In Liquidation), Behlke Electronic GmbH*, above note 7, at paragraph 35; similarly: REPORT ON THE CONVENTION on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Schlosser Report) OJ 1979 C59/90.
[19] See *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB*, above note 7, at paragraph 21.

> up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000."

6 The case law regarding the insolvency-related proceedings is extensive.[20] In general terms, it can be said that in order to qualify an action as one deriving directly from insolvency proceedings and closely connected with them (as insolvency-related), the Court considers that that action is based on the insolvency law provisions of the applicable law derogating from the general rules of civil law.[21] These actions cannot exist outside the context of the insolvency proceedings. The main types of the insolvency-related actions are these: actions to set aside acts detrimental to the general body of creditors (avoidance actions),[22] actions on the personal liability of directors (including de facto directors) based upon insolvency law,[23] lawsuits relating to the admission or the ranking of a claim,[24] disputes between the liquidator and the debtor on whether an asset belongs to the bankrupt's estate and disputes related to the exercise of the powers of the liquidator, including the related liability issues.[25]

7 What is particularly important from the point of view of this paper is the *Seagon*[26] judgment. In this decision the Court ruled that the courts of the Member State within the territory of which insolvency proceedings had been opened had jurisdiction to decide an action to set a transaction aside by virtue of insolvency that was brought against a person whose registered office was in another Member State. Although the ruling concerns the avoidance actions only, it is submitted[27] that the principle underlying the ruling applies to other types of insolvency-related actions, as well. By this decision the Court declared that, in the context of the EIR, the *vis attractiva* principle applies regarding insolvency-related proceedings: the courts of the state where insolvency proceedings have been opened also have international jurisdiction to hear insolvency-related cases. This view has expressly been adopted by the recast EIR.[28]

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[20] Among others, see above notes 6-7.
[21] See *Gourdain*, above note 6, at paragraphs 4-6; Virgós-Schmit Report, at paragraph 196; M. Virgós and F. Garcimartín, above note 17, at 61-62. While the BR should be broad in its scope, the scope of application of the EIR should not be broadly interpreted; see *German Graphics*, above note 7, at paragraphs 23 and 25.
[22] See e.g. *Seagon*, above note 7; *Schmid v Hertel* (Case C-328/12) [2014] 1 WLR 633.
[23] See *Gourdain*, above note 6; H, acting as liquidator in the insolvency of G.T. GmbH v H.K., above note 7; *Simona Kornhaas v Thomas Dithmar as liquidator of the assets of Kornhaas Montage und Dienstleistung Ltd* (C-594/14) [2015] ECLI:EU:C:2015:806.
[24] *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch); [2014] 2 BCLC 662.
[25] See *Polymer Vision R&D Ltd v Van Dooren*, above note 7.
[26] Above note 7. On the decision see P. Mankowski and C. Willemer, "Die internationale Zuständigkeit für Insolvenzanfechtungsklagen" (2009)10 Recht der internationalen Wirtschaft 669.
[27] See *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*, above note 7, at paragraph 27.
[28] Article 6 recast EIR.

8 To sum up: in the case of insolvency-related actions the jurisdiction as determined by Article 3(1) of the EIR includes the jurisdiction to hear the insolvency-related cases, too. Article 6 of the recast EIR makes this completely clear by providing that the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 of the EIR shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions. Beyond, given that an action, in order to be qualified as insolvency-related, must derive directly from the insolvency proceedings and be closely linked with them, there is little doubt that the same domestic substantive insolvency law will govern both the insolvency proceedings and the connected insolvency-related action. Since the forum applies its own substantive insolvency law as *lex concursus* when ruling on the insolvency-related cases there is, by definition, no room for any collision between the jurisdiction and the applicable law. For this reason, insolvency-related actions are outside the scope of this paper.

Pending Lawsuits are out of Scope

9 Article 4(2)(f) of the EIR[29] states that, in the context of EIR, the *lex concursus* determines the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending. This provision is to be read in conjunction with Article 15 of the EIR[30] providing that the effects of insolvency proceedings on a pending lawsuit shall be governed solely be the law of the Member State in which that lawsuit is pending. Article 15 of the EIR is one of the exceptions to the generally applicable *lex concursus* provided by the EIR:[31] although the opening of insolvency proceedings does affect lawsuits which have been initiated prior to the opening of the insolvency proceedings in another Member State, these effects are not direct; in other words, the *lex concursus* does not directly apply in the state where the lawsuit is pending. Instead, the effect of the *lex concursus* is indirect: the law of the state where the lawsuit is pending (*lex fori processus*) will determine how the insolvency proceedings opened in another Member State affects the ongoing litigation.[32] Articles 7(2)(f) and 18 of the recast EIR follow the same path thus the recast EIR has not brought any relevant changes.[33]

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[29] Article 7(2)(f) recast EIR

[30] Article 18 recast EIR

[31] See Articles 5-15 EIR; Articles 8-18 recast EIR.

[32] See three decisions of the Austrian Supreme Court 17 March 2005, 8 Ob 131/04d; 24 January 2006, 10 Ob 80/05w; 23 February 2006, 9 Ob 135/04z. The decisions were referred to in *Syska v Vivendi Universal SA [2009] EWCA Civ 677; [2009] 2 All ER (Comm) 891; [2009] Bus LR 1494; [2010] BCC 348; [2010] 1 BCLC 467; [2009] 2 CLC 10; [2009] BPIR 1304; [2009] 28 EG 84 (CS); (2009) 159 NLJ 1033*, at paragraph 42; and in G. Moss and T. Smith, "Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings", Chapter 8 in G. Moss, I. Fletcher and S. Isaacs (eds), *EU Regulation on Insolvency Proceedings* (3rd edition) (2016, Oxford University Press, Oxford), at 363.

[33] There is one important change, though. Namely, Article 18 recast EIR expressly includes arbitration proceedings apparently adopting the English decision in *Syska v Vivendi*, ibid.

10 Given that the *lex concursus* does not apply concerning the lawsuits pending, any collision is excluded between the *lex concursus* on the one hand and the provisions on the basis of which the jurisdiction of the court hearing the lawsuit pending is based on the other hand. In other words: whatever the *lex concursus* says about the moratorium regarding the lawsuits pending in other Member States is irrelevant. Namely, the consequences of the insolvency shall be drawn solely on the basis of the *lex fori processus*. For this reason, also the lawsuits pending are outside the scope of this paper.[34]

Claims for Performance are out of Scope

11 The main characteristic of insolvency proceedings is that they are collective in nature. The question of distribution of the proceeds or particularly the proceeds of any enforcement actions *vis-à-vis* the estate belongs to the very core of the *lex concursus.*[35] In the system of the EIR the enforcement pertains to the competence of the state where the enforcement is sought.[36] Thus, even if a foreign litigation forum ordered the debtor subject to insolvency proceedings in another Member State to perform a payment, such judgment could only be "enforced" if the state where the enforcement is sought declared such judgment enforceable (exequatur or acceptance by the insolvency practitioner).[37]

12 In the context of insolvency, commercial lawsuits tend to be of a declaratory nature. Their effect is limited to the determination of the existence, legal basis, validity, content or amount of a claim. Even if a judgment formally orders the insolvent defendant to perform, the judgment should be regarded as a declaratory one because the only way to enforce the judgment is, typically, to lodge the claim confirmed by the judgment with the liquidator in compliance with the *lex concursus.* The actual "execution" of the commercial judgment takes place in the framework of the insolvency proceedings: the judgment creditor will have a share from the distribution of the debtor's assets if and as far as the *lex concursus* allows.

Post-opening Commercial Proceedings against the Insolvent Debtor[38]

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[34] However, if the applicable *lex processus* provides for a moratorium and requires the claimant to submit his claim with the insolvency forum instead of the litigation forum then the situation is similar to the one analysed in this paper.

[35] Subject to the exceptions in Articles 5-15 EIR; Articles 8-18 recast EIR.

[36] See Article 25 EIR; Article 32 recast EIR.

[37] A lawsuit is of declaratory nature if *its effect* is merely limited to the determination of the existence, legal basis, validity, content or amount of a claim. Even if a judgment formally ordered the insolvent defendant to perform, the judgment should be regarded as a declaratory one because the only way to enforce the judgment would be to lodge the claim with the liquidator – in compliance with the *lex concursus*.

[38] Actions initiated by the insolvent debtor (typically represented by the liquidator), even those which are not insolvency-related, i.e. based on the general commercial law, are outside the scope of this paper, too, because a moratorium provided by a *lex concursus* will most probably not prevent the debtor from bringing actions *vis-à-vis* third parties.

13 The category of proceedings where the interplay between jurisdiction and the applicable law must be examined, is those "other"[39] civil and commercial proceedings which have been initiated *after the opening* of the insolvency proceedings (that is where they are not pending lawsuits) and do not fall within the category of the insolvency-related actions. These are proceedings the connection of which to the insolvency proceeding is not close enough to qualify them as insolvency-related; according to the Report,[40] these will include actions on the existence or the validity under general law of a claim or relating to its amount, actions to recover another's property the holder of which is the debtor, and, in general, actions that the debtor could have undertaken even without the opening of insolvency proceedings.[41] As a consequence, neither the jurisdiction rules of the EIR[42] nor the simplified recognition and enforcement regime as provided by Article 25(1) of the EIR[43] are applicable regarding these proceedings. Instead, provided that the BR is applicable,[44] the latter will determine which courts have jurisdiction to hear these cases and the mechanism as to how these judgments may be recognised and enforced in other Member States.

The Coexistence of the Rules on Jurisdiction and those on the Applicable Law

14 As discussed, the BR determines the international jurisdiction regarding the post-opening commercial claims against the debtor over which insolvency proceedings have been opened in another Member State. The jurisdiction pursuant to the BR may be conferred on courts of Member States where the insolvency proceedings have been opened. Article 4 of the recast BR states, as a general rule on jurisdiction in the context of the BR, that persons domiciled[45] in a Member State shall be sued in the courts of that Member State. In most cases, this general jurisdictional rule will point to the place of the COMI of the debtor-defendant,[46] that is, principally to the state where the (main) insolvency proceedings have been opened.[47] In such a case, there is no potential for conflict between the *lex concursus* and the provisions on the jurisdiction. However, the BR acknowledges several other grounds of jurisdiction. Such alternative grounds of jurisdiction may be more likely to allocate the jurisdiction to the courts of a Member State which differs from the place where the COMI of the defendant is located. For instance, the place of the performance of the

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[39] See the wording of Article 25(2) EIR, Article 32(2) recast EIR.
[40] Virgós-Schmit Report, at paragraph 196.
[41] Decisions where the courts held that the actions do not fall within the insolvency exception of the BR are e.g. *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB,* above note 7; *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*, above note 7; *German Graphics Graphische Maschinen GmbH v van der Schee*, above note 7; *Hayward (Deceased), Re*, above note 7; *Byers v Yacht Bull Corp*, above note 7.
[42] Article 3(1) EIR (implied), Article 6 recast EIR.
[43] Article 32(1) recast EIR.
[44] See the exclusions in Article 1(2) recast BR. For the interpretation of the phrase "provided that that regulation [the BR] is applicable" in Article 25(2) EIR and 32(2) recast EIR see *German Graphics Graphische Maschinen GmbH v van der Schee*, above note 7, at paragraphs 14-20.
[45] Articles 62-63 recast BR.
[46] See Article 3(1) EIR, Article 3(1) recast EIR.
[47] See Virgós-Schmit Report, at paragraphs 75 and 206.

obligation determines the jurisdiction in contractual matters[48] and the place where the harmful event occurred or may occur determines the jurisdiction in matters relating to tort, delict or quasi-delict.[49] Most importantly, the parties themselves may also choose to submit to the jurisdiction of a certain court (prorogation of jurisdiction).[50]

15 As we have seen regarding the insolvency-related proceedings, the substantive law governing those proceedings is necessarily the *lex concursus*: in order to be qualified as insolvency-related, the action must be based on the applicable insolvency law. By contrast, regarding the post-opening commercial (that is, non insolvency-related) claims against the debtor, the situation is slightly different. The rights and obligations of the parties are created and defined by the ordinary rules of civil, commercial, labour and other law.[51] The mere fact that one of the parties goes insolvent does not change the law governing the contract; for example, a dispute arising under a contract subject to English law should not be decided pursuant to French law just because the obligor is subject to insolvency proceedings in France. Basically, the validity of the contract, the legal basis and the amount or subject-matter of the claim remains to be judged on the basis of the law originally applied to the contract.[52] In the context of the EU, the two most important legal instruments are the Rome I Regulation[53] determining the applicable law in contractual relations and the Rome II Regulation[54] dealing with the law applicable to non-contractual obligations. A basic feature of both regulations is that the parties enjoy a freedom of choice as to the applicable law[55] (although the parties typically make use of this freedom of choice in the case of international commercial transactions falling within the scope of the Rome I Regulation).

16 The fact that the insolvency of the debtor does not change the law governing the contract does not mean that the insolvency proceeding would not affect the litigation at all. Pursuant to Article 4 of the EIR,[56] the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. In other words, the insolvency law of the Member State where the main insolvency proceedings have been opened (the *lex concursus*) universally applies throughout the Member States of the EU. Therefore, in the event

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[48] Article 7(1) BR.
[49] Article 7(2) BR.
[50] Article 25 BR.
[51] M. Virgós and F. Garcimartín, above note 17, at 69.
[52] Unless, of course, if the parties agree to subject the contract to a law other than that which previously governed it. See Article 3(2) of the Rome I Regulation. See 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 2008 L 177/6).
[53] Ibid.
[54] REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199/40).
[55] Article 3 of the Rome I Regulation; Article 14 of the Rome II Regulation. In both instruments, several exceptions to the freedom of choice of law apply.
[56] Article 7 recast EIR.

of insolvency, the parties need to face with possibility that a foreign insolvency law will impact on their rights and obligations.[57] The universal application of the *lex concursus* may only be limited by the exceptions to Article 4 of the EIR as provided by Articles 5-15 of the EIR,[58] and by opening territorial proceeding(s) in other Member State(s).[59] The universal application of the *lex concursus* follows from both the wording of Article 4 of the EIR and Articles 16-17(1) of the EIR[60] expressly widening the effects of the opening of the insolvency proceedings to all Member States. The application of Article 4 of the EIR, and consequently that of the *lex concursus* is independent from the jurisdiction. Not only the courts opening and conducting the insolvency proceedings need to apply the *lex concursus*. On the contrary, whichever court is competent, the law applied (the *lex concursus*) will be the same; it is aimed at all courts in the EU.[61]

17 Consequently, the court before which a post-opening claim against the debtor subject to foreign main insolvency proceeding has been brought needs to take into consideration both the general commercial law governing the case (the *lex causae*) and the insolvency law of the opening state (the *lex concursus*). While the general law, at least in theory, continues to apply to the questions like the validity, the legal and factual basis and the amount or subject of the claim, insolvency law determines the "insolvency effects",[62] for example as to which assets form part of the estate, what effect the opening has on the current contracts of the debtor and how the opening influences the individual proceedings brought by creditors. The scope of the "insolvency effects" is determined by the particular *lex concursus*. However, the non-exhaustive list provided by Article 4(2) of the EIR[63] gives a broad idea of the questions generally belonging to the realm of the *lex concursus*.

18 The example of the *German Graphics* judgment[64] of the Court, which has been criticised by a number of scholars,[65] demonstrates convincingly that the question of

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[57] As to the "hidden bankruptcy clause" and the "risks of internationality" arguments see M. Virgós, "The 1995 European Community Convention on Insolvency Proceedings: an Insider's View" (1998) 25 *Forum Internationale* 1, at 7-8.

[58] Articles 8-18 recast EIR.

[59] In the latter case, the law of the state where the territorial (Article 3(2) EIR, Article 3(2) recast EIR) proceedings have been opened will apply. However, the territorial scope of this *"lex concursus territorialis"* is limited to the Member State where the territorial proceedings have been opened; see Article 3(2) EIR, Article 3(2) recast EIR.

[60] Articles 19-20(1) recast EIR.

[61] M. Virgós and F. Garcimartín, above note 17, at 59. See *Probud*, above note 13.

[62] See M. Virgós and F. Garcimartín ibid, at 73. "[T]he *lex fori concursus* displaces, in so far as insolvency policy requires, the law governing the affected act or right itself."

[63] Article 7(2) recast EIR.

[64] *German Graphics Graphische Maschinen GmbH v van der Schee*, above note 7.

[65] See G. McCormack, above note 17, at 329-330; Z. Crespi Reghizzi, "Reservation of title in insolvency proceedings: Some remarks in light of the German Graphics judgment of the ECJ" in A. Bonomi and R. Gian Paolo (eds), *Yearbook of Private International Law 2010 Vol. XII.* (2011, De Gruyter). Furthermore, regarding the *German Graphics* case see M. Brinkmann, "Der Aussonderungsstreit im internationalen Insolvenzrecht – Zur Abgrenzung zwischen EuGVVO und EuInsVO" (2010) 30(4) Praxis des

the jurisdiction and that of the *lex concursus* should be treated separately. The facts in a nutshell: German Graphics Graphische Maschinen GmbH, a German company, sold machines to a Dutch company called Holland Binding BV, under a contract which included a reservation of title clause. The Dutch company went into involuntary liquidation in the Netherlands. Subsequently, the German court granted the application made by German Graphics for the adoption of protective measures with regard to a certain number of machines situated at the premises of Holland Binding in the Netherlands. That application was based on the reservation of title clause. The question arose in the proceedings before the Dutch courts whether or not the German order should be recognised and enforced in the Netherlands. After diverging rulings passed by the lower courts, the Dutch Supreme Court requested a preliminary ruling from the Court. The question, slightly reshaped by the Court, asked whether as a result of the opening of insolvency proceedings against a purchaser, where the asset covered by the reservation of title is situated in the Member State of the opening of those proceedings, an action brought by the seller against that purchaser based on the reservation of title clause is excluded from the scope of application of the BR.

19 First, the Court, applying the Gourdain test, examined whether or not the German action should be qualified as insolvency related.[66] The Court concluded that the link between the German action and the Dutch insolvency proceedings was neither sufficiently direct nor sufficiently close to exclude the application of BR. German Graphics requested the recovery of assets owned by it and the only question before the court related to the ownership of certain machines situated on the premises of Holland Binding in the Netherlands. The answer to that question of law was independent of the opening of insolvency proceedings. The action concerning the reservation of title clause constituted an independent claim, as it was not based on the law of the insolvency proceedings and required neither the opening of such proceedings nor the involvement of a liquidator. Consequently, the Court held that a claim such as that brought by German Graphics before the German court does not fall outside the scope of application of BR.

20 Second, the Court stated that Article 7(1) of the EIR[67] did not influence the classification of actions having a link with insolvency proceedings. Article 7(1) of the EIR merely states that the opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings. In other words, that provision only constitutes a substantive rule intended to protect the seller with respect to assets which are situated outside the Member State opening insolvency proceedings. In the *German Graphics* case, Article 7(1) of the EIR was

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Internationalen Privat- und Verfahrensrechts 324; Bob Wessels, "On the Edges of the Insolvency Regulation" (2010) 23(2) *Insolvency Intelligence* 22.

[66] *German Graphics Graphische Maschinen GmbH v van der Schee*, above note 7, at paragraphs 21-34.

[67] Article 10(1) recast EIR.

inapplicable anyway, since German Graphics' assets were situated, at the time of the opening of insolvency proceedings, in the Netherlands, that is to say, in the Member State of the opening of those proceedings.[68]

21 Third, the Court ruled out any connection between Article 4(2)(b) of the EIR[69] and the question of jurisdiction. Article 4(2)(b) of the EIR provides that the *lex concursus* shall determine the assets which form part of the estate. The question to be answered was whether Dutch law, which determines the status of the asset sold to the debtor under retention of title, should somehow influence the jurisdiction of the German court to hear the claim brought by the seller of the asset. In other words, can the German court be deprived of the jurisdiction rooted in the BR because the subject of the litigation is potentially part of the estate in the Netherlands? The Court held (as regards the possible effect of Article 4(2)(b) of the EIR on the classification of the lawsuit) that that provision only constituted a rule intended to prevent conflicts of law by providing that the *lex concursus* was to apply in order to determine first, the assets which form part of the estate and second, the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings. That provision had no effect on the scope of the application of the BR.[70]

22 To sum up, the Court stated, on the basis of the Gourdain formula, that an action based on a reservation of title clause *vis-à-vis* a debtor over which insolvency proceedings have been opened in another Member State should not be qualified as insolvency-related. Consequently, the limited *vis attractiva* rule as established in *Seagon*[71] does not come into play: instead, the BR continues to determine the international jurisdiction. However, the application of the BR merely means that the German court had international jurisdiction to entertain the case – and nothing more. The Court did not say in *German Graphics* that the *lex concursus* (here the laws of the Netherlands) would not be applicable for the insolvency aspects of the case. This was simply outside the scope of the judgment. Actually, there is little doubt that, following Article 4(2)(b) of the EIR[72], the German court was (or should have been) obliged to apply the *lex concursus* when deciding whether or not the German claimant was entitled to reclaim the asset sold under retention of title to the purchaser in the Netherlands.

23 Two conclusions of the German Graphics judgments should be highlighted. First, the jurisdictional rules of the EIR have not been widened. The limited *vis attractiva* principle underlying the EIR, as suggested by the Report[73] and confirmed by *Seagon*

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[68] *German Graphics Graphische Maschinen GmbH v van der Schee*, above note 7, at paragraphs 35-36.
[69] Article 7(2)(b) recast EIR.
[70] *German Graphics Graphische Maschinen GmbH v van der Schee*, above note 7, at paragraph 37.
[71] Seagon, above note 7.
[72] Article 7(2)(b) recast EIR.
[73] Actually, the Report is controversial at this point. On the one hand, it stated that the 1995 Insolvency Convention adopted neither the precept not the philosophy of Article 15 of the 1982 Community Draft Convention inspired by the *vis attractiva* theory. That provision conferred on the courts of the state of the opening of insolvency proceedings jurisdiction over a list of actions resulting from the insolvency. On the

remains unchanged: no commercial (i.e. non-insolvency) proceedings other than the insolvency-related proceedings as defined by the Gourdain formula will fall within the scope of the EIR. Second, the judgment confirmed that Article 4(2)(b) of the EIR[74] is only a conflicts of laws provision having no effect on the determination of the jurisdiction in the context of the BR.[75]

The Interpretation of Article 4(2)(f) of the EIR[76]

24 Nevertheless, the relation between the jurisdiction and the law applicable under Article 4 of the EIR[77] is far from resolved. As McCormack notes,[78] *German Graphics* makes no reference to Article 4(2)(f) of the EIR. Indeed, that provision may not be disregarded when considering the effects of the *lex concursus* on the jurisdiction of courts entertaining commercial (that is, non-insolvency based) claims against the debtor. Article 4(2)(f) of the EIR provides that the *lex concursus* shall determine, among others, the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits. The last phrase apparently refers to Article 15 of the EIR[79] providing an exception to the universally applicable *lex concursus* stating that the effects of insolvency on a pending lawsuit shall be governed solely be the law of the Member State where the lawsuit is pending.

25 As discussed, the question of international jurisdiction is a separate one from the question of applicable law.[80] The *lex concursus* has no repercussion on the rules on jurisdiction. This has been held by the Court in *Seagon* regarding the insolvency related actions and in *German Graphics* regarding the non-insolvency related disputes. However, the problem is not that simple. All of the national laws of the Member States are believed to provide for an interruption or suspension of proceedings or at least executions or seizures of property by means of a stay of steps by individual creditors against the debtor or his assets upon insolvency.[81] If the

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other hand, the Report asserted that those actions excluded from the Brussels Convention (the insolvency exception) were subject to the 1995 Insolvency Convention. In effect, the scope of the category of the insolvency-related actions as determined by the case law applying the Gourdain formula is quite similar to the list provided by Article 15 of the 1982 Community Draft Convention. See Virgós-Schmit Report, at paragraph 77.

[74] Article 7(2)(b) recast EIR.

[75] The idea that Article 4 does not concern the question of international jurisdiction found support also before German Graphics: See M. Virgós and F. Garcimartín, above note 17, at 57 and 59.; C. Willemer, above note 2, at 73.

[76] Article 7(2)(f) recast EIR.

[77] Article 7 recast EIR.

[78] G. McCormack, above note 17, at 329.

[79] Article 18 recast EIR.

[80] Contra see S. Bariatti, above note 15, at 32-34; Z. Crespi Reghizzi, above note 65, at 595-598; A. Leandro, "*Effet Utile* of the Regulation No. 1346 and *Vis Attractiva Concursus*. Some Remarks on the *Deko Marty Judgment*" in Andrea Bonomi and Paul Volken (eds), *Yearbook of Private International Law: Volume XI (2009)* (Sellier 2010), at 476-480.

[81] G. Moss and T. Smith, above note 32, at 341-342, 360.

moratorium provided by the *lex concursus* is final,[82] that is, if the *lex concursus* deprives the court having jurisdiction to entertain the commercial claim from actually hearing the case so that the only choice for the creditor to assert his commercial claim is to bring the claim before the insolvency court (or other courts of the state opening the insolvency proceedings), this in effect amounts to a *(de facto) vis attractiva* rule. Further, the scope of this *de facto vis attractiva* rule would be rather broad because it would consist of not only the insolvency-related actions as determined by the Gourdain formula but, what is more important in this context, also the post-opening commercial lawsuits against the insolvent debtor. Thus, the question is whether the moratorium on new lawsuits against the insolvent debtor as provided by the domestic insolvency law of several Member States enjoys a universal (EU-wide) application through Article 4(2)(f) of the EIR.[83]

26 It is remarkable that the Report, explaining Article 4(2)(f) of the EIR,[84] seems to restrict the scope of Article 4(2)(f) suggesting that that provision determines

> "the effects of the insolvency proceedings **on executions** [emphasis added] brought by individual creditors, their suspension or prohibition after the opening of collective insolvency proceedings".[85]

Thus, the Report appears to say that the rather general expression of "proceedings brought by individual creditors" covers individual enforcement actions only.[86] The explanation of Article 15 of the EIR[87] does not clear the fog, either. The Report states that

> "[t]he Convention distinguishes between the effects of insolvency on individual enforcement proceedings and those on lawsuits pending.
>
> The effects **on individual enforcement actions** [emphasis added] are governed by the law of the State of the opening (see Article 4(2)(f)) so that the collective insolvency proceedings may **stay or prevent any individual enforcement action** [emphasis added] brought by creditors against the debtor's assets.

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[82] By contrast, as Westbrook puts it, a temporary stay is a matter of case management. See J. L. Westbrook, "International Arbitration and Multinational Insolvency" (2010-2011) 29 *Penn St. Int'l L. Rev.* 635, at 645.

[83] Article 7(2)(f) recast EIR.

[84] Ibid.

[85] Virgós-Schmit Report, at paragraph 91. This has straightforwardly been confirmed by the Court in *Probud*, above note 13.

[86] Paragraph 190 of the Report does not leave any doubt that the authors use both the expressions „execution" and enforcement in the same sense.

[87] Article 18 recast EIR.

> Effects of the insolvency proceedings on other legal proceedings concerning the assets or rights of the estate are governed (ex Article 15) by the law of the Contracting State where these proceedings are under way." [88]

27. Thus, on the one hand, the Report asserts that Article 4(2)(f) of the EIR[89] deals with individual enforcement actions; the *lex concursus* determines whether or not individual enforcement actions against the debtor may be brought. On the other hand, the Report makes it clear that the "other legal proceedings underway" (pending lawsuits) are governed by the *lex fori* processes so that the implications of the insolvency proceedings are to be determined by that law.[90] However, the Report conspicuously avoids answering the question how, if at all, the *lex concursus* affects the post-insolvency declaratory (non-enforcement) actions against the debtor, given that where the commercial court simply passes a ruling on the validity, legal basis or the amount of the claim this will be a declaratory judgment and will not fall within the scope of an "enforcement action". Whether or not the moratorium provided by the *lex concursus* inhibits the commencement of such declaratory actions against the insolvency debtor is left unanswered by the Report.[91]

28. The textbook written by Virgós and Garcimartín[92], which is often cited by courts and in the opinions of advocate generals,[93] elaborates on this question. First, regarding the *vis attractiva* principle, the authors ask the question:

> "Take the example of a claim, the existence or amount of which is disputed between the parties: a creditor files his claim in insolvency proceedings opened in State 1, where the claim is contested by the liquidator on the basis of general contract law […]; the contract contained a clause submitting any dispute to the exclusive jurisdiction of the courts of State 2. Does the opening of insolvency proceedings in State 1 prevent the creditor from having

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[88] Virgós-Schmit Report, at paragraph 142.
[89] Article 7(2)(f) recast EIR.
[90] See *Syska v Vivendi*, above note 32; *Mocover Beheer BV and anonymous natural person [claimant 2] v Clemar NV, and others*: Rechtbank Rotterdam 1 May 2013, ECLI:NL:RBROT:2013:CA3395; OLG Celle v 27112012 - 2 U 147/12.
[91] Balz concisely states that the stay is governed by the *lex concursus*. See M. Balz, above note 8, at 507-8.
[92] M. Virgós and F. Garcimartín, above note 17.
[93] See *Syska v Vivendi*, above note 32, at paragraph 22; See the judgment of the court of first instance in *Syska v Vivendi*: *Syska v Vivendi Universal SA* [2009] EWCA Civ 677; [2009] 2 All E.R. (Comm) 891; [2009] Bus. L.R. 1494; [2010] B.C.C. 348; [2010] 1 B.C.L.C. 467; [2009] 2 C.L.C. 10; [2009] B.P.I.R. 1304; [2009] 28 E.G. 84 (C.S.); (2009) 159 N.L.J. 1033, at 30-35, 51, 58, 61, 83, 90; *Seagon v Deko Marty Belgium NV* (Case C-339/07) [2009] ECR I-767, Opinion of GA Colomer, at notes 37, 38, 39 55; *Lutz v Bauerle* (Case C-557/13) [2015] ECLI:EU:C:2014:2404, Opinion of GA SZPUNAR, at note 16 and several others; *Re Eurofood IFSC Ltd* (Case C-341/04) [2005] BCC 1021, Opinion of GA Jacobs, at note 4 and others; *Rodenstock GmbH, Re* [2011] EWHC 1104 (Ch); [2011] Bus LR 1245; [2012] BCC 459; [2011] ILPr 34, at paragraph 48 etc.

> recourse to the courts of State 2 to demonstrate that his claim is well founded?" [94]

The authors' answer is:

> "[…] in the insolvency proceedings opened in Member State 1, the disputed claim would be accepted as *a conditional or contingent claim* [italics in original]. Meanwhile, **the creditor may bring his case to the courts of Member State 2 and obtain a money judgment fixing the amount of his claim** [emphasis added]. This judgment cannot be directly enforced in State 2 because this state must recognize the insolvency proceedings opened in State 1 and the effects thereof, in particular the stay of executions by individual creditors. However, pursuant to regulation 44/2001 the money judgment has, in its turn, to be recognized in State 1, which means that this claim must be admitted in the insolvency proceedings opened in State 1."[95]

29 Elaborating the effects of the *lex concursus* on proceedings brought by individual creditors, the reputable commentary states that the term "proceedings" in Article 4(2)(f) of the EIR[96] is broad enough to encompass all kinds of procedures brought about by individual creditors, including enforcement measures. Given that the list provided by Article 4(2) of the EIR[97] is non-exhaustive, the basic rule remains: unless otherwise provided for by the EIR, the *lex concursus* govern all the effects of the insolvency proceedings.[98] Then the authors carry on:

> "(i) The effects of individual enforcement actions, both pending and future, are always determined by the *lex fori concursus* […]
>
> (ii) The effects on the continuation of *lawsuits pending* at the moment of the opening of the insolvency proceedings are, by way of exception, determined by the law of the State where the lawsuit is pending (Article 15)
>
> (iii) The effects on commencement, after the opening of insolvency proceedings, of *new lawsuits* are governed by the *lex fori concursus*, **with one important exception: international jurisdiction** [emphasis added]. The *lex concursus* will determine

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[94] M. Virgós and F. Garcimartín, above note 17, at 58.
[95] Ibid.
[96] Article 7(2)(f) recast EIR.
[97] Article 7(2) recast EIR.
[98] M. Virgós and F. Garcimartín, above note 17, at 76; The court of first instance in *Syska v Vivendi*, see above note 93, discussed the interpretation of the phrases "proceedings brought by individual creditors" and "lawsuit pending" and the related passages of the Report and the commentary of M.Virgós and F. Garcimartín at some length. Further, see G. Moss and T. Smith, above note 32, at 342.

> the necessary procedural modifications which result from the divestment of the debtor (e.g. actions will have to be filed by or against the liquidator) and may impose **a temporary stay** [emphasis added] to enable the liquidator to make an inventory of the debtor's position. But the international jurisdiction to entertain new actions will be determined by the Insolvency Regulation itself, in the case of insolvency-derived actions, or by the ordinary rules, including the Regulation 44/2001 on civil jurisdiction and other international instruments, in other cases."[99]

30 Thus, the Virgós-Garcimartín textbook seems to go further than the Report acknowledging that Article 4(2)(f) of the EIR[100] governs all effects of the insolvency proceedings, including *all kinds of post-opening procedures* brought by individual creditors.[101] Still, the authors refer to one important exception, namely the international jurisdiction. In other words, the *lex concursus* does not affect the international jurisdiction. Even if the *lex concursus* is based on a strict *vis attractiva* rule, that will not deprive the courts having jurisdiction for the contractual claim from the jurisdiction.

31 On the basis of the discussion of the *"de facto vis attractiva"* thus far, one may argue that a *lex concursus* providing a non-temporary moratorium preventing creditors from commencing commercial actions outside the insolvency proceedings does create a *de facto exclusive jurisdiction* in favour of the insolvency forum. However, a broad *vis attractiva principle* was not intended to be adopted by the drafters of the EIR.[102] While regarding the insolvency-related actions the jurisdiction is implied in Article 3(1) of the EIR,[103] the non-insolvency related proceedings remain within the scope of the BR. By accepting the *de facto vis attractiva* principle (thus the *de facto* exclusive jurisdiction of the insolvency forum) regarding the non-insolvency related actions one would necessarily violate the jurisdictional provisions of the BR. Although this point is not elaborated in the Virgós-Garcimartín text,[104] it may be indirectly supported by the phrase used by the authors, namely that the l*ex concursus* may impose a temporary stay to enable the liquidator to make an inventory of the debtor's position. It is submitted that this is intended to suggest that the impact of the *lex concursus* on the right of the insolvency court having jurisdiction to hear the case is not unlimited; while a temporary stay may be included, the impact of the *lex concursus* should not reach the level of the *"de facto vis*

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[99] M. Virgós and F. Garcimartín, above note 17, at 76-77; italics in original. In *Kepler*, the Court confirmed that the words „lawsuits pending"cover only proceedings on the substance; See *LBI hf v Kepler Capital Markets SA and Frédéric Giraux* (Case C-85/12) [2013] ECLI:EU:C:2013:697, at paragraph 54.

[100] Article 7(2)(f) recast EIR.

[101] See *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 1864 (Comm); [2015] 2 BCLC 307, at paragraph 79: "There is no limitation on the proceedings affected by the winding-up proceedings: it applies to *any lawsuits* [emphasis added] brought by individual creditors (save for lawsuits pending)."

[102] Virgós-Schmit Report, at paragraph 77.

[103] See Article 6 recast EIR.

[104] M. Virgós and F. Garcimartín, above note 17.

attractiva" by imposing a final moratorium on new lawsuits in other Member States.[105]

Cases where the Courts have recognised the *"de facto vis attractiva"* Principle

European Commission v. AMI Semiconductor Belgium BVBA[106]

32 The Commission and the defendants entered into a contract in 1998 in the framework of the Esprit programme. Having taken the view that the services provided by the defendants were defective, the Commission terminated the project prematurely and sued the defendants, as joint and several debtors, for repayment of the advances. The claim was brought in August 2002 after the entry into force of the EIR. One of the relevant issues was the admissibility of the claim given that in respect of two defendants, an Austrian company and a German company, insolvency proceedings had already been opened at the time of the commencement of the proceeding (but after the entry into force of the EIR). The jurisdiction of the Court was based on the agreement of the parties as enabled by *ex* Article 238 TEC.[107] The Court ruled that the Commission's action against the insolvency defendant was inadmissible. The relevant part of the judgment is this:

> "[The Court have jurisdiction to deal with disputed between the parties.] 67. Nevertheless, the question has arisen of how that jurisdiction is to be exercised *vis-à-vis* a party against which insolvency proceedings have been instituted. That question must be examined in the light of the procedural law applicable in the Court of Justice.
>
> 68. Given that neither the Statute of the Court of Justice nor its Rules of Procedure contain any specific provisions concerning the treatment of applications brought against parties against which insolvency proceedings have been commenced, it is necessary to deduce what rules are applicable **from the principles common to the procedural laws of the Member States in this area** [emphasis added].
>
> 69. In that connection, it appears that in the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible.

[105] C. Willemer is of a different view. See above note 2, at 329-347.
[106] *Commission of the European Communities v AMI Semiconductor Belgium BVBA and Others* (Case C-294/02) [2005] ECR I-2175.
[107] Article 272 TEU.

> Moreover, the Member States are required, on a mutual basis, to respect proceedings commenced in any one of them. That is clear from **Article 4(2)(f) of Regulation No 1346/2000** [emphasis added] according to which the law governing the effects of insolvency proceedings brought by individual creditors is that of the State in which they were opened, which in this case means Austrian law and German law. Furthermore, by virtue of Articles 16 and 17 of the same regulation, the opening of insolvency proceedings in a Member State is to be recognised in all the other Member States and is to produce the effects attributed thereto by the law of the State in which the proceedings are opened.
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> 70. As the Advocate General observed in points 84 and 85 of her Opinion, the aim of Regulation No 1346/2000 is, as is clear in particular from recitals 2, 3, 4 and 8 in its preamble, to ensure the efficiency and proper coordination of insolvency proceedings within the European Union and thus to ensure equal distribution of available assets amongst all the creditors. **The Community institutions would enjoy an unjustifiable advantage over the other creditors if they were allowed to pursue their claims in proceedings brought before the Community judicature when any action before national courts was impossible** [emphasis added]."

33 It is not completely clear what is the role of "the principles common to the procedural laws of the Member States" in the argument, because the judgment itself identified the Austrian and German insolvency laws as the relevant *lex concursus*. What is more important from our point of view is that in its judgment the Court seemed to recognise the *"de facto vis attractiva"* effect of the *lex concursus* via Articles 4(2)(f), 16 and 17 of the EIR.[108] The Court took into consideration that the Commission would have enjoyed an unjustifiable advantage over the other creditors if they had been allowed to pursue their claims in proceedings brought before the Community judicature when any action before national courts was impossible. This piece of the reasoning suggests, however, that what was found inadmissible was only bringing a *claim for satisfaction* before a court outside the state of the opening of the insolvency proceedings.

34 Alternatively, the Commission sought a declaratory judgment *vis-à-vis* those defendants who were subject to insolvency proceedings in Germany and Austria respectively, in order to prove the debts payable to it for the purpose of pursuing them in the national insolvency proceedings.[109] Thus, the Court directly faced the question whether or not post-insolvency declaratory proceedings (determining the

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[108] Articles 7(2)(f), 19 and 20 recast EIR.

[109] *Commission of the European Communities v AMI Semiconductor Belgium BVBA and Others*, above note 106, at paragraph 73.

validity, legal basis and amount of the claim) may be brought outside the scope of the insolvency proceedings opened in another Member State.

35 The Court rejected the alternative claim as inadmissible for procedural reasons because the additional alternative claim had been delayed. Despite this, the Court addressed the substantive legal issue as to the question of admissibility of a declaratory claim against the insolvent debtors.

> "76. Second, the relief sought falls outside the authority conferred on the Court of Justice by the arbitration clause in this case, which limits its jurisdiction to 'any dispute between the Commission and the contractors', and **an application seeking a finding which is to be relied on in insolvency proceedings implies the involvement of other parties, namely the other creditors of the insolvent undertaking** [emphasis added]. In that connection, it should be emphasised that the Commission has not taken any steps with a view to involving those parties in the present proceedings.
>
> 77. Finally, **the considerations set out in paragraphs 68 to 70 of this judgment are also applicable to the Commission's additional claims** [emphasis added], and the latter must be declared inadmissible for that reason."

36 First, the Court referred to the other creditors who should have been involved in the commercial proceedings. Unfortunately, the Court did not elaborate on the kind of legally protected interests the creditors of the defendant may have had in commercial proceedings between the contracting parties (that is, the Commission and the insolvent defendants) where the only aim of the proceedings was to rule on the existence and amount of the contractual claim against the defendants. It is difficult to imagine how the interest of the other creditors, or even the fact that the defendants were insolvent, could influence the outcome of a commercial legal dispute the subject matter of which were the services of the defendants, asserted by the claimant to be defective and which had been performed prior to the opening of the insolvency proceedings. Second, the Court indicated that the considerations set out regarding the claim for performance (that is, the first cause of action) were also applicable to the secondary cause of action seeking a declaratory judgment. Given that no further explanation is provided, one may struggle to see any unjustifiable advantage enjoyed by the claimant over the other creditors if the claimant were allowed to pursue its declaratory claims in proceedings brought before the Community judicature having jurisdiction to hear those claims, if the ranking and satisfaction of those claims are governed by the *lex concursus*.

37 In *AMI Semiconductor* the Court interpreted the *(de facto) vis attractiva* rule extremely widely and found that the declaratory claims against the insolvent debtor were also inadmissible. On the other hand, it is questionable whether the Court in

this judgment took a general position on the scope of the jurisdiction of the insolvency forum and on the *vis attractiva concursus* as a general principle. Namely, the issue at stake was limited to assessing whether the Commission as the institution of the EU (as opposed to other creditors) could bring individual actions against a debtor that was subject to insolvency proceedings.[110]

Erste Bank Hungary[111]

38 The facts of the case in short are these: Main insolvency proceedings over an Austrian debtor were opened in Austria. Erste Bank Hungary (Erste), a Hungarian entity brought an action before the Municipal Court (Fővárosi Bíróság, Hungary) against, among other defendants, the Austrian debtor. Erste sought a declaratory judgment *vis-à-vis* the Austrian defendant to the effect that it had a right over a security deposit. The first instance court ruled that since insolvency proceedings against the Austrian defendant had already been opened in Austria, Austrian insolvency law was the law applicable to the insolvency proceedings and its effects. As Austrian law excludes the possibility of bringing an action against an economic operator in liquidation in respect of the assets relating to the insolvency, no action could be brought against the insolvent Austrian company. Accordingly, the Municipal Court delivered an order removing the case from the register. Following an appeal by Erste, the Court of Appeal (Fővárosi Ítélőtábla), basing its decision on Article 4(1) of the EIR,[112] confirmed the order passed at first instance by the Municipal Court. It also pointed out that it is Austrian law that determines whether Erste may obtain a declaratory judgment that it has a right over the security deposit in question.[113]

39 As can be seen, the position of the courts of the first and second instance was that the Austrian insolvency law as *lex concursus* and applicable through Article 4 of the EIR,[114] deprived the Hungarian courts, whose jurisdiction stems from the BR, from the power to hear the case. As a consequence, the claimant should have asserted its claim *vis-à-vis* the insolvent debtor in the Austrian insolvency proceedings. In other words, the Hungarian courts in effect, through the conflict of laws provision of Article 4 of the EIR, recognised the priority of the Austrian insolvency proceedings

[110] Ibid. at 35-36.
[111] Kúria (Supreme Court of Hungary) Gfv.VII.30.236/2012/5. The decisions referred to in this section are the judgments delivered by the first and second instance courts.
[112] Article 7(2)(f) recast EIR.
[113] The claimant then appealed the case to the Legfelsőbb Bíróság (Supreme Court of Hungary, from 1 January 2012: Kúria). The Supreme Court was of the view that, being the subject matter of the case a security deposit situated in Hungary (i.e. outside the state of the opening of the insolvency proceedings), Article 5 EIR (Article 8 recast EIR) applies. Accordingly, the Supreme Court reversed the decisions of the lower courts. See *ERSTE Bank Hungary Nyrt v Hungary* (Case C-527/10) [2012] I.L.Pr. 38; A. Csőke, *A határokon átnyúló fizetésképtelenségi eljárások [Cross-border insolvency proceedings]* (2nd ed) (2016, HVG-ORAC, Budapest), at 254-257.
[114] Article 7 recast EIR.

over the jurisdiction of the Hungarian courts despite the fact that the jurisdiction of the Hungarian courts stemmed from the binding and directly applicable BR.[115]

Lornamead Acquisitions Ltd v. Kaupthing Bank HF[116]

40 This is a case which is based on the on the Reorganisation and Winding-up of Credit Institutions Directive[117] (2001 Directive) and the Credit Institutions (Reorganisation and Winding-up) Regulations 2004 (SI 2004/1045) by which the UK implemented that directive. However, since the regime set up by the Directive is comparable with (though not fully identical to) the system set up by the EIR, the decision may be of some relevance.

41 An English claimant brought a declaratory claim against an insolvent Icelandic bank. The English court had jurisdiction under the Lugano Convention 1988.[118] The English judge opined[119] that if the Icelandic bank against which the English claimant had brought a claim in England were indeed subject to an insolvency measure, any attempt by the UK court to determine the merits of the claim, would have undermined the purpose of the 2001 Directive, namely to give effect throughout the EEA to all aspects of the relevant insolvency regime of a credit institution's home state, as part of one universal and unitary process, including its moratorium and dispute resolution mechanisms. It would also undermine the role of the Icelandic court, as the supervisory court of the defendant's insolvency. Accordingly, the UK court should stay the English proceedings, so that the claim could be resolved in the liquidation proceedings in accordance with the Icelandic insolvency provisions. According to J. Gloster it would be wrong if a claimant under a contract were entitled to initiate proceedings in the UK, when it would have no such right in the *lex concursus*. Moreover, a credit institution subject to an EEA insolvency measure which was denied full effect in the UK would be exposed to the risk of uncontrolled litigation. Unlike an ordinary company, there would be no prospect of obtaining any insolvency protection at all, because of the exclusion of the UK insolvency proceedings.[120] Neither the 2001 Directive, nor the 2004 Regulations, provide any sort of carve out, or statutory exception, for claims simply on the grounds that they are governed by contractual exclusive jurisdiction clauses.

42 In this case the UK court gave a straightforward and well-reasoned answer to the initial question. Pursuant to this court, the purpose of the 2001 Directive is to give effect throughout the EEA to all aspects of the relevant insolvency regime of a credit

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[115] Article 5(1)(a) of the 44/2001 Regulation; Article 7(1)(a) recast BR.
[116] *Lornamead Acquisitions Limited v Kaupthing Bank HF* [2011] EWHC 2611 (Comm); [2013] 1 BCLC 73.
[117] Directive 2001/24/EC, OJ 2001 L 125/15
[118] CONVENTION on jurisdiction and the enforcement of judgments in civil and commercial matters Done at Lugano on 16 September 1988 (88/592/EEC) (OJ 1988 L 319/9).
[119] See *Lornamead Acquisitions Limited v Kaupthing Bank HF*, above note 117, at paragraphs 94-95.
[120] See Article 3 of the Credit Institutions (Reorganisation and Winding-up) Regulations 2004 (SI 2004/1045).

institution's home state, as part of one universal and unitary process, including its moratorium and dispute resolution mechanisms. Thus, the *lex concursus* applies and the moratorium prevents the UK court even from deciding on a declaratory claim despite the fact that the UK court has jurisdiction arising from the Lugano Convention. However, the decision seems to have been influenced by the special rules on the reorganisation and winding-up of credit institutions.[121]

Tchenguiz v Grant Thornton UK LLP[122]

43 The factual and legal basis of this case was similar to the one of the *Lornamead* decision referred to above. The Icelandic bank sought dismissal or stay of the proceedings against it on two independent grounds. The first ground was that the claimants were barred from bringing the proceedings against Kaupthing under Icelandic law, which had effect in England under the 2004 Regulations. As to this issue, the judge referred to *Lornamead*[123] as a main authority[124] and concluded that the prohibition on proceedings as provided by the Icelandic law was effective in England.

44 The Icelandic bank as defendant also contended that the claims against them fell within the insolvency exception in Article 1(2)(b) of the (new) Lugano Convention[125] being identical to the corresponding insolvency exception of the BR.[126] The UK court, considering the relevant case law of the Court, concluded that the connection to the winding up proceeding in Iceland was not sufficiently close to qualify the claim as insolvency-related.[127] Consequently, the judge found that the claims against the Icelandic defendant fell within the Lugano Convention and not excluded by Article 1(2)(b) thereof.[128] The judge cited *AMI Semiconductor* with approval, emphasising that in that case the questions of choice of law were dealt with distinctly from questions of jurisdiction.

> "Having decided that it had jurisdiction, the court went on to consider choice of law. It decided, by analogy with national proceedings, that Article 4(2)(f) of the Insolvency Regulation required reference to the rules of the state in which the insolvency proceedings were opened. On that basis the mandatory stay arising under Austrian and German law was to apply."[129]

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[121] Ibid.
[122] *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 1864 (Comm); [2015] 2 BCLC 307.
[123] See *Lornamead Acquisitions Limited v Kaupthing Bank HF*, above note 117.
[124] See *Tchenguiz v Grant Thornton UK LLP*, above note 123, particularly at paragraphs 52, 66.
[125] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ *2000 L 339/3)*.
[126] Article 1(2)(b) recast BR.
[127] *Tchenguiz v Grant Thornton UK LLP*, above note 123, at paragraph 140-157.
[128] Ibid, at paragraph 158.
[129] See *Tchenguiz v Grant Thornton UK LLP*, above note 123, at paragraphs 58-59.

45 What can be seen in the decisions referred to above is that the courts, despite having jurisdiction under the BR (or its counterpart, the Lugano Convention), acknowledged the priority of the *vis attractiva* principle of the state of the opening of the insolvency proceeding. By doing so, these decisions *in effect* established the lack of their jurisdiction in defiance of the clear-cut provisions of BR.

Cases where the Courts rejected the *"de facto vis attractiva"* Principle

Gibraltar Residential Properties Ltd v Gibralcon[130]

46 The claimant, GRPL, a company registered in Gibraltar, had engaged Gibralcon, a company registered in Spain, to construct part of a substantial property development scheme in Gibraltar. The contract was subject to the laws of Gibraltar and the parties submitted to the exclusive jurisdiction of the courts of England and Wales. Main insolvency proceedings opened over the Spanish contractor in Spain. Subsequently, GRPL issued proceedings in the United Kingdom, making a number of claims under the contract. GRPL submitted that the UK had exclusive jurisdiction to hear the claims on the basis of the jurisdiction clause contained in the contract. Gibralcon, on the other hand, sought declarations that the English courts had *no jurisdiction* because of the insolvency proceedings opened in Spain. It argued that the insolvency exception in the BR applied and that the amounts due under the contract were to be determined by the Spanish administrators. Gibralcon also asserted that the *vis attractiva* principle followed by the Spanish Insolvency Act applied also in international context and not only for domestic proceedings.[131]

47 Prior to the hearing, the Commercial Court in Madrid made an order declaring that the UK court "*does not have jurisdiction* [emphasis added] to adopt any kind of measures, either precautionary or executive, relating to the assets or rights comprising the company equity of [Gibralcon]". In addition, the Spanish court requested the English court to abstain from hearing the case.[132]

48 In the English court, the judge first made it clear that the English court would do no more than to pass a declaratory judgment regarding the claim of GRPL and would not interfere anyhow in the Spanish insolvency proceedings:

> "13 I should say at once, so that there is no misunderstanding about it, that because Gibralcon is now the subject of insolvency proceedings […] this court would not make orders directing Gibralcon to pay money to GRPL if the court found that […] money was owed by Gibralcon to GRPL. Instead, the court would make declarations in relation to the matters set out above […] so

[130] *Gibraltar Residential Properties Ltd v Gibralcon* [2010] EWHC 2595 (TCC); [2011] BLR 126; [2011] ILPr 27.
[131] Ibid, at paragraphs 38-49.
[132] Ibid, at paragraph 7.

> that GRPL could prove that debt in the Spanish insolvency proceedings.
> 14 So I must make it entirely clear that this court, having made declarations as asked, would then leave the question of GRPL's entitlement to payment to be dealt with in the insolvency proceedings in Spain. In the alternative, if it was found that a net sum was due to Gibralcon, the court would make directions for payment of that sum to the administrators in Spain or, at least, order a stay of such payment in order to give the administrators an opportunity to intervene and seek an appropriate order from this court.
>
> 15 Accordingly, there is no question whatever that this court would take any step to prejudice or interfere with the Spanish insolvency proceedings. This court **will do no more than determine the rights of the parties under this contract, disputes which are subject to the exclusive jurisdiction of the courts of England and Wales, and make declarations accordingly, and, in particular, determine so far as it can which party is owed money by the other and how much** [emphasis added].
>
> 52 […] [T]his court would not seek to enforce its decisions given the existence of the insolvency proceedings in Spain. So if GRPL receives decisions that are in its favour from this court, **it must lodge its claim in the Spanish insolvency proceedings. There will be no question of enforcement in this jurisdiction** [emphasis added]."

49 Second, the judge distinguished between the scope of the BR and the EIR regarding jurisdiction. He stated, referring to *German Graphics* as principal authority,[133] that

> "28 [i]t is now established that the fact that a defendant in commercial proceedings is the subject of insolvency proceedings in another Member State is not of itself a ground for depriving the Jurisdiction and Judgments Regulation of application: see the decision of the European Court of Justice in *German Graphics Graphische Maschinen GmbH v Van der Schee* [2010] I.L.Pr. 1, which followed the earlier decisions of the ECJ in *Gourdain v Nadler* [1979] ECR 733, and *Seagon v Deko Marty Belgium NV* [2009] 1 WLR 2168."

[133] See G. McCormack, above note 17, at 330.

> "37 I consider that the Insolvency Regulation 1346/2000 [EIR] and the Jurisdiction and Judgments Regulation 44/2001 [BR] are intended to provide mutually exclusive codes in relation to jurisdiction: the former is confined to insolvency and analogous proceedings, whereas the latter applies to other civil and commercial proceedings […]."

50 Third, the interplay between Article 4 of the EIR[134] and the question of jurisdiction was addressed. Gibralcon's main argument was based on Article 4(2)(f) of the EIR[135] stating that Spanish law as *lex concursus* determined the effects of insolvency proceedings on proceedings brought by individual creditors.

> "34 […] Article 4 is headed »Law applicable«. So this article, as both this heading and its text indicates, is concerned with applicable law, not with questions of jurisdiction. This is for the simple reason that art. 3 of the Regulation deals with jurisdiction and provides for international jurisdiction to open insolvency proceedings."

51 Thus, the English court clearly rejected the argument that the *lex concursus*, through Article 4 of the EIR,[136] can even indirectly, affect the jurisdiction of the court whose jurisdiction is rooted in the BR. By contrast, the English court (having jurisdiction) held that it was entitled to hear the case on its merits and to pass a declaratory judgment on the rights and obligation of the parties.

52 Finally, the judge, considering the legal position elaborated above went on (perhaps unnecessarily) to examine the *vis attractiva concursus* according to Spanish law. Apparently, Spanish insolvency law followed the *vis attractiva* principle in providing that the jurisdiction of the Insolvency Court was exclusive and excluded all others in both civil actions with an economic impact lodged against the insolvent debtor's estate.[137] It is not an ambition of this paper to analyse the Spanish *vis attractiva* rule. However, the opinion of Professor Virgós, who acted as GRPL's expert witness in the English proceedings, is remarkable and concerns not only the Spanish law. He was asked to interpret Article 11 of the Spanish Insolvency Act which limited the scope of the Spanish *vis attractiva* rule in the international arena. He opined that the *vis attractiva* rule as provided by the Spanish law was limited to the domestic field.

> "42 […] He [Prof. Virgós] says that it is only for domestic litigation that the *vis attractiva concursus* applies: **otherwise, the Spanish judge would have to be transformed into what he**

[134] Article 7 recast EIR.
[135] Article 7(2)(f) recast EIR.
[136] Article 7 recast EIR.
[137] *Gibraltar Residential Properties Ltd v Gibralcon*, above note 131, at paragraph 38.

> **called a sort of »Judge Hercules« capable of dealing with whatever action under whatever law** [emphasis added]. He says that **to permit this would result in conflicts of jurisdiction with foreign courts** [emphasis added]."

53 This points to another aspect of the question. However broadly a *vis attractiva* principle is interpreted, it must be noted that the commercial proceedings *vis-à-vis* the debtor are basically governed by the law as determined by the Rome regime, that is, typically by the law chosen by the parties (excluding the insolvency effects)[138]. In other words, even if the *vis attractiva* principle were very broad and all of the post-commencement claims brought against the debtor were forced to the insolvency forum, this would not change the law applicable for the litigation. Thus, the insolvency forum would need to decide the case on the basis of the general (i.e. non-insolvency) law which governs the contract: questions like warranty claims, defective performance, compensation, or pre-insolvency interest rates would be decided by the law chosen by the parties. The court of the state where the insolvency proceedings are opened may face real difficulties in solving complex legal issues subject to a foreign law. Consequently, the life of the insolvency judges of the opening state may be easier if a foreign court having jurisdiction pursuant to the general (that is, non-insolvency) rules does the job and delivers a declaratory judgment determining the existence and the amount of the claimant's claim[139] leaving it to the claimant to try to enforce his claim in the framework of the insolvency proceedings.

54 To sum up, the judge in *Gibralcon* ruled that on the basis that the exclusive jurisdiction of the UK court had been conferred by the BR, this court was entitled to decide the case. However, this ruling was declaratory in its nature, in the sense that the prevailing party would need to lodge its claim with the Spanish liquidator and that Spanish insolvency law would apply regarding the enforcement. Despite of all the elegance, simplicity and practicality of the solution chosen by the English judge, however, it was not fully compliant with the wording of the EIR. The EIR provides that the effects of the insolvency (moratorium included) are to be determined by the *lex concursus*. But how could a universal *vis attractiva* rule be reconciled with the exclusive jurisdiction of the foreign courts? This is contradiction between the regimes set up by the EIR and the BR which cannot be solved without apparently violating the provisions of the one or the other instrument.[140]

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[138] See above, at paragraph 15.

[139] This argument appears also in other decisions. See *Fondazione Enasarco v Lehman Brothers Finance SA*, above note 24, at paragraphs 57-58; *UBS AG v Omni Holding AG (in Liquidation)*, above note 7.

[140] By contrast, the authors of the Heidelberg-Vienna Report are of the view that if the *lex concursus* bars individual creditors from enforcing their claim against the debtor outside the insolvency proceedings, this dictum claims validity in all other Member States by virtue of universality. *In this regard, Article 4(2) EIR has jurisdictional effect*. The authors of the Report opine that this aspect was overlooked in *Gibralcon*. See B. Hess, P. Oberhammer and T. Pfeiffer, *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings (Heidelberg-Luxembourg-Vienna Report)*

Conclusion

55 The main points of this paper can be summarised as follows:

a) The EIR and the BR are intended to be mutually exclusive. Proceedings which do not fall within the EIR will generally fall within the scope of the BR.
b) The EIR follows a limited *vis attractiva rule*: only the insolvency-related actions as determined by the Gourdain test are attracted by the main insolvency proceeding opened in another Member State.
c) By contrast, jurisdiction over the other actions, for example, claims based on the general law against the insolvent defendant, are determined by the BR.
d) A non-temporary moratorium provided by the *lex concursus* and given effect in other Member States by Article 4(2)(f) of the EIR[141] prohibiting any other courts but the insolvency forum to hear the actions against the insolvent defendant amounts, in effect, to a *de facto vis attractiva* rule. In other words, such a moratorium, in effect, confers *de facto* exclusive jurisdiction on the insolvency forum because any other forum is supposed to be deprived of the power to hear the case. This *de facto vis attractiva* rule is in conflict with the rules on jurisdiction as determined directly by the BR.
e) Thus, should a court recognise the *de facto vis attractiva* principle and abstain from hearing the case, this is not in compliance with the jurisdictional rules as determined by the binding and directly applicable BR.
f) By contrast, should a court insist on exercising its jurisdiction and hear the case, by doing so the court would violate Article 4 of the EIR,[142] at least the literal meaning thereof, which attributes a universal effect to the moratorium provided for by the *lex concursus*.

56 However, the territory of the conflict is rather narrow: it is limited to the declaratory aspects of actions brought against the debtor after the opening of the insolvency proceedings. Actions brought prior to the opening of the insolvency proceeding (pending lawsuits) fall within the exception provided by Article of the 15 EIR[143] thus Article 4 of the EIR[144] does not apply here. Actions for performance clearly fall within the scope of the *lex concursus;* in those cases the *lex concursus* will determine how such claims can be enforced *vis-à-vis* the debtor in or outside the framework of the insolvency proceedings.

<http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>, at 194-195. A. Csőke is also of the view that Gibralcon was wrongly decided, above note 114, at 233-236.

[141] Article 7(2)(f) recast EIR.

[142] Article 7 recast EIR.

[143] Article 18 recast EIR.

[144] Article 7 recast EIR.

57 It could be said that the conflict is an ostensible one because it originates merely from the wording of Article 4(2)(f) of the EIR.[145] However, the fact that the case law is divergent shows that it is about a real issue. Apparently, the conflicting provisions give rise to legal uncertainty. Since the recast EIR has not brought any changes in this field[146] it is to be assumed that the Court will have the last say in this question.

58 It is submitted that the approach applied by the English court in *Gibralcon* is more justifiable:

- The BR, rather than the applicable law determines the jurisdiction.
- The legitimate expectation of the parties is protected as far as possible: the existence and amount of the claim is established by the court the jurisdiction of which they agreed on or at least were able to foresee.
- The collective interests of the body of the stakeholders in the insolvency proceedings must also be taken into consideration; no foreign judgment will be enforced *vis-à-vis* the insolvent debtor unless the applicable insolvency law (*lex concursus*) allows.
- The commercial litigation will be heard and decided by a court most probably the best suited to deal with it; the one chosen by the parties or otherwise determined by the BR. This may be of great assistance to the insolvency forum as it is not required to decide commercial cases likely to be governed by a foreign law and potentially based on foreign language documents.

[145] Article 7(2)(f) recast EIR.
[146] See B. Hess, P. Oberhammer and T. Pfeiffer, above note 141, at 253-254.