Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 18 October 2018[1]

Case C-535/17

NK, liquidator in the bankruptcies of PI Gerechtsdeurwaarderskantoor BV and PI
v
BNP Paribas Fortis NV

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling — Area of freedom, security and justice — Judicial cooperation in civil matters — Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Insolvency proceedings — Regulation (EC) No 1346/2000 — Scope of application — Regulation (EC) No 864/2007 — Scope *ratione temporis* — Damages claim brought by a liquidator against a third party having acted wrongfully towards the creditors)

I. Introduction

1. PI was a bailiff in the Netherlands. He held a current account with BNP Paribas Fortis NV ('Fortis') in Belgium. PI used the account for professional purposes relating to his bailiff practice. In 2006, PI set up a company through which to carry out the activities of the bailiff practice. He was the sole shareholder and director of that company. Another account, a trust account, was held in the company's name with Rabobank in the Netherlands.

2. In September 2008, PI transferred EUR 550 000 from the trust account with Rabobank in the Netherlands to the current account with Fortis in Belgium. A few days later, he withdrew that amount in cash from the current account with Fortis.

3. Both PI and the company were declared bankrupt. The liquidator dealing with these bankruptcy procedures, which were opened in the Netherlands, now seeks the recovery of EUR 550 000 from Fortis in the interest of the general body of creditors of PI and the company. This type of claim is known in Netherlands law as a 'Peeters-Gatzen action'. It was first allowed in 1983 by a decision of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court in the present case.

1 Original language: English.

4. For the purposes of deciding on the issue of international jurisdiction, the referring court asks this Court whether a claim such as the Peeters-Gatzen action falls within the scope of application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2] ('the Insolvency Regulation') or of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [3] ('the Brussels I Regulation').

II. Legal framework

A. EU law

1. The Brussels I Regulation

5. Article 1(2)(b) of the Brussels I Regulation states that the regulation shall not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

2. The Rome II Regulation

6. Article 17 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [4] ('the Rome II Regulation') states:

'In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.'

7. Article 31 of the Rome II Regulation is entitled 'Application in time'. It states that the regulation 'shall apply to events giving rise to damage which occur after its entry into force'. According to Article 32, entitled 'Date of application', the regulation 'shall apply from 11 January 2009'.

3. The Insolvency Regulation

8. Recital 6 of the Insolvency Regulation states: 'In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. …'

9. Article 3 of the Insolvency Regulation sets out rules on international jurisdiction. Paragraph 1 thereof grants jurisdiction to open main insolvency proceedings in 'the courts of the Member State within the territory of which the centre of a debtor's main interests is situated'.

2 OJ 2000 L 160, p. 1.

3 OJ 2001 L 12, p. 1.

4 OJ 2007 L 199, p. 40.

10. Article 4 of the Insolvency Regulation determines the rules on the applicable law. It reads as follows:

'1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

…

(c) the respective powers of the debtor and the liquidator;

…

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.'

11. Pursuant to Article 13 of the Insolvency Regulation, entitled 'Detrimental acts':

'Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

— the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and

— that law does not allow any means of challenging that act in the relevant case.'

B. Netherlands (case-)law

1. The Peeters-Gatzen action

12. The Peeters-Gatzen action was first allowed by a judgment rendered on 14 January 1983 [5] by the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). In its order for reference, that court outlines some of the main features of this type of action, as developed in its subsequent case-law. [6]

13. Where creditors were prejudiced by the bankrupt party prior to the bankruptcy, a liquidator has the power to defend the interests of the general body of creditors. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) held that in certain circumstances it may also be possible to enforce a claim for damages arising from a wrongful act against a third party who was involved in causing that prejudice, even if such a claim was not available to the bankrupt party itself. The proceeds of such a claim brought by the liquidator in the interests of the general body of creditors form part of the estate, like the proceeds of a claim for nullification pursuant to Article 42 et seq. of the Faillissementswet of 30 September 1893 ('Law on insolvency', or 'Fw'). They thus benefit the general body of creditors in the form of an increase in the estate's assets.

5 ECLI:NL:HR:1983:AG4521, NJ 1983/597.

6 The referring court cites its judgments of 23 December 1994, ECLI:NL:HR:1994:ZC1590, NJ 1996/628; of 21 December 2001, ECLI:NL:HR:2001:AD 2684, NJ 2005/95; of 16 September 2005, ECLI:NL:HR:2005:AT7797, NJ 2006/311; and of 24 April 2009, ECLI:NL:HR:2009:BF3917, NJ 2009/416.

14. The liquidator is entitled to bring such claims on the basis of Article 68(1) of the Fw which entrusts him with the task of administering and liquidating the bankrupt estate. That entitlement to bring a claim, irrespective of whether or not the liquidator makes use of it, does not preclude individual creditors themselves from enforcing a claim to which they are entitled due to a wrongful act of a third party. However, the importance of a proper settlement of the bankruptcy may require that if, on the basis of the same set of facts, the liquidator is entitled to enforce a claim arising from a wrongful act for the benefit of the general body of creditors against the third party, that claim should be decided first, and followed by that of the individual creditor(s).

15. In assessing the claim brought by the liquidator for the benefit of the general body of creditors, there is no room for an examination of the individual position of each of the creditors concerned: the first priority is to redress the damage jointly suffered by the creditors. Furthermore, the joint interest that the liquidator aims to protect justifies the fact that the third party cannot, in a Peeters-Gatzen action, deploy all the defences that may have been at its disposal against certain individual creditors.

16. The power of the liquidator to bring a Peeters-Gatzen action is not limited to cases where the third party belongs to the circle of persons who, based on a Paulian (bankruptcy) claim (Article 42 et seq. of the Fw), would be liable for involvement in allegedly detrimental acts. The liquidator's competence relates more generally to the damage caused to the general body of creditors by the wrongful act of a third party involved in causing that damage. The third party need not have caused the damage or have profited from it: it is sufficient that that third party could have prevented the damage but cooperated instead.

III. Facts, national proceedings and the questions referred

17. PI was a bailiff in Beek (in the Netherlands) from 2002 until his removal from office. From 2002 onwards, PI had held a current account with Fortis, a bank incorporated under Belgian law. That current account was located in Belgium and was used by PI's bailiff practice to collect payments from Belgian debtors.

18. In 2006 PI established the limited liability company PI Gerechtsdeurwaarderskantoor BV ('PI BV'), of which he was the sole shareholder and sole director. With the establishment of PI BV, the assets of PI's bailiff practice which he had previously operated as a sole trader, including the current account with Fortis, were reassigned to that company. PI BV also held a trust account with Rabobank, in the Netherlands, in respect of its bailiff practice. This account held the funds of about 200 clients of the bailiff practice.

19. Between 23 and 26 September 2008, PI transferred a total of EUR 550 000 from the trust account with Rabobank to the current account with Fortis via internet banking. On 1 and 3 October 2008, PI withdrew a total of EUR 550 000 in cash from the current account with Fortis in Belgium.

20. On 16 December 2008, PI was removed from office for embezzlement of the funds entrusted to him. He was later sentenced to imprisonment on the same grounds.

21. On 23 June 2009, PI BV was declared bankrupt. On 2 March 2010 PI himself was declared bankrupt. Those bankruptcies were consolidated. NK is the liquidator in both bankruptcies.

22. The liquidator instituted proceedings before the Rechtbank Maastricht (District Court, Maastricht, Netherlands; 'the first-instance court'), seeking an order that Fortis pay EUR 550 000. He claimed that Fortis acted wrongfully towards the general body of creditors of PI BV and PI by allowing the cash withdrawals by PI to take place unchallenged, thus disregarding its statutory obligations. According to the liquidator, as a result of Fortis' acts the creditors in both bankruptcies were prejudiced.

23. In an interim judgment, the first-instance court declared itself competent to consider the liquidator's claim. The Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch, Netherlands; 'the second-instance court') upheld that decision by an interim judgment of 4 June 2013, holding that the claim lodged by the liquidator was exclusively based on the bankruptcies of PI and PI BV and therefore fell within the scope of the Insolvency Regulation.

24. By a final judgment, the first-instance court granted the order sought by the liquidator, ordering Fortis to pay EUR 550 000 to the liquidator.

25. On appeal against that final judgment, the second-instance court considered in its interim judgment of 16 February 2016 that since it had already adjudicated on jurisdiction in its interim judgment of 4 June 2013, it could not (in principle) do so again. However, it also noted that the subsequent judgments of this Court of 4 September 2014, *Nickel & Goeldner Spedition*,[7] and of 11 June 2015, *Comité d'entreprise de Nortel Networks and Others*,[8] provided support for Fortis' allegation that the decision in the interim judgment of 4 June 2013 was incorrect. Therefore, the second-instance court decided to authorise an interim appeal in cassation on that point.

26. The second-instance court also considered that the Wet Conflictenrecht Onrechtmatige Daad of 11 April 2001 ('Law on conflict of laws on torts', or 'WCOD') applies to damage which occurred before the entry into force of the Rome II Regulation on 11 January 2009. Under Article 3 of the WCOD the claim should be adjudicated according to Belgian law, since the actions of Fortis took place in Belgium.

27. The second-instance court further held that the question whether a liquidator has the power to bring a specific type of claim, such as a Peeters-Gatzen action, must be answered in accordance with the law governing the bankruptcy (Article 4(2)(c) of the Insolvency Regulation). In the present case that is Netherlands law, under which a liquidator has the power to start a Peeters-Gatzen action.

28. The liquidator lodged an appeal in cassation before the referring court against the interim judgment of the second-instance court of 16 February 2016. The liquidator argued that on the basis of Article 4(1) of the Insolvency Regulation, the second-instance court should have found that the Peeters-Gatzen action must be deemed to be 'an effect of the insolvency proceedings' and that therefore the *lex fori concursus* (that is to say, Netherlands law) was applicable to it.

29. Fortis lodged a cross-appeal against the interim judgments of the second-instance court of 4 June 2013 and 16 February 2016. It argued that the second-instance court disregarded the fact that the claim brought by the liquidator is governed by the Brussels I Regulation and not by the Insolvency Regulation. A Peeters-Gatzen action would not be covered by the exception of Article 1(2)(b) of the Brussels I Regulation, since that claim has its basis in the ordinary rules of civil law and therefore does not stem directly from the derogating rules specific to insolvency proceedings.

30. In the order for reference, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) notes that a Peeters-Gatzen action relates to the creditors' right of action and the third party's liability vis-à-vis the creditors, and that that right of action and that liability stem from the ordinary rules of civil law. However, it also highlights that the liquidator's power to bring such a claim stems from the rules on insolvency and that the proceeds of the claim revert to the estate, and not to the individual creditors.

7 C-157/13, EU:C:2014:2145.

8 C-649/13, EU:C:2015:384.

31. The referring court also has doubts as to the determination of the law applicable to the claim. The second-instance court distinguished between the law applicable to the power of the liquidator to bring the Peeters-Gatzen action (the *ius agendi*, which would be subject to Netherlands law) and the substantive law applicable to that claim (which would be Belgian law). However, in case the Insolvency Regulation applies, the referring court further enquires whether the law applicable to that claim under Article 4(2) of the Insolvency Regulation (Netherlands law) governs the claim in its entirety, thus both with regard to the power to bring the claim and with regard to the substantive law applicable to it. Moreover, if that is the case, the referring court asks whether Belgian law should nevertheless be taken into account to assess Fortis' liability.

32. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is a claim for damages against a third party brought by the liquidator pursuant to the task assigned to him in Article 68(1) of the Faillissementswet of administering and liquidating the bankrupt estate on behalf of the joint creditors, on the grounds that that third party behaved wrongfully towards the creditors, and the proceeds of which, if the claim succeeds, are added to the estate, covered by the exception of Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters?

(2) If question 1 is answered in the affirmative and the claim concerned is therefore covered by Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, is that claim then governed by the law of the Member State where the insolvency proceedings were opened under Article 4(1) of that regulation, both as regards the power of the liquidator to bring that claim and as regards the substantive law applicable to that claim?

(3) If question 2 is answered in the affirmative, should the courts of the Member State where the insolvency proceedings were opened then take account, whether or not by analogy, of:

    (a) the provisions of Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in the sense that the defendant can defend itself against a claim brought by the liquidator for the benefit of the joint creditors by proving that its conduct did not result in it being liable, if assessed on the basis of the law which would have been applicable to the claim if it had not been brought by the liquidator, but by an individual creditor as a result of a wrongful act;

    (b) the provisions of Article 17 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), in conjunction with Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, that is to say, with the security regulations and codes of conduct applicable at the site of the alleged wrongful act, such as financial rules of conduct for banks?'

33. Written submissions were lodged by the liquidator, Fortis, the Portuguese Government and the European Commission. The liquidator, Fortis and the Commission presented oral argument at the hearing held on 5 July 2018.

IV. Assessment

34. This Opinion is structured as follows: I will start by revisiting the criteria of delineation between the Brussels I Regulation and the Insolvency Regulation. The application of those criteria to the Peeters-Gatzen action will bring me to the conclusion that such a claim falls *ratione materiae* within the scope of the Brussels I Regulation (A). As a result, I do not think it is necessary to reply to the second and third questions asked by the referring court. However, in order to fully assist the Court if it were to reach a different response to the first question, I will briefly touch upon the issue whether under the Insolvency Regulation, the generally applicable *lex fori concursus* might be limited to only some elements of a claim (B), before finally addressing the potential applicability of the Rome II Regulation *ratione temporis* to the case in the main proceedings (C).

A. The first question: the scope of application of the Brussels I Regulation and of the Insolvency Regulation

35. By the first question, the referring court seeks in essence to ascertain which regulation (the Brussels I Regulation or the Insolvency Regulation) is applicable as regards a damages claim brought against a third party by a liquidator pursuant to the obligation, imposed on the latter by the national law on insolvency, to administer and liquidate the bankrupt estate on behalf of the general body of creditors, where that claim is brought on the grounds that that third party behaved wrongfully towards the creditors, and where the proceeds of the claim, if it succeeds, are added to the estate.

36. In order to reply to that question, it is necessary to determine whether such a claim falls within the exception set out in Article 1(2)(b) of the Brussels I Regulation, which states that that regulation does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. It is only if such a claim were to be considered as falling within the scope of that exception that the Insolvency Regulation would apply.

1. The relationship between the Brussels I Regulation and the Insolvency Regulation

37. It is established case-law [9] that the Brussels I Regulation and the Insolvency Regulation must be interpreted in such a way as to avoid any overlap between the rules of law that they lay down, on the one hand, and any legal vacuum, on the other. Accordingly, actions excluded, under Article 1(2)(b) of the Brussels I Regulation, from the scope of that regulation fall within the scope of the Insolvency Regulation. Conversely, actions which fall outside the scope of the Insolvency Regulation must fall within the scope of the Brussels I Regulation.

38. The Court has also held, having regard to the recitals to the Brussels I Regulation, and in particular to recital 7, that the intention on the part of the EU legislature was to provide for a broad definition of the concept of 'civil and commercial matters' referred to in Article 1(1) of that regulation. [10] By contrast, the scope of the Insolvency Regulation should be interpreted narrowly. [11]

9 See judgments of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 21); of 11 June 2015, *Comité d'entreprise de Nortel Networks and Others* (C-649/13, EU:C:2015:384, paragraph 26); and of 9 November 2017, *Tünkers France and Tünkers Maschinenbau* (C-641/16, EU:C:2017:847, paragraph 17). See also, with regard to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1; 'the Brussels I bis Regulation'), judgment of 20 December 2017, *Valach and Others* (C-649/16, EU:C:2017:986, paragraph 24).

10 See judgments of 10 September 2009, *German Graphics Graphische Maschinen* (C-292/08, EU:C:2009:544, paragraphs 22 and 23), and of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 22). See also judgment of 20 December 2017, *Valach and Others* (C-649/16, EU:C:2017:986, paragraph 25).

11 See judgments of 10 September 2009, *German Graphics Graphische Maschinen* (C-292/08, EU:C:2009:544, paragraph 25), and of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 22). See also judgment of 20 December 2017, *Valach and Others* (C-649/16, EU:C:2017:986, paragraph 25).

39. The relationship between both regulations should thus be one of complementarity. The Court has already noted that bankruptcy and similar proceedings were excluded from the scope of the legal predecessor of the Brussels I Regulation, namely the Brussels Convention,[12] both on account of the special nature of the subject matter concerned, which necessitates specific rules, and because of major differences between the legislation of the Contracting States.[13] It is however also undisputed[14] that that exclusion was due to the fact that when the Brussels Convention was adopted, a convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings was being drafted in parallel in order to provide for the abovementioned specific rules. Both conventions were supposed to be complementary, in the sense that proceedings falling within the scope of the Bankruptcy Convention would be excluded from the scope of the Brussels Convention.[15] Although the Convention on Insolvency Proceedings[16] never entered into force, it served as the basis for the subsequent adoption of the Insolvency Regulation which reproduced, in identical terms, the provisions of that convention.[17]

2. The exclusion: to 'derive directly from' and/or to be 'closely connected with' insolvency proceedings

40. As regards the delineation of the scope of the Brussels I Regulation and the Insolvency Regulation, the Court has stated, with regard to the exclusion contained in Article 1(2)(b) of the Brussels I Regulation, that only actions which *derive directly from* insolvency proceedings *and* are *closely connected with* them[18] are excluded from the scope of the Brussels I Regulation.[19] Consequently, only those actions fall within the scope of the Insolvency Regulation.[20]

41. That formula was first employed by the Court in *Gourdain*.[21] As the Court has noted on a number of occasions,[22] the same formulation is also set out in recital 6 of the Insolvency Regulation to define the subject matter of the latter. The same wording is also used in the second subparagraph of Article 25(1) of the Insolvency Regulation. The first subparagraph of that article imposes an obligation to recognise judgments handed down by a court with jurisdiction under Article 3(1) of the regulation.[23] Pursuant to the second subparagraph of the same article, the first subparagraph also applies to 'judgments deriving directly from the insolvency proceedings and which are closely linked with them'.

12 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36).

13 See judgments of 22 February 1979, *Gourdain* (133/78, EU:C:1979:49, paragraph 3), and of 2 July 2009, *SCT Industri* (C-111/08, EU:C:2009:419, paragraph 20).

14 See judgment of 19 April 2012, *F-Tex* (C-213/10, EU:C:2012:215, paragraph 21).

15 See the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, drawn up by P. Jenard (OJ 1979 C 59, p. 1, at pp. 11 and 12). See also the Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, drawn up by P. Schlosser (OJ 1979 C 59, p. 71, paragraph 53).

16 Opened for signature by the Member States on 23 November 1995.

17 Judgment of 19 April 2012, *F-Tex* (C-213/10, EU:C:2012:215, paragraph 24).

18 These actions are referred to as 'related actions' in the judgment of 11 June 2015, *Comité d'entreprise de Nortel Networks and Others* (C-649/13, EU:C:2015:384).

19 Regarding the equivalent provision of the Brussels Convention, namely point 2 of the second subparagraph of Article 1, see judgments of 22 February 1979, *Gourdain* (133/78, EU:C:1979:49, paragraph 4), and of 12 February 2009, *Seagon* (C-339/07, EU:C:2009:83, paragraph 19). On the Brussels I Regulation, see judgments of 19 April 2012, *F-Tex* (C-213/10, EU:C:2012:215, paragraph 29); of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 23); and of 11 June 2015, *Comité d'entreprise de Nortel Networks and Others* (C-649/13, EU:C:2015:384, paragraph 27). On the Brussels I bis Regulation, see judgment of 20 December 2017, *Valach and Others* (C-649/16, EU:C:2017:986, paragraph 26).

20 Judgments of 19 April 2012, *F-Tex* (C-213/10, EU:C:2012:215, paragraph 29); of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 23); of 11 June 2015, *Comité d'entreprise de Nortel Networks and Others* (C-649/13, EU:C:2015:384, paragraph 27); or of 20 December 2017, *Valach and Others* (C-649/16, EU:C:2017:986, paragraph 26 and the case-law cited).

21 Judgment of 22 February 1979, *Gourdain* (133/78, EU:C:1979:49, paragraph 4).

22 Judgments of 12 February 2009, *Seagon* (C-339/07, EU:C:2009:83, paragraph 20); of 9 November 2017, *Tünkers France and Tünkers Maschinenbau* (C-641/16, EU:C:2017:847, paragraph 20); and of 20 December 2017, *Valach and Others* (C-649/16, EU:C:2017:986, paragraph 27).

23 See judgment of 12 February 2009, *Seagon* (C-339/07, EU:C:2009:83, paragraph 25).

Moreover, in its judgment in *Seagon*, the Court held that Article 3(1) of the Insolvency Regulation 'confers international jurisdiction on the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them'.[24]

42. Thus, that formula is quoted as the test to be used in order to determine whether a claim (such as the Peeters-Gatzen action in the present case) falls within the scope of the Brussels I Regulation or of the Insolvency Regulation.

3. The test as applied: two criteria or only one criterion?

43. It is, however, fair to admit that on a closer inspection of the case-law, it seems that the test to be applied in individual cases is not entirely straightforward, in particular as regards (i) the definition of the exact content of each of the two criteria and (ii) their mutual relationship.

44. The uncertainty starts already as regards the content of each criterion. The meaning of to 'derive directly from' appears to shift from an assessment of a *direct link* (thus effectively coming dangerously close to being merged with the second condition) to an analysis of the *legal basis* of the claim (in the sense of the underlying cause of action). To be 'closely connected' with insolvency proceedings points to some sort of proximity test, although it is not entirely clear which circumstances should be taken into account to assess whether such a close link exists in a given case.

45. That uncertainty is further increased due to the lack of clarity regarding the logical relationship between those two criteria, casting doubts on whether there are actually two different conditions. The use of 'and' as the grammatical conjunction would suggest a logical conjunction as well: the whole proposition will be true if and only if both of the individual propositions are fulfilled. There would thus be two cumulative criteria.

46. However, the case-law does not entirely match that picture.

47. In some cases, the Court has held that where one of the criteria is lacking, it is unnecessary to examine the other one. For example, in *F-Tex* the Court considered that as the action at stake was not closely connected with the insolvency proceedings (second condition), it was unnecessary to rule on the existence of a direct link between the action and those proceedings (first condition).[25] In *Nickel & Goeldner Spedition*, the Court held that the action at issue did not have a direct link with the insolvency proceedings (first condition), so it was not necessary to examine whether that action was closely connected with those proceedings (second condition).[26]

48. In other cases, the fact that one of the criteria of the test was unfulfilled did not prevent the Court from examining the other one. This was the case in *Tünkers France and Tünkers Maschinenbau*, where the Court, after holding that the action at stake did not derive directly from insolvency proceedings (first condition), went on to examine whether the action was closely connected with those proceedings (second condition).[27] The Court nonetheless concluded that the second condition had not been met

24 Judgment of 12 February 2009, *Seagon* (C-339/07, EU:C:2009:83, paragraph 21). This rule was subsequently codified in Article 6(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19), which repealed the Insolvency Regulation but which is not applicable *ratione temporis* to the case at hand. According to that provision, '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, such as avoidance actions'.

25 See judgment of 19 April 2012, *F-Tex* (C-213/10, EU:C:2012:215, paragraphs 47 and 48).

26 See judgment of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraphs 30 and 31).

27 See judgment of 9 November 2017, *Tünkers France and Tünkers Maschinenbau* (C-641/16, EU:C:2017:847, paragraphs 22, 27 and 28).

either. It can therefore certainly not be inferred from this case that one of the two conditions carries more weight than the other. But the need to examine both criteria casts doubts on their cumulative nature: if the two criteria need to be fulfilled, it would be rather futile to examine both criteria when it is clear that one of them is unfulfilled.

49. In addition, there are also cases in which the Court singled out a criterion that was deemed decisive and stated that it prevails over the other.

50. In *SCT Industri* the Court, after recalling that in *Gourdain* it had held that 'an action is related to bankruptcy if it derives directly from the bankruptcy and is closely linked to [bankruptcy proceedings]', concluded that 'it is therefore *the closeness of the link*, in the sense of the *Gourdain* case-law, between a court action … and the insolvency proceedings that is *decisive* for the purposes of deciding whether the exclusion in Article 1(2)(b) of [the Brussels I Regulation] is applicable'.[28]

51. By contrast, in *Nickel & Goeldner Spedition*, the Court stated that 'the *decisive* criterion … to identify the area within which an action falls is not the procedural context of which that action is part, but the *legal basis* thereof'. The Court added that according to that approach, it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings.[29]

52. Thus, contrary to the approach in *SCT Industri*, which underlined the second condition of the test, the criterion of the legal basis of the action seems to be linked with the first of the two conditions of the test, namely the fact that the action derives directly from the insolvency proceedings. Indeed, in *Nickel & Goeldner Spedition* the Court assessed the action at stake in view of this criterion and concluded that that action did not have a direct link with the insolvency proceedings, a conclusion that implied that it was not necessary to examine whether that action was closely connected with those proceedings.[30]

53. More recently, the Court held that *both* the legal basis and the closeness of the link constitute *decisive* criteria: the former on the analysis of the first condition (whether the action derives directly from the insolvency proceedings) and the latter on the assessment of the second condition (whether the action is closely connected with such proceedings).[31]

54. It is thus fair to acknowledge that it may not be easy to determine the exact content of the test and how it is to be applied. The application of the test oscillates between two cumulative conditions (with, however, rather indistinct contours), sometimes merging both conditions into one, or even actually replacing both conditions by a differently worded criterion.

28 Judgment of 2 July 2009, *SCT Industri* (C-111/08, EU:C:2009:419, paragraphs 21 and 25) (emphasis added). See also judgment of 10 September 2009, *German Graphics Graphische Maschinen* (C-292/08, EU:C:2009:544, paragraph 29).

29 See judgment of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 27) (emphasis added). See also judgments of 11 June 2015, *Comité d'entreprise de Nortel Networks and Others* (C-649/13, EU:C:2015:384, paragraph 28), and more recently, of 20 December 2017, *Valach and Others* (C-649/16, EU:C:2017:986, paragraph 29 and the case-law cited).

30 Judgment of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraphs 30 and 31). It is interesting to note, in this regard, that the notion of 'legal basis' was already mentioned (with the terms 'legal foundation') in *Gourdain*, although in that case such a notion referred to both parts of the test: see judgment of 22 February 1979, *Gourdain* (133/78, EU:C:1979:49, paragraph 4).

31 See judgments of 9 November 2017, *Tünkers France and Tünkers Maschinenbau* (C-641/16, EU:C:2017:847, paragraphs 22 and 28), and of 20 December 2017, *Valach and Others* (C-649/16, EU:C:2017:986, paragraphs 29 and 37).

55. There is of course no denying that the interpretation and application of the EU rules on private international law will always be, as is the case with any conflict of law rules, heavily fact- and context-dependent, characterised by a case-by-case approach. Thus, discussing hair-splitting taxonomies for an area of law that will always be inherently reasoned on a case-by-case basis might not really appear to be necessary: it is within the overall procedural context of each individual case that the proximity of the claim in question to the insolvency proceedings may best be assessed, thus making it possible to take into account a number of different (but presumably still relevant) elements.

56. Tempting as such a proposition might be *in abstracto*, the arguments presented by the interested parties in this case vividly demonstrate the limits of such an approach. Without clarity about the exact condition(s) and their relationship, the overall proximity and/or procedural context assessment approach results in each of the parties (as well as, for that matter, national courts) focusing on a different aspect of a claim and, on that basis, assessing whether or not in their view the action at hand is sufficiently closely linked to the ongoing insolvency proceedings. Needless to say, in so far as different elements are taken as the starting point for the assessment, each of these approaches leads to very different outcomes, particularly where there is a hybrid action such as the one in the main proceedings.

4. The test: the legal basis of the claim (unless inextricably linked to the insolvency proceedings)

57. I would therefore suggest that the Court reaffirm the test essentially embraced since *Nickel & Goeldner Spedition*: does the ascertaining of the right or obligation which forms the basis of the action have its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings? The *decisive* criterion would thus be linked to the first part of the test, namely whether the legal basis for the action derives directly from insolvency rules.[32] The second condition of the test would rather serve as a verification tool for the result reached on the basis of the first part, but not as a fully-fledged criterion on its own.

58. In order to assess the *legal basis of the action*, what needs to be examined is the nature of the claim in the sense of the cause of action: is it an action based on ordinary rules (for example rules on tort, on contract, on unjust enrichment) or rather on insolvency specific rules?

59. When considering what the legal basis of the action is, the idea is to identify the origin and the nature of the claim in terms of the (main) substantive analysis that the case calls for. Thus, for example, an action for the enforcement of a contractual obligation has its legal basis in the ordinary rules of contract law even if it is brought by a liquidator acting in the interest of the creditors,[33] which then implies that the (potential) proceeds will revert to the estate. The same applies to an action based, for example, on the rules on unjust enrichment or, as appears to be the case in the main proceedings, on the rules on tort/delict.

60. In such cases, the underlying nature of the claim remains the same irrespective of who brings the action. Thus, the circumstance that an action is brought by (or against) a liquidator simply as a consequence of the fact that it is brought while insolvency proceedings are ongoing will not alter the (main or underlying) nature of the claim. Its legal basis remains unchanged.[34] The same can be said about the fact that the proceeds of the claim revert to the estate: if that is merely a result of the action being brought while insolvency proceedings are open, it does not have any bearing on the nature of the claim.

32 On the importance of the legal basis test, see also Virgós, M., and Schmit, E., Report on the Convention on Insolvency Proceedings of 3 May 1996 (Document of the Council of the European Union, No 6500/96, DRS 8 (CFC)), point 196.

33 Judgment of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 29).

34 See, to that effect, judgment of 10 September 2009, *German Graphics Graphische Maschinen* (C-292/08, EU:C:2009:544, paragraphs 32 and 33).

61. Both of these changes to the 'input' of the claim (who brings the action or against whom it is brought) or to its 'output' (where the proceeds will go) are natural and necessary consequences of the existence of ongoing insolvency proceedings, but they do not, *in themselves*, alter the nature of the claim that is brought by the liquidator. If they were allowed to trigger the exemption from the applicability of the Brussels I Regulation in favour of the Insolvency Regulation, then virtually anything occurring while insolvency proceedings are open would trigger the exception. An 'insolvency black hole' would be opened: because the legal act was carried out by a liquidator, who is acting by virtue of specific rules relating to insolvency, and the money comes from or reverts to the estate, which is also due to specific rules on insolvency, then anything and everything occurring within those two parameters would effectively fall within the Insolvency Regulation.

62. Thus, for example, a liquidator who signs a contract for the supply of office stationery that he needs to carry out his professional duties enters into that contract in relation to the tasks assigned to him by the special rules on insolvency and does so in the interest of the general body of creditors. Moreover, the purchase price will (ultimately) be paid out of the remainder of the estate. However, that certainly does not mean that, if an action has to be brought in a dispute concerning the enforcement of that contract, that claim has its source in the derogating rules specific to insolvency proceedings. The underlying main action relating to such a transaction clearly remains contractual.

63. Furthermore, what needs to be examined is the legal basis for the claim (the rules that will be applicable when deciding on the merits of the case), and not the economic or financial reason behind the transaction (for example why a contract was concluded, or why certain behaviour which ultimately caused damage was attempted in the first place) nor, in the particular context of delict/tort, the issue of precisely what rules were (allegedly) breached.

64. Thus, to provide another example, one may imagine a liquidator who causes a car accident while on the way to a meeting with creditors (because his mind is focused on the ongoing insolvency proceedings instead of on the road). If an injured party wishes to sue the liquidator, then the nature of the claim would clearly be tortious, irrespective of the fact that, to some extent, one could certainly suggest that the liquidator was involved in the accident because of and while carrying out tasks imposed upon him by special insolvency rules.

65. From this perspective, it becomes clear that the second part of the formulation used by the Court, namely whether the action is *closely connected with insolvency proceedings*, is not really a free-standing criterion, but more of an additional element of verification of the key criterion, namely the legal basis. The close-connection criterion thus allows for a check on whether the assessment based on the legal basis is correct. It does so by enabling other contextual elements which could potentially point, in rather specific cases, to a solution other than the one reached under the legal basis criterion to be taken into consideration.

66. In most cases, the existence of a close connection with the insolvency proceedings would be verified by asking a rather simple question: would it be possible to bring the same action — that is to say, an action of the same legal nature, but of course not identical in all aspects — outside of the ongoing insolvency proceedings? If the answer is yes, then there is not likely to be a close connection capable of modifying the assessment carried out under the first part of the test, by having regard to the legal nature of the claim.

67. From this point of view, the close connection rather means to be *inextricably linked* to. It amounts to a 'but for' test: if a similar action (again, not identical in terms of all its procedural elements, but just in terms of its legal nature) can be brought in parallel to or independently of insolvency proceedings, then it is confirmed that such an action is not inextricably linked to insolvency proceedings.

68. Such a test allows for further confirmation of the irrelevance of the aforementioned 'input' or 'output' elements of a claim, to the extent that they are due simply to the existence of ongoing insolvency proceedings. Conversely, the answer may be different if a specific action cannot be brought by or against a person other than the insolvency liquidator, or if it requires the previous opening of insolvency proceedings.

69. Finally, it cannot be entirely ruled out that, in truly exceptional cases, the verification based on the close connection could override the result of the legal basis test. That could happen if a given action, while in principle based on ordinary rules, is characterised by such a great number of specific derogating rules, for example on the subject of the claim, on the burden of proof, or on the period of limitation, which differ from the general regime so significantly that they in effect amount to a separate and specific regime which, as a result, would be capable of pushing that action into the realm of insolvency. To put it metaphorically, adding more and more specific elements to a drawing of a horse will inevitably mean that, at a certain point, the very nature of the beast portrayed will morph into a camel, an elephant, or something else.

70. However, while applying the test, and in particular the second step verification I have just outlined, the overall approach is indeed one of the repetitively stated need for narrow interpretation of the insolvency exception in the Brussels I Regulation.[35] This is further underlined by the fact that the triggering of that exception is likely not only to result in a decision on international jurisdiction but also to affect the determination of the applicable law, as will be seen below in my answers to the referring court's other questions.

5. The Peeters-Gatzen action

71. Turning now specifically to the Peeters-Gatzen action at issue in the main proceedings, it would be for the referring court, with its knowledge of the rather complex national procedural rules, to apply the considerations I have suggested above to that procedural instrument and thus determine which of the two regulations in question applies to the claim at hand.

72. However, considering the main characteristics of the Peeters-Gatzen action as presented in the order for reference, assessed in terms of its legal nature in the sense just outlined, I consider that such an action is an action in tort or delict. I would therefore suggest that it does not fall within the exception set out in Article 1(2)(b) of the Brussels I Regulation. Thus, such a claim remains within the scope of the Brussels I Regulation.

73. The order for reference describes the Peeters-Gatzen action as a claim stemming from the ordinary rules of civil law, namely the rules on tort or delict. It states that it appears from a judgment of the referring court of 24 April 2009[36] that the Peeters-Gatzen action is based on the damage caused to the creditors by the actions of the bankrupt party and the third party. Such a claim relates to the creditors' right of action and the third party's liability vis-à-vis the creditors. Thus, while presenting some insolvency specific features, the fact remains that such an action derives from a tort.

74. The legal nature of the claim brought by the liquidator against Fortis therefore appears to be tortious: it is based on the alleged failure of the bank to fulfil its statutory duties in terms of monitoring and disallowing cash withdrawals, thus apparently causing damage to the creditors (first part of the test). None of the specific characteristics of the Peeters-Gatzen action presented are sufficient to justify a finding that an action such as the one launched in the context of the main proceedings would indeed be so closely connected with the insolvency proceedings as to override the fact that its legal nature is that of a tort (second part of the test).

35 Above, footnotes 10 and 11.

36 ECLI:NL:HR:2009:BF3917, NJ 2009/416.

75. The referring court mentions three such specific characteristics in the text of the first question.

76. First, the referring court notes that the Peeters-Gatzen action is brought by a liquidator pursuant to a task assigned to him by the national insolvency legislation: to administer and liquidate the bankrupt estate on behalf of and in the interests of the general body of creditors. This in itself is not decisive, because virtually all actions brought by a liquidator are carried out on the basis of the tasks set out by insolvency rules and for the administration and liquidation of the estate on behalf of and in the interests of the general body of creditors. As already discussed above at points 61 to 64, if this were to be a defining element, then any claim brought by a liquidator in his official capacity would, irrespective of its legal nature, fall within the scope of the Insolvency Regulation.

77. Second, the referring court mentions the fact that in a Peeters-Gatzen action the liquidator brings the claim on the grounds that the third party behaved wrongfully towards the creditors. I do not think this element is capable of justifying a close connection of this type of claim with the insolvency proceedings. It rather underlines, in my view, the truly tortious nature of the Peeters-Gatzen action.

78. Third, the referring court also highlights the fact that the proceeds of the claim are added to the estate. Again, as explained in points 61 to 64, this element is not decisive, as it would result in rendering the Insolvency Regulation applicable to virtually all claims brought by a liquidator. Indeed, the proceeds of those claims usually revert to the estate, as creditors with a right to obtain the proceeds of a specific action are the exception, and not the rule in insolvency.

79. Apart from these elements, cited in the text of the first question, the order for reference also mentions two further elements which are characteristic of this type of claim and which were also discussed at the hearing.

80. The first additional element derives from a judgment of 21 December 2001 [37] in which the referring court held that although the Peeters-Gatzen action does not preclude individual creditors from bringing a claim in their own name, if an individual creditor brings such a claim, the importance of a proper settlement of the bankruptcy may require that the Peeters-Gatzen action be decided first.

81. This element does show a connection between this specific type of claim and the insolvency proceedings, in so far as the (potential) preferential treatment of the Peeters-Gatzen action would be based on the existence of those proceedings. However, in my view this connection does not appear to be so close as to override the assessment made on the basis of the nature of the claim, because that preferential treatment does not seem to be automatically granted: as the referring court notes, where parallel individual actions exist, it 'may' be necessary to decide the Peeters-Gatzen action first.

82. The second additional element highlighted by the order for reference is that, according to a judgment of the referring court of 23 December 1994, [38] the position of the creditors in a Peeters-Gatzen action is examined jointly in order to provide redress for the harm that they suffered jointly. Therefore the third party cannot invoke the defences that it may have had against individual creditors.

83. In my view, this characteristic derives rather from the collective nature of the Peeters-Gatzen action than from its connection with the insolvency proceedings. [39] It is nevertheless true that it might be held that this limitation on the defences that can be raised is ultimately in the interest of the insolvency proceedings, in so far as it enhances the efficiency of a claim which, if successful, will end

37 ECLI:NL:HR:2001:AD 2684, NJ 2005/95.

38 ECLI:NL:HR:1994:ZC1590, NJ 1996/628.

39 The efficient treatment of collective actions usually precludes an individual examination of the situation of each plaintiff vis-à-vis the defendant: see for example, as regards Dutch collective actions, Bosters, T., *Collective Redress and Private International Law in the EU*, T.M.C. Asser Press, The Hague, 2017, pp. 38 and 39.

up increasing the assets of the estate. However, such a rather incidental or ancillary characteristic of the Peeters-Gatzen action does not appear to establish a sufficiently close connection between that action and the insolvency proceedings which would allow the general conclusion based on the assessment of the nature of this claim to be overturned.

84. For all the aforementioned reasons, I am of the view that a claim for damages stemming from the ordinary rules of civil law, brought against a third party by a liquidator pursuant to the obligation, imposed on him by the national law on insolvency, to administer and liquidate the bankrupt estate on behalf of the general body of creditors, which is brought on the grounds that that third party behaved wrongfully towards the creditors, and the proceeds of which are added to the estate, falls *ratione materiae* within the scope of the Brussels I Regulation.

B. The second question and the first part of the third question: the scope of the lex fori concursus under the Insolvency Regulation

85. The second and the third questions submitted by the referring court need only be addressed if the Court finds that the Peeters-Gatzen action falls within the scope of application of the Insolvency Regulation. In view of the negative answer that I suggest in response to that question, I do not think that it is necessary to examine the second and the third questions. However, in order to fully assist the Court if it were to reach a different conclusion on the first question, I will briefly consider those questions in the remaining part of this Opinion.

86. By the second question, the referring court wishes to know whether, if the Peeters-Gatzen action is covered by the Insolvency Regulation, such a claim would be governed, pursuant to Article 4(1) of that regulation, by the law of the Member State where the insolvency proceedings were opened as regards both the power of the liquidator to bring that claim and the substantive law applicable to that claim.

87. This question seeks to determine whether it is possible to follow the approach of the second-instance court in the main proceedings and thus to separate the law governing the powers of the liquidator (*ius agendi*) from the law applicable to the merits of the claim. If such an approach were to be followed, the powers of the liquidator would be governed by the *lex fori concursus* (namely Netherlands law), as set out in Article 4(2)(c) of the Insolvency Regulation. That article states that 'the law of the State of the opening of proceedings … shall determine in particular … the respective powers of the debtor and the liquidator'. However, the merits of the claim would be governed by the law applicable by virtue of the general (non-insolvency) conflict of law rules. In the present case that would lead to application of the Netherlands' conflict of law rules, because the Rome II Regulation does not apply *ratione temporis* (see below, section C). In that case, according to the order for reference, the applicable rule would be Article 3 of the WCOD, pursuant to which the claim should be adjudicated on the basis of Belgian law, as the actions of Fortis took place in Belgium.

88. Such separation of the law applicable to each element of the action seems problematic to me.[40]

40 In the way suggested by the referring court, namely if the Insolvency Regulation were applicable to the damages claim against Fortis, but not to 'all the elements' of that action. I wish to make clear, however, that the fact that the Insolvency Regulation is not applicable to such an action naturally does not entail that the Insolvency Regulation would not be relevant for the determination of the powers of the liquidator in the ongoing insolvency proceeding, including the issue of standing to bring an action (in tort) in another Member State.

89. First, as the Court has highlighted,[41] recital 23 of the Insolvency Regulation states that that regulation 'should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law'. That recital adds that 'the *lex concursus* determines *all the effects* of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned'.[42] Therefore, if the Peeters-Gatzen action were covered by the Insolvency Regulation, *all its elements* would be governed exclusively by the conflict of law rules of that regulation.

90. Second, it seems clear that the combined provisions of Articles 3 and 4 of the Insolvency Regulation seek to obtain, as a general rule, an identity between *forum* and *ius*, that is to say a correspondence between the courts having international jurisdiction and the law applicable to the insolvency proceedings. Indeed, as provided for in Article 4(1), 'save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened'.[43] In my view, the regulation provides no exception that could justify applying a law other than the *lex fori concursus* to the merits of a claim such as the Peeters-Gatzen action, should such a claim be governed by the Insolvency Regulation.

91. In case the separation of the law applicable to the action is not possible, the referring court seeks, by the first part of the third question, to ascertain whether Belgian law can be taken into consideration in a different way. It asks whether the courts of the Member State where the insolvency proceedings were opened can take account of the provisions of Article 13 of the Insolvency Regulation, so that the defendant can defend itself against a Peeters-Gatzen action by proving that its conduct would not trigger its liability if it were assessed on the basis of the law which would have been applicable to the claim had it been brought by an individual creditor as a result of a wrongful act, rather than by the liquidator (namely Belgian law).

92. Pursuant to Article 4(2)(m) of the Insolvency Regulation 'the law of the State of the opening of proceedings … shall determine in particular … the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors'.

93. In turn, Article 13 foresees an exception to the applicability of Article 4(2)(m), setting out that the latter 'shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that (i) the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and (ii) that law does not allow any means of challenging that act in the relevant case'. Therefore, Article 13 can only be applicable to cases where Article 4(2)(m) itself is applicable.

94. It is difficult to see how the Peeters-Gatzen action at issue in the main proceedings could be qualified as a rule 'relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors', in the sense of Article 4(2)(m) of the Insolvency Regulation. The purpose of such an action is not a declaration of the voidness, voidability or unenforceability of an act of the third party, but the recovery of damages based on the wrongful behaviour of that third party towards the creditors. Therefore, as Article 4(2)(m) of the regulation would not apply in the main proceedings, the exception in Article 13 could not apply either.

41 Judgment of 8 June 2017, *Vinyls Italia* (C-54/16, EU:C:2017:433, paragraph 47).

42 Judgment of 9 November 2016, *ENEFI* (C-212/15, EU:C:2016:841, paragraph 17). Emphasis added.

43 On the relationship between Articles 3 and 4 of the Insolvency Regulation, see judgment of 10 December 2015, *Kornhaas* (C-594/14, EU:C:2015:806, paragraph 17).

95. A further obstacle to the applicability of Article 13 seems to arise from its wording and purpose. Turning to the wording, this provision refers to 'the person who *benefited* from an act detrimental to the creditors' (emphasis added). Looking at its purpose, the Court held that the exception set out in Article 13, which must be interpreted strictly,[44] 'aims to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors by providing that the act will continue to be governed, even after insolvency proceedings have been opened, by the law that was applicable at the date on which it was concluded …'.[45]

96. In the present case I fail to see an act from which Fortis *benefited* and which should be maintained in order to *protect the legitimate expectations* of Fortis. Therefore, the exception of Article 13 of the Insolvency Regulation, subject to an obligation of strict interpretation, cannot be considered to apply to the main proceedings.

97. In conclusion, if the Peeters-Gatzen action were considered to fall within the scope of the Insolvency Regulation, it would be exclusively governed by the *lex fori concursus*. Moreover, Article 13 of the regulation cannot be invoked to take a different law into consideration.

98. By way of a postscript, it might be added that the discussion in this section appears in my view to further confirm that the correct answer to the first question is that the Peeters-Gatzen action is not governed by the Insolvency Regulation. Indeed, if such an action were to fall within the scope of that regulation, this would mean that the law applicable to the alleged tort would not be Belgian law (the law of the site where the alleged tort took place), but Netherlands law (the law of the place where the subsequent insolvency proceedings against the person who was alleged to have benefited from the tort were opened). This fact would trigger, as demonstrated by the discussion in the present section, the practical need for a rather artificial or cumbersome legal construction in order to reverse the operation of the general rules of the Insolvency Regulation, which certainly begs the question of why these rules should then be applicable in the first place. Such efforts rather confirm that there is indeed no close and necessary connection between that action and the insolvency proceedings.

C. The second part of the third question: the Rome II Regulation

99. By the second part of the third question, the referring court asks whether, if the Peeters-Gatzen action is exclusively subject to the *lex fori concursus*, it would be possible to take into account, whether directly or at least by analogy, and on the basis of Article 17 of the Rome II Regulation read in conjunction with Article 13 of the Insolvency Regulation, the security regulations and codes of conduct applicable at the place of the alleged wrongful act (that is to say, in Belgium), such as financial rules of conduct for banks.

100. To my knowledge, Article 17 of the Rome II Regulation has never been interpreted by the Court. In assessing the conduct of the person claimed to be liable, this provision allows for the *taking into account* (rather than applying), as *a matter of fact* (rather than as a *legal rule*) and *in so far as is appropriate* (so arguably with a certain leeway for the judge), the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

44 Judgment of 15 October 2015, *Nike European Operations Netherlands* (C-310/14, EU:C:2015:690, paragraph 18).

45 Judgment of 15 October 2015, *Nike European Operations Netherlands* (C-310/14, EU:C:2015:690, paragraph 19). See also judgment of 8 June 2017, *Vinyls Italia* (C-54/16, EU:C:2017:433, paragraph 30).

101. In order to apply Article 17 of the Rome II Regulation in the main proceedings, that regulation would have to be applicable *ratione temporis*. It is true that the determination of the scope *ratione temporis* of the Rome II Regulation, as set out in Articles 31 and 32 of that regulation, is not self-evident. However, in *Homawoo*, the Court clarified that those provisions must be interpreted as requiring a national court to apply the regulation only to events giving rise to damage *occurring after* 11 January 2009. The date on which the proceedings seeking compensation for damage were brought has no bearing on determining the scope *ratione temporis* of the regulation.[46]

102. Therefore, in the light of the judgment in *Homawoo*, and without it being necessary to verify whether financial rules of conduct for banks fall within the notion of 'rules of safety and conduct', I am of the view that Article 17 of the Rome II Regulation cannot apply to the main proceedings.

103. Finally, the referring court enquires about the possibility to take Article 17 of the Rome II Regulation (as well as Article 13 of the Insolvency Regulation) into account *by analogy* in the present case. It is certainly true that any EU legal rule or principle, whether in force or not, whether producing binding legal effects or not, can potentially be taken into consideration by analogy by a national court, to the extent that its national rules of interpretation and application allow for that,[47] and in so far as the national judge deems such a facultative inspiration drawn from EU law useful for resolving the case at hand.

104. However, in my view the more pertinent question is, once again,[48] whether it is really necessary to have recourse to a cumbersome legal construction, in this case the application of rules by analogy, outside of their material and temporal scope, in order to reach a solution (the application of Belgian law) which solves a problem (the applicability of Netherlands law by virtue of the Insolvency Regulation) that should not have been created in the first place (since the Peeters-Gatzen claim at hand should fall within the scope of the Brussels I Regulation). In any event, I am of the view, also in this regard, that these questions by the referring court rather confirm that there is no close connection between that action and the insolvency proceedings.

V. Conclusion

105. In the light of the foregoing, I suggest that the Court reply to the questions raised by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

A claim for damages stemming from the ordinary rules of civil law, such as the one in the main proceedings, brought against a third party by a liquidator pursuant to the obligation, imposed on him by the national law on insolvency, to administer and liquidate the bankrupt estate on behalf of the general body of creditors, which is brought on the grounds that that third party behaved wrongfully towards the creditors, and the proceeds of which are added to the estate, falls *ratione materiae* within the scope of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

46 Judgment of 17 November 2011, *Homawoo* (C-412/10, EU:C:2011:747, paragraph 37).

47 See, as regards the recourse to analogy within EU law, judgment of 12 December 1985, *Krohn* (165/84, EU:C:1985:507, paragraph 14 and the case-law cited).

48 Above, point 98 of this Opinion.