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von

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right holder and the liquidator.[417] From a jurisdictional perspective, it is irrelevant whether the asset over which the security right is created forms part of the insolvency estate[418] or whether it is not affected by the opening of insolvency proceedings (as is the case with the right to segregate)[419].

The Advocate General *J.Mazák* ignored this aspect in his opinion in the *ERSTE Bank* case, as he assumed annex jurisdiction on the basis of Article 3 EIR over an action for declaratory relief concerning the existence of a security right. He justified his view with the sole argument that the security right was ordered on an asset, or to be more accurate: on the liquidation proceeds which formed part of the insolvency estate.[420] 550

(3) In the light of the above, significant arguments justify the classification of actions to separate satisfaction within the scope of the Brussels I Regulation.[421] Should the opposite view be endorsed, the location of the secured asset in a Member State other than the state of the opening of the proceedings would necessarily entail, in view of Article 5 EIR, an asymmetry between *forum* and *ius*. Choice of forum clauses which, in practice, often bestow jurisdiction upon the courts at the lender's domicile would lose their validity in the event that a single forum jurisdiction was assumed by analogy to Article 3 EIR. Furthermore, in cases concerning immovable property, the proximity to the facts, as ensured by the exclusive jurisdiction of Article 22 No 1 Brussels I Regulation, would not be taken into consideration. 551

4.2.5.3.8 Actions concerning liabilities and rights of the insolvency estate. The administration and liquidation of the insolvency estate depends on sufficient financial resources. Debts incumbent on the estate therefore have a privileged status, taking precedence over the insolvency creditors' claims.[422] These debts, incurred after the opening of insolvency proceedings and mostly subject to an enforceable limit[423], include the costs of the proceedings[424], transactions entered into and actions taken by the liquidator, i. e. through the option to perform contracts in the interest of the general body of creditors[425] as well as mutual claims arising out of the continuity of specific contracts by virtue of law[426]. 552

(1) Such claims arising out of *contractual* agreements entered into by the liquidator do not justify a single court's jurisdiction according to Article 3 EIR.[427] They lack an insolvency-specific procedural purpose. As a result, national insol- 553

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[417] *Häsemeyer*, Insolvenzrecht (4th ed. 2007), para. 18.73.
[418] Cf. the current version of the German Insolvency Act.
[419] Cf. the previous version of the German Insolvency Act ("Konkursordnung").
[420] *ECJ*, case C-527/10, *ERSTE Bank Hungary Nyrt*, Opinion of the AG J.Mazák, 1/26/2012, para. 41.
[421] The same conclusion draws *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 196; *Gebauer*, in: Gebauer/Wiedmann (eds.), Zivilrecht unter europäischem Einfluss (2nd ed. 2010), Art. 1 EuGVVO, para. 23; *Willemer*, Vis attractiva concursus (2006), 366; *Haubold*, IPRax 2002, 157, 163; cf. also *Jahr*, ZZP 79 (1966), 347, 373.
[422] See *Hefermehl*, in: MünchKomm-InsO (2nd ed. 2007), § 53, para. 5 et seq.
[423] Cf. in German Law: § 90 InsO.
[424] Cf. in German Law: § 54 InsO.
[425] Cf. in German Law: § 55 I No 1 and 2, 1st option InsO.
[426] Cf. in German Law: § 55 I No 2, 2nd option InsO.
[427] Also *Schlosser*, in: Festschrift F. Weber (1975), 395, 409; contra *Oberlandesgericht Zweibrücken*, 30 June 1992, 3 W 13/92, EuZW 1993, 165 et seq. (concerning the execution of a claim arising out of an agreement concluded between the insolvency practitioner and the debtor).

vency laws are confined to provisions on the liquidator's power to conclude contracts or to exercise an option right, further to the continuation of obligations or to the privileged ranking of debts. Although such priority rights are capable of enhancing the respective restructuring or reorganisation efforts, they are not relevant for the realization of the insolvency liability regime. Since they are not linked to the *pari passu* principle, these rights are to be asserted outside insolvency proceedings like typical civil actions.[428] If the jurisdictional rules of the Brussels I Regulation apply to this kind of liabilities and rights[429], the liquidator will be in a position to conclude choice of court agreements in the interest of the insolvency estate.[430] The same applies in principle to claims deriving from a contractual activity of the liquidator and forming part of the insolvency estate.[431]

554 By contrast, disputes arising from a court-approved settlement[432] concluded between the bankruptcy trustee and individual creditors and dealing with the office holder's statutory power to sell the debtor's assets for, inter alia, the benefit of the general creditors are to be classified as falling under the jurisdiction of Article 3 EIR.[433]

555 **(2)** The costs of the insolvency proceedings (cost of legal proceedings and remuneration of the insolvency administrator[434]) should be assessed differently as well. These debts serve a genuine insolvency-specific procedural purpose. In this regard, the classification of Article 4(2)(l) EIR and the proximity of the courts of the Member State in which insolvency proceedings are initiated justifies annex jurisdiction by analogy to Article 3 EIR.[435]

556 **4.2.5.3.9 Proceedings concerning the admissibility of execution measures into the insolvency estate or into the debtor's property.** If a creditor executes in assets forming part of the estate (to be) subsequent to the insolvency petition or to the opening of insolvency proceedings, the (provisional) liquidator, a third-party debtor or – if appropriate – the debtor itself are entitled to challenge the admissibility of enforcement measures. International jurisdiction is to be determined, as in the case of

[428] Cf. *Häsemeyer*, Insolvenzrecht (4th ed. 2007), para. 14.03.

[429] This must hold equally true for liabilities due to restitution for unjust enrichment of the insolvency estate, cf. in German Law § 55(3) No 3 InsO.

[430] Also *Schlosser*, in: Festschrift F. Weber (1975), 395, 409; *Willemer*, Vis attractiva concursus (2006), 372 et seq.

[431] However, *statutory* claims belonging to the insolvency estate and founded consequent on the opening of insolvency proceedings, such as unjust enrichment claims, could be assessed differently. Nonetheless, the *Oberlandesgericht Hamm*, 15 September 2011, 18 U 226/10, IPRax 2012, 251, left this issue open for a claim arising out of § 816(2) BGB. By contrast, (statutory) claims belonging to the debtor's estate but founded prior to the opening of insolvency proceedings do not fall within the exemption rule of Article 1(2)(b) Brussels I Regulation; in this regard also the French *Cour de Cassation* (Ch. Com.), 24 May 2005, *Consorts D'Auria v Perrota et SPC Mizon-Thoux*, ès qual., Rev.crit.DIP 2005, 489 et seq., further *Cour d'Appel de Lyon*, 20 May 2009, 08/04260, *Société Ketton Stone v. M. Z.*, INSOL EIR-case register: action, filed by the *commissaire à l'exécution du plan*, for payment arising out of a contract concluded by the debtor with a third party is governed by the jurisdictional rules of the Brussels I Regulation, Article 5(1)(b); cf. further *Corte di Cassazione* (sez. unite), 14 April 2008, No 9745, *Chantiers de l'Atlantique s. a. v. Fallimento Festival Crociere s.p.a.*, Il diritto del commercio internazionale 2008, 480 (Art. 23 Brussels I Regulation applies).

[432] Cf. Article 25(1) subpara. 1, 1st sentence EIR.

[433] *Polymer Vision R&D Ltd v. Van Dooren* [2011] EWHC 2951 (Comm), [2012] I.L.Pr. 14: The proceedings instituted against the office holder sought damages for misrepresentation and/or breach of contract.

[434] Cf. in German law: § 54 InsO.

[435] Similarly *Willemer*, Vis attractiva concursus (2006), 374.

other types of actions, autonomously: National provisions conferring jurisdiction on the insolvency court over objections against enforcement measures[436] should be disregarded.[437]

Although such actions are filed on the occasion of insolvency proceedings and in the interest of the general body of creditors, it seems more appropriate to apply the exclusive jurisdictional rule of Article 22(5) Brussels I Regulation.[438] The principle that only the state in which enforcement measures take place is empowered to supervise its enforcement authorities underlies this rule – it prevents, irrespective of Article 25(1) EIR, infringements upon state sovereignty in the field of enforcement and, therefore, leaves the jurisdictional interests of the sued executing creditor unconsidered.[439] Indeed, the *lex concursus* regulates in principle the effects of the opening of insolvency proceedings on individual enforcement measures, Article 4(2)(f) EIR. This does not apply, however, to creditors holding rights *in rem* and pursuing enforcement in a Member State other than that of the opening of insolvency proceedings (for instance, over a pledged asset of the debtor)[440]: According to Article 5 EIR, the *lex situs* governs the enforceability of security rights in case of insolvency – in these significant situations, Article 22(5) Brussels I Regulation leads to a synchronization of *forum* and *ius*. 557

4.2.6 Exclusive or Elective Jurisdiction

4.2.6.1 Current Legal Situation

The classification-formula, as established by the ECJ, relates to the pleas submitted by the plaintiff, as specified by their legal basis and procedural form. Therefore, either the Brussels I Regulation *or* the EIR is exclusively applicable. *De lege lata*, an insolvency-derived action can, directly or by analogy, only be subject to the jurisdictional rule of Article 3 EIR: Due to its mandatory nature[441], this provision applies to insolvency-related actions (by analogy) as well as to the opening of collective proceedings.[442] Consequently, irrespective of whether the liquidator is plaintiff or defendant, insolvency-derived actions are subject to the principle of *vis attractiva concursus*; Article 3 EIR therefore establishes exclusive jurisdiction. Although the 558

[436] Cf. in German Law: § 89(3) InsO. The provision derogates from the jurisdiction of the court of execution with the purpose of achieving a higher degree of proximity to the facts of the case.

[437] Assuming the jurisdiction of the German courts with reference to § 89(3) German InsO, the *Tribunal d'arrondisement de et à Luxembourg*, 24 October 2008, no 221/2008, overlooks this fact.

[438] Handled differently by the Belgian courts according to the **Belgian** National Report.

[439] *ECJ*, case C-261/90, 3/26/1992, *Reichert/Dresdner Bank*, ECR 1992 I-2149, 2182, para. 26; *Mankowski*, in: Rauscher (ed.), EuZPR/EuIPR (2011), Art. 22, para. 54.

[440] However, excluded from the scope of Article 22(5) Brussels I Regulation are proceedings producing an enforceable title, such as proceedings seeking acquiescence to the enforcement, or concerning contest of the debtor's transaction or the avoidance claims, to this see *Mankowski*, in: Rauscher (ed.), EuZPR/EuIPR (2011), Art. 22, para. 58.

[441] Cf. *ECJ*, case C-191/10, 12/15/2011, *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, para. 27 ("exclusive jurisdiction" with regard to the collective proceedings), NZI 2012, 147.

[442] If the liquidator, in disregard of Article 3(1) EIR, files an avoidance action before the courts of the Member State in which the defendant's domicile is located, the international jurisdiction of the court before which the defendant enters an appearance shall be excluded in accordance with the general legal concept laid down in Article 24, 2nd sentence Brussels I Regulation.

ECJ left this question open[443], assuming exclusive jurisdiction is a necessary result of the fact that the *Gourdain*-formula is specified through objective *jurisdictional* criteria, but decides – one step ahead – upon the Regulations' *applicability*.[444]

4.2.6.2 Policy Options

559 However, as an alternative policy option one could principally envisage a (liquidator's) right of choice between the centralized jurisdiction of the courts of the Member State in the territory of which insolvency proceedings have been initiated on one hand and Article 2 Brussels I Regulation on the other.[445] On a *case-by-case basis*, this may enable the liquidator to benefit from the proximity of the seized court to the place of enforcement or an attractive procedural or legal system as such[446], whereas usually not from a parallelism of *forum* and *ius*[447].

560 Nonetheless, at second glance, this approach appears less persuasive: First of all, an elective jurisdiction would only be relevant with respect to avoidance actions or similar (corporate) actions falling within the exemption rule of Article 1(2)(b) Brussels I Regulation. If the *actor sequitur forum rei*-principle applied cumulatively, this could contradict the interplay between the respective action and the insolvency liability regime[448] without significantly improving procedural economy in the event that the office holder is acting as defendant[449]. On this premise, the values underlying the *Gourdain*-formula would be relativized and the foreseeability of the competent court deteriorated.[450]

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[443] Cf. *ECJ*, case C-213/10, 4/19/2012, *F-Tex SIA v. Lietuvos-Anglijos UAB "Jadecloud-Vilma"*, NZI 2012, 469, para. 50 et seq. Nevertheless, the passage at para. 24 of the *Seagon*-decision in particular points at the interpretation of an exclusive jurisdiction: *"The possibility for more than one court to exercise jurisdiction as regards actions to set a transaction aside by virtue of insolvency brought in various Member States would undermine the pursuit of such an objective."*, *ECJ*, Case C-339/07, 2/12/2009, *Seagon v. Deko Marty Belgium* ECR 2009 I-767.

[444] Therefore, the delimitation between the EIR and the Regulation No 44/2001 is not comparable to the delimitation among the jurisdictional rules of the Brussels I regime. Whereas its basic types of jurisdiction (general, specific and exclusive) are in competition with each other within a *closed* jurisdictional system, annex jurisdiction solely based on Article 3 EIR lies outside, i. e. without concurrent relation to the jurisdictional rules of the Brussels I Regulation.

[445] Taking this approach, a new Article 3a(1), sentence 2 EIR could be formulated as follows:
"The liquidator may also bring such an action [which derives directly from the insolvency proceedings and is closely linked with them] in the courts of the Member State within the territory of which the defendant is domiciled."
Regarding the alternative recommended formulation, see *infra* 4.2.10.

[446] Cf. *Vallens*, Recueil Dalloz 2009, 1311, 1314.

[447] This is related to the general applicability of the *lex concursus* (Article 4 EIR). Article 13 EIR, for instance, has solely been designed as a veto rule in the interest of the person objecting against the invalidity of the act. The provision therefore does not entitle the liquidator to opt for a favourable law different from the *lex concursus*, cf. *Moss/Fletcher/Isaacs* (eds.), The EC-Regulation on Insolvency Proceedings (2nd ed. 2009), para. 4.39.

[448] For example, this is the case with the action for the determination of a lodged claim brought by the liquidator against an individual creditor domiciled abroad (cf. § 179(2) German InsO), see *supra* 4.2.5.3.3.

[449] With regard to actions brought against the liquidator (representing the interests of the insolvency estate), the general jurisdiction of Article 2 Brussels I Regulation typically corresponds to the *vis attractiva concursus* pursuant to Article 3 EIR, provided that the general venue of the office holder is determined by the seat of the insolvency court (cf. § 19 a German ZPO).

[450] This is even more true if the jurisdictional rules of the Brussels I Regulation cumulatively applied as a whole.

Rather, the exclusive character of the *vis attractiva* should be seen as the down- **561**
side of sparing liquidators the obligation to take action in a foreign court[451], whilst simultaneously permitting them to profit from facilitated recognition (Article 25(1) subpara. 2 EIR)[452] and enforceability (under the forthcoming Brussels I regime). Finally: The problem of "torpedo actions" for negative declaratory relief brought for example by the debtor of an avoidance claim outside the state of the opening of proceedings can be countered by jurisdictional means, that is to say by an exclusive head of jurisdiction at the debtor's centre of main interests.[453]

Article 18(2) EIR does not allow any other conclusion: By conferring upon the **562**
insolvency practitioner the (procedural) power to recover a debtor's assets removed to the territory of another Member State, this exception rule solely protects the integrity and proper functioning of territorial proceedings as such.[454] Deducing jurisdictional consequences from a provision which invests the office holder with a specific legal entitlement does not seem to be a compelling argument. It is questionable why Article 18(2) EIR should be designed to fill a regulatory loophole in the context of a particular constellation, whereas the wording of Article 3(1) EIR has not even implemented the *vis attractiva*-principle for main insolvency proceedings.[455]

Although principally an alternative policy option, the introduction of a liquida- **563**
tor's unilateral right of choice between Article 3 EIR and the general jurisdiction set forth in Article 2 Brussels I Regulation is therefore not recommended.[456]

4.2.6.3 Related Claims and Jurisdiction on the ground of Connectedness

Criticism of the exclusive character of the *vis attractiva concursus*[457] has mostly **564**
arisen with regard to its practical consequences arising in case of an accumulation of related claims: Should the plaintiff's plea be qualified as directly relating to insolvency law on one hand and to civil law (company or tort law) on the other, the

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[451] This objective would be undermined if the jurisdictional rules of the Brussels I regime cumulatively applied as a whole and, following the principle of equality of arms, bilaterally, irrespective of the liquidator's party role in the process.

[452] Cf. *Legfelsöbb Bíróság* (*Supreme Court of Hungary*), 21 April 2011, Pfv. X.21.978/2010/5 szám, available at: http://www.archive-hu.com (last accessed on 20 November 2012).

[453] Concerning this problem see *Thole*, ZIP 2012, 605 et seqq.

[454] See *Moss/Fletcher/Isaacs* (eds.), The EC-Regulation on Insolvency Proceedings (2nd ed. 2009), para. 8.228; *Paulus*, EuInsVO (3rd ed. 2010), Art. 18, para. 10 et seq.; cf. also *Riedemann*, in: Pannen (ed.), EuInsVO (2007), Art. 18, para. 38, 41.

[455] In this sense, however, *Machtinger*, ZIK 2009, 151; reluctant in turn: AG R.-J. Colomer in his opinion in case C-339/07 (*Seagon/Deko Marty*), 10/16/2008, para. 47.

[456] In favour of an exclusive jurisdiction see *Gerechtshof Amsterdam*, 3 November 2009, LJN: BL8405, *Groet Houdstermaatschappij v. Conrads*, Jurisprudentie Onderneming & Recht (JOR) 2010, 244; further *Rechtbank Amsterdam*, 17 February 2010, *Liersch v. Subway international BV*, Jurisprudentie Onderneming & Recht (JOR) 2011, 155 referred to by the **Dutch** National Reporter. Left open by *ECJ*, case C-339/07, 2/12/2009, *Seagon v. Deko Marty Belgium,* ECR, 2009 I-767, at para. 21 et seq. as well as in *ECJ*, case C-213/10, 4/19/2012, *F-Tex SIA v. Lietuvos-Anglijos UAB "Jadecloud-Vilma"*, NZI 2012, 469, para. 50 et seq.; further *Wessels*, International Insolvency Law (2012), para. 10606 d; *Fumagalli*, IILR 2011, 460, 465.

[457] See, for instance, *Oberhammer*, KTS 2009, 27, 47; *Hau*, KTS 2009, 382, 385; *Thole*, ZEuP 2010, 904, 924; *Stürner/Kern*, LMK 2009, 278572. AG R.-J. Colomer adopts in his opinion in the case C-339/07 (*Seagon/Deko Marty*), 10/16/2008, para. 65 the term of a "*relatively exclusive jurisdiction*" with reference to *Virgós/Garcimartín*, The European Insolvency Regulation: Law and Practice (2004), para. 97; cf. also *Polymer Vision R&D Ltd v. Van Dooren* [2011] EWHC 2951 (Comm), [2012] I.L.Pr. 14, para. 88; *Stoecker/Zschaler*, NZI 2010, 757, 760 et seq.

application of both the EIR and the Brussels I Regulation can, in particular cases, open jurisdiction over a single life situation to the courts of different Member States. This result has proven to be procedurally uneconomical – (regularly) not only for the liquidator as a plaintiff, but also from a defendant's perspective; moreover, incoherent judgments would certainly contravene the proper administration of justice in the European Union.

565 A preliminary question which was initially pending before the ECJ fits within this context.[458] In civil proceedings instituted before the *Landgericht* (Appellate Court of) *Essen*, the liquidator based the claim for repayment to the insolvency estate on both insolvency avoidance[459] and corporate rules, whereby the latter was not contingent upon the opening of insolvency proceedings.[460]

566 In view of the above, a reform is to be recommended *de lege ferenda*, including, in case of the accumulation of related claims, the power of the liquidator[461] to file the insolvency-derived action optionally before the courts of the Member State within the territory of which the defendant is domiciled, if and to the extent that said courts have jurisdiction over the connected claim in civil and commercial matters under the provisions of the Regulation No 44/2001.[462] This jurisdiction on the ground of connectedness leaves to the liquidator greater room for strategic and operative manoeuver with regard to the administration of the proceedings without obliging the defendant to appear before the courts located outside the Member State of his domicile.[463] At the same time, this relativizes the classification of insolvency-related actions in cases lying at the interface of insolvency, company or general civil law. The same principles should apply in the event that the liquidator files an insolvency-derived counterclaim before a foreign *forum*.[464]

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[458] *Landgericht Essen*, 25 November 2010, 43 O 129/09, BeckRS 2011, 06041 as well as *Landgericht Essen*, 30 September 2010, 43 O 129/09, BeckRS 2011, 06042. However, the Appellate Court decided not to uphold the preliminary proceedings before the *ECJ*, cf. *ECJ*, case C-494/10, 5/7/2012, *Dr. Biner Bähr als Insolvenzverwalter über das Vermögen der Hertie GmbH v. HIDD Hamburg-Bramfeld B.V. 1*, BeckRS 2012, 80987.

[459] Cf. in German Law: §§ 143, 129, 135 InsO.

[460] Cf. in German Law: §§ 30, 31 GmbHG old version.

[461] The scope *ratione personae* of the proposed rule should be formulated unilaterally, i. e. from a liquidator's perspective. It is true that, in the event of reversed party roles, the accumulation rule could also result in a jurisdiction shifting, if, for instance, liability claims brought against the liquidator are based on breach of insolvency-specific duties as well as on tort. Nevertheless, in the few cases where the general venue of the liquidator differs from the debtor's centre of main interests, the accumulation rule would be of very little practical relevance.

[462] Cf. also *Van Galen* et al., INSOL Europe Proposals (2012), para. 3.21.

[463] Choice of forum clauses, binding upon the insolvency practitioner with regard to claims falling within the ambit of Regulation No 44/2001 (on this issue see *Bayerisches Oberstes Landesgericht*, 9 March 1999, 1Z AR 5/99, NJW-RR 2000, 660, 661; further *Brinkmann*, IPRax 2010, 324, 329 et seq.), do not apply to insolvency-related actions, see *supra* 4.2.5.3.3. If, in the event of the accumulation of related claims, such a choice of forum clause gives jurisdiction to the courts of a Member State in which neither the defendant's domicile is located nor the insolvency proceedings were opened, the liquidator should, following the above mentioned approach, not be empowered to bring the insolvency-related action alternatively before these courts.

[464] Also *Landgericht Detmold*, 5 January 2010, 6 O 3/09, BeckRS 2011, 19353 (insolvency derived counterclaim brought by the German liquidator against the Dutch plaintiff based on §§ 135(1) No 2, 129, 143(1) InsO); further *Virgós/Garcimartín*, The European Insolvency Regulation: Law and Practice (2004), para. 100.

The connectedness of concurrent claims should be modeled upon the wording of Articles 6 No 1, 28(3) of the Brussels I Regulation. According to Article 28(3), actions are deemed to be related, **567**

> "when they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

In such cases, a basically homogenous life situation would be sufficient.[465] **568**

4.2.7 Annex Proceedings Related to Secondary or Territorial Insolvency Proceedings

The ECJ has established the principle of a European *vis attractiva concursus* with regard to actions linked to main insolvency proceedings. Admittedly, there is no apparent reason why the concentration of jurisdiction shall not apply accordingly to actions deriving directly from secondary or territorial proceedings according to Article 3(2) and Article 3(4) EIR and closely linked to them.[466] It is thereby preconditioned that the secondary administrator's right to contest the debtor's transactions arises from the facts coherently submitted by the plaintiff (doctrine of double pertinence of facts). **569**

The Belgian *Tribunal de Commerce de Charleroi* decided on an avoidance action brought by the secondary insolvency administrator before the courts of the state of the opening of secondary proceedings and assumed international jurisdiction of the Belgian courts.[467] Since the defendant's domicile was located in Belgium, however, the Court did not respond to a *vis attractiva concursus* according to Article 3(2) EIR. **570**

Should secondary proceedings be opened after the main insolvency administrator has initiated avoidance proceedings over an asset henceforth forming part of the insolvency estate of the secondary proceedings, there is no change of jurisdiction: Pursuant to the *perpetuatio fori*-principle, the initial proceedings are to be resumed by the secondary insolvency administrator as the new plaintiff. **571**

4.2.8 Conflicting Proceedings and Decisions

According to their formal structure, insolvency-related actions are "ordinary" civil proceedings. Therefore, neither the risk of conflicting decisions or competing proceedings involving the same subject matter nor the situation in which the right **572**

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[465] Since Articles 6 No 1, 28(3) Brussels I Regulation do not presuppose the identity of the parties, these provisions are based on a narrower understanding of connectedness than the one necessary in the case of accumulation of related claims. In this procedural situation, an identical cause of action is deliberately not preconditioned as it is, in the context of the *Gourdain*-formula, relevant for the classification and, therefore, leads to the jurisdiction of courts in different Member States. With regard to the term "cause of action", see *ECJ*, case C-144/86, 12/8/1987, *Gubisch Maschinenfabrik v. Palumbo,* ECR 1987 I-4871, para. 14 et seq., concerning the delimitation of Article 5 No 1 und 3 Brussels I Regulation: *ECJ*, case C-189/87, 9/27/1988, *Kalfelis v. Schröder u. a.*, ECR 1988 I-5579, para. 19 et seq.

[466] See also *Stürner/Kern*, LMK 2009, 278572; contra *Mankowski/Willemer*, RIW 2009, 669, 678, preferring an elective jurisdiction with reference to Article 18(2), 2nd sentence EIR; against this argument see *supra* 4.2.6.2.

[467] *Tribunal de Commerce de Charleroi*, 14 September 2004, *SARL Bati France v. Alongi et crts*, Revue Régionale de Droit, 358 et seq. (action en déclaration d'inopposabilité).

to be heard has been disregarded (e. g. in the course of the service) are excluded. Certainly: In contrast to its unclear wording, Article 26 EIR applies to annex actions in the sense of Article 25(1) subpara. 2 EIR and therefore encompasses grounds for non-recognition on the basis of public policy.[468] Apart from that, however, the EIR, being tailored to collective proceedings, is lacking in rules such as those provided for by Articles 27 et seq. Brussels I Regulation concerning conflicting proceedings in civil and commercial matters; Article 16 EIR does not apply.[469] Nevertheless, there is no substantive reason why these provisions[470] should not be applied *mutatis mutandis* to annex actions.[471] It is therefore recommendable to include a corresponding reference in the recitals of the Regulation.[472]

4.2.9 Annex Proceedings Against Third State Defendants on the Example of Avoidance Actions

4.2.9.1 General Remarks

573 Cross-border insolvencies concerning third states have not explicitly been regulated in the EIR. Only a few provisions marginally refer to this issue;[473] for the rest, the autonomous national jurisdictional and recognition regime is applicable. The consensus view is as follows: In the event that the centre of a debtor's main interests is

[468] *Duursma-Kepplinger*, in: Duursma-Kepplinger/Duursma/Chalupsky (eds.), EuInsVO (2002), Art. 26, para. 15; *Paulus*, EuInsVO (3rd ed. 2010), Art. 26, para. 4. This also includes violations of the right to be heard pursuant to Article 34 No. 2 Brussels I Regulation.

[469] It would be conceivable that actions for the determination of a lodged claim involving the same cause of action (existence of the claim) are brought in parallel both in the main and in the secondary proceedings. Accordingly, this conflict of competence is to be resolved by applying Articles 27 et seq. Brussels I Regulation *mutatis mutandis*.

[470] Even though annex actions fall within the exclusive jurisdiction, Article 35(1) Brussels I Regulation is not applied *mutatis mutandis*. This would be contrary to the predominant interpretation of Article 26 EIR, according to which jurisdiction may not be reviewed on the basis of public policy, cf. *Laukemann*, IPRax 2012, 207, 210 et seq. However, recognition may be refused assuming that the subject matter does not fall within the scope of the EIR, for the comparable problem in the framework of the Brussels I Regulation see *Leible*, in: Rauscher (ed.), EuZPR/EuIPR (2011), Art. 35, para. 2; cf. further *Thole*, ZIP 2012, 605, 612. In this case, recognition is subject to Articles. 34 et seq. Brussels I Regulation and Articles 25 et seq. EIR do consequently not apply.

[471] See also *Leipold*, in: Festschrift A. Ishikawa (2001), 221, 233; *ibid*., in: Stoll (ed.), Vorschläge und Gutachten zur Umsetzung des EU-Übereinkommens über Insolvenzverfahren im deutschen Recht (1997), 185, 193, 199 (with regard to German International Insolvency Law). Contra *Thole*, ZIP 2012, 605, 610 et seq.

[472] *De lege lata*, this situation is different with regard to Article 34 No 3, 4 Brussels I Regulation since Article 25(1) subpara. 2 EIR intends to facilitate recognition compared to the Brussels I regime, cf. *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 192; *Ambach*, Reichweite und Bedeutung von Art. 25 EuInsVO (2009), 157 et seq.; *Mankowski*, NZI 2010, 508, 509. However, avoiding conflicting decisions involving the same cause of action between the same parties constitutes a fundamental principle of European procedural law and should therefore outweigh the regulative objective laid down in Article 25(1) subpara. 2 EIR, which is to accelerate the administration of insolvency proceedings. For these reasons, irreconcilable decisions over insolvency-related claims, although rarely present in insolvency law, should be circumvented *de lege ferenda*, by establishing a priority rule modelled on Article 34 No. 4 Brussels I Regulation.

[473] Cf. Articles 13 and 15 EIR which explicitly refer to the legal order of a Member State. Article 3 EIR also covers debtors which are nationals of third states or have been founded there but have their COMI within the territory of the EU.