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ARTICLE

Unravelling the insolvency exception

A case law analysis of the reasoning used by the CJEU

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Abstract

In European private international law, a distinction between insolvency-related and non-insolvency-related proceedings is drawn. However, the case law of the Court of Justice of the European Union on the delimitation between these regimes has been widely criticised for its lack of legal certainty. This article analyses the relevant case law and develops a structured set of factors to determine whether a proceeding is insolvency-related and, consequently, falls within the scope of the European Insolvency Regulation.

1 Introduction

1. Within the European Union, with the exception of Denmark, questions of private international law concerning insolvency-related proceedings are addressed separately from non-insolvency proceedings. While international jurisdiction in civil and commercial matters is generally governed by the Brussels Ia Regulation,[2] the European Insolvency Regulation[3] ("EIR") applies where the proceedings are insolvency-related. Determining which instrument applies depends on the scope of Article 1(2)(b) of the Brussels Ia Regulation ("the insolvency exception").[4]

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2 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).

3 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

4 In this article, the term 'insolvency exception' is used to refer to the insolvency exception found both in the Brussels Convention and in its successors. It is noted that an interpretation given by

If the insolvency exception applies, the EIR applies, ensuring that neither a legal vacuum nor any overlap exists.[5]

2. In 1979, the Court of Justice of the European Union ("CJEU") held that the insolvency exception in the Brussels Convention,[6] a predecessor of the Brussels Ia Regulation, is not only applicable to a decision on the opening of insolvency proceedings but also to claims that "derive directly from the bankruptcy or winding-up" and are "closely connected with" it, thereby excluding these proceedings from the scope of the Brussels Convention.[7] These two criteria are commonly referred to as the Gourdain criteria, named after one of the parties to that proceeding, and have been codified in Article 6(1) EIR. In the nearly five decades since the *Gourdain* judgment, the case law has seemingly failed to provide clear guidance on their application. Bork has called it "much more opaque than it seems".[8] Advocate General Medina has observed that it remains difficult to establish the precise scope of the insolvency exception and noted that the Gourdain criteria "have been applied in an inconsistent manner in practice".[9] Advocate General Bobek stated that the case law in this area is "[h]eavily dependent on the factual and legal context of each individual case" and that its application "may not always be straightforward".[10]
3. This article analyses the CJEU's case law and examines how the Court has approached the scope of the insolvency exception. It argues that, while the CJEU approaches questions concerning the scope of the insolvency exception in a

the CJEU concerning the Brussels Convention also applies to its successors, such as the Brussels Ia Regulation, "where its provisions and those of the Brussels Convention may be treated as equivalent", see: Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419, para 22. Compare: Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544, para 27; Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 23; Case C-649/16 Valach [2017] ECLI:EU:C:2017:986, para 23; Case C-292/25 Shopping24 [2026] ECLI:EU:C:2026:476 para 24; Recital 34 Brussels Ia Regulation.

5 Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 21; Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, para 21; Case C-649/13 Nortel Networks [2015] ECLI:EU:C:2015:384, para 26; Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 17; Case C-337/17 Feniks [2018] ECLI:EU:C:2018:805, para 30; Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, para 24; Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754 para 33; Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952 para 32. See also: Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, para 37.

6 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

7 Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:49, para 4.

8 R Bork, 'International Jurisdiction', in: R Bork & R Mangano (eds), *European Cross-Border Insolvency Law* (Oxford University Press, 2nd edition), para 3.93.

9 Case C-394/22 Oilchart v O.W. Bunker & ING [2024] ECLI:EU:C:2024:330, Opinion of AG Medina, paras 42 and 43.

10 Case C-337/17 Feniks [2018] ECLI:EU:C:2018:487, Opinion of AG Bobek, para 44.

predominantly pragmatic manner, there are identifiable factors that are determinative.

4. Only those cases in which the CJEU has addressed the insolvency exception are examined in this article. National case law is excluded on the basis that the CJEU has ultimate authority over the interpretation of the insolvency exception.
5. Where the CJEU refers to national law, the analysis in this article follows the way in which the national law is presented by the CJEU itself and, where applicable, the Advocate General. This research did not examine national literature or case law on the specific legal basis of the claims that the CJEU had to characterise as insolvency-related. This approach mirrors both the material on which the CJEU itself relied and the way in which it understood the national law when determining if an action falls within the scope of the insolvency exception. While the focus is on the Court's reasoning, Advocate General opinions are also considered.
6. The article proceeds as follows. First, the relevance of the applicability of the insolvency exception is described (§2). Thereafter, the CJEU's reasoning is analysed (§3). The article describes how the Court's assessment changed over time (§3.1-3.3) and what common thread can be found (§3.4). Thereafter, a conclusion is drawn (§4).

2 Relevance of the insolvency exception

7. Determining whether the Brussels Ia Regulation or the EIR applies is of central importance for several reasons.
8. First, the objectives of the Brussels Ia Regulation and the EIR differ, and, thereby, the applicability of either the Brussels Ia Regulation or the EIR might affect which courts have jurisdiction. Whereas the Brussels Ia Regulation prioritises legal predictability and the protection of certain defendants such as employees, the EIR places greater emphasis on the efficiency of insolvency proceedings.[11] Specifically, under the EIR, the courts of the Member State in which insolvency proceedings have been opened shall have jurisdiction over any action which derives directly from the insolvency proceedings and is closely linked with them (Article 6 EIR). This furthers the efficiency and acceleration of the insolvency proceedings.[12] On the other hand, under the Brussels Ia Regulation, employees, for instance, benefit from enhanced protection since they can start proceedings

11 Recitals 15 and 18 Brussels Ia Regulation; recital 3 EIR.

12 WG Ringe, 'Article 6 Jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them' in R Bork and K van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press 2022) para 6.13.

against their employer at the court of the place in which the employee habitually carries out their work (Article 21(1)(b)(i) Brussels Ia Regulation).[13] Additionally, special provisions apply, for instance, to rights *in rem* in immovable property (Article 24(1) Brussels Ia Regulation) and choice of forum agreements (Article 25 Brussels Ia Regulation). To date, the CJEU has not applied the specific, nuanced rules of the Brussels Ia Regulation by analogy to cases governed by the EIR.[14] This upholds the distinct approaches of the two regulations.

9. Second, if the Brussels Ia Regulation is applicable, the enforceability of an arbitration agreement is unaffected, as this regulation leaves it outside its scope.[15] By contrast, the EIR does not provide a clear position on the enforceability of an arbitration agreement. This uncertainty is reflected in ongoing academic debate concerning the permissibility of arbitration when the EIR applies.[16] Accordingly, arbitration agreements may be unenforceable or only enforceable under limited circumstances when the EIR applies.
10. Third, the applicability of the insolvency exception in the Brussels Ia Regulation affects, in practice, the enforceability of court rulings in Denmark, Norway, Iceland, and Switzerland. These countries, as contracting states to the Lugano Convention,[17] apply a similarly worded insolvency exception to that found in the Brussels Ia Regulation.[18] If a ruling falls within the scope of the insolvency exception in the Lugano Convention, enforcement in these countries becomes more challenging, as this Convention cannot be relied upon and no unified treaty governs the recognition of insolvency-related judgments in these jurisdictions. It is important to look at the case law of the CJEU to determine the scope of the insolvency exception in the Lugano Convention. Notably, the Swiss Supreme

13 Recital 18 Brussels Ia Regulation.

14 Regarding lis pendens: Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754 para 46. Regarding immovable property: Case C-493/18 Tiger and Others [2019] ECLI:EU:C:2019:1046 paras 33-34. Regarding the stay of proceedings: Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952 para 59.

15 Article 1(2)(d) and Recital 12 Brussels Ia Regulation.

16 For instance, Wilfinger argues that arbitration within the Member State where the insolvency proceedings are opened remains possible, see: A Wilfinger, "Declaration of Claims in International Insolvency Proceedings" (2021) 2 European Insolvency and Restructuring Journal 1, 10. However, Leandro argues that arbitration after the opening of the insolvency proceeding is possible if the lex concursus permits it, apparently even with a seat outside the Member State in which the insolvency proceeding has been opened, see: A Leandro, "Article 6. Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them" in G Cuniberti and A Leandro (eds), *The European Insolvency Regulation and Implementing Legislations. A Commentary* (Edward Elgar 2024); A Leandro, *Jurisdiction in EU Cross-Border Insolvency Law* (Edward Elgar 2025) paras 3.140 and 7.031.

17 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (adopted 30 October 2007, entered into force 1 January 2010) [2009] OJ L147/5.

18 E.g. Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410 para 32.

Court generally interprets the insolvency exception in the Lugano Convention in accordance with CJEU rulings about the insolvency exception in the Brussels Ia Regulation.[19] Also, the Norwegian Supreme Court regards the rulings of the CJEU as a weighty source of law when interpreting the insolvency exception in the Lugano Convention.[20]

11. As the foregoing shows, the applicability of either the Brussels Ia Regulation or the EIR has implications at every stage of the proceedings, not only for jurisdiction and the permissibility of arbitration, but also for the enforceability of rulings in Denmark, Norway, Iceland, and Switzerland.

3 Analysis of the case law of the CJEU

12. The Court changed its overarching assessment of the insolvency exception over time. It first applied a rather broad assessment (§3.1), altered it to the test of the closeness of the link (§3.2), culminating in a structured twofold test (§3.3). Despite using these different frameworks, the reasoning of the CJEU has been rather consistent, which makes it possible to develop a coherent framework for determining whether an action falls within the scope of the insolvency exception (§3.4).

3.1 Broad assessment

13. In its first two rulings on the scope of the insolvency exception (*Gourdain* and *Seagon*), the CJEU adopted a broadly pragmatic approach. The Court applied a broad assessment of certain features of the action in the main proceedings in order to determine whether it fell within the scope of the insolvency exception. Namely, in both cases, the Court provided several reasons why the insolvency exception was applicable. It referred, for instance, to the fact that only the insolvency practitioner can make the application in the interest of the general body of creditors,[21] a presumption of liability[22] and rules of limitation connected to events related to the insolvency proceedings.[23]

19 Federal Supreme Court of Switzerland 29 May 2015, 5A_491/2013.

20 Supreme Court of Norway 28 June 2017, HR-2017-1297-A, para 37.

21 Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:49, para 5; Case C-339/07 Christopher Seagon v Deko Marty Belgium NV [2009] ECLI:EU:C:2009:83, para 16. Also: Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:33, Opinion of AG Reischl, p. 753; Case C-339/07 Christopher Seagon v Deko Marty Belgium NV [2008] ECLI:EU:C:2008:575, Opinion of AG Ruiz-Jarabo, para 56.

22 Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:49, para 5.

23 Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:49, para 5. Also: Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:33, Opinion of AG Reischl, p. 753; Case C-339/07 Christopher Seagon v Deko Marty Belgium NV [2008] ECLI:EU:C:2008:575, Opinion of AG Ruiz-Jarabo, para 56.

14. In the absence of a general framework, an approach that considers only the features of a specific action is unsatisfactory. Following such an assessment of features, the CJEU would have to determine for each possible action whether it falls within the scope of the insolvency exception. Is the insolvency exception applicable if, indeed, the insolvency practitioner may only bring the claim, but there are no specific rules covering the limitation, and there is no presumption of liability? Or what about the case where there is a presumption of liability due to the insolvency proceeding, but someone other than the insolvency practitioner can bring the action? Relying on the features of an action without any overarching guidance is problematic. Specifically, a claimant has to know in advance which court it must go to and, thereby, whether the Brussels Ia Regulation or the EIR applies. It can take years before a preliminary question has been asked and answered by the CJEU, during which the court cannot delve into the substance of the dispute, and the parties are left in a state of jurisdictional uncertainty.

3.2 Closeness of the link

15. Subsequently, the Court shifted its approach. Instead of the rather broad assessment of relevant features, the Court stated in *SCT Industri* for the first time that "the closeness of the link (...) between a court action such as that at issue in the main proceedings and the insolvency proceedings" is decisive for the purposes of deciding whether the insolvency exception is applicable.[24] The Court followed this assessment in its rulings *German Graphics*[25] and *F-Tex*[26]. In *F-Tex*, however, the Court, while restating the closeness-of-the-link test, went on to draw an explicit distinction between whether the action derived directly from insolvency proceedings and whether it was closely connected to it.[27] It thereby, in practice, already altered its assessment to the twofold test stated in §3.3.
16. When applying the closeness of link test, the Court examined the legal grounds applicable to the dispute,[28] whether the action was "the direct and indissociable consequence of the exercise" by the insolvency practitioner[29] or an independent claim which was also possible outside insolvency proceedings.[30]
17. However, the required degree of proximity remained unclear. In *SCT Industri*, the Court stated that the link is "particularly close"; the action fell within the scope

24 Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419, para 25.
25 Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544, para 29.
26 Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 23.
27 Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 41.
28 Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419, para 30.
29 Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419, para 28.
30 Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544, para 32.

of the insolvency exception.[31] In *German Graphics,* it was stated that the link was "neither sufficiently direct nor sufficiently close"; the action did not fall within the scope of the insolvency exception.[32]

3.3 The twofold test

18. In 2014, the CJEU further refined its framework. The Court stated that its assessment is about "determining on each occasion whether the action at issue derived from insolvency law or from other rules".[33] More specifically, "it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency".[34] This has become known as the 'legal basis test' and was restated in *H. v H.K.*[35] Since *Tünkers v Expert France,* the Court has mentioned this legal basis test in relation to the first criterion.[36] However, it has, on occasion and seemingly inadvertently, presented this test as determinative of the insolvency exception as a whole, rather than confining it to the first criterion.[37] The Court has almost consistently held that the procedural context of the action is not relevant; it is about the legal basis of the action.[38] The only judgment since *Nickel v Kintra* in which the Court did not restate the above framework is *Feniks*.[39] This is likely so because the CJEU examined the applicability of the insolvency exception *ex officio* since no preliminary question about it was asked, making its reasoning about the insolvency exception rather brief and not including its general framework.

31 Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419, para 26.

32 Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544, para 30.

33 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, para 26.

34 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, para 27.

35 Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410, para 21.

36 Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 22; Case C-649/16 Valach [2017] ECLI:EU:C:2017:986, para 29; Case C-493/18 Tiger and Others [2019] ECLI:EU:C:2019:1046, para 27 in which the CJEU noted that this approach is "the Court's settled case-law"; Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 37; Case C-292/25 Shopping24 [2026] ECLI:EU:C:2026:476, para 29.

37 Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, para 28; Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754, para 36

38 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, para 27; Case C-649/13 Nortel Networks [2015] ECLI:EU:C:2015:384, para 28; Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 22; Case C-649/16 Valach [2017] ECLI:EU:C:2017:986, para 29; Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, para 28; Case C-493/18 Tiger and Others [2019] ECLI:EU:C:2019:1046, para 27; Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 37; Case C-292/25 Shopping24 [2026] ECLI:EU:C:2026:476, para 29. However, in Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754 the Court did not restate the irrelevance of the procedural context in relation to the first criterion.

39 Case C-337/17 Feniks [2018] ECLI:EU:C:2018:805, paras 28-33.

19. In relation to the second criterion – whether the action is closely connected to insolvency proceedings – the Court held that "the closeness of the link between a court action and the insolvency proceedings" is decisive.[40] *Tünkers v Expert France* was the first time the Court stated this in relation to the second criterion. It followed from its previous case law that the closeness was decisive for the assessment of the insolvency exception as a whole, not just for the second criterion (see §3.2). In *Tünkers v Expert France,* the CJEU seemingly altered this by making the closeness of the link only relevant in relation to the second criterion. The Court restated that the closeness of the link is decisive for the second criterion in *Valach*[41], *Tiger and Others*[42], *Oilchart*[43] and *Shopping24*[44]. In *NK v BNP,* the Court seemingly inadvertently referred to the closeness of the link as a decisive norm for the insolvency exception as a whole, instead of merely the second criterion, thereby applying its assessment pre-*Tünkers v Expert France*.[45] In *Feniks* and *Skarb v Riel*, the Court did not refer to the closeness of the link at all.[46]

3.4 Underlying factors

20. Although the Court, as analysed above, altered its assessment over time, the reasons the Court used to assess whether an action falls within the insolvency exception are sufficiently consistent to permit the development of a coherent framework. At its core, the inquiry concerns whether the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings.[47] If so, the action falls within the scope of the insolvency exception. Since the Court generally examined the two Gourdain criteria

40 Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 28.

41 Case C-649/16 Valach [2017] ECLI:EU:C:2017:986, para 37.

42 Case C-493/18 Tiger and Others [2019] ECLI:EU:C:2019:1046, para 28.

43 Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 47.

44 Case C-292/25 Shopping24 [2026] ECLI:EU:C:2026:476, para 30

45 Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, para 30.

46 Case C-337/17 Feniks [2018] ECLI:EU:C:2018:805. In Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754, para 38 the CJEU solely stated that the action was "closely connected" with the insolvency proceeding, while not including the closeness of link in the general legal framework of the insolvency exception.

47 Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:49, para 5; Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419, para 27; Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, paras 26-27; Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410, para 23; Case C-649/13 Nortel Networks [2015] ECLI:EU:C:2015:384, para 28; Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754, paras 35-36; Case C-493/18 Tiger and Others [2019] ECLI:EU:C:2019:1046, para 30; Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 45; Case C-292/25 Shopping24 [2026] ECLI:EU:C:2026:476, para 29. Cf. Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 42 in which the CJEU referred to the exercise of the right acquired by an assignee. In Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 26 the CJEU referred to the fact that

together,[48] the following analysis does not make any separation between the two, except when the Court explicitly made this distinction.

21. This article first examines rulings in which the CJEU reasoned in relation to the exclusive prerogative of the insolvency practitioner (§3.4.1). Thereafter, it delves into reasoning about whether the claim requires the commencement of insolvency proceedings (§3.4.2). It then considers the situation in which a claim does not require the commencement of insolvency proceedings and does not relate to the exclusive prerogative of the insolvency practitioner, being an independent claim (§3.4.3). Subsequently, the article assesses whether a claim that requires an actual status of insolvency may fall within the scope of the insolvency exception (§3.4.4) and whether the fact that the action benefits the general body of creditors is relevant (§3.4.5). The article follows by looking into the fact that insolvency proceedings have been closed during or before the proceedings that led to the preliminary proceeding (§3.4.6). Also, the fact that the court has to examine obligations related to insolvency law is analysed (§3.4.7).

3.4.1 Exclusive prerogative of the insolvency practitioner

22. As early as its first ruling (*Gourdain*), the CJEU mentioned the exclusive prerogative of the insolvency practitioner.[49] This continued in *Seagon*[50] and *ÖFAB v Koot*[51]. In *Gourdain*, the Court stated that the national court itself can also make the order on its own motion, so that possible involvement of the court *ex officio* apparently does not preclude the exclusive prerogative of the insolvency practitioner.[52]

the alleged tortfeasors were subject to other rules than those applicable in the contest of insolvency proceedings.

48 Also: Case C-394/22 Oilchart v O.W. Bunker & ING [2024] ECLI:EU:C:2024:330, Opinion of AG Medina, para 43; WG Ringe, 'Article 6 Jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them' in R Bork and K van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press 2022) para 6.18. In addition, Bobek stated it is uncertain whether the Gourdain criteria are truly cumulative, see: Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, paras 45-54. In *Skarb v Riel*, the CJEU inadvertently added as a criterion whether the action has its origin in insolvency proceedings, see: Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754, para 38.

49 Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:49, para 5.

50 Case C-339/07 Christopher Seagon v Deko Marty Belgium NV [2009] ECLI:EU:C:2009:83, para 16.

51 Case C-147/12 ÖFAB, Östergötlands Fastigheter AB v Frank Koot, Evergreen Investments BV [2013] ECLI:EU:C:2013:490, para 25.

52 Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:49, para 5

23. As follows from *NK v BNP*, what matters is the *exclusive* prerogative of the insolvency practitioner. If others can bring the same claim, there is no such exclusive prerogative.[53]

24. The rulings *German Graphics*,[54] *Nickel v Kintra*[55] and *NK v BNP*[56] seem to clarify that the mere involvement of the insolvency practitioner is insufficient to bring an action within the scope of the insolvency exception. The exclusive prerogative appears to turn on whether the insolvency practitioner's involvement is required for the claim itself. This is not the case if the claim existed prior to the commencement of insolvency proceedings, and only the insolvency practitioner can bring the claim during the insolvency proceeding.[57] An example of this is the action by the insolvency practitioner for payment of a debt that existed prior to the commencement of insolvency proceedings.[58] The fact that only the insolvency practitioner can bring the claim during insolvency proceedings concerns the type of enforcement – the procedural context – and is, therefore, irrelevant for the first criterion.[59] The same holds true if the claim can only be brought against the insolvency practitioner, due to the commencement of insolvency proceedings, while the claim existed prior to, or independent of, insolvency proceedings.[60]

25. As follows from *F-Tex*, if a claim is indeed based on the exclusive prerogative of the insolvency practitioner, but is assigned to a third-party and "the dispute does not relate to the validity of the assignment granted by the liquidator and the exercise by the assignee of the right acquired are governed by rules other

53 Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, paras 35-36.
54 Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544, para 33.
55 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, para 29.
56 Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, para 29.
57 E.g. Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145; Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, para 29. Cf. Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544.
58 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, paras 28-30.
59 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, para 27; Case C-649/13 Nortel Networks [2015] ECLI:EU:C:2015:384, para 28; Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 22; Case C-649/16 Valach [2017] ECLI:EU:C:2017:986, para 29; Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, para 28; Case C-493/18 Tiger and Others [2019] ECLI:EU:C:2019:1046, para 27; Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 37; Case C-292/25 Shopping24 [2026] ECLI:EU:C:2026:476, para 29. See also: Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, paras 59-61. Surprisingly, the CJEU mentioned the enforcement mechanism in relation to whether the action derives directly from the insolvency proceeding in: Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 43.
60 Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544. See also: Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, paras 59-61.

than those that apply in the context of insolvency proceedings",[61] the insolvency exception does not apply. In practice, this has the effect of giving insolvency practitioners an opportunity for forum-shopping. They can assign the claim to a third party – even include a provision by which the general body of creditors benefits from possible proceeds obtained by the third party[62] – and thereby exclude the applicability of the EIR and rely instead on the Brussels Ia Regulation. This undermines legal certainty and is inconsistent with the EIR's own objective of preventing forum shopping in cross-border insolvency proceedings.[63] Moreover, it is inconsistent with other provisions of the Brussels Ia Regulation, in relation to which the CJEU has held that "the transfer of claims by the initial creditor cannot, by itself, have an impact on the determination of the court having jurisdiction".[64]

3.4.2 The claim requires the commencement of an insolvency proceeding[65]

26. Moreover, some case law suggests that if the claim itself requires the commencement of insolvency proceedings, even if other persons than the insolvency practitioner can bring the claim, the action falls within the scope of the insolvency exception.
27. As follows from *Valach*, a claim requires the commencement of insolvency proceedings when the claim is based on an action for liability in tort due to

61 See: Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 39 in which the CJEU summarised its ruling in Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215.

62 The CJEU stated that this fact does not alter their analysis regarding the close connection with the insolvency proceedings, see: Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 45.

63 Case C-296/17, Wiemer & Trachte [2018] ECLI:EU:C:2018:902 paras 33-34 with reference to recitals 2, 4 and 8 EIR.

64 Case C-551/24 Deutsche Lufthansa AG v AirHelp Germany GmbH [2025] ECLI:EU:C:2025:771 paras 38-40. Also: Case C-147/12 ÖFAB, Östergötlands Fastigheter AB v Frank Koot, Evergreen Investments BV [2013] ECLI:EU:C:2013:490, paras 56-59; Case C-352/13 CDC Hydrogen Peroxide [2015] ECLI:EU:C:2015:335 para 35; Case C-498/16 Schrems [2018] ECLI:EU:C:2018:37 para 48. This is different when the claimant is not a party to a consumer contract and invokes a jurisdictional basis relating to consumer contracts, see: Case C-89/91 Shearson Lehman Hutton [1993] ECLI:EU:C:1993:15, paras 23-34; Case C-167/00 Henkel [2002] ECLI:EU:C:2002:555, para 33.

65 Bork stated earlier that the case law of the CJEU may be summarised in a "'condicio sine qua non' test according to which (…) that set of insolvency proceedings must be the condicio sine qua non of that action", see: R Bork, 'International Jurisdiction', in: R Bork & R Mangano (eds), *European Cross-Border Insolvency Law* (Oxford University Press, 2nd edition), para 3.114. According to him, this includes the situation that the action "could not be brought outside the insolvency proceedings under those particular substantive or procedural conditions under which this could be brought within them". Langkjaer noted that the first criterion is primarily met if "the debtors' insolvency is a prerequisite for establishing the claim which upon the action is based", see: LH Langkjaer, 'Mixed Actions – A Bit of a Niche When Defining Insolvency Related Actions', in: JMGJ Boon, JA Adriaanse, H Koster, and JMW Pool (eds), *In and Out of Solvency. A Tribute to Prof. Reinout Vriesendorp* (Wolters Kluwer 2025), 90.

alleged infringement of an insolvency-related duty imposed on a member of the committee of creditors to act in the joint interest of all creditors.[66] In addition, a claim requires the commencement of insolvency proceedings when it is about the power of an insolvency practitioner to transfer shares[67] or the validity of the assignment of a claim by the insolvency practitioner, including the power of the insolvency practitioner to assign such a claim.[68]

28. Although the CJEU has not ruled explicitly on it in relation to the insolvency exception, the Court should not take into account insolvency-related defences raised or potentially raised by the defendant.[69] That is in line with the case law under vast majority of other provisions of the Brussels Ia Regulation and its predecessors.[70] Consequently, for example, if a buyer initiates legal proceedings against the insolvency practitioner to compel the delivery of goods based on a contractual reservation of title, and the insolvency practitioner argues in its defence that the contract is void pursuant to a provision of insolvency law, the insolvency exception does not apply. The insolvency practitioner should, therefore, initiate a separate court proceeding about the alleged void nature of the contract. Another approach would undermine legal certainty. What if, for instance, the defendant raises the insolvency-related defence not in the first instance, but on

66 Case C-649/16 Valach [2017] ECLI:EU:C:2017:986, paras 33-34.

67 Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419, paras 27-28.

68 Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 37.

69 Different: LH Langkjaer, 'Mixed Actions – A Bit of a Niche When Defining Insolvency Related Actions', in: JMGJ Boon, JA Adriaanse, H Koster, and JMW Pool (eds), *In and Out of Solvency. A Tribute to Prof. Reinout Vriesendorp* (Wolters Kluwer 2025) 96-98, who held that the "court should instead carefully (…) find the core element(s) of the legal dispute". Compare: S Madaus and others, 'CERIL Report 2021-1 on Identifying annex actions under Article 6(1) of the European Insolvency Regulation prepared by CERIL Working Party (WP) 11 on Matters regarding the European Insolvency Regulation 2015', 9 who held that the first criterion includes a claim which has its basis in commercial or civil law but "is affected by the effects of the commencement of insolvency proceedings to such an extent that matters of insolvency law dominate the litigation"; Case 133/78 *Gourdain* [1979] ECLI:EU:C:1979:33, Opinion of AG Reischl, p. 753: "However, the same must also be assumed to apply to rights, which, although they arise under the general law, are modified by the law of bankruptcy and winding-up to such a substantial extent as to suggest the conclusion that viewed as a whole their nature is entirely determined by the law of bankruptcy and winding-up".

70 Case C-190/89 Rich [1991] ECLI:EU:C:1991:319 paras 26-28; Case C-341/93 Danværn Production A/S v Schuhfabriken Otterbeck GmbH & Co [1995] ECLI:EU:C:1995:239 para 13; Case C-111/01 Gantner Electronic [2003] ECLI:EU:C:2003:257 para 31; Case C-266/01 TIARD [2003] ECLI:EU:C:2003:282 paras 41-44. The CJEU ruled differently in relation to the exclusive jurisdiction in relation to the registration or validity of patents, see: Case C-4/03 [2006] Gesellschaft für Antriebstechnik v Lamellen und Kupplungsbau Beteiligungs ECLI:EU:C:2006:457. However, this ruling has been heavily criticised, see for instance: Case C-339/22 BSH v Electrolux [2024] ECLI:EU:C:2024:159, Opinion of AG Emiliou paras 41-63 with further references. Compare: Case C-144/10 Berliner Verkehrsbetriebe v JPMorgan [2011] ECLI:EU:C:2011:300 paras 37-42.

appeal? May the court decide on the other issues, excluding the insolvency-related defence? Does it have to stay the proceedings? It is not without reason that the Court's different approach in relation to the registration or validity of patents is described as "unwarranted", not offering "a convincing justification" and "undesirable".[71]

3.4.3 Independent claim[72]

29. If the claim does not require the involvement of the insolvency practitioner or the commencement of insolvency proceedings, it is an "independent" claim, and it thus does not fall within the scope of the insolvency exception.[73] This is, for instance, the case in relation to the enforcement of a debt that existed prior to the commencement of insolvency proceedings, without it being relevant that the insolvency practitioner enforces the debt in the interest of the insolvent estate[74] or the insolvent entity being the debtor against which the proceeding is started.[75] Moreover, a claim against assignees of a part of a business acquired during insolvency proceedings regarding acts of unfair competition is independent.[76] The validity of the assignment during the insolvency proceedings was not contested.[77] An independent claim also exists when a contractual reservation of title in relation to an asset which is situated in the Member State where the insolvency proceedings have been opened is invoked.[78]
30. In essence, the fact that a claim is independent is the flip side of the coin of whether the claim concerns the exclusive prerogative of the insolvency practitioner or requires the commencement of insolvency proceedings.

71 Case C-339/22 BSH v Electrolux [2024] ECLI:EU:C:2024:159, Opinion of AG Emiliou.

72 According to Medina, "the question whether an action similar to that at issue may be brought at the same time as, or independently of, insolvency proceedings" relates to the second criterion – whether the action is closely connected with the insolvency proceedings – see: Case C-394/22 Oilchart v O.W. Bunker & ING [2024] ECLI:EU:C:2024:330, Opinion of AG Medina, para 58. Also: Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, para 66.

73 In Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544, para 32, the Court also stated that the claim should not be based on the law of the insolvency proceedings. In Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 27 the Court referred to it as "a separate action". In Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 44 the Court stated the action is "autonomous in so far as it may be brought outside any insolvency proceedings" and para 45. See also: Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, paras 29 and 35-36.

74 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, paras 28-30.

75 Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, paras 43-44.

76 Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847.

77 Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 23.

78 Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544.

31. There is one ruling in which the Court ruled that a claim fell within the scope of the insolvency exception, even though the claim itself did seemingly not require the involvement of the insolvency practitioner or the commencement of insolvency proceedings. Specifically, in *Skarb v Riel*, the Court held that "an action for a declaration of the existence of claims for the purposes of their registration in the context of insolvency proceedings" falls within the scope of the insolvency exception.[79] The dispute concerned an alleged debt out of a contract that was concluded prior to the opening of insolvency proceedings.[80] The Austrian insolvency practitioner challenged the claim submitted in the insolvency proceedings, and, subsequently, a claim validation proceeding commenced.[81] The claim seemingly existed prior to the declaration of insolvency and did not require the commencement of insolvency proceedings. The mere fact that the claim was brought in the context of an insolvency proceeding should not matter. The procedural context is not relevant for the question of whether the claim derives directly from insolvency proceedings.[82] This is underlined by the Court's ruling in *NK v BNP*. In the dispute leading to that judgment, the specific manner of enforcement was only possible in the context of insolvency proceedings, while the claim existed independently of insolvency proceedings.[83] In *NK v BNP*, the Court ruled correctly that the claim did not fall within the scope of the insolvency exception. It seems unlikely the Court will change its position given in *Skarb v Riel*. As Wilfinger wrote, "*Luxembourg locuta, causa finita*".[84]

3.4.4 Claim requires an actual status of insolvency

32. There is one ruling in which the CJEU ruled that the insolvency exception is applicable, despite the claim not requiring insolvency proceedings and not concerning the exclusive prerogative of the insolvency practitioner but merely an actual status of insolvency. This case, *H. v H.K.*, concerned the liability of

79 Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754, para 40.

80 Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754, paras 18-23.

81 Case C-47/18 Skarb v Riel [2019] ECLI:EU:C:2019:754, paras 23 and 25.

82 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, para 27; Case C-649/13 Nortel Networks [2015] ECLI:EU:C:2015:384, para 28; Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 22; Case C-649/16 Valach [2017] ECLI:EU:C:2017:986, para 29; Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, para 28; Case C-493/18 Tiger and Others [2019] ECLI:EU:C:2019:1046, para 27; Case C-394/22 Oilchart [2024] ECLI:EU:C:2024:952, para 37; Case C-292/25 Shopping24 [2026] ECLI:EU:C:2026:476, para 29. See also: Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, paras 59-61.

83 Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, paras 31-34.

84 A Wilfinger, "Declaration of Claims in International Insolvency Proceedings" (2021) 2 European Insolvency and Restructuring Journal 1, 4. The CJEU also restated its *Skarb v Riel* judgment recently, see: Case C-292/25 Shopping24 [2026] ECLI:EU:C:2026:476, para 31.

directors for payments made after it has been established that the liabilities of the company exceed its assets, unless these payments are compatible with the care to be expected of a prudent businessman.[85] In theory, this claim may arise before insolvency proceedings are opened.[86] The CJEU ruled, however, that this "per se does not preclude such an action being characterised as an action which derives directly from insolvency proceedings and is closely connected with them, providing that that action was actually brought in the context of insolvency proceedings, as is the case in the main proceedings".[87] The claim "clearly derogates from the common rules of civil and commercial law" because of the "insolvency of the debtor company".[88] Otherwise, the CJEU went on to say, "an artificial distinction" between this claim and comparable claims, such as a claim to set transactions aside would be created "on the sole ground that the action (…) could theoretically be brought even if there were no insolvency proceedings".[89] However, if the action were to be brought outside the context of insolvency proceedings, it may not fall within the scope of the insolvency exception, the CJEU concluded.[90]

33. It remains to be seen whether all claims that solely require an actual status of insolvency and are brought in the context of insolvency proceedings fall within the scope of the insolvency exception. There is no case law in which the Court held that the insolvency exception is inapplicable despite the action requiring an actual status of insolvency. However, in cases finding the exception inapplicable, the Court has not consistently addressed whether the action required an actual status of insolvency.

3.4.5 The action benefits the general body of creditors

34. A recurring factor in the Court's case law is whether the action benefits the general body of creditors or the claimant acted in its own interest.
35. The Court held numerous times that an insolvency practitioner acting in the interest of the general body of creditors is a relevant factor for concluding that the insolvency exception applies.[91] This should not, however, be a determinative reason for concluding that the insolvency exception applies. As correctly noted

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85 Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410, para 7.
86 Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410, para 20.
87 Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410, para 20.
88 Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410, para 23.
89 Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410, para 24.
90 Case C-295/13 H. v H.K. [2014] ECLI:EU:C:2014:2410, para 25.
91 In Case 133/78 Gourdain v Nadler [1979] ECLI:EU:C:1979:49, para 5 the CJEU also referred to the fact that the insolvency practitioner acted "on behalf of" the general body of creditors. In Case C-339/07 Christopher Seagon v Deko Marty Belgium NV [2009] ECLI:EU:C:2009:83, paras 16-17 the CJEU

by Advocate General Bobek, if it were determinative whether the action benefits the general body of creditors, "virtually anything occurring while insolvency proceedings are open would trigger the exception", creating an "insolvency black hole".[92]

36. The fact that acting in the interest of the general body of creditors is not determinative also follows from the case law of the Court. In its judgment *Nickel v Kintra*, the action was in the interest of the creditors, but the CJEU stated that this "does not substantially amend the nature of the debt relied on, which continues to be subject, in terms of the substance of the matter, to the rules of law which remain unchanged".[93] The Court ruled similarly in *NK v BNP*.[94] In addition, the Court ruled that it is not sufficient to conclude that the action benefits the general body of creditors when the proceeds of an action benefit them by a contractual agreement in relation to the transfer of a right.[95]
37. By contrast, the CJEU ruled in *German Graphics* that the action was brought in the applicant's "own favour" and concluded that the insolvency exception was not applicable.[96] Similarly, the CJEU ruled in *F-Tex* that the insolvency exception did not apply since the assignee acted in its own interests and was, thereby, also free to decide whether to exercise the right of claim.[97] The Court ruled in the same vein in *ÖFAB v Koot*[98], *Tünkers v Expert France*[99] and *Feniks*[100]. In *Feniks*, the Court conclusively stated that "[i]n so far as the action in the main proceedings (…) aims to preserve the creditor's own interests and not to increase the assets of [the insolvent defendant]" it does not fall within the scope of the insolvency exception.[101] This, however, is difficult to align with its judgment in *Valach*. In that ruling, the claimants also acted in their own interest, while the action fell within

referred to this as "protecting the interest of the general body of creditors". See also: Case C-493/18 Tiger and Others [2019] ECLI:EU:C:2019:1046, para 30.

92 Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, paras 61, 76 and 78.
93 Case C-157/13 Nickel v Kintra [2014] ECLI:EU:C:2014:2145, para 29.
94 Case C-535/17 NK v BNP [2019] ECLI:EU:C:2019:96, paras 29 and 31-32.
95 Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 45.
96 Case C-292/08 German Graphics [2009] ECLI:EU:C:2009:544, para 31.
97 Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, paras 43-44.
98 Case C-147/12 ÖFAB, Östergötlands Fastigheter AB v Frank Koot, Evergreen Investments BV [2013] ECLI:EU:C:2013:490, para 25.
99 Case C-641/16 Tünkers v Expert France [2017] ECLI:EU:C:2017:847, para 26. The Court also stated that the action "cannot have any influence on the insolvency proceedings".
100 Case C-337/17 Feniks [2018] ECLI:EU:C:2018:805, para 33.
101 Case C-337/17 Feniks [2018] ECLI:EU:C:2018:805, para 33.

the scope of the insolvency exception.[102] Similarly, in *SCT Industri*, the claimant acted in its own interest, and the insolvency exception was applicable.[103]

38. In conclusion, whether the claimant acts for the benefit of the general body of creditors or for its own benefit is not relevant, or at least not decisive, for determining whether the action falls within the scope of the insolvency exception. There is no consistent case law of the CJEU in this regard. Treating whether the insolvency practitioner acts in the general interest of creditors as a conclusive factor would also create an "insolvency black hole" because all actions "occurring while insolvency proceedings are open would trigger the exception".[104]

3.4.6 Closure of the insolvency proceedings

39. The case law of the CJEU does not adopt a consistent position on whether the closure of the insolvency proceedings could amount to concluding that the insolvency exception is not applicable. On the one hand, the Court held in *SCT Industri* that the link between the action and the insolvency proceedings is "not weakened by the fact that, in the case in the main proceedings, the insolvency proceedings had been closed when the action for restitution of title was brought before the Austrian courts".[105] On the other hand, the CJEU held in *F-Tex* that the fact that a claim remains possible after "the closure of the insolvency proceedings" is a relevant factor for concluding that the insolvency exception is not applicable.[106] Whether the closure of the insolvency proceedings is relevant for deciding on the insolvency exception is therefore not entirely clear.

3.4.7 Legal analysis

40. In *Valach,* the CJEU stated that the action was closely connected to the insolvency proceedings because "it will be necessary to analyse in particular extent" of obligations relating to insolvency law.[107] There is no other case law in which the CJEU reasoned in the same vein. Its reasoning in *Valach* raises the question whether the action would fulfil the close connection requirement if the court did not have to analyse obligations related to insolvency law because, for instance, the defendant did not contest those parts of the dispute. Such an approach would be undesirable, for the same reasons as the applicability of the insolvency exception should not depend on defences a defendant raised or might raise (see

102 Case C-649/16 Valach [2017] ECLI:EU:C:2017:986.
103 Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419.
104 Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, para 61.
105 Case C-111/08 SCT Industri AB v Alpenblume AB [2009] ECLI:EU:C:2009:419, para 30.
106 Case C-213/10 F-Tex v Lietuvos-Anglijos [2012] ECLI:EU:C:2012:215, para 46.
107 Case C-649/16 Valach [2017] ECLI:EU:C:2017:986, para 38.

above, paragraph 28). Instead, the requirement of a close connection with insolvency proceedings – to which the CJEU refers in this regard in *Valach* – should be better understood as a verification tool, which the CJEU, incidentally, in most of its rulings did not examine separately.[108]

4 Conclusion

41. Having examined the case law of the CJEU concerning the insolvency exception, this article finds that the Court's pragmatic attitude remains. The Court first followed a broad assessment of relevant factors (§3.1), while it remained unclear what the overriding assessment is. Later, it nuanced its assessment two times (§3.2-3.3). Despite these differences, §3.4 has shown that it is possible to establish a framework to determine whether an action falls within the scope of the insolvency exception.
42. To determine whether a claim falls within the scope of the insolvency exception, one must first determine whether the claim concerns the exclusive prerogative of the insolvency practitioner (§3.4.1) or if the claim itself requires the commencement of insolvency proceedings (§3.4.2). If so, the action falls within the scope of the insolvency exception. However, a claim that concerns the exclusive prerogative of the insolvency practitioner does not fall under the insolvency exception if, in essence, it is assigned to a third party, while the dispute does not relate to the validity of this assignment. If the claim does not concern the exclusive prerogative of the insolvency practitioner and the claim itself does not require the commencement of insolvency proceedings, the claim will be an independent one and does not fall under the insolvency exception (§3.4.3).
43. There is one ruling in which the claim did not require the commencement of insolvency proceedings but merely an actual status of insolvency (§3.4.4). The CJEU concluded that the action nevertheless fell within the scope of the insolvency exception provided that the claim was brought in the context of insolvency proceedings. It remains to be seen whether all claims that solely require an actual status of insolvency fall within the scope of the insolvency exception.
44. In this article, it is conclusively stated that factors relating to whether the action benefits the general body of creditors (§3.4.5), the closure of insolvency proceedings (§3.4.6) or whether the national court should analyse provisions relating to insolvency law (§3.4.7) are not, or should not be treated as, conclusive reasons when examining the scope of the insolvency exception.

108 Case C-535/17 NK v BNP [2018] ECLI:EU:C:2018:850, Opinion of AG Bobek, paras 57 and 65.

45. By analysing the case law of the CJEU, this article has established a comprehensive framework for answering questions dealing with the applicability of the insolvency exception. It is acknowledged that other scholars would describe and analyse the case law of the CJEU in another way, and that further case law of the CJEU might not perfectly fit in the framework stated in this article. Building a clear framework of the scope of the insolvency exception remains an ongoing task to serve the foreseeability of the rules of private international law.