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Declaration of Claims in International Insolvency Proceedings[1]

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Abstract

The ECJ ruled on a particularly controversial question in the recent case of Skarb Państwa/Riel: An action for declaration of the existence of claims for the purposes of their registration in the context of insolvency proceedings falls within the scope of the European Insolvency Regulation. This paper examines the implications of the decision with regard to jurisdiction, arbitration agreements and pending proceedings.

Keywords

international insolvency proceedings, European Insolvency Regulation, Skarb Państwa/Riel, action for the declaration of claims, jurisdisction, arbitration, pending proceedings

1. Introduction

1.1. Frame of reference

Since the European Insolvency Regulation 2000 (EIR 2000) came into force,[2] European Union law outlines the framework for international insolvency proceedings: proceedings are opened by the courts of the Member State within the territory of which the centre of the debtor's main interests (COMI) is situated (Art. 3 para. 1), are governed by the law of that Member State (Art. 4) and shall be recognised in all other Member States (Arts. 16 ff.). This basic principle of unity was perpetuated by the now applicable EIR 2015 (Arts. 3 para. 1, 7, 19 ff.).[3]

Of course, there was more to the EIR 2000 than the allocation of insolvency proceedings to the COMI. Namely, the ECJ began to endorse the so-called *vis attractiva concursus* in a line of jurisprudence starting with the case of *Gourdain/Nadler*.[4] Actions closely linked with insolvency proceedings fall within the scope of the EIR and are therefore within the jurisdiction of the opening State.[5] This was reasoned by analogy under the regime of the EIR 2000[6] and is now explicitly stated in Art. 6 EIR 2015: "The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them".

Hence, the insolvency practitioner does not have to bring avoidance actions abroad at the place of the foreign defendant's domicile but is allowed to sue before the courts of the opening State.[7] This is because avoidance actions are related so closely to the insolvency proceedings that the ECJ

[1] This paper has been published in German in [2020] Zeitschrift für Insolvenzrecht (KTS) 121.
[2] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
[3] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); cf. R. Bork, 'Principles of Cross-Border Insolvency Law' (Intersentia 2017) para. 2.2 ff.
[4] Case 133/78 *Gourdain/Nadler* ECLI:EU:C:1979:49.
[5] Cf. P. Oberhammer, 'Europäisches Insolvenzrecht: EuGH Seagon / Deko Marty Belgium und die Folgen' in P. Apathy et al. (eds.), Festschrift für Helmut Koziol (Jan Sramek 2010) 1239, 1242 ff.; A. Piekenbrock, 'Insolvenzrechtliche Annexverfahren im Europäischen Justizraum' [2015] KTS 379, 387 ff.
[6] For critical remarks regarding the methodology see P. Oberhammer (fn. 5) 1247 f.
[7] Since there is exclusive jurisdiction in the opening State, the administrator must do so; cf. Case C-296/17 *Wiemer & Trachte* ECLI:EU:C:2018:902; on this decision M. Brinkmann and Ch. Kleindiek, case note on *Wiemer & Trachte* [2019] Entscheidungen zum Wirtschaftsrecht (EWiR) 19; L. Planitzer, 'Die ausschließliche Zuständigkeit für insolvenzrechtliche Annexverfahren' [2019] Zeitschrift für Insolvenzrecht & Kreditschutz (ZIK) 5.

established this accessory jurisdiction at an early stage[8] and it is now prototypically mentioned in Art. 6 para. 1 EIR 2015. In contrast, if the administrator wants to bring an action for the performance of the obligation under a contract concluded by the debtor prior to the opening of proceedings, the link between the action and the insolvency proceedings is not close enough.[9] Accordingly, this action is not privileged under Art. 6 EIR. Rather, jurisdiction is governed by the general rules applicable.

In the European context, these general rules are to be found in the Brussels Ia-Regulation[10] which governs international jurisdiction in civil and commercial matters. Persons domiciled in a Member State shall thereafter principally be sued in the courts of that Member State (Art. 4). In some cases, there is special jurisdiction in other Member States, whereby the underlying purpose differs from article to article and reaches from the close connection of a case to a certain forum (Art. 7) to consumer protection (Arts. 17 ff.).[11] Therefore, contrary to the EIR which concentrates insolvency-related actions in the opening state through its exclusive jurisdiction, Brussels Ia potentially spreads civil litigation throughout the European Union.

It becomes clear that the distinction between EIR and Brussels Ia is of peculiar interest. And it comes as no surprise that it keeps courts and legal scholars occupied.[12] While the assessment of avoidance actions on the one hand, and of actions for performance on the other, may be rather definite, there are numerous cases still to be resolved.[13] As the ECJ of course has the last say in this discussion, it ruled on a particularly controversial question in the recent case of *Skarb Państwa/Riel* that will be discussed in further detail in this paper: An "*action for declaration of the existence of claims for the purposes of their registration in the context of insolvency proceedings*" falls within the scope of the EIR.[14]

1.2. Case in question

The case in question arose out of the insolvency of an Austrian construction company which made it impossible for this company to work on a number of road construction projects in Poland. The Polish road network administration lodged damage claims in the main proceedings in Austria as well as in the secondary insolvency proceedings opened in Poland.[15] Since most of these claims were challenged by the appointed insolvency practitioners, the Polish road network administration brought actions for a declaratory judgment on the existence of the claims in Poland and later in Vienna. In Vienna it simultaneously filed for a stay of the proceedings until the Polish court had made a decision. This opportunity of suspension is provided by Brussels Ia (Arts. 29 f.), not, however, by the EIR. Therefore, it was in dispute which regulation governs such actions for the declaration of the existence of claims in insolvency proceedings.[16] The OLG Wien (Higher

[8] Case C-339/07 *Seagon/Deko Marty Belgium* ECLI:EU:C:2009:83.
[9] Case C-157/13 *Nickel & Goeldner* ECLI:EU:C:2014:2145; Case C-198/18 *CeDe Group/KAN* ECLI:EU:C:2019:1001, para. 37; Rec. 35 EIR 2015.
[10] 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); according to Art. 1 Abs. 2 lit. b, insolvency proceedings are not within the scope of Brussels Ia.
[11] Arts. 7 f., 10 ff., 17 ff., 20 ff., 24, 25 Brussels Ia.
[12] Cf., amongst others, U. Haas, 'Insolvenzrechtliche Annexverfahren und internationale Zuständigkeit' [2013] Zeitschrift für Wirtschaftsrecht (ZIP) 2381; A. Konecny, 'Keine insolvenznahe Klage ohne insolvenzrechtliche Wurzel des Klagsanspruchs' [2019] ZIK 82.
[13] R. Bork, 'Annexzuständigkeiten nach Art. 6 EuInsVO' in J. Exner and C.G. Paulus (eds.), Festschrift für Siegfried Beck (C.H. Beck 2016) 49, 54 ff. with further references.
[14] Case C-47/18 *Skarb Państwa/Riel* ECLI:EU:C:2019:754, para. 40.
[15] Cf. OLG Wien, decision of 17 January 2018 (3 R 59/17v), [2018] ZIK 41.
[16] The OLG also referred the question to the ECJ, whether Arts. 29 f. could be applied in EIR-proceedings by analogy, which the ECJ answered in the negative with, inter alia, reference to Art. 31 EIR (para. 45). Accordingly, the insolvency practitioners appointed in parallel insolvency proceedings are obligated to cooperate. Whether this obligation actually makes the power of the court to suspend proceedings redundant, if closely linked proceedings are pending, could, of course, be doubted; after all, the influence of the administrators, who find themselves in the position of the defendant party, on the objective sought by Arts. 29 f. Brussels Ia to avoid contradictory decisions is limited at this stage. The administrators may not even share this concern. Cf., on the analogous application of Arts. 29 f. Brussels Ia, Ch. Thole, 'Negative Feststellungsklagen, Insolvenztorpedos und EuInsVO' [2012] ZIP 605, 609 ff.; M. Fehrenbach, case note on *Nortel Networks* [2015] Neue Zeitschrift für Insolvenz- und Sanierungsrecht (NZI) 667, 667 f.; A. Geroldinger, 'Verfahrenskoordination im Europäischen Insolvenzrecht' (Manz 2010) 338 f.; see also P. Mankowski,

Regional Court Vienna) referred this question to the ECJ for a preliminary ruling.[17]

2. Procedural and substantive law background

The question has to be evaluated against the background of national law, which makes it particularly intricate, because insolvency law and civil procedure law combine to a national mix which is hard to handle at the European level.
As is well known, creditors seeking compensation from the insolvency estate must lodge their claims and, if there is opposition, bring an action for the declaration of the existence and eventually the ranking of the claim. This is basically the same in Austria (§ 110 of the Austrian Insolvency Act, öIO) as it is in Germany (§ 179 of the German Insolvency Act, InsO). In both countries, this action is considered to be an "ordinary" action for declaration and it therefore is a matter of ordinary civil litigation (§ 256 of the German Code of Civil Procedure, ZPO; § 228 of the Austrian Code of Civil Procedure, öZPO).[18] Accordingly, the dispute concerning the claim is relocated from insolvency proceedings to civil procedure. However, the connection to the insolvency proceedings is not broken off completely, as the action must also be brought against opposing creditors,[19] there is special jurisdiction at the place of the insolvency court[20] and all of the creditors are bound by the declaratory judgement.[21] The other Member States provide comparable instruments, however, there usually is a closer link to the insolvency proceedings.[22]
Substantive law reflects this procedural melange: on the one hand, the questions in case can arise out of insolvency law, for instance, if the ranking or the capitalisation of the claim is being opposed. According to Art. 7 para. 2 lit. h EIR, these questions are governed by the law of the opening State (*lex fori concursus*). On the other hand, it is a fundamental prerequisite for a claim against the insolvency estate that the claim must be considered valid and existing under substantive law.[23] In this respect, the action for declaration is, as *Lüke* pointed out, eventually about civil law, insolvency only calls for certain procedural adjustments.[24] Consequently, the question of the existence of the claim is not governed by the *lex fori concursus*, but by the *lex causae*, which is determined according to the international private law of the state in which proceedings are pending.[25]
This close connection between insolvency law and civil law makes it difficult to distinguish between EIR and Brussels Ia. The academic discussion is correspondingly broad, with three main approaches that can be identified. Some emphasise the characterisation of actions for declaration as instruments of insolvency proceedings and therefore argue that the EIR applies.[26] In contrast,

'Keine Litispendenzsperre unter der EuInsVO' [2009] KTS 453, 455 f.

[17] The particular case was still governed by the EIR 2000. However, the decision is also relevant under the EIR 2015, since Art. 6 EIR is seen as a codification of the ECJ's caselaw regarding the EIR 2000; cf., amongst others, P. Mankowski in P. Mankowski, M.F. Müller and J. Schmidt (eds.), EuInsVO 2015 (C.H. Beck 2016) Art. 6 para. 1.

[18] G. Pape and O. Schaltke in B.M. Kübler, H. Prütting and R. Bork (eds.), Kommentar zur Insolvenzordnung (RWS 2019) § 179 para. 11; R. Schumacher in R. Stürner, H. Eidenmüller and H. Schoppenmeyer (eds.), Münchener Kommentar zur Insolvenzordnung II (C.H. Beck, 4th ed. 2019) § 179 para. 5; for Austria see G.E. Kodek in R. Bartsch, R. Pollak and W. Buchegger (eds.), Österreichisches Insolvenzrecht IV (Verlag Österreich, 4th ed. 2006) § 110 KO para. 68.

[19] § 179 para. 1 InsO; § 110 para. 1 öIO.

[20] § 180 InsO, which takes the amount in dispute into account; § 111 öIO.

[21] § 183 para. 1 InsO; § 112 para. 1 öIO.

[22] C. Willemer, 'Vis attractiva concursus und die Europäische Insolvenzverordnung' (Mohr Siebeck 2006) 323 ff.

[23] Claims governed by public law are not subject of this paper.

[24] W. Lüke, 'Europäisches Zivilverfahrensrecht – das Problem der Abstimmung zwischen EuInsÜ und EuGVÜ' in R. Geimer (ed.), Festschrift für Rolf A. Schütze (C.H. Beck 1999) 467, 483.

[25] An effect of the place of jurisdiction within the EU on the applicable law is an exception, since international private law has been largely harmonised under the Rome Regulations.

[26] Cf. P. Schlosser, 'Konkurs- und konkursähnliche Verfahren im geltenden Europarecht', in E. Bökelmann, W. Henckel and G. Jahr (eds.), Festschrift für Friedrich Weber (Walter de Gruyter 1975) 395, 407 ff.; P. Mankowski, 'Inlandskonkurs und Vollstreckbarerklärungsverfahren' [1994] ZIP 1577, 1581; P. Mankowski in Th. Rauscher (ed.), EuZPR/EuIPR I: Brüssel Ia-VO (Verlag Dr. Otto Schmidt, 4th ed. 2015) Art. 1 para. 90; K. Pannen in K. Pannen (ed.), EuInsVO (De Gruyter 2007) Art. 3 para. 114; C. Willemer (fn. 22) 319 ff., 350; A. Piekenbrock, 'Klagen und Entscheidungen über Insolvenzforderungen zwischen LugÜb, EuGVVO und EuInsVO' [2014] ZIP 2067, 2071 f.; R. Bork (fn. 13) 60; M. Brinkmann in K. Schmidt (ed.), Insolvenzordnung (C.H. Beck, 19th ed. 2016) Art. 3 EIR para. 53; P. Kindler in F.J. Säcker et al. (eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch XII (C.H. Beck, 7th ed. 2018) Art.

according to others, the dispute concerns civil law issues rather than insolvency law issues and should therefore be governed by Brussels Ia.[27] Finally, there are mediating approaches that differentiate between the specific national procedural rules[28] or the specific substantive point at issue,[29] which would make the question of the applicability of EIR or Brussels Ia dependent on a detailed case-by-case examination.

3. Decision of the ECJ

However, the ECJ – as well as Advocate General *Bot*[30] – was not impressed by this debate, but felt certain about its decision: the court reasoned that the legal basis of the action was the decisive factor. Since the Austrian action for declaration on the existence of a claim for the purpose of participation in the insolvency proceedings is provided for in § 110 of the Austrian Insolvency Act and it is intended to be brought in the context of insolvency proceedings by participating creditors, it directly derived from insolvency proceedings, was closely connected with them and had its origin in insolvency law. Consequently, the court ruled that the action does not fall within the scope of Brussels Ia but falls within the scope of the EIR.[31]

Whether these remarks live up to the problem is a pointless question.[32] Eventually, what can be said is: *Luxembourg locuta, causa finita*. There are strong indications that the *causa* is *finita* ultimately, since it would come as a surprise if the ECJ would rule differently on declaratory disputes governed by the law of other Member States. After all, the link between the Austrian – as well as the German – action for declaration on insolvency proceedings is quite loose comparatively.[33] Besides, in the particular case the opposition to the lodged claims did not only relate to questions of insolvency law but to civil law questions as well. It can therefore be assumed that *Skarb Państwa/Riel* sets out a wide-ranging applicability of the EIR with no room left to distinguish between different types of declaratory disputes.

4. Consequences

4.1. Jurisdiction

What are the consequences for creditors? Prior to the opening of insolvency proceedings, Brussels Ia is applicable in civil and commercial matters. According to this regulation, the place of general

6 EIR para. 14; C.G. Paulus, 'EuInsVO' (R&W, 5th ed. 2017) Art. 6 para. 11; B. Schneider, 'Insolvenznahe Verfahren' in B. Nunner-Krautgasser, Th. Garber and C. Jaufer (eds.), Grenzüberschreitende Insolvenzen im europäischen Binnenmarkt (Manz 2017) 97, 104 f.; R. Hänel in H. Vallender (ed.), EuInsVO (RWS 2017) Art. 6 paras. 34, 58; A. Konecny in P. Mayr (ed.), Handbuch des europäischen Zivilverfahrensrechts (Manz 2017) para. 17.98; S. Mock in A. Fridgen, A. Geiwitz and B. Göpfert (eds.), Beck'scher Online-Kommentar zur Insolvenzordnung (C.H. Beck, 15th ed. 2019) Art. 6 EIR para. 5.

[27] Amongst others W. Lüke, 'Das europäische internationale Insolvenzrecht' (1998) 111 Zeitschrift für Zivilprozeß (ZZP) 275, 295; W. Lüke (fn. 24) 483; M. Stürner, 'Gerichtsstandsvereinbarungen und Europäisches Insolvenzrecht' [2005] Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 416, 419; Th. Garber, 'Zur Abgrenzung zwischen dem sachlichen Anwendungsbereich der EuInsVO und jenem der EuGVVO im Bereich insolvenzrechtlicher Verfahren' in S. Clavora and Th. Garber (eds.), Grenzüberschreitende Insolvenzen im europäischen Binnenmarkt – die EuInsVO (NWV 2011) 41, 61; P. Gottwald in Th. Rauscher and W. Krüger (eds.) Münchener Kommentar zur Zivilprozessordnung III (C.H. Beck, 5th ed. 2017) Art. 1 Brussels Ia para. 20; S. Grompe, 'Die vis attractiva concursus im Europäischen Insolvenzrecht' (Nomos 2018) 300.

[28] Amongst others J. Haubold, 'Europäisches Zivilverfahrensrecht und Ansprüche im Zusammenhang mit Insolvenzverfahren' [2002] IPRax 157, 163 fn. 102; G.E. Kodek in A. Burgstaller and M. Neumayr (eds.), Internationales Zivilverfahrensrecht (LexisNexis 2003) Art. 25 EIR para. 29; G.E. Kodek in H. Fasching and A. Konecny (eds.), Zivilprozessgesetze (Manz, 2nd ed. 2008) Art. 1 Brussels Ia para. 150; Ch. Thole in R. Stürner, H. Eidenmüller and H. Schoppmeyer (eds.) Münchener Kommentar zur Insolvenzordnung IV (C.H. Beck, 3rd ed. 2016) Art. 3 EIR para. 125.

[29] Amongst others V. Lorenz, 'Annexverfahren bei Internationalen Insolvenzen' (Mohr Siebeck 2005) 63 f.; F. Strobel, 'Die Abgrenzung zwischen EuGVVO und EuInsVO im Bereich insolvenzbezogener Entscheidungen' (Peter Lang 2006) 256 f.; D. Haß and Ch. Herweg in D. Haß et al. (eds.), EU-Insolvenzverordnung (C.H. Beck 2005) Art. 3 para. 27; see also Ch. Thole (fn. 28) Art. 3 EIR para. 125; for further references see P. Oberhammer (fn. 5) 1261 fn. 59.

[30] Opinion *Bot* C-47/18 *Skarb Państwa/Riel* ECLI:EU:C:2019:292, paras. 41 ff.

[31] *Skarb Państwa/Riel* (fn. 14) paras. 36 ff.

[32] Especially since insolvency law does not so much shape the legal basis but the procedural context of the action and the procedural context, however, shall not be the decisive factor according to case C-535/17 *NK/BNP Paribas* ECLI:EU:C:2019:96, para. 28.

[33] P. Schlosser (fn. 26) 408; J. Haubold (fn. 28) 163 fn. 102; G.E. Kodek (fn. 28) Art. 25 EIR para. 29; C. Willemer (fn. 22) 326.

jurisdiction is the defendant's domicile (Art. 4). In this respect, the opening of insolvency proceedings is of little effect, since the COMI (opening State according to Art. 3 EIR) is usually located at the debtor's domicile as well.[34] Hence, the place of general jurisdiction according to Art. 4 Brussels Ia is equivalent to the place of jurisdiction according to Art. 6 EIR.[35]

Rather, the opening of insolvency proceedings becomes noticeable if Brussels Ia would provide for a venue in another Member State. For instance, if there is a contractual relationship between the creditor and the debtor Art. 7(1) Brussels Ia provides for a forum at the place of performance, which could be located in the home state of the creditor and therefore could be beneficial to him. In matters relating to tort Art. 7(2) Brussels Ia enables the creditor to sue either at the place of the event giving rise to the damage or at the place where the damage occurred.[36] *Skarb Państwa/Riel* now sets an expiration date on these fora, as they cease to apply as soon as insolvency proceedings are opened. As of this moment, creditors have to bring their actions before the courts of the opening State.

With regard to the creditors who legitimately trust in the beneficial fora provided by Brussels Ia, this consequence might be irritating. However, according to *Willemer*, in the special situation of insolvency the interests of individual creditors cannot prevail over the collective interests of the participating creditors in the place of jurisdiction, as their compensation is at stake as well.[37] Eventually, creditors are confronted with a procedural risk of insolvency,[38] which already exists in national law (exclusive jurisdiction regarding actions for declaration at the place of the insolvency court according to § 180 InsO, § 111 öIO) and merely increases on the European level. Since claims have to be lodged in the opening State – which, of course, is far less burdensome than filing a suit[39] –, creditors already have to seek compensation abroad.

However, the aspect of legitimate expectations weighs more heavily with regard to the fora of Brussels Ia that aim to protect the weaker party. Namely, policy-holders and consumers benefit from the opportunity to sue at their domicile,[40] employees are provided with an additional forum at the place where work is usually carried out.[41] As soon as insolvency proceedings are opened, these fora also cease to apply, since the EIR does not provide for comparable privileges.[42] Exceptionally, the ECJ's rigorous line also forces these persons to sue abroad.

In addition to such geographical challenges for creditors *Skarb Państwa/Riel* may lead to a decline in procedural efficiency which not only concerns creditors but the insolvency estate as well. This addresses the European concern to jointly manage and decide content-related proceedings in order to enhance efficiency and to avoid contradictory decisions.[43] The EIR partly commits itself to this objective, as Art. 6(2) provides for facilitations for actions brought by the administrator.[44] As an exception, insolvency-related proceedings may be conducted outside the opening State if the asserted EIR-claim is closely related to a Brussels-Ia-claim and the courts in the defendant's country of residence have jurisdiction under Brussels Ia. According to Rec. 35 EIR, the administrator should make use of this additional venue "if he considers it more efficient to bring the action in that forum."

Brussels Ia devotes several special venues to this objective (Art. 8).[45] In the present context, Art. 8(3) Brussels Ia is of particular interest.[46] Accordingly, counterclaims can be brought before the court in which the original claim is pending if action and counter-claim concern "the same

[34] Cf. the corresponding presumptions in Art. 3 para. 1 EIR.
[35] Carstens, 'Die internationale Zuständigkeit im europäischen Insolvenzrecht' (Carl Heymanns 2005) 108; C. Willemer (fn. 22) 341.
[36] Case 21/76 *Bier/Potasse* ECLI:EU:C:1976:166.
[37] C. Willemer (fn. 22) 342, 161 ff.
[38] In a comparable context P. Oberhammer (fn. 5) 1251 f.
[39] This is, amongst other reasons, because of the standard claims form according to Art. 55 EIR.
[40] Arts. 11 para. 1 lit. b, 18 para. 1 Brussels Ia.
[41] Art. 21 para. 1 lit. b No. ii Brussels Ia.
[42] On employees C. Willemer (fn. 22) 343 f.
[43] Correspondingly Art. 6 para. 3 EIR; Arts. 8 No. 1, 30 para. 3 Brussels Ia.
[44] Cf. P. Kindler and M. Wendland, 'Die internationale Zuständigkeit für Einzelstreitverfahren nach der neuen Europäischen Insolvenzverordnung' [2018] Recht der Internationalen Wirtschaft (RIW) 245, 252 f.
[45] Cf. A. Stadler in H.-J. Musielak and W. Voit, Zivilprozessordnung (Verlag Franz Vahlen, 16th ed. 2019) Art. 8 Brussels Ia para. 1.
[46] Cf. also Art. 8 No. 1 Brussels Ia regarding the joinder of parties.

contract or facts". The EIR does not provide for such a forum. One possible consequence of this can be seen in the above-mentioned case of an action for the performance of the obligation under a contract concluded by the debtor prior to the opening of proceedings:[47] The jurisdiction regarding this action of the administrator is governed by Brussels Ia and therefore regularly lies outside the opening State. If the defendant, for his part, asserts warranty claims or claims for damages relating to the contract at issue against the debtor, Art. 8(3) Brussels Ia would, in principle, enable their assertion by means of a counter-claim before the court already seised. However, in the case of the debtor's insolvency, these claims give rise to insolvency claims only, which is why – provided that there has been lodging and opposition – the action for declaration is the only possibility of assertion. Since the applicability of the EIR has now been clarified in this respect, the case of *Skarb Państwa/Riel* indicates that the counter-claim under Brussels Ia and the joint negotiation on the related claims are ruled out. Under this premise, the creditor would have to bring his action separately in the opening State according to Art. 6 EIR, if the assertion by way of a plea in objection or set-off during the first proceedings is not possible or not expedient.[48] This would also force the administrator to engage in second, separate proceedings, and would lead to a decrease in efficiency which concerns the creditors and the insolvency estate at the same time. Nonetheless, the loss of the venues provided by Brussels Ia might very well lead to this outcome.[49]

Finally, there are strong indications that *Skarb Państwa/Riel* has significant consequences for prorogation agreements concluded by the creditor and the later debtor (Art. 25 Brussels Ia), because the exclusive jurisdiction under Art. 6 EIR takes precedence. Accordingly, the fate of a jurisdiction clause in insolvency depends on whether the asserted action can be qualified as insolvency-related or not,[50] which is why the applicability of the EIR prejudices the relevance of the prorogation. If actions for declaration of the existence of a claim are within the scope of the EIR generally, as the judgement of the ECJ gives good reason to believe, there is much to suggest that creditors are generally not entitled to rely on jurisdiction clauses.[51] In contrast to creditors asserting a claim for separation, whose position is insolvency-proof not only substantively but because of the applicability of Brussels Ia also procedurally,[52] insolvency creditors are thus facing an insolvency risk with regard to prorogations.[53]

4.2. Arbitration agreements

If procedural private autonomy in the form of jurisdiction agreements experiences such a deep cut in insolvency, the question of the fate of arbitration agreements concluded between the creditor and the later debtor arises.

4.2.1. National law background

With regard to German domestic cases, it is, first of all, recognised that arbitration agreements do not spare the lodging of claims. By referring insolvency creditors to the insolvency proceedings unexceptionally, § 87 InsO prevents a "race against the assets"[54] irrespective of whether the proceedings would be instituted by an ordinary action or a request for arbitration. However, if the

[47] Above, 1.1.
[48] For set-off see Art. 9 EIR and from the perspective of Brussels Ia P. Gottwald (fn. 27) Art. 8 Brussels Ia para. 29.
[49] Only the administrator might have the possibility to bundle proceedings, for example by requesting – in accordance with Brussels Ia and within the framework of the applicable national law – a declaratory judgement on the non-existence of counterclaims in addition to the judgement on performance.
[50] M. Stürner (fn. 27) 419.
[51] M. Stürner (fn. 27) 419, according to whom this is an argument supporting the cautious acceptance of accessory jurisdiction; cf. P. Mankowski (fn. 17) Art. 6 para. 29; R. Hänel in H. Vallender (ed.), EuInsVO (RWS, 2nd ed. 2020) Art. 6 para. 55; St. Madaus in B.M. Kübler, H. Prütting and R. Bork (eds.), Kommentar zur Insolvenzordnung (RWS 2019) Art. 6 EIR para. 4.
[52] See, in detail, M. Brinkmann, 'Der Aussonderungsstreit im internationalen Insolvenzrecht – Zur Abgrenzung zwischen EuGVVO und EuInsVO' [2010] IPRax 324, 326 ff., 329 f.
[53] A special case can be found in Art. 24 Brussels Ia, which provides for exclusive jurisdiction, inter alia, for actions in rem relating to real estate or actions under company law. As a rule, these proceedings will not concern insolvency claims. However, as far as claims relating to rental or lease agreements under Art. 24 No. 1 Brussels Ia are concerned, the exclusive jurisdiction under Brussels Ia is replaced by the exclusive jurisdiction under Art. 6 EIR.
[54] Cf. G. Wagner, 'Insolvenz und Schiedsverfahren' [2010] KTS 39, 51.

administrator opposes the lodged claim, the declaratory dispute may be conducted in arbitration proceedings. This is because the administrator takes over the insolvency estate in the state in which the debtor has left it and he is therefore, according to the prevailing opinion, bound by arbitration agreements concluded by the debtor.[55] Since the exclusive jurisdiction of the insolvency court according to § 180(1) InsO only governs the distribution of cases between State courts, it prevails over prorogations but, however, does not conflict with arbitration agreements, which is why the declaratory dispute is not lacking in arbitrability (§ 1030 ZPO).[56] Consequently, the German *Bundesgerichtshof* (Federal Court of Justice) has interpreted an arbitral award that was made after the administrator had intervened in place of the debtor as a declaratory award on the existence of a claim, because the awarded claim should entitle to participation in insolvency proceedings.[57] In contrast to prorogation clauses, which fail in national German cases due to § 180 InsO, arbitration agreements are therefore still relevant in insolvency proceedings.

However, under autonomous German law, the fact that there could be exceptions to this principle is shown by the uncertainties that exist in grey areas. On the one hand, it is disputed whether opposing creditors are also bound by arbitration agreements entered into by the debtor; [58] on the other hand, there are some doubts as to whether insolvency law issues such as ranking and registrability can be effectively included in an arbitration agreement by the debtor.[59] At least, this is impossible with regard to avoidance claims, because these claims are not at the debtor's disposal.[60]

In addition, a cursory comparative glance shows that it cannot be taken for granted that insolvency law respects arbitration agreements. In Austria, for example, it was assumed until recently that the declaratory dispute according to § 110 öIO can only be conducted in ordinary proceedings before the State court competent under § 111 öIO.[61] In academic literature, reference is made to comparable situations in other Member States.[62]

4.2.2. Implications of the European vis attractiva concursus

Against this national background, in cross-border cases the European question arises as to whether arbitration on the declaration of the existence of a claim for the purpose of participation in insolvency proceedings is admissible. In contrast to Brussels Ia, which expressly excludes arbitration proceedings from its scope (Art. 1(2)(d)), the EIR's claim of validity does not stop at arbitration.[63] This is made clear by Art. 18 EIR,[64] which expressly stipulates the law that governs the effect of the opening of insolvency proceedings on arbitration proceedings already

[55] BGH, decision of 25 April 2013 (IX ZR 49/12), [2013] NZI 934; G. Wagner (fn. 54) 41 ff., 44 f.; G. Pape and O. Schaltke (fn. 18) § 180 para. 7; see, however, L. Häsemeyer, 'Insolvenzrecht' (Carl Heymanns, 4th ed. 2007) para. 13.28.

[56] A. Heidbrink and M.-C. Gräfin von der Groeben, 'Insolvenz und Schiedsverfahren' [2006] ZIP 265, 268; U. Ehricke, 'Die Feststellung streitiger Insolvenzforderungen durch ein Schiedsgericht' [2006] ZIP 1847, 1851; G. Wagner (fn. 54) 45 ff., also on the implication of the extension of the force of res judicata according to § 183 para. 1 InsO on arbitrability. For a different opinion based on insolvency law objectives see M. Heese, 'Insolvenzverfahren und Verfahrensautonomie' [2017] KTS 167, 181 ff.

[57] BGH, decision of 29 January 2009 (III ZB 88/07), 179 BGHZ 304.

[58] In favour Th. Jestaedt, 'Schiedsverfahren und Konkurs' (Duncker & Humblot 1985) 130 f.; St. Smid, 'Deutscher Konkurs und internationales Schiedsverfahren' [1993] Deutsche Zeitschrift für Wirtschaftsrecht (DZWir) 485, 490 f.; L. Flöther, 'Auswirkungen des inländischen Insolvenzverfahrens auf Schiedsverfahren und Schiedsabrede' (Carl Heymanns 2001) 64 ff.; Ch. Berger, 'Schiedsvereinbarung und Insolvenzverfahren' [2009] Zeitschrift für das gesamte Insolvenzrecht (ZInsO) 1033, 1038; G. Wagner (fn. 54) 45, 46 f.; in contrast U. Ehricke (fn. 56) 1854; W. Gerhardt in W. Henckel and W. Gerhardt (eds.), Jaeger Insolvenzordnung VI (De Gruyter 2011) § 180 paras. 19 f.; R. Sinz in H. Hirte and H. Vallender (eds.) Uhlenbruck Insolvenzordnung (Verlag Franz Vahlen, 15th ed. 2019) § 180 para. 16.

[59] In favour, amongst others, M. Riedel, 'Insolvenz in nationalen und internationalen Schiedsverfahren' (Peter Lang 2016) 33 ff.; R. Sinz (fn. 58) § 180 para. 16; cf. also Ch. Berger (fn. 58) 1039; in contrast D. Eckardt in Kölner Schrift zur Insolvenzordnung (ZAP, 3rd ed. 2009) chapter 17 para. 50; R. Schumacher (fn. 18) § 180 para. 11.

[60] Cf. G. Wagner (fn. 54) 48 f.

[61] A. Konecny in A. Konecny and G. Schubert (eds.), Kommentar zu den Insolvenzgesetzen (Manz 1997) § 110 KO para. 6 with further references; W. Rechberger, 'Schiedsverfahren und Insolvenz' in St. Smid (ed.), Fragen des deutschen und internationalen Insolvenzrechts (De Gruyter 2007) 71, 80 f.; a recent judgement of the Austrian Supreme Court OGH, decision of 30 November 2018 (18 ONc 2/18s), [2019] ZIK 65, points in the German direction.

[62] Th. Jestaedt (fn. 58) 49 ff.; Ch. Berger (fn. 58) 1034, 1037; P. Mankowski, 'EuInsVO und Schiedsverfahren' [2010] ZIP 2478, 2483; M. Heese (fn. 56) 172, 175 f.

[63] Cf. P. Mankowski (fn. 62) 2481.

[64] Cf. M. Riedel (fn. 59) 136 f.

pending abroad, which will be discussed below.[65] Arbitration proceedings are therefore not completely excluded from the scope of the EIR, which is consistent; the EIR claims universal validity[66] and a case can be insolvency-related regardless of whether the proceedings take place before State courts or arbitral tribunals.[67]
Of course, this does not say anything about the implications of the EIR in detail, since, apart from Art. 18, which is not relevant in this context, arbitration agreements are not explicitly addressed. In any case, the qualification and assertion of insolvency claims is governed by the *lex fori concursus* (Art. 7 EIR), which regularly prevents individual actions and forces to lodge the claims. On this basis, which always depends on the *lex fori concursus*, arbitration proceedings cannot be instituted right away any more than State proceedings.[68] Rather, the creditors must lodge their claims. The question of arbitration arises only with the opposition of the administrator or other creditors, which forces the declaratory judgment dispute.

Whether, and if so, to what extent, the administrator and other creditors are bound by the arbitration agreement is also governed by the *lex fori concursus*. [69] If there is no binding effect,[70] arbitration against the opposing person(s) is inadmissible from the outset. If, on the other hand, the agreement covers the opponent(s), as it is the case under German law with regard to the administrator and, partially affirmed, to the creditors, arbitration could be considered.[71]
In this case only Art. 6 EIR might be relevant, since *Skarb Państwa/Riel* clarified its applicability with regard to declaratory disputes. Accordingly, the "courts" of the opening State shall have exclusive jurisdiction for any insolvency-related "action", whereby the term "court" refers to "the judicial body of a Member State" according to Art. 2(6) EIR. These terms do not include arbitral tribunals and requests for arbitration,[72] which constitutes a possible consequence that should be taken seriously from an arbitration law perspective: Art. 6 EIR might, beyond the determination of international jurisdiction, aim to assign all insolvency-related proceedings to State proceedings and therefore generally exclude arbitration.[73]

At second reading, however, it seems questionable whether Art. 6 EIR actually intends such a consequence.[74] In any case, arbitration "which derives directly from the insolvency proceedings and is closely linked with them" (Art. 6 EIR) is the exemption. In fact, the debtor regularly has no disposal over such matters of dispute under national law, which, above all, is shown by avoidance claims;[75] often national law completely disapproves of a binding of the administrator to arbitration agreements concluded by the debtor.[76]

[65] See below, 5.4.
[66] Rec. 23 EIR; R. Bork (fn. 3) para. 2.8 ff.
[67] Cf. D. Eckardt, 'Internationale Handelsschiedsgerichtsbarkeit und Insolvenzverfahren: Die Bestimmung des maßgeblichen Rechts' in H. Kronke and K. Thorn (eds.), Festschrift für Bernd von Hoffmann (Gieseking 2011) 934, 942; D. Poelzig, 'Parteieninsolvenz in der internationalen Schiedsgerichtsbarkeit' (2009) 14 Zeitschrift für Zivilprozess International (ZZPInt) 393, 426.
[68] G. Wagner (fn. 54) 51 ff.; H. Prütting, 'Schiedsklauseln in der Insolvenz' in M. Dahl, H.-G. Jauch and Ch. Wolf (eds.), Festschrift für Klaus Hubert Görg (C.H. Beck 2010) 371, 376; M. Riedel (fn. 59) 135 ff.
[69] Cf. G. Wagner (fn. 54) 50; P. Mankowski (fn. 62) 2482 ff.; D. Eckardt (fn. 67) 946; M. Riedel (fn. 59) 145 ff., 151 ff.; in contrast L. Schultze-Moderow, 'Schiedsverfahren und Insolvenz' (Nomos 2017) 206.
[70] For example, explicitly in Polish law, cf. P. Mankowski (fn. 62) 2482 f. See also R. Hänel (fn. 51) Art. 6 para. 55.
[71] Always provided that the specific agreement includes the declaratory dispute; cf. M. Heese (fn. 56) 174.
[72] Ch. Wenner and M. Schuster in K. Wimmer (ed.) Frankfurter Kommentar zur Insolvenzordnung (Luchterhand, 9th ed. 2017) Art. 6 EIR para. 23; see also Ch. Thole (fn. 28) Art. 2 EIR para. 8; J. Schmidt in P. Mankowski, M.F. Müller and J. Schmidt (eds.), EuInsVO 2015 (C.H. Beck 2016) Art. 2 para. 17; M. Brinkmann in M. Brinkmann (ed.), European Insolvency Regulation (C.H. Beck–Hart Publishing–Nomos 2019) Art. 2 para. 11.
[73] Ch. Wenner and M. Schuster (fn. 72) Art. 6 EIR para. 23 probably tend in this direction; for a different view see Ch. Koller, 'Die internationale Zuständigkeit für Annexverfahren und das Kollisionsrecht der Insolvenzanfechtung im Spiegel jüngster Entwicklungen' in A. Konecny (ed.), Insolvenz-Forum 2017 (NWV 2018) 37, 50; R. Hänel (fn. 51) Art. 6 para. 55.
[74] Cf. for German law D. Leipold, case note on 179 BGHZ 304 (2010) 123 ZZP 90, 91 f., who refers to § 185 IO, according to which the opening of insolvency proceedings has no effect on the legal process. However, since this is primarily a matter of enforcing claims under public law, nothing can be gained from this consideration with regard to Art. 6 EIR.
[75] Cf. R. Hänel (fn. 51) Art. 6 para. 55.
[76] See above, 4.2.1.

Since the comprehensive classification of declaratory disputes – in which arbitration agreements concluded by the debtor might be relevant comparatively often – as insolvency-related was only recently affirmed by the ECJ, it is therefore likely that the consideration of arbitration simply was not seen as necessary. This is all the more probable as Art. 6 EIR is seen as a codification of the previous case law of the ECJ,[77] which, however, was never confronted with arbitration agreements. Besides, Art. 18 EIR proves that there are no deep concerns with regard to arbitration proceedings as such. According to this provision, the effects of the insolvency proceedings on "pending arbitral proceedings" shall be governed by the law of the Member State in which the arbitral tribunal has its seat. Hence, the EIR takes the possibility of the continuation and, ultimately, of a decision by arbitral tribunals into account.[78] It is therefore doubtful, whether Art. 6 EIR, in addition to determining international jurisdiction, redirects insolvency-related arbitration to State courts.

Of course, even under the preliminary assumption that Art. 6 EIR does not concern the legal process, the undoubted content of this provision has to be considered: Art. 6 EIR provides for an exclusive international jurisdiction in the opening State in order to bundle insolvency-related proceedings there. For this purpose, it excludes divergent agreements on the place of jurisdiction and the possibility to rectify a lack of jurisdiction based on acceptance without complaint.[79] Not even the administrator and the creditor could therefore agree on a forum outside the opening State. Rather, there is no way around the opening State, because, in this respect, insolvency law objectives prevail the procedural private autonomy. According to the ECJ in the case of *Wiemer & Trachte*, this "*is consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings*" and avoids forum shopping between the Member States at the same time.[80] It may be left open, whether the reasoning and the result are ultimately convincing.[81]

Against this background, it is to be doubted whether arbitration should offer the parties an opportunity to engage in insolvency-related proceedings outside the opening State. Admittedly, it is recognised that exclusive jurisdiction does not conflict with arbitration agreements under autonomous German law;[82] this is, however, due to the systematic approach of German civil procedural law, which declares jurisdiction clauses invalid in the case of exclusive jurisdiction (§ 40 ZPO) but stipulates the conditions for arbitration proceedings independently (§§ 1025 ff. ZPO) without taking exclusive jurisdiction into account.[83] In contrast, according to the ECJ's interpretation of Art. 6 EIR, due to insolvency law objectives, insolvency-related proceedings have to be initiated in the opening State in any case. Arbitration abroad would be just as detrimental to this approach as proceedings before foreign State courts, which are undoubtedly inadmissible. Consequently, no distinction should be made in this respect. Rather, according to Art. 6 EIR, insolvency-related arbitration proceedings outside the opening State are equally inadmissible.[83a]

Thus, the question raised as to whether Art. 6 EIR completely prohibits insolvency-related arbitration proceedings becomes considerably less important, since, from the perspective of the EIR, all that could remain is the possibility of arbitration in the opening State.[84] This would, however, only be of small consolation, as the

[77] R. Bork (fn. 13) 41; St. Madaus (fn. 51) Art. 6 EIR para. 3.
[78] See below, 5.4.
[79] P. Mankowski (fn. 17) Art. 6 para. 29; P. Mankowski, case note on *Wiemer & Trachte* [2018] NZI 998, 997.
[80] *Wiemer & Trachte* (fn. 7) paras. 33 f.
[81] Sceptically, amongst others, R. Bork (fn. 13) 61; P. Kindler and M. Wendland (fn. 44) 249; L. Planitzer (fn. 7) 7.
[82] K. Schmidt, 'Schiedsfähigkeit von GmbH-Beschlüssen' [1988] Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 523, 526 f.; G. Wagner (fn. 54) 45 f.; P. Schlosser in R. Bork and H. Roth (eds.), Stein/Jonas Kommentar zur Zivilprozessordnung X (Mohr Siebeck, 23rd ed. 2014) § 1030 para. 3; BT-Drucks. 13/5274, 34 f.
[83] G. Wagner (fn. 54) 46.
[83a] Contrary Ch. Koller (fn. 73) 50; R. Hänel (fn. 51) Art. 6 para. 55.
[84] Hereinafter it is assumed that the place of arbitration also determines the applicable procedural law; cf. for Germany § 1025 para. 1 ZPO; for Austria § 577 para. 1 öZPO. It could still be considered whether Art. 6 EIR precludes the parties from choosing a procedural law that differs from that of the opening State.

parties of international arbitration agreements regularly aim to avoid the proceedings from being conducted in the home country of one of the parties.[85] Accordingly, the agreed upon place of arbitration will rarely be located in the opening State since its neutrality is necessarily ruled out by the COMI. In this respect, the problem will often resolve itself.

However, proverbial exceptions to this rule are quite conceivable. On the one hand, the admissibility of arbitration could be of importance for creditors who are themselves domiciled in the opening State and who have therefore agreed to this place of arbitration from the outset.[86] On the other hand, arbitration agreements concluded with the administrator subsequent to the opening of insolvency proceedings can be considered. If Art. 6 EIR would redirect all insolvency-related proceedings to the State courts of the opening State, these possibilities would be eliminated. The declaratory dispute could not even be conducted before an arbitral tribunal in the opening State if it was permitted by national law and creditor and opposing administrator would agree upon it; arbitration regarding avoidance claims would, in any case, be inadmissible. Although these possibilities are not called into question under national law,[87] they would thus be abolished on the European level, even if the objective of the concentration of proceedings in the opening State emphasised by the ECJ would be taken into account.[88] Art. 6 EIR would amount to an absolute European refusal of insolvency-related arbitration proceedings and thus would, to some extent, interfere deeply with the *lex fori concursus*. However, it is hardly convincing that the decision of insolvency law on whether and, if so, to what extent, arbitration is admissible is to be completely removed from the *lex fori concursus*, especially against the background that Art. 6 EIR presumably does not aim at arbitration.

Hence, good reasons argue in favour of reducing[89] the substantive content of Art. 6 EIR teleologically so that it does not address the admissibility of arbitration. Of course, since the determination of exclusive international jurisdiction is also relevant with regard to arbitration proceedings, the problem becomes less significant, because the agreed place of arbitration regularly will not be located in the opening State. Apart from this, however, the EIR leaves the assessment of insolvency-related proceedings to national law.[90] Whether the declaratory dispute can be conducted before an arbitral tribunal in the opening State therefore depends on the *lex fori concursus*, which decides on arbitrability, on the binding of the opposing parties to the agreement entered into by the debtor and on the possibility of concluding new agreements.

5. Pending proceedings

5.1. Lex fori and continuation

All in all, the implications of *Skarb Państwa/Riel* on jurisdiction and arbitration are far-reaching, since declaratory disputes now have to be initiated in the opening State.[91] However, the ECJ did not comment on the effect of the opening of insolvency proceedings on cases already pending in other Member States at this point of time. According to Art. 18 EIR, which is applicable because the claims in question concern the debtor's insolvency estate, these effects "*shall be governed solely by the law of the Member State in*

[85] J. Münch in Th. Rauscher and W. Krüger (eds.), Münchener Kommentar zur Zivilprozessordnung III (C.H. Beck, 5th ed. 2017) preliminary remark to § 1025 para. 100 with further references.
[86] Of course, in this case, other circumstances have to constitute the international dimension which is a prerequisite for the applicability of the EIR; cf., amongst others, S. Mock in A. Fridgen, A. Geiwitz and B. Göpfert (eds.), Beck'scher Online-Kommentar zur Insolvenzordnung (C.H. Beck, 21st ed. 2020) Art. 1 EIR para. 20.
[87] G. Wagner (fn. 54) 40 on German law with a comparative reference; see also K. Schmidt, 'Schiedsklauseln in der Insolvenz' in M. Brinkmann et al. (eds.), Festschrift für Hanns Prütting (Carl Heymanns 2018) 889, 891, 894.
[88] The conceivable objection that the desired increase in efficiency results precisely from the application of the civil procedural law of the opening State and that arbitration proceedings are inadmissible for this reason would not be convincing.
[89] Cf. J. Neuner, 'Die Rechtsfortbildung' in K. Riesenhuber (ed.), Europäische Methodenlehre (De Gruyter, 3rd ed. 2015) § 12 para. 33.
[90] In contrast Ch. Wenner and M. Schuster (fn. 72) Art. 6 EIR para. 23.
[91] Cf., against this background, A. Piekenbrock (fn. 5) 417 ff.; P. Kindler and M. Wendland (fn. 44) 254 f.

which that lawsuit is pending or in which the arbitral tribunal has its seat."[92] Therefore, in conformity with the general *lex-fori*-principle, courts shall continue to apply the procedural law of the respective Member State,[93] which servers to ensure procedural legal certainty as well as effective litigation.[94] Thus, civil proceedings in Germany and Austria are suspended – according to national law – if insolvency proceedings are opened in another Member State.[95] Specific aspects of arbitration proceedings will be discussed below.[96]

If the creditor subsequently lodges his claim and there is opposition, the pending, suspended proceedings are taken into account by German (§ 180(2) InsO) as well as Austrian (§ 113 öIO) law. Proceedings are continued and adapted to the insolvency proceedings, whereby civil procedure shows itself unaccustomedly flexible: it is easily possible to convert the action for payment to an action for declaration, which is still admissible in appeal proceedings and, in Austria, is even carried out *ex officio*; opposing creditors are included without further ado, even though the action was originally brought against the debtor only.[97] Obviously, no procedural obstacles shall be placed in the way of continuation, which underlines the significance of the objective: the continuation allows the use of already established evidence and negotiation results, thus prevents the frustration of procedural effort and, correspondingly, is more efficient than the initiation of new proceedings.[98]

With regard to European cross-border insolvencies, this objective could now be in conflict with the *vis attractiva concursus* emphasised by the ECJ, which would like declaratory disputes to be conducted in the opening State. Since neither EIR or Brussels Ia nor German or Austrian law provide for a cross-border referral or delegation of proceedings to the competent court in the opening State while maintaining the already existing results of the proceedings,[99] a continuation of the proceedings in the opening State is impossible. If the proceedings could not be continued before the foreign court seized, the filing of a separate action in the opening State according to Art. 6 EIR would be inevitable, which would largely frustrate the previous litigation effort.

It is all the more understandable, that Art. 18 EIR refers to national procedural law and therefore leaves the decision on the possibility of continuation to the Member States. In detail, this results in the following: the jurisdiction of the court already seized is to be assessed in accordance with Brussels Ia, which is still applicable at the time the action is filed. Since subsequent changes in the circumstances relevant for jurisdiction are not taken into account (*perpetuatio fori*),[100] the accessory jurisdiction under Art. 6 EIR does not apply. The effects of the opening of insolvency proceedings abroad are governed by national law only (Art. 18 EIR). Accordingly, civil procedure is regularly suspended.

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[92] Inversely Art. 7 para. 2 lit. f EIR; with regard to the applicability of Art. 18 EIR see Case C-250/17 *Virgílio Tarragó da Silveira* ECLI:EU:C:2018:398, para. 33.

[93] Cf. M. Brinkmann (fn. 26) Art. 15 EIR para. 1; H.-J. Lüer in W. Uhlenbruck, H. Hirte and H. Vallender (eds.), Insolvenzordnung (Verlag Franz Vahlen, 14th ed. 2015) Art. 15 EIR para. 1; C.G. Paulus (fn. 26) Art. 18 para. 2; Ch. Thole in H. Vallender (ed.), EuInsVO (RWS, 2nd ed. 2020) Art. 18 para. 1; M. Trenker in Ch. Koller, E. Lovrek and M. Spitzer (eds.), Insolvenzordnung (Verlag Österreich 2019) Art. 18 EIR para. 1.

[94] R. Bork in B.M. Kübler, H. Prütting and R. Bork (eds.), Kommentar zur Insolvenzordnung (RWS 2018) Art. 18 EIR para. 2; see also G. Mäsch in Th. Rauscher (ed.), EuZPR/EuIPR II (Verlag Dr. Otto Schmidt, 4th ed. 2015) Art. 15 EIR para. 1.

[95] With regard to the question of whether the suspension occurs according to § 240 ZPO or § 352 InsO see M.F. Müller in P. Mankowski, M.F. Müller and J. Schmidt (eds.), EuInsVO 2015 (C.H. Beck 2016) Art. 18 para. 18 with further references.; cf., for Austria, §§ 7, 231 öIO.

[96] Below, 5.4.

[97] W. Gerhardt (fn. 58) § 180 paras. 67 ff.; R. Sinz (fn. 58) § 180 paras. 22, 29 f.; for Austria see A. Konecny (fn. 61) § 113 KO paras. 23 ff.; W. Jelinek in Ch. Koller, E. Lovrek and M. Spitzer (eds.), Insolvenzordnung (Verlag Österreich 2019) § 113 paras. 31, 34 ff.

[98] Motive zu dem Entwurf einer Konkurs-Ordnung (1875) S. 365 f.; for Austria cf. Denkschrift zur Einführung einer Konkursordnung, einer Ausgleichsordnung und einer Anfechtungsordnung (1914) S. 99. Other legal systems, however, attach less importance to this circumstance and therefore do not allow the continuation at all or only to a limited extent, cf. C. Willemer (fn. 22) 348.

[99] H. Prütting in Th. Rauscher and W. Krüger (eds.) Münchener Kommentar zur Zivilprozessordnung I (C.H. Beck, 5th ed. 2016) § 281 para. 5; G.E. Kodek, 'Überweisung von Klagen im europäischen Justizraum' [2005] Österreichische Richterzeitung (RZ) 219.

[100] A. Piekenbrock (fn. 26) 2072; B. Schneider (fn. 26) 105.

Subsequently, if the claim is an insolvency claim under the *lex fori concursus*, the creditor must lodge it in the opening State (Art. 7(2)(g) and (h) EIR).[101] However, the implications of opposition to the claim with regard to the pending lawsuit depend, again, on the *lex fori* (Art. 18 EIR), which governs the continuation of suspended proceedings according to the prevailing opinion.[102] Therefore, in Germany and Austria, proceedings are continued, the action is being conversed to an action for declaration and opponents to the claim are able to participate (§ 180 (2) InsO, § 113 öIO).[103] The doctrine largely agrees in this respect.[104]

5.2. Objections under insolvency law

However, there are different views on the power of the court hearing the case, the limitation of which to the assessment of the claim under substantive law is being considered. In a certain recurrence of the general discussion on the categorisation of actions for declaration,[105] reference is made to the specific questions of insolvency law (such as the ranking of the claim) which can arise in the context of declaratory disputes. With regard to these questions, the *vis attractiva concursus* was relevant, which is why proceedings in the opening State were necessary.[106] The judgement given in the continued proceedings had binding effect with regard to the preliminary question of the existence of the claim.[107]

Of course, this separation of civil and insolvency law issues would devalue the reference in Art. 18 EIR to national procedural law, which becomes particularly clear in Germany and Austria. Although the focus would remain on the continued litigation, because regularly the existence of a claim and not, for example, its ranking is disputed, nevertheless the necessity of second proceedings in the opening State would conflict with the national objective of efficiency.

The fact that insolvency-specific issues are governed by the *lex fori concursus* (Art. 7(2)(g) and (h) EIR) could not justify this incursion into national law and at the same time into Art. 18 EIR,[108] since there are no objections to a decision of the seized court (partly) based on the *lex fori concursus*. After all, the questions which may be relevant (such as ranking or capitalisation) do not, on the one hand, arise from the sovereignty of States in a way that a court would not be allowed to asses them under foreign law. This would be the case, for example, with regard to the composition of the court, the procedural principles to be complied with or the types of judgements provided.[109] On the other hand, these questions do not concern the conduct of proceedings in a technical manner, which would compel courts to apply the *lex fori* for the pragmatic reason that it would be considerably more difficult to handle

[101] Cf. F. Garcimartín and M. Virgós in R. Bork and K. van Zwieten (eds.), Commentary on the European Insolvency Regulation (Oxford University Press 2016) Art. 18 para. 18.10; A. Konecny (fn. 26) paras. 17.128 f.

[102] R. Bork (fn. 94) Art. 18 EIR paras. 12 ff.; P. Kindler (fn. 26) Art. 18 EIR para. 11; C.G. Paulus (fn. 26) Art. 18 para. 2; M.F. Müller (fn. 95) Art. 18 para. 18.

[103] M. Brinkmann (fn. 26) Art. 15 EIR para. 10; see also M. Brinkmann, 'Die Auswirkungen der Eröffnung eines Verfahrens nach Chapter 11 U.S. Bankruptcy Code auf im Inland anhängige Prozesse' [2011] IPRax 143, 146, according to whom the fact that the relevant provisions can be found in the Insolvency Code does not change their procedural nature, which is why Art. 18 EIR refers to them; accordingly St. Reinhart in R. Stürner, H. Eidenmüller and H. Schoppmeyer (eds.), Münchener Kommentar zur Insolvenzordnung (C.H. Beck, 3rd ed. 2016) Art. 15 EIR para. 13.

[104] C. Willemer (fn. 22) 347 ff.; A. Piekenbrock (fn. 26) 2072 f.; M. Brinkmann (fn. 26) Art. 15 EIR para. 10; B. Schneider (fn. 26) 105; A. Konecny (fn. 28) para. 17.98; S. Grompe (fn. 27) 199 fn. 518; see also M. Trenker (fn. 93) Art. 18 EIR para. 10 fn. 44; see, however, F. Garcimartín and M. Virgós (fn. 101) Art. 18 para. 18.11.

[105] See above, 2.

[106] In this context it would be questionable whether the creditor or the contestant would have to initiate the second declaratory dispute in the opening State, which would be governed by the law of the opening State; cf. C. Jungmann in K. Schmidt (ed.), Insolvenzordnung (C.H. Beck, 19th ed. 2016) § 179 paras. 10 f.; G.E. Kodek (fn. 18) § 110 KO para. 46.

[107] A. Piekenbrock (fn. 26) 2072 f., who points to the necessity of the participation of all disputants in order to preserve their right to be heard and to ensure recognition of the judgement; see also A. Piekenbrock (fn. 5) 412; more reserved M. Trenker (fn. 93) Art. 18 EIR para. 10 fn. 44.

[108] Cf. C. Willemer (Fn. 22) 348 f.

[109] Extensively on this possible justification of the *lex-fori*-principle M. Brinkmann, 'Das lex fori-Prinzip und Alternativen' (2016) 129 ZZP 461, 475 ff.; see also P. Böhm, 'Die Rechtsschutzformen im Spannungsfeld von lex fori und lex causae' in R. Holzhammer, W. Jelinek and P. Böhm (eds.), Festschrift für Hans W. Fasching (Manz 1988) 107, 117 ff. The corresponding type of judgement (declaration) must, of course, be provided by national law.

proceedings otherwise.[110] Rather, they are substantial issues.[111] Their assessment under foreign law does not differ structurally from the assessment of the conclusion of a contract or the legal capacity of a legal person, which, of course, is possible in both cases. Thus, conflict-of-law rules do not in any way restrict the continued proceedings to the assessment of civil law.[112] Objections under insolvency law against the claim must be assessed according to the law of the opening State, but not necessarily in the opening State.

Consequently, the dictum that the declaratory dispute is not about the existence of civil claims against the debtor but rather about the right to participate in the insolvency proceedings and the insolvency estate[113] becomes less significant regarding the problem at hand. It tells us nothing about the question, whether the declaration of the right to participate is possible outside the opening State.[114] Since there is no fundamental objection to this, whether the continuation up to the final decision on the right to participate in the insolvency proceedings is possible depends on whether the national law applicable according to Art. 18 EIR offers the necessary procedural framework. If it can be found and the interests of all parties involved are preserved – which above all makes it necessary to adapt the subject-matter of the dispute[115] and to include all opposing parties[116] – there is no reason why there should not be a final decision. If the framework cannot be found, the *lex fori* prevents the continuation anyway. For instance, it is disputed under German law whether pending proceedings are to be continued according to § 180 para. 2 InsO if the opposition is exclusively relating to the ranking of the claim.[117] If this were not the case, the *lex fori* established under Art. 18 EIR would stand in the way of continuation and the new action which would have become necessary as a result would have to be filed in the opening State according to *Skarb Państwa/Riel*. Therefore, in this case, the creditor is referred to the opening State anyway.

5.3. Interim result

As a result, the principle of Art. 18 EIR must be applied, according to which pending lawsuits are governed by the *lex fori* further on. Hence, the possibility to continue civil proceedings to obtain a declaratory judgement on the existence of a claim for the purpose of participation in insolvency proceedings depends on the *lex fori*. Accordingly, the continuation is admissible in Germany and Austria. Exceptions to this principle are in need of justification. The reference to insolvency specifics of the declaratory dispute does not meet this demand, because their assessment according to the *lex fori concursus* is possible for foreign courts too. If and because the national procedural law appointed under Art. 18 EIR permits this, the proceedings can therefore be continued.[118]

5.4. Arbitration

The same applies to arbitration proceedings which were already pending abroad when the insolvency proceedings were opened, as Art. 18 EIR now

[110] M. Brinkmann (fn. 109) 486 f.; see also G. Wagner, 'Prozessverträge' (Mohr Siebeck 1998) 353 ff.; B. Hess, 'Europäisches Zivilprozessrecht' (C.F. Müller 2010) § 1 para. 13; P. Böhm (fn. 109) 115 ff.

[111] Cf. H. Roth, 'Die Reichweite der lex-fori-Regel im internationalen Zivilprozeßrecht' in F. Dencker et al. (eds.), Festschrift für Walter Stree und Johannes Wessels (C.F. Müller 1993) 1045, 1051 f., according to whom the circumstances justifying the *lex-fori*-rule are also relevant with regard to the preliminary question of qualification.

[112] Cf. S. Grompe (Fn. 27) 180.

[113] W. Henckel, 'Der Gegenstand des Verfahrens zur Feststellung von Konkursforderungen' in H.-M. Pawlowski and F. Wieacker (eds.), Festschrift für Karl Michaelis (Vandenhoeck & Ruprecht 1972) 151, 152 ff.; see also B. Nunner-Krautgasser, 'Schuld, Vermögenshaftung und Insolvenz' (Manz 2007) 362 ff.; R. Schumacher (fn. 18) § 179 para. 3, § 180 para. 18; M. Trenker (fn. 93) Art. 18 EIR para. 10; OGH (Austrian Supreme Court), decision of 22 April 2010 (8 Ob 78/09t), [2010] ZIK 192.

[114] The question of whether the declaratory judgement on the existence of a claim is of relevance in parallel insolvency proceedings or whether the existence can only be determined for one specific insolvency proceeding at a time relates to a different problem; cf. G.E. Kodek, 'Feststellung zur Tabelle (Forderungsfeststellung) in Österreich und internationale Bindungswirkung' [2011] ZInsO 889.

[115] On the admissibility of declaratory actions, which is governed by procedural law as well as substantive law, see P. Böhm (fn. 109) 119 ff.; H. Roth (fn. 111) 1058.

[116] Cf. A. Piekenbrock (fn. 26) 2073.

[117] R. Schumacher (fn. 18) § 180 para. 19 with further references.; in favour BGH, decision of 26 January 2017 (IX ZR 315/14), [2017] ZIP 436. For Austria cf. G.E. Kodek (fn. 18) § 113 KO paras. 36 ff.; A. Konecny (fn. 61) § 113 KO paras. 9 f.; W. Jelinek (fn. 97) § 113 paras. 19 ff.

[118] C. Willemer (fn. 22) 347 ff., on recognition 349 f.; see also M. Brinkmann (fn. 26) Art. 15 EIR para. 10; A. Piekenbrock (fn. 26) 2073.

clarifies.[119] The law of the place of arbitration is decisive, whereby the permissible choice of another procedural law must be considered.[120] As a result, arbitration proceedings remain subject to the law that was applicable prior to the opening of insolvency proceedings (*lex arbitri*).[121] The *lex arbitri*, for example, governs suspension and the possibility of continuation.[122]

Of course, as it is the case with regard to pending civil proceedings, the scope of this reference is less clear in detail. Concerning civil proceedings, for example, the assessment of the power of attorney is controversial; whether the debtor or the administrator is entitled to conduct proceedings, however, was governed by the *lex fori concursus* in any case.[123] In arbitration proceedings, as a structurally comparable borderline case, it is also necessary to assess whether and, if so, to what extent the arbitration agreement is still relevant in the event of insolvency. After all, although it is largely acknowledged under German law that the administrator is bound to arbitration agreements concluded by the debtor, there is no European consensus on this issue; rather, the binding effect is rejected regularly.[124] In the light of these considerable differences, the question of the applicable law is gaining in importance.[125] The options are the *lex fori concursus* and the *lex arbitri*. While it is a genuine decision of insolvency law whether there is room for arbitration agreements in insolvency and it is therefore recognised that this question is governed by the *lex fori concursus* in principle,[126] the objective of Art. 18 EIR could argue for the *lex arbitri* in pending proceedings.

Doctrine and jurisprudence have dealt with this in detail following the insolvency of a Polish company which, at the time of the opening of insolvency proceedings, was involved in numerous arbitration proceedings against a French company and which was subject to the particularly "arbitration-unfriendly"[127] Polish insolvency law („*Elektrim v. Vivendi*").[128] This *lex fori concursus* would have prevented the continuation of the proceedings, the *lex arbitri* would have partly allowed it, which was particularly evident in England. Both the High Court of Justice and the Court of Appeals approved of the continuation by an arbitral tribunal under English law, as the EIR's reference to the *lex arbitri* would otherwise be "*rendered practically redundant*".[129]

In the academic discourse this result was criticised to some extent,[130] but was confirmed predominantly[131] in order to take the objective of Art. 18 EIR into account sufficiently.[132] Accordingly, Art. 18 EIR completely equalises the

[119] On the genesis C.G. Paulus (fn. 26) Art. 18 para. 4 with further references.
[120] Cf. P. Mankowski (fn. 62) 2482; M. Brinkmann (fn. 26) Art. 15 EIR para. 11; P. Ehret in E. Braun (ed.), Insolvenzordnung (C.H. Beck, 7th ed. 2017) Art. 18 EIR para. 18.
[121] R. Bork (fn. 94) Art. 18 EIR para. 16.
[122] On suspension under German law, amongst others, G. Wagner (fn. 54) 55 ff.
[123] Cf. St. Reinhart (fn. 103) Art. 15 EIR para. 15; M. Brinkmann (fn. 26) Art. 15 EIR para. 9; M. Dahl and J. Kortleben in M. Brinkmann (ed.), European Insolvency Regulation (C.H. Beck–Hart Publishing–Nomos 2019) Art. 18 para. 11.
[124] See above, 4.2.1.
[125] D. Eckardt (fn. 67) 938 f.
[126] See above, 4.2.2.
[127] Cf. D. Eckardt (fn. 67) 941.
[128] Cf., amongst others, B. Kasolowsky and M. Steup, 'Insolvenz in internationalen Schiedsverfahren' [2010] IPRax 180.
[129] *Syska v. Vivendi Universal SA* [2008] EWHC 2155 (Comm); *Syska v. Vivendi Universal SA* [2009] EWCA Civ 677. In contrast, the Swiss Federal Supreme Court (BG) applied Polish law – according to the international private law of Switzerland – which led to the dismissal of arbitration proceedings; cf. BG, decision of 31 March 2009 (4A_428/2008), [2010] ZIP 2530.
[130] P. Mankowski (fn. 62) 2483 ff. with regard to the possibility of *perpetuatio arbitrationis*, which is governed by the *lex arbitri* and does not take subsequent changes of the circumstances relevant for the admissibility of arbitration into account; D. Poelzig (fn. 67) 430; St. Reinhart (fn. 103) Art. 15 EIR para. 6; differentiating Ch. Thole (Fn. 93) Art. 18 para. 10, who, however, subjects the question of the effect of insolvency proceedings on the arbitration agreement to the *lex fori concursus*; Ch. Wenner and M. Schuster (fn. 72) Art. 18 EIR para. 14.
[131] G. Wagner (fn. 54) 59 f.; Ph. Wagner, 'Die insolvente Partei im Schiedsverfahren – eine Herausforderung für alle Beteiligten' [2010] Gesellschafts- und Wirtschaftsrecht (GWR) 129, 131; D. Eckardt (fn. 67) 945 f.; M. Riedel (fn. 59) 150, 154 f.; P. Kindler, '*Lex loci arbitri* vs. *lex fori concursus* vs. *lex societatis*: Die Insolvenz der ausländischen Schiedspartei nach der (geplanten) Reform der EuInsVO' in R. Geimer, A. Kaissis and R. Thümmel (eds.), Festschrift für Rolf A. Schütze (C.H. Beck 2014) 221, 224; Th. Pfeiffer, 'Insolvenzeröffnung und internationale Schiedsverfahren' in M. Flitsch et al. (eds.), Festschrift für Jobst Wellensiek (C.H. Beck 2011) 821, 829 f.; see also M.F. Müller (fn. 95) Art. 18 para. 22.
[132] See also OGH, decision of 23 February 2005 (9 Ob 135/04z) and on this decision M. Brinkmann, 'Zu Voraussetzungen und Wirkungen der Art. 15, 25 EuInsVO' [2007] IPRax 235. Accordingly, the loss of the debtor's right to dispose is governed by the *lex fori concursus*, the

effects of the opening of domestic and foreign insolvency proceedings with regard to pending arbitration proceedings as well.[133] The problem is not to be discussed any further at this point, however, the ECJ has not had a chance to rule on it yet. In the meantime, it is therefore advisable for the parties of an arbitration agreement to keep an eye on both the *lex arbitri* and the potential *lex fori concursus*. As always, the reference to the applicable law is of course open-ended, which is why the applicability of the *lex arbitri* does not necessarily lead to the possibility of continuation. If, for example, a German defendant in arbitration were to become insolvent in the course of arbitration proceedings pending in Poland, Polish law, unlike German law, would prevent the continuation as a declaratory dispute. Accordingly, the reference to the *lex arbitri* is no more a carte blanche to arbitration than the application of the *lex fori concursus* is its deathblow.

6. Outcomes

All in all, the *vis attractiva concursus* continues to take shape: the ECJ emphasises the insolvency law character of actions for declaration of the existence of claims in *Skarb Państwa/Riel*, making the broad discussion on this subject obsolete. Since Austrian – as well as German – declaratory proceedings are linked to the insolvency proceedings comparatively loosely and are nevertheless to be conducted in the opening State, it can be assumed that the decision is precedent-setting with regard to the corresponding instruments of other Member States.

The now established applicability of the EIR leads to the loss of the fora provided by Brussels Ia if the debtor becomes insolvent. As the objective of the venue Brussels Ia would provide is irrelevant, even the protective provisions regarding insurance, consumers and employees cease to apply. Prorogation agreements entered into by insolvency creditors are not insolvency-proof either.

The relevance of arbitration agreements in insolvency is regularly limited by national law, in Germany, of course, the possibility to carry out declaratory disputes in arbitral proceedings is widely acknowledged. In European cases, this is governed by the *lex fori concursus*. However, the initiation of proceedings outside the opening State is inadmissible according to Art. 6 EIR. From the perspective of the EIR this only leaves the possibility of arbitration proceedings in the opening State, which usually is not very attractive to creditors.

In contrast, *Skarb Państwa/Riel* has no implications on proceedings already pending in other Member States at the time of the opening of insolvency proceedings, which are governed by the *lex fori* further on (Art. 18 EIR). Hence, if the respective national law permits the continuation as a declaratory dispute, proceedings can be continued after the claim was lodged and opposed. In arbitration proceedings, the additional question arises whether and, if so, to what extent the arbitration agreement is still relevant in the event of insolvency. According to the prevailing, but controversial opinion this is governed by the *lex arbitri* in accordance with Art. 18 EIR as well. However, until the ECJ has decided on this question, it is advisable for arbitral parties to keep the *lex fori concursus* in mind.

implications of which with regard to pending proceedings are to be governed by the *lex fori*.

[133] Cf. C.G. Paulus (fn. 26) Art. 18 para. 1; R. Bork (fn. 94) Art. 18 EIR para. 2. On the question of recognition in the opening State see D. Eckardt (fn. 67) 939.