Eötvös Loránd University

Doctoral School of Law

Head of the Doctoral School: Dr. Marianna Nagy, Professor

Zoltán Fabók

THE QUESTION OF INTERNATIONAL JURISDICTION IN EUROPEAN AND HUNGARIAN INTERNATIONAL INSOLVENCY LAW

Theses of a PhD Dissertation

Academic Supervisor:
Prof. Dr. Lajos Vékás
Full Member of the
Hungarian Academy of Sciences
Professor Emeritus
Department of Civil Law

Budapest, March 2023

1. Introduction – Brief summary of the objectives

1.1 Background

In my thesis, I use the term of ‘international (cross-border) insolvency law’ as the private international law of insolvency law in a broad sense, i.e. including international procedural law, which consists certain substantive and procedural insolvency rules. Accordingly, international insolvency law is concerned with the cross-border aspects of the national insolvency laws and insolvency proceedings.

The codification of European insolvency law, which took forty years and was repeatedly derailed, began in the 1960s. Following the drafting of numerous reports and drafts, the European Union's statutory insolvency law was finally first established in 2000 by the Insolvency Regulation (EIR)[1], which was replaced after a decade and a half by the recast Insolvency Regulation (recast EIR)[2], applicable from 2017. The Insolvency Regulations did not create a single European insolvency procedure, nor did they aim at a minimum harmonisation of insolvency laws in the Member States. The aim of the Insolvency Regulations was to create a uniform legal regime allowing for the 'co-operation' of national insolvency proceedings. The Regulations achieved this mainly through rules of a private international law nature: they provide uniform EU rules on jurisdiction, universal (i.e. extending beyond the Member State concerned) scope of the main proceedings, applicable law, recognition and enforcement of judgments in insolvency proceedings in the Member States covered by the Regulations.

As a consequence of the principle of primacy of EU law and the direct effect of the regulation as a secondary act, the scope of the international insolvency law of Hungary – as a Member State – is limited to those proceedings which fall outside the territorial or material scope of the Insolvency Regulations. On the one hand, these are insolvency proceedings against debtors whose COMI (centre of the main interests) is situated outside the EU (or in Denmark). On the other hand, those proceedings against debtors with a COMI within the EU which are either excluded from the scope of the Regulation or are not insolvency proceedings for the purposes of the recast EIR, i.e. not included in Annex A of the Regulation.

---

[1] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1.
[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19.

Although the issue of international insolvency was not *ab ovo* excluded from the scope of Decree-Law No 13 of 1979 on Private International Law (the previous PIL Code), the legislation dealt with the private international law of insolvency only indirectly and in a fragmentary manner. Beyond, Hungary is not party to any multilateral or regional conventions applicable to international insolvency, but has concluded a number of bilateral treaties on legal assistance in civil and commercial matters. However, the applicability of the latter international treaties to cross-border insolvency situations is more than questionable. By contrast, Act XXVIII of 2017 on Private International Law (the PIL Code), which entered into force in 2018, contains explicit rules on insolvency proceedings, both in terms of jurisdiction, applicable law, the effects of insolvency proceedings and recognition.

1.2 Objectives

In my dissertation, I deal with a fundamental aspect of European and Hungarian international insolvency law, the question of international jurisdiction. In this context, it is necessary to stress that the question of international jurisdiction is necessarily linked to the question of applicable law and the question of recognition and enforcement. In principle, it is beyond the ambition of this thesis to discuss the latter two major topics, but I will draw attention to the connections where appropriate.

2. Analyses and methodology

2.1 Brief description of the analyses

As a starting point (in Chapter 2 of the dissertation), the question had to be clarified how the criteria for insolvency proceedings can be defined in the legal regimes under examination, i.e. in the European regime established by the Insolvency Regulations and in the Hungarian Code system. In other words, which proceedings fall within the scope of the legal regimes in question. This required both an outline - necessarily fragmentary - of the specific substantive criteria for insolvency and a description of the formal criteria laid down in the various legal instruments. Particular attention had to be paid to the question of proceedings "deriving directly from insolvency proceedings and closely linked with them" (so-called insolvency-related or annex proceedings). These are cases which are otherwise civil or commercial in nature (litigious or non-litigious) but which are also closely connected with insolvency proceedings. The demarcation of the jurisdictional boundaries of these annex proceedings is of particular importance because the classification of the proceedings points to the legal regime determining jurisdiction: while annex proceedings

are governed by the jurisdictional rules of the Insolvency Regulations, non-annex civil and commercial matters are typically governed by the jurisdiction rules of the Brussels I*bis* Regulation.[3]

Following the definition of insolvency proceedings and annex proceedings under EU law, I have attempted to define these concepts under Hungarian (national) law. The definition under Hungarian law is important because the PIL Code does not specify which insolvency proceedings and annex proceedings fall within its scope, i.e. which proceedings are covered by the relevant provisions of the PIL Code.

After the delimitation of insolvency and annex proceedings, the EU jurisdiction rules are analysed in Chapter 3 of the dissertation. In particular, I focused on the jurisdictional provisions regarding annex actions rooted mostly in the case law, the jurisdictional impact of insolvency on (non-annex) civil and commercial cases (*"de facto" vis attractiva concursus*) and the fitting of the various Hungarian insolvency proceedings into the jurisdictional regime of the recast EIR.

In Chapter 4 of my dissertation I analysed the provisions of the PIL Code governing insolvency proceedings. In this context, it was particularly important to compare the scope of the PIL Code and the Hungarian rules governing certain procedures in order to identify any possible incompatibilities.

2.2 Methodology

My aim was, on the one hand, to describe existing law using a legal positivist approach. This includes a systematic analysis of the relevant secondary law of the European Union and the jurisdictional provisions of the PIL Code, as well as an exploration of the relevant case law of the EU and national courts. In this respect, my work aims at a doctrinal analysis of the existing law by examining the internal coherence of the relevant rules, including the identification of inconsistencies within the system. The exploration of existing law is a valuable goal in itself. Richard Posner aptly put it:

> "The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability (not only brains and knowledge and judgment, but also *Sitzfleisch* [emphasis in the original] to organize dispersed,

[3] 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) [2015] OJ 2012 L351/1.

> fragmentary, prolix, and rebarbative materials. These are tasks that lack the theoretical breadth or ambition of scholarship in more typically academic fields. Yet they are of inestimable importance to the legal system and of greater social value than much esoteric interdisciplinary legal scholarship."[4]

The positivist approach also includes the use of relevant secondary literature. In addition to the relatively modest amount of relevant literature in Hungarian, I could not strive for completeness in the case of foreign, mainly English, language literature. Among the highly inspiring secondary sources I have used, I would highlight the handbook[5] by Professors Virgós and Garcimartín, published nearly twenty years ago, which has proved prophetic in many respects over the last two decades, insofar as its conclusions have been regularly published in CJEU case law.

On the other hand, my aim is to find the "better law".[6] From this perspective, jurisprudence is a normative discipline. Legal doctrine as a normative principle may be, at least in part, a matter of pure internal logic. Indeed, if we discover an internal inconsistency in the legal system, this in itself is a good reason to look for a solution to resolve the inconsistency. This does not necessarily require legislative intervention. This is the field of norm-contentions as explained by Mackor:

> "In cases where the formulations of norms are vague or ambiguous, where the norms turn out to be inconsistent or incoherent, or where there are gaps in the law, the only norm-description that legal scholars can offer is the statement that formulations are vague or ambiguous, or that the law contains a gap, etc. In order to remove the vagueness. ambiguity, inconsistency or incoherency, legal scholars have to make proposals on how law as a social fact has to be changed in order to deal with these deficiencies. […] [N]orm-contentions are statements about law as an *optimal internally coherent normative system* [emphasis in the original]. […] [C]ontentions must take as much as possible of the positive law into account. Due to the fact that only legal norms and presuppositions of legal cognition play a role, it is an internal rather than an external critique of positive law."[7]

---

[4] Richard A. Posner: In Memoriam: Bernard D. Meltzer (1914-2007). University of Chicago Law Review 74 (2007) 435, 437.
[5] Miguel Virgós – Francisco Garcimartín: The European Insolvency Regulation: Law and Practice. Kluwer Law International, The Hague, 2004.
[6] Please note that the concept of better law is somewhat different in the terrain of conflict of laws. Many thanks to Professor Miklós Király for the clarification.
[7] Anne Ruth Mackor: Explanatory Non-Normative Legal Doctrine. In: Hoecke, Mark Van (ed.): Methodologies of legal research: Which kind of method for what kind of discipline? Hart Publishing, Oxford, 2011. 45, 64. f.

According to Mackor, the purpose of norm-contention is to fill in the gaps and eliminate ambiguity. This is different from a mere description of existing law, but it follows from the latter because the gaps to be filled stem from the legal system itself, not from circumstances outside the legal system.

Thirdly, my aim is to draw the attention of the legislator to cases where legislation seems necessary. The normative approach, i.e. the search for a "better law", cannot stop at the borders of the legal system. The boundaries of the legal field must be crossed and external factors must be taken into account when assessing the functioning of law as a social system. After all, law cannot be a closed system, independent of the social reality in which it operates. On the contrary, the legal system must ultimately serve the people and the society in which they live. In this context, it is sufficient to refer to Recital (2) of the recast EIR which states that the Union's objective is to establish an area of freedom, security and justice.

One of the factors outside the legal system is legal certainty and predictability: as far as possible, parties should be able to anticipate which forum will have international jurisdiction over their case. The interests of stakeholders other than the debtor and the creditor(s) are also important. Another factor to consider is the efficiency and effectiveness of the procedure. These principles are also referred to, albeit in a slightly different context, in Recital (8) of the recast EIR. At first sight, it may seem that the more civil and commercial actions are covered by the jurisdiction of the insolvency forum, the more efficient and effective an insolvency proceeding will be. On the other hand, extreme concentration can have the opposite effect. If, for example, all litigation against an insolvent debtor were to be brought within the insolvency forum, the forum court would most likely have to decide commercial cases governed by foreign law and possibly based on documents in foreign languages. Likewise, referring any litigation that the insolvency practitioner might bring against the debtor's former directors solely to the insolvency forum might also be counterproductive. This has also been recognised by the European legislator by introducing new rules (Article 6(2) and (3) of the recast EIR) allowing insolvency proceedings to be brought before the courts of the Member State of the defendant's domicile under certain conditions. Moreover, the concentration of proceedings in the insolvency forum may in certain cases affect the defendant's right to a fair trial. In particular, this concerns the general right of the defendant to be sued in the courts of his domicile, as

provided for in the basic rule of jurisdiction in Article 4(1) of the Brussels I*bis* Regulation. The roots of this principle reflect the Roman maxim *actor sequitur forum rei*.

3. Brief summary of the conclusions, practical applications of the research

3.1 Main conclusions

3.1.1 The concept of insolvency proceedings in the context of the recast EIR and the PIL Code

- An exhaustive list of insolvency proceedings in the Member States covered by the recast EIR is set out in Annex A to the Regulation. This makes it convenient for the practitioners which national proceedings are covered by the recast EIR. In relation to Hungary, these are bankruptcy proceedings (*csődeljárás*), liquidation proceedings (*felszámolási eljárás*) and public restructuring proceedings (*nyilvános szerkezetátalakítási eljárás*). Therefore, the substantive criteria set out in the Regulation - publicity, collective nature, insolvency law basis, total or partial deprivation of the right of disposal, judicial control or supervision, temporary stay of court enforcement proceedings - rather impose limits and obligations on the national legislator who initiates the inclusion of certain national proceedings in Annex A and on the European legislator (the Council of the European Union and the Commission) who determines or amends Annex A in the course of the ordinary legislative process. At the same time, from an enforcement point of view, it may be debatable whether proceedings involving public entities as debtors fall within the scope of recast EIR. In this context, it seems reasonable to argue that the recast EIR does not apply to public debtors, as the Regulation is established under the aegis of judicial cooperation in civil matters under Article 81 TFEU.

- The issue of the delimitation of proceedings "deriving directly from insolvency proceedings and closely linked with them" (insolvency-related or annex proceedings) has received particular attention in EU case law. Annex proceedings are outside the scope of the Brussels regime and fall within the scope of the Insolvency Regulations. This distinction is important, on the one hand, because the rules of jurisdiction in the Brussels regime and the Insolvency Regulations often point to different Member States. On the other hand, because the Insolvency Regulations have established a simplified recognition and enforcement mechanism for decisions in insolvency proceedings (including insolvency-related decisions).

The starting point in the more recent prevailing case law is to determine whether the right or the obligation that 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 proceedings. The first part of the Gourdain formula, namely that the action "derives directly from insolvency proceedings", applies if the underlying claim exists only in the context of the insolvency proceedings or, at the very least, the action is in the interest of the general body of creditors. Regarding the second part - i.e. that the action is "closely connected" with the insolvency proceedings - the strength of the link between the action and the insolvency proceedings is decisive. On the basis of the case law, the following types of actions in particular fall within the category of insolvency-related actions and are therefore covered by the Insolvency Regulations: avoidance actions; actions on the personal liability of directors based upon insolvency law; lawsuits relating to the admission or the ranking of creditors' claims; disputes between the liquidator and the debtor on whether an asset belongs to the bankrupt's estate and disputes related to the exercise of the powers of the liquidator, including the related liability issues; disputes between the insolvency practitioners in the main and secondary insolvency proceedings concerning the determination of the debtor's assets; actions against the creditors' committee in which the claimant seeks damages for the failure to approve the debtor's reorganisation plan; actions brought by the trustee in bankruptcy appointed by a court of the Member State within the territory of which the insolvency proceedings were opened seeking a declaration that the sale of immovable property situated in another Member State and the mortgage granted over it are ineffective as against the general body of creditors.

- The PIL Code does not specify which proceedings under Hungarian law constitute insolvency proceedings. In our thesis we have outlined a three-step definition. As a first step, it seems appropriate to refer back to the recast EIR. The reason for this is that, by including it in Annex A of the Regulation, the Hungarian and European legislators have thus taken a clear position on the question of whether the proceedings in question constitute insolvency proceedings for the purposes of the Hungarian and recast EIR, which, in the absence of a different definition in the PIL Code (and other legislation), seems instructive also in relation to the PIL Code. Accordingly, bankruptcy proceedings (*csődeljárás*), liquidation proceedings

(*felszámolási eljárás*) and public restructuring proceedings (*nyilvános szerkezetátalakítási eljárás*) under Hungarian law should also qualify as insolvency proceedings for the purposes of the PIL Code. As a second step, it is appropriate to exclude those types of proceedings that are most likely not to fall within the scope of the Code. The starting point in this context should be that the PIL Code applies to private law relationships. As a matter of principle, public law issues are not governed by private international law, due to the sovereignty of the State. In cases where the debtor is clearly a public law entity, it is highly doubtful whether the PIL Code applies. In such cases, the proceedings are rather of a public law nature and are aimed at the dissolution or the restoration of the solvency of the public law entity. It is therefore questionable whether the insolvency proceedings of municipalities under Hungarian law, the liquidation of political parties or insolvency proceedings against public notaries and bailiffs can fall within the scope of the Code. In a third step, it is appropriate to consider as insolvency proceedings those proceedings which meet the criteria under the MLCBI [8] that the proceedings must be collective (i.e. public), based on insolvency law, the debtor's assets, business activities and transactions must be subject to the control or supervision of a court, must be judicial or administrative proceedings, or must be reorganisation or winding-up proceedings. Accordingly, the public version of corporate reorganisation (*vállalkozások reorganizációjának nyilvános változata*) and the (judicial) debt settlement proceedings of natural persons (*természetes személyek adósságrendezési eljárása*) fulfil the criteria of insolvency proceedings and can therefore be included in the insolvency concept of the PIL Code without any concerns. However, compulsory winding-up proceedings (*kényszertörlési eljárás*) are unlikely to fall within the scope of insolvency proceedings. With regard to the remaining non-public restructuring proceedings (*nem nyilvános szerkezetátalakítási eljárás*) and non-public reorganisation proceedings (nem nyilvános reorganizációs eljárás), it is not excluded that judicial practice will include these proceedings in insolvency proceedings, although these proceedings are not necessarily collective proceedings and therefore not public.

- The PIL Code does not specify which foreign insolvency proceedings are covered. The issue is relevant in relation to the recognition of foreign proceedings

[8] UNCITRAL Model Law on Cross-Border Insolvency (1997).

(judgments) and the effects of foreign proceedings in Hungary. In this area, the qualification rules of the Code apply in principle. However, Hungarian legislation and case law - which is limited in scope - are not without problems, as it is not clearly delimited whether the personal law of the party or the applicable *lex concursus* or the rules on recognition are taken into account when determining the domestic effects of foreign proceedings.

- As regards actions deriving directly from insolvency proceedings and closely linked with them the detailed case law of the CJEU and other EU courts is expected to apply to the PIL Code, despite the slightly different wording of the statute.
- In the course of my excursus to the terrain of applicable law and recognition of foreign judgments, I have demonstrated that the PIL Code's provisions addressing the domestic effects of foreign insolvency proceedings suffer from conceptual and practical shortcomings that would raise very serious questions about the applicability of the provisions even if there were reciprocity with a foreign State.

3.1.2 Rules on international jurisdiction governing insolvency proceedings in EU law

- The conflict between the jurisdictional rules of Insolvency Regulations and those of the Brussels I*bis* Regulation may be a problem primarily between the special jurisdictional provisions in the Brussels I*bis* Regulation aimed at the protection of the "weaker party" (consumers, employees, injured parties in in matters relating to insurance) and the exclusive jurisdiction rules of the Brussels I*bis* Regulation on the one hand and the jurisdictional provisions of the Insolvency Regulation on the other hand. The correct starting point is that no logical distinction can be drawn between the jurisdictional rules of the Insolvency Regulations and those of of the Brussels I*bis* Regulation. This is because the jurisdictional provisions of the former Regulation fall outside the scope of the latter legislation. In other words, it is a question of the applicability of one or the other regulation. The delimitation must be made not at the level of the jurisdictional rules, but at a more general level: namely, whether or not a particular proceeding falls within the scope of the insolvency exception to the Brussels I*bis* Regulation and therefore within the scope of the Insolvency Regulation. The case-law of the CJEU following the Gourdain case C-133/78 provides a good starting point for such a delimitation. In order for an action to be reallocated under the scope of one or the other jurisdiction, the boundaries of

the annex actions would have to be adjusted. However, if an action has been classified as an annex action on the basis of the current criteria, no further criteria can be taken into account in order to change the result of this classification. Therefore, as long as the European legislator or the courts do not change the criteria for distinguishing between insolvency-related and non-insolvency-related claims, the classification should be made according to the existing criteria. This classification in turn determines jurisdiction. Thus, where the Insolvency Regulation applies to a particular action, the courts of the Member State of the opening of insolvency proceedings have jurisdiction, even if the subject-matter of the action would suggest that the courts of the Member State as determined by the Brussels system should have exclusive jurisdiction: since the Brussels system, precisely because of the delimitation, does not apply, it clearly cannot determine jurisdiction. Any other proposal, at least *de lege lata*, seems *contra legem*.

- In the context of the new Article 6 of the recast EIR, it should be stressed that the European legislator has accepted the idea of cumulation of annex and and related non-annex actions before the courts of the same Member State. At the same time, the legislator has adopted a solution which somewhat weakens the principle of *vis attractiva concursus* (cumulation of proceedings in the insolvency forum): it authorises the insolvency practitioner to bring annex proceedings, under certain conditions, before courts of other Member States (with jurisdiction under the Brussels regime) different from the court of the Member State in which insolvency proceedings were opened. The wording of Article 6(2) and (3) of the recast EIR has somewhat opened up the question whether the Regulation would not only contain an international jurisdiction rule in this respect, but also a rule of territorial jurisdiction (and perhaps competence?) within a Member State. At the very least, a teleological interpretation of the provision suggests that actions brought by an insolvency practitioner in a Member State other than the Member State of insolvency may be brought only in the same courts of the that Member State. This is supported by the wording of Article 6(3) of the recast EIR stating that actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments. This stated aim of the legislation would be difficult to achieve if annex and civil actions were brought in the same Member State but before different courts. However, this

seems to be in contradiction with Recital (26) of the recast EIR, which states that the rules of jurisdiction laid down in the Regulation only create international jurisdiction, i.e. designate the Member State whose courts may open insolvency proceedings; however, the territorial jurisdiction within that Member State must be determined by the national law of that Member State.

- The issue of *lis pendens* in relation to annex proceeedings was addressed by the CJEU in its judgment in Case C-47/18 Riel, but no definitive answer has yet been given to the question of how to address the risk of irreconcilable judgments in parallel proceedings. In this context, the *obiter dictum* in the earlier C-649/13 Nortel Networks judgment that the mechanical priority rule applies in this context still seems to be the guiding principle. The same conclusion is likely to be reached where the situation of *lis pendens* does not arise between two insolvency-related actions, but between an annex action and a non-annex action (for example, an action based on insolvency law and an action based on general company or civil law against the director).

- By the phenomenon of *"de facto" vis attractiva concursus*, it is meant that, although the Insolvency Regulation does not directly regulate the international jurisdiction of non-annex civil and commercial actions, and thus those actions in principle remain subject to the jurisdictional rules in the Brussels regime, the *lex concursus* may notwithstanding indirectly determine the jurisdiction for non-annex actions by referring the disputes to the insolvency proceedings. In this context, according to what is currently considered to be the majority opinion, the *lex concursus* may indeed have jurisdictional effects, in so far as the broad moratorium imposed by the *lex concursus* may deprive courts outside the insolvency forum of the possibility of hearing port-opening actions brought against the insolvent debtor. The minority view is that the forum of civil or proceedings continues to have international jurisdiction under the Brussels regime. Indeed, there are several arguments against the indirect jurisdictional effect of the *lex concursus*. On the one hand, a judgment in a civil commercial case would greatly assist the insolvency forum, which would then be relieved of the burden of dealing with the existence and amount of the claim. On the other hand, the protection of the legitimate expectations of the parties would dictate that the jurisdiction chosen or expected under the Brussels regime should not be unnecessarily overridden by the insolvency of the debtor. Third, under the

Brussels regime, the law of jurisdiction and the applicable law often coincide; it is not appropriate to unnecessarily disturb such a concordance between forum and law by transferring jurisdiction to the insolvency forum. Fourth, it follows from the system of jurisdictional rules that, in the event of a clear conflict between the directly applicable jurisdictional provisions of Brussels I*bis* Regulation and the indirect jurisdictional effects of the *lex concursus* applicable through the recast EIR, the directly applicable Brussels I*bis* Regulation should prevail. Fifth, the application of Member States' domestic, non-harmonised *vis attractiva* rules could lead to fragmentation if, instead of the directly and uniformly applicable jurisdiction rules of the Brussels regime, jurisdiction would be transferred to the insolvency forum in some Member States, while in others the forum of civil commercial proceedings would retain jurisdiction.

- The personal scope of the Hungarian legislation governing insolvency proceedings sometimes interferes with the jurisdiction rules of the Insolvency Regulation, which are exclusive, prevailing over domestic law and non-derogable. In this context, by analysing Section 3(1)(a)(ab) of the Hungarian Insolvency Act (HIA)[9], which addresses the personal scope of the HIA, we have demostrated that the legislation limits the scope of the HIA to "legal persons or entities without legal personality, which are business entities or other entities engaged in business activities under their personal law". This provision is relevant if the debtor could be subject to territorial proceedings in Hungary under Article 3(2) of recast EIR, taking into account the place of establishment, but a debtor who does not meet the definition in the Hungarian HIA - such as an individual or an entity not engaged in an economic activity - is not a debtor under the HIA. Taking into account that Hungarian law applies to territorial insolvency proceedings opened in Hungary pursuant to Article 7 of the recast EIR, in this case territorial proceedings will not be opened. On this point, therefore, there is a conflict between the rules of jurisdiction under Article 3(2) of the recast EIR and Section 3(1)(a)(ab) of the HIA which determines the personal scope of the Cstv. However, that conflict is only ostensible, as the Regulation clearly leaves it to the *lex concursus* of the Member States to decide which debtors can be the subject of insolvency proceedings. It is therefore of importance that under the recast EIR a situation may arise where a particular type

[9] Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings.

of entity (e.g. a natural person) is subject to main insolvency proceedings in the Member State of the COMI under the applicable *lex concursus*, but the same type of entity cannot be a debtor under the insolvency law of the Member State of the establishment: in this case, no territorial proceedings can be opened in the latter Member State. This leads to the somewhat paradoxical situation that the Member State of the establishment cannot open insolvency proceedings against a certain type of debtor under its own applicable *lex concursus*, but automatically recognises main insolvency proceedings opened against the same debtor in another Member State under the provisions of the recast EIR together with their legal effects.

- As regards the public restructuring proceedings under the Hungarian Restructuring Act (HRA)[10], it is clear that it does not fit properly into the system of the recast EIR. Through the analysis of Sections 1(3), 7(c)(cd) and § 8(e) of the HRA we concluded that the Hungarian legislator intended that restructuring proceedings in Hungary can only be opened as main proceedings - provided that the debtor's COMI is situated in Hungary. If the debtor's COMI is in another Member State, Hungarian courts cannot open main proceedings for lack of jurisdiction under the recast EIR. However according to Section 1(3) of the HRA, Hungarian courts cannot open territorial proceedings either even if the debtor would otherwise have an establishment in Hungary, since such a debtor does - in most cases - not fall within the scope of the HRA. On the one hand, the Hungarian legislator's approach does not appear to be advantageous for domestic creditors as it deprives them of the protective function of secondary insolvency proceedings. On the other hand, the solution adopted is most probably incompatible with EU law.
- The "strategic" insolvency proceedings - such as liquidation and bankruptcy proceedings provided for in Chapter IV of the HIA - are likely to fall within the scope of the recast EIR without any concerns. It also seems plausible that the "state liquidator" (*állami felszámoló*) appointed as an administrator (*vagyonfelügyelő*) in strategic bankruptcy proceedings and as a liquidator (*felszámoló*) in strategic liquidation would qualify as an insolvency practitioner for the purposes of the Insolvency Regulation, given that the administrator and liquidator are listed in Annex B of recast EIR. However, it seems unlikely that a state liquidator acting as

[10] Act LXIV of 2021 on Restructuring and on the Amendment of Certain Acts for the Purpose of Approximation

an interim administrator (*ideiglenes vagyonfelügyelő*) appointed in a strategic procedure would qualify as an insolvency practitioner for the purposes of the Regulation. A so-called extraordinary administrator (*rendkívüli vagyonfelügyelő*) appointed in 'priority' strategic proceedings (Sections 68-70 of the HIA) for the period of the extraordinary moratorium (*rendkívüli moratorium*) temporarily protecting the debtor's ability to operate is also unlikely to be considered an insolvency practitioner for the purposes of the reast EIR. This could significantly limit the authority of the extraordinary administrator in cross-border proceedings, which could lead to significant problems, as Hungarian law has conferred very important powers on the extraordinary administrator during the period of the extraordinary moratorium. The fact that the extraordinary administrator cannot exercise the powers granted to the insolvency practitioner under the Regulation may make it more difficult to achieve the purpose of the extraordinary moratorium, which is critical for the continuation of the debtor's operation.

- In relation to the Hungarian branch office of foreign-registered companies, I have come to the conclusion that the concept of branch office (*fióktelep*) under both the Branch Office Act (BOA)[11] and the Company Procedure Act[12] overlaps significantly with the concept of establishment under the recast EIR, which implies that the Hungarian branch of the foreign company is most likely to be a proper basis for the opening of domestic territorial insolvency proceedings. However, it is essential that the territorial proceedings opened in respect of a branch in Hungary can be any insolvency proceedings under EU-Fizként-II-R, i.e. either bankruptcy, liquidation or (at least according to the recast EIR) public restructuring proceedings. The BOA as an element of the Hungarian *lex concursus* applicable to the proceedings only provides for special rules in the case of liquidation proceedings opened in Hungary in respect of the domestic branch. However, the provisions on bankruptcy or public restructuring proceedings do not preclude the opening of such (territorial) proceedings on the basis of a domestic establishment if it is also a Hungarian establishment of a foreign company.

[11] Act CXXXII of 1997 on Hungarian Branch Offices and Commercial Representative Offices of Foreign-Registered Companies.
[12] Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings.

3.1.3 Jurisdiction rules governing insolvency proceedings in the PIL Code

- The rules of jurisdiction in the PIL Code may - indirectly – be problematic in relation to the recognition in Hungary of judgments in foreign insolvency proceedings. This is because Section 109(1)(a) of the PIL Code follows the so-called mirror-image principle, i.e. one of the conditions for the recognition of a foreign judgment is whether the jurisdiction of the foreign court would have been established under the PIL Code (and not under another piece of legislation). Accordingly, only a ground of jurisdiction recognised by the PIL Code can be taken into account. However, the Code only recognises as a ground of jurisdiction in insolvency proceedings the statutory seat and the place of operation of a legal person. The narrow Hungarian jurisdictional grounds together with the mirror-image principle therefore mean that insolvency proceedings opened in a third state on the basis of jurisdictional grounds other than the statutory seat or the place of operation, and the decisions made in those proceedings, are in principle not recognised under the PIL Code.
- As regards the fitting of certain Hungarian insolvency proceedings into the PIL Code, I have examined those scenarios first where the scope of the PIL Code is narrower than that of the relevant Hungarian proceedings. The debt settlement proceedings of natural persons may not fall under the jurisdiction rules of the Code for legal persons, but the jurisdiction of Hungarian courts can most likely be inferred from other provisions. Likewise, in the case of entities without legal personality, it is not clear whether they are covered by the provisions of the PIL Code limited to legal persons, but the jurisdiction of Hungarian courts can most likely be inferred from other provisions. In the case of non-public restructuring proceedings, the jurisdictional rule of the PIL Code appears to be narrower than the scope of the HRA: while the latter would allow for non-public restructuring proceedings to be brought in Hungary against a debtor whose COMI is located in Hungary but not its domicile, the Code does not grant jurisdiction to Hungarian courts in such a case. However, here again, it is conceivable that the courts would derive the jurisdiction of the Hungarian courts directly from the HRA.
- On the other hand, I have examined those provisions where the personal scope of certain Hungarian insolvency proceedings limits the actual availability of those proceedings, despite the fact that the jurisdiction of the Hungarian court would - in principle - be established under the PIL Code. According to the PIL Code, the

domestic place of operation is a sufficient ground for jurisdiction even if the debtor's COMI is located in a third state, whereas the personal scope of the HIA only extends to entities with a COMI situated in Hungary or within the EU. This means that even if the Code grants jurisdiction to Hungarian courts to hear insolvency proceedings against debtors not domiciled in Hungary on the basis of their domestic place of operation, it will be in vain, because insolvency proceedings under the HIA - bankruptcy and liquidation proceedings - will not be available against these debtors. Finally, the limitation of the reorganisation proceedings to companies domiciled in Hungary results in the fact that territorial reorganisation proceedings cannot essentially be opened in Hungary on the basis of the domestic place of operation as a ground for jurisdiction, because reorganisation proceedings are not available for debtors domiciled outside Hungary.

3.2 Practical applications of the research

I consider the practical utility and contribution of my work to Hungarian international insolvency law to be significant in the following aspects:

- On the one hand, EU law (in particular case law) on insolvency (including annex) proceedings and the jurisdiction governing such proceedings has not been dealt with in detail in Hungarian, to my knowledge.
- On the other hand, the insolvency provisions of the new PIL Code had not been systematically analysed before my thesis.
- Analysing the phenomenon of *"de facto" vis attractiva concursus* and exploring the related case law can contribute to the further development of jurisprudence.
- Finally, my dissertation identifies a number of points where there are problems of fit between Hungarian insolvency proceedings and the applicable international insolvency framework, as defined by the Insolvency Regulations and the PIL Code, which may contribute to the elimination of these problems in future legislation.

4. Publications of the PhD candidate on the topic of the dissertation

Fabók, Zoltán	A nemzetközi fizetésképtelenségi jog az új nemzetközi magánjogi kódexben, különös tekintettel a külföldi fizetésképtelenségi eljárások belföldi joghatásainak szabályozására [International Insolvency Law in the New PIL Code, in particular the Domestic Effects of Foreign Insolvency Proceedings] In: Vékás Lajos – Nemessányi Zoltán – Osztovits András (eds.): Nemzetközi Magánjogi Évkönyv 2022. HvgOrac, Budapest, 2022, 57-79.

Fabók, Zoltán Újabb fejlemények a polgári és kereskedelmi eljárások, illetve a fizetésképtelenségi eljárások közötti elhatárolás körében [Recent Developments in the Delimitation between Civil-Commercial Proceedings and Insolvency Proceedings]

In: Vékás Lajos-Osztovits András-Nemessányi Zoltán (eds.): Nemzetközi magánjogi rendeletek az Európai Unió Bírósága gyakorlatában. HvgOrac, Budapest, 2021, 435-456.

Fabók, Zoltán A fizetésképtelenségi eljárás hatása az egyedi végrehajtásokra a fizetésképtelenségi rendelet kontextusában [The Effects of Insolvency Proceedings on Individual Enforcement Actions in the Context of the Insolvency Regulation]

Fizetésképtelenségi Jog 2021/1.

Fabók, Zoltán Észrevételek a Szát. egyes nemzetközi fizetésképtelenségi vonatkozásaihoz [Comments on Certain International Insolvency Aspects of the Hungarian Restructuring Act]

Fizetésképtelenségi Jog 2021/2-3.

Fabok, Zoltan Jurisdiction concerning annex actions in the context of the insolvency and Brussels I*bis* regulations.

International Insolvency Review 2 (2020) 204-233. https://doi.org/10.1002/iir.1379

Fabók, Zoltán A Szerkezetátalakítási Irányelv átültetésének kérdése: Észrevételek Csőke Andrea javaslatához [Transposition of the Restructuring Directive: Comments on Andrea Csőke's Proposal]

Polgári Jog 2020/5-6.

Fabók, Zoltán Észrevételek a Szerkezetátalakítási Irányelv átültetésének kérdéséhez [Comments on the Transposition of the Restructuring Directive]

In: Bodzási, Balázs (ed.): Gazdasági jogi és adójogi tanulmányok 2020. Budapesti Corvinus Egyetem, Budapest, 2020, 149-160.

Fabók, Zoltán A fizetésképtelenség jogi szabályozása [The Legal Regime of Insolvency]

In: Benisné, Győrffy Ilona (ed.): Negyvenharmadik Jogász Vándorgyűlés. Magyar Jogász Egylet, 2019, 1-12. <https://fliphtml5.com/nezyf/kcdo/basic> [last accessed 30 January 2023]

Fabók, Zoltán A felszámolást megelőző engedményezés hatása a követelés besorolására [Effect of a Pre-Liquidation Assignment on the Classification of a Claim]

Polgári jog 2018/4.

Fabók, Zoltán Csődtörvény-módosítás a Parlament előtt. Tényleg veszélyben az egész magyar gazdaság? [New Bill Amending the Insolvency Act – Is the Entire Hungarian Economy Really indeed at Risk?]

JTI Blog – a Jogtudományi Intézet blogoldala, 2018. <https://jog.tk.hu/blog/2018/07/csodtorveny-modositas-a-parlament-elott> [last accessed 3 February 2022]

Fabok, Zoltan ’Wrongful Trading' in England and Hungary: A Comparative Study

In: Dr Jennifer L. L. Gant (ed.): Harmonisation of European Insolvency Law. INSOL Europe, Nottingham, 2017.

<https://irep.ntu.ac.uk/id/eprint/31980/1/9424_Gant.pdf> [last accessed 3 February 2022]. https://doi.org/10.2139/ssrn.2896290

Fabok, Zoltan — Grounds for Refusal of Recognition of (Quasi-) Annex Judgements in the Recast European Insolvency Regulation

International Insolvency Review 3 (2017) 295-313. https://doi.org/10.1002/iir.1284

Fabok, Zoltan — Vis Attractiva Concursus Throughout the EU? New Ruling of the Hungarian Curia on the Jurisdiction for Post-opening Actions Against an Insolvent Debtor

OBLB Oxford Business Law Blog 31 October 2017. <https://www.law.ox.ac.uk/business-law-blog/blog/2017/10/vis-attractiva-concursus-throughout-eu-new-ruling-hungarian-curia> [last accessed 1 July 2022]

Fabók, Zoltán — Az átdolgozott Fizetésképtelenségi Rendelettel kapcsolatos egyes magyar jogalkotói feladatok [Some Hungarian Legislative Tasks related to the Recast Insolvency Regulation]

In: Bodzási, Balázs (ed.): A versenyképesség jogi kérdései 2017-ben - Tanulmányok a gazdasági jog köréből : Kutatások a Budapesti Corvinus Egyetemen. HvgOrac, Budapest, 2017, 92-108.

Fabók, Zoltán — International insolvency law in the new Hungarian PIL code: a window of opportunity to enact the UNCITRAL model law on cross-border insolvency?

In: Modernizing International Trade Law to Support Innovation and Sustainable Development, Vienna International Centre, Vienna, Austria, 4-6 July 2017 <International insolvency law in the new Hungarian PIL code - a window of opportunity to enact the UNCITRAL model law on cross-border insolvency? - IRep - Nottingham Trent University> [last accessed 30 September 2022]

Fabok, Zoltan — Case C-195/15 SCI Senior Home v Gemeinde Wedemark and Hannoversche Volksbank eG ECLI:EU:C:2016:804

Nottingham Law School Centre for Insolvency and Business Law, Insolvency Bulletin Spring 2017 Volume 14. <https://www.ntu.ac.uk/__data/assets/pdf_file/0021/332715/1Nottingham-Insolvency-and-Business-Law-e-Journal-14-volume.pdf> [last accessed 30 January 2023]

Fabók, Zoltán — A Bizottság irányelv-tervezete az anyagi fizetésképtelenségi jog részleges harmonizációjáról [Draft Directive of the Commission on Partial Harmonisation of Substantive Insolvency Law]

JTI Blog – a Jogtudományi Intézet blogoldala, 2016. <https://jog.tk.hu/blog/2016/11/a-bizottsag-iranyelv-tervezete> [last accessed 30 January 2023]

Fabók, Zoltán — Csőke Andrea: A határokon átnyúló fizetésképtelenségi eljárások (könyvismertetés) [Andrea Csőke: Cross-border insolvency proceedings (book review)]

Európai Jog 2016/4., 44-47.

Fabók, Zoltán — The Jurisdictional Paradox in the Insolvency Regulation

Nottingham Insolvency and Business Law e-Journal 4(1) (2016) 3

Fabók, Zoltán — Dologi jognak minősülhet-e egy adókövetelés a Fizetésképtelenségi Rendelet kontextusában II.? A Bíróság ítélete [May Real Property Taxes Constitute a

	'Right in Rem' in the Context of the Insolvency Regulation Part II? The Judgement of the CJEU]
	JTI Blog – a Jogtudományi Intézet blogoldala, 2016. <https://jog.tk.hu/blog/2016/11/dologi-jognak-minosulhet-e-egy-adokoveteles-ii> [last accessed 30 January 2023]
Fabók, Zoltán	Dologi jognak minősülhet-e egy adókövetelés a Fizetésképtelenségi Rendelet kontextusában? [May Real Property Taxes Constitute a 'Right in Rem' in the Context of the Insolvency Regulation?]
	JTI Blog – a Jogtudományi Intézet blogoldala, 2016 <https://jog.tk.hu/blog/2016/09/ingatlanado-koveteles-fizeteskeptelensegi-rendelet-kontextus> [last accessed 30 January 2023]
Fabók, Zoltán	Lehet-e fedezetelvonó a visszterhes szerződés? (A rosszhiszeműség tartalmáról) [May an Arm's Length Asset Transfer be Qualified as a Fraudulent Conveyance? (About the Concept of Bad Faith)]
	Gazdaság és Jog 2014/3., 14-18.
Fabók Zoltán – Kimmel, Jenő – Bajorfi, Ákos	Länderbericht Ungarn
	In: Schlegel, Ursula (Hrsg.) Münchener Kommentar zur Insolvenzordnung: InsO, Band 4: EuInsVO 2015, Art. 102a-102c EGInsO, Länderberichte. Verlag C. H. Beck, München, 2021 (4. Auflage), 2091-2128.
Fabók Zoltán – Kökényesi, Gábor	Directors in the Twilight Zone – Hungary
	INSOL International Technical Paper Series No 43, London, 2019, 1-18.