CURRENT DEVELOPMENTS

PRIVATE INTERNATIONAL LAW

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THE APPLICATION *RATIONE TEMPORIS* OF THE INSOLVENCY REGULATION IN NEW MEMBER STATES

I. INTRODUCTION

On 5 July 2012, the CJEU rendered a ruling in *Erste/BCL* on the temporal application of the Insolvency Regulation in Member States that joined the EU after the Regulation's initial entry into force on 31 May 2002 (new Member States).[1] The uncertainties of interpretation concerned 'cross-date' proceedings; that is, when the insolvency proceeding was launched before the accession of the (new) Member State but after the Regulation's original entry into force (in the old Member States) and remained pending also after the accession. Taking into account that 44.4 per cent of the Member States joined the EU after the Insolvency Regulation's entry into force (12 out of 27 Member States),[2] the ruling has an enormous practical and economic relevance, which will be refreshed following the accession of Croatia.[3]

The controversy emerged from the recognition in Hungary of an Austrian insolvency proceeding. The latter was launched in Austria after 31 May 2002 (the date of the Insolvency Regulation's entry into force in Austria) but before Hungary's accession to the European Union, while its recognition became an issue before the Hungarian courts after Hungary's accession. Unfortunately, the CJEU seems to have disregarded the private international law intricacies of the case.

II. FACT PATTERN AND PROCEDURAL HISTORY

BCL was an Austrian company and the second defendant in the principal proceeding; Postabank was a Hungarian company, the legal predecessor of Erste Bank, which was the plaintiff in the main proceeding. Postabank issued a letter of credit upon the request of BCL but afterwards refused to honour it (due to certain mistakes allegedly attributable to BCL). In order to ensure that Postabank effected the payments, BCL offered Postabank shares as security. That is, BCL was one of Postabank's shareholders and established a security right for Postabank in its shares in case the bank would have to pay the addressees of the letter of credit (or the assignees). After the bank effected payment, it tried to enforce this security right. However, in the meantime, the Hungarian state acquired determinative influence over Postabank, and—due to Hungarian capital market rules—was obliged to purchase the shares of the minority shareholders

[1] C-527/10. *Erste v Magyar Állam and others*, not yet published.
[2] On 1 May 2004, ten states, on 1 January 2007 two states joined the EU.
[3] Croatia joined the EU on 1 July 2013.

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(provided they offered them for sale);[4] accordingly, the shares of Postabank were purchased by the Hungarian state through unilateral declaration. The purchase price replaced the shares, thus, thereafter the security right covered the purchase price. Since the Hungarian state was uncertain about the obligee, it paid the sum into court.

Erste Bank brought an action, asking the court to establish that it had a security right in the collateral and was entitled to the money; however, in the meantime, insolvency proceedings were launched against BCL in Austria (the proceedings were instituted on 5 December 2003 and published on 4 February 2004). Under Austrian law, no judicial proceedings can be instituted against a company in liquidation as to its assets. On the other hand, Hungarian insolvency law is less watertight; from the institution of the insolvency proceedings, no claim for money recovery in respect of the assets relating to the insolvency may be submitted outside the insolvency proceedings (these claims may be enforced only in the frame of the insolvency proceedings).[5] However, the party may seek a declaratory judgment against the company in liquidation.

Erste Bank's legal representative elegantly utilized this 'gap' and sued BCL in Hungary in January 2006, seeking a judicial declaration of the fact that Erste Bank had security rights in the money deposited. In January 2009, the Budapest Court ('*Fővárosi Bíróság*') established, on the basis of Austrian law, that no proceedings could be instituted against BCL concerning the assets relating to the insolvency and, hence, terminated the proceedings. The Budapest Court of Appeal ('*Fővárosi Ítélőtábla*') confirmed this decision in February 2010. The plaintiff submitted a plea for supervision (an extraordinary appeal based on the violation of the law) to the Hungarian Supreme Court (at that time: '*Legfelsőbb Bíróság*', currently: '*Kúria*'), which, in turn, stayed the proceedings and sought a preliminary ruling from the CJEU.

III. THE PRELIMINARY QUESTION: ONE QUERY—TWO QUESTIONS

The Hungarian Supreme Court submitted the following question to the CJEU:

> Does Article 5(1) of … [the Insolvency Regulation] govern civil proceedings relating to the existence of rights in rem (in this case security deposits (*óvadék*)) where the country in which the bond, and subsequently the money it represented, was deposited as a security was not a Member State of the European Union at the time when insolvency proceedings were opened in another Member State, but was a Member State of the European Union by the time the application initiating the proceedings was submitted?[6]

Hungary joined the European Union on 1 May 2004, that is, after the institution of the insolvency proceedings. Accordingly, at the moment when the insolvency proceedings were launched, Hungary was not a member of the EU. On the other hand, Article 5(1) refers to the situation where the debtor's assets are 'situated within the territory of *another Member State at the time of the opening of proceedings*'.[7]

The Supreme Court's request for a preliminary ruling, in essence comprised two questions: an implicit pre-question and an explicit (principal) question. First, it was dubious whether the Insolvency Regulation's temporal scope covered 'cross-date' cases

[4] The Hungarian Supreme Court (at the time of the proceedings: 'Legfelsőbb Bíróság', currently: 'Kúria') rendered a judgment on 6 December 2005 enjoining the Hungarian state to buy the shares.

[5] Section 38(3) of Act IL of 1991 on the reorganization and the insolvency proceeding (in Hungarian: '1991. évi IL. törvény a csődeljárásról és a felszámolási eljárásról').

[6] Para 26.

[7] Emphasis added.

(like the one in the fact pattern) at all; that is, when the insolvency proceedings were instituted in an existing Member State after the Regulation's entry into force, but before the accession of the new Member State, and the Regulation's recognition provisions were to be applied in the new Member State after the latter's accession.[8] Second, if the first element was answered in the affirmative, the question emerged whether Article 5 was applicable to such 'cross-date' proceedings. Namely, as noted above, Article 5(1) refers to assets that are 'situated within the territory of *another Member State at the time of the opening of proceedings*'.[9] As Hungary was not a Member State at the time the insolvency proceedings were launched in Austria (5 December 2003), a literal interpretation of Article 5(1) would suggest that the provision was not applicable to the debtor's assets located in the former country.

It is to be noted that the application *ratione temporis* of the Insolvency Regulation and the territorial application of Article 5 are closely interrelated. As advanced below, the prohibition of retrospective effects, the principle of legal certainty and the protection of legitimate expectations justify that the Regulation's temporal scope should not cover 'cross-date' matters. However, if the Regulation's temporal scope extended to such cases, the above principles would warrant the application of Article 5. *In rem* rights are normally governed by the law of the *situs* (*lex rei sitae*). When insolvency proceedings are instituted, the proceedings and their effects come under the purview of the *lex concursus*, i.e. the law of the country where the insolvency proceedings were opened. This could result in the change of the applicable law in cases where the main insolvency proceedings are launched in a Member State different from that where the assets are located (with the exception of territorial insolvency proceedings: here the ambit of the *lex concursus* is confined to the Member State where the territorial proceedings were opened).[10] Since the change of the applicable law may frustrate creditors' rights, the protection of legitimate expectations and legal certainty justify that the creditors' *in rem* rights remain governed by the law of the *situs*. This is why Article 5 of the Insolvency Regulation provides that '[t]he opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties . . . which are situated within the territory of another Member State at the time of the opening of proceedings'. If the Regulation is not applicable *ratione temporis*, the problem of retrospective effects does not emerge; on the other hand, if it covers the fact pattern, its application shall occur in accordance with the prohibition of retrospective effects, the protection of legitimate expectations and the requirement of equal treatment between the old and new Member States (more precisely between the creditors of the old and the new Member States).

An interpretation of Article 5 that leads to a situation where the protection afforded by the provision is confined to assets located in the old Member States seems to go counter to the requirement of equal treatment. The circumstance that Article 5 refers to 'another Member State' and not to 'another state' may probably be explained by the fact that, first, the Regulation is applied solely by the courts and authorities of Member States,

[8] See Opinion of AG Mazák in C-527/10 *Erste v Magyar Állam and others*, para 23 ('That fact calls into question not only the applicability of that provision of the Regulation, but also the applicability *ratione temporis* of the Regulation itself to the present case. Consequently, before even dealing with the issue of the applicability of Art 5(1) of the Regulation, it is necessary to clarify the effects in time of the Regulation in the States which became Members of the European Union after its entry into force.').

[9] Emphasis added.

[10] Art 3(2) of the Insolvency Regulation.

while countries outside the EU apply their own rules, and, second, that the legislator failed to reckon with the possibility that the state where the assets are located is not part of the EU, but subsequently becomes a Member State. The Regulation's space–time continuum warped with the accession of the new Member States in 2004 and in 2009. The Regulation comprises a coherent system, which can be preserved only if it is not applied in the new Member States with immediate effect (ie not applied in pending cases) or it is applied together with Article 5.

IV. THE AG'S OPINION

AG Mazák considered the Hungarian Supreme Court's question to be hypothetical and its answering as unnecessary. He opined that Hungarian courts had no jurisdiction due to Article 3 of the Insolvency Regulation since the 'action follows directly from the insolvency proceedings opened against BCL Trading and is closely connected to those proceedings'.[11] He continued: 'the Court's answer to the question referred for a preliminary ruling is of no use to the referring court for the purpose of ruling on the action, given that that court has no international jurisdiction for that purpose and that the question referred for a preliminary ruling is therefore hypothetical.'[12] He 'propose[d] that the Court should declare that it lacks jurisdiction to answer the question referred by the … [Hungarian Supreme Court] for a preliminary ruling'.[13]

Nonetheless, the Opinion of AG Mazák advances that 'cross-date' matters come under the Insolvency Regulation's temporal scope, while they fall outside the territorial application of Article 5. On the one hand:

> [a] Member State which acceded to the European Union after the date of entry into force of the Regulation was required, upon its accession to the European Union, to recognise any decision opening insolvency proceedings if it had been handed down by a court having jurisdiction pursuant to Article 3 of the Regulation.[14]

On the other hand, the question of the application of Article 5 should be answered in the negative:

> … given that one of the conditions for application of Article 5(1) of the Regulation, namely the condition that an asset of the debtor be located within the territory of another Member State at the time of the opening of the insolvency proceedings, is not satisfied. That condition could not be regarded as having been satisfied if the asset in question was located at the relevant time within the territory of a State which acceded to the European Union only at a later date.[15]

V. THE PRELIMINARY RULING'S *RATIO DECIDENDI* AND THE RECONSTRUCTION OF THE LEGAL ARGUMENTATION

A. The Answer to the Implicit Pre-Question: The Temporal Application of the Insolvency Regulation

The CJEU addressed the question of temporal scope and ruled that it covered the fact pattern of the present case. It considered that the Regulation applied to 'cross-date' proceedings, where the insolvency proceedings were started before the (new) Member

[11] Opinion of AG Mazák (n 8), para 41.
[12] Opinion of AG Mazák (n 8), para 43.
[13] Opinion of AG Mazák (n 8), para 48.
[14] Opinion of AG Mazák (n 8), para 31. For the reasoning behind this interpretation see paras 24–25 and 27–29.
[15] Opinion of AG Mazák (n 8), para 47.

State's accession but after the Regulation's original entry into force (in the old Member States) and remained pending also after the accession. It is submitted that the preliminary ruling may be re-conceptualized as distinguishing between the 'original entry into force' and the 'derivative entry into force through accession'. The term 'derivative' refers to the circumstance that the Regulation does not enter into force autonomously but its entry into force is derived from the entry into force of EU law in each new Member State. In the first case, the Regulation enters into force only for the future, while in the latter it enters into force with immediate application, that is, it is to be applied also in pending matters.

Article 43 of the Regulation provides that it 'shall apply only to insolvency proceedings opened after its entry into force', while Article 47 provides that the date of entry into force is 31 May 2002. As this date predates Hungary's accession to the EU, it can certainly not be regarded as the starting point of the Regulation's application in time. It could be argued that the Accession Treaty's date of entry into force can be inserted in Article 43, replacing the original date; that is, when the Regulation refers to the entry into force, this means—in respect of new Member States—the respective Accession Treaty's date of entry into force.

The CJEU's preliminary ruling did not take this path. The Court held that the date of entry into force was 31 May 2002, as defined in Article 47 of the Insolvency Regulation ('original entry into force'), thus the Accession Treaty's date of entry into force could not be inserted in Article 43.[16] The new Member States entered into a 'geared' system with immediate effect ('derivate entry into force through accession'). The consequences of these two types of entry into force differ; while on 31 May 2002 the Regulation entered into force in respect of future actions, the new Member States joined a regime that had already been into force; hence, the derivative entry into force entailed immediate application. '[U]nder Article 2 of the Act of Accession, the provisions of the Regulation are applicable in Hungary from the date of accession of that State to the European Union that is from 1 May 2004.'[17] Accordingly, the Regulation has been immediately and completely applicable in the new Member States since the moment of accession:

> Thus, from that date, the Hungarian courts are required, in accordance with Article 16(1) of the Regulation, to recognise any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 thereof. Furthermore, pursuant to Article 17(1), any judgment opening insolvency proceedings handed down by a Member State produces in principle in Hungary, from 1 May 2004 and without any other formality, the effects attributed to it by the law of the State of the opening of proceedings.[18]

The consequences of the 'derivative entry into force' are fundamentally different from those of the 'original entry into force'. When the Insolvency Regulation entered into force on 31 May 2002, it was applicable only to proceedings opened after this date. On the contrary, due to the derivative entry into force, the new Member States, as noted above, entered into a 'geared' system, which is to be applied also in pending matters.

Unfortunately, the CJEU's preliminary ruling failed to examine the relationship between the Regulation's immediate application and the retrospective effects emerging therefrom, on the one hand, and the protection of legitimate expectations and the prohibition of retrospective effect, on the other. Therewith, it also failed to take into account the repercussions of the immediate effect and to explain why the Regulation has an immediate application in the new Member States, while having had only a *pro futuro*

[16] Para 30. [17] Para 35. [18] Para 36.

application in the old ones. Although initially the Regulation entered into force only as to proceedings launched after 31 May 2002 and was not applicable to pending cases, when a new Member State joined the EU the Regulation had to be applied forthwith, ie even in pending cases.

B. The Answer to the Explicit Principal Question: The Applicability of Article 5 of the Insolvency Regulation

According to the CJEU's interpretation, Article 5 of the Insolvency Regulation is applicable, if the assets were, at the time of the opening of the insolvency proceedings, in a country outside the European Union, which subsequently joined the EU. Article 5 is to be applied in spite of the fact that this country was not a Member State during the relevant time:

> Article 5(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that that provision is applicable, in circumstances such as those in the main proceedings, even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union where, on 1 May 2004, the debtor's assets on which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain.[19]

The CJEU's ruling expressly states that the assets in question were, at the time when the insolvency proceedings were opened, on the territory of a state, which was not part of the European Union (yet).[20] Still, the Court adopted the *above* interpretation. Unfortunately, the judgment does away with the clear language of Article 5 with a short clause, without detailing the reasons for this:

> *In those circumstances, in order to maintain the cohesion of the system established by the Regulation and the effectiveness of insolvency proceedings*, Article 5(1) thereof must be interpreted as meaning that that provision is applicable even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union in a case, such as that in the main proceedings, when, on 1 May 2004, the debtor's assets on which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain.[21]

In other words, the Regulation established a coherent scheme, which can be applied only in a 'take it or leave it' system. In cases where the Regulation is applicable *ratione temporis*, its system would lose its equilibrium if some of its constituent elements were pulled out. Hence, the Regulation should be applied either in its entirety, or not at all. It seems that the interpretation concerning the territorial application of Article 5 followed from the interpretation on the Regulation's temporal scope at large.

VI. THE EVALUATION AND CRITICISM OF THE CJEU'S JUDGMENT

A. The Implicit Principal Question: The Insolvency Regulation's Application Ratione Temporis

1. The temporal dimension of the Regulation's application in new Member States

The Insolvency Regulation, according to Article 47, entered into force on 31 May 2002. According to Article 43: '[t]he provisions of this Regulation shall apply only to

[19] C-527/10 *Erste v Magyar Állam and others*, operative part.
[20] Para 43.
[21] Para 45 (emphasis added).

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insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.' Since the date of 31 May 2002 can certainly not apply to new Member States, these provisions require interpretation.

Since the Insolvency Regulation contains both international procedural rules (jurisdiction[22], recognition and enforcement[23]), and choice-of-law provisions,[24] the exclusion of retrospective effects is a fundamental requirement.[25] This is why Article 43 of the Regulation provides that it applies only to proceedings opened after the date of entry into force, and stresses that '[a]cts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.' This provision was 'prompted by the concern not to alter existing situations and relations which were governed by specific legal rules at the time of the introduction of the new rules of the . . . [Regulation] into the legal systems of the' Member States.[26] Para 304 of the Virgos-Schmit Report emphasizes that the Regulation does not apply if insolvency proceedings of any kind (main or secondary) were opened before the date of entry into force:[27]

> The rule in Article 47 has an absolute character: if insolvency proceedings are opened against a given debtor prior to the entry into force of the Convention in a Contracting State, any proceedings opened after the entry into force are not subject to the Convention, irrespective of whether such later proceedings are main or secondary proceedings within the meaning of the Convention.[28]

The considerations behind this rule are essentially the same that justify the position that the Insolvency Regulation should not have immediate effect in new Member States; protection of legitimate expectations, legal certainty and prohibition of retrospective effects:

> If proceedings are opened on the basis of the debtor's centre of main interests after the entry into force of the Convention, it could have been thought that, in view of the primacy of the main proceedings in the operation of the Convention, the latter would apply even if proceedings had previously been opened away from the centre of main interests. This solution was not adopted, because it might disturb the course of proceedings opened in accordance with the law applicable at the time of opening. Reorganization proceedings opened in a State where the debtor's centre of main interests is not situated would have to be converted. Rules on conflict of laws would where appropriate have to be modified in the course of proceedings by the application of those in the Convention. Proceedings of a universal nature opened in accordance with the criteria of international jurisdiction laid

[22] Art 3.

[23] Arts 16–26.

[24] C Nagy, *Az Európai Unió nemzetközi magánjoga* (HVG-Orac 2006) 283.

[25] M Virgos and F Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) 30 ('with regard to its sphere of application in time, the Regulation has no retroactive effects').

[26] Para 303 of M Virgos and E Schmit, *Report on the Convention on Insolvency Proceedings* (1996), Document 6500/96 of Council of the EU, 3 May 1996 ('Virgos-Schmit Report'). Although the Report was not published in the Official Journal and it relates to the 1995 Draft Convention, it has considerable persuasive authority as to the Insolvency Regulation. The Report is available at <http://aei.pitt.edu/952/>.

[27] See Virgos and Garcimartín (n 25) 30–1; G Moss and T Smith, 'Commentary on Council Regulation 1346/2000 on Insolvency Proceedings' in G Moss, IF Fletcher and S Issacs (eds), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (Oxford University Press 2002) 234; C Nagy (n 24) 287.

[28] Para 304 of the Virgos-Schmit Report.

> down in the national law applicable would, where appropriate, be classified as territorial proceedings if, within the meaning of the Convention, the centre of main interests was not situated in the State of the opening of the earlier proceedings.[29]

This interpretation was confirmed by the CJEU in *Susanne Staubitz-Schreiber*:[30]

> The first sentence of Article 43 of the Regulation lays down the principle governing the temporal conditions for application of that regulation. That provision must be interpreted as applying if no judgment opening insolvency proceedings has been delivered before its entry into force on 31 May 2002, even if the request to open proceedings was lodged prior to that date.[31]

The Insolvency Regulation contains no specific provision on its application in respect of states that join the EU after the Regulation's entry into force. Hence the provisions of the Accession Treaty and those of the Act of Accession must be examined.

According to Article 2 of the Act of Accession of Hungary (and of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia):[32] '[f]rom the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.' According to Article 2(2) of the Act of Accession, the Treaty of Accession entered into force on 1 May 2004.[33] EU law has therefore been applicable in Hungary (and in the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia) as from this date. Similar provisions are to be found in the accession documents of Bulgaria and Romania, and in those of Croatia. According to Article 4(2) of the Treaty of Accession[34] of Bulgaria and Romania, the Treaty entered into force on 1 January 2007, and, as provided in Article 2 of the Act of Accession,[35] '[f]rom the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act.' Croatia's Treaty of Accession[36] entered into force on 1 July 2013,[37] and according to Article 2(1) of the Act of Accession,[38] '[f]rom the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on Croatia and shall apply in Croatia under the conditions laid down in those Treaties and in this Act.'

Since the Insolvency Regulation, as to the new Member States, entered into force on 1 May 2004, 1 January 2007 and 1 July 2013, its application *ratione temporis* raises serious uncertainties. On the one hand, the date of the Regulation's entry into force may be replaced with the date of the new Member State's accession, that is, '[t]he provisions of this Regulation shall apply only to insolvency proceedings opened after [1 May 2004, 1 January 2007, 1 July 2013 respectively].' On the other hand, the Regulation may be interpreted in a way that the new Member States entered into an already operating

[29] Para 304 of the Virgos-Schmit Report.
[30] Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-701.
[31] Para 21.
[32] [2003] OJ L 236/17.
[33] Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (2003), [2003] OJ L 236/33.
[34] [2005] OJ L 157/11.
[35] [2005] OJ L 157/203.
[36] [2012] OJ L 112/10.
[37] Art 3(3) of the Treaty of Accession.
[38] [2012] OJ L 112/21.

system with immediate effect. In order to answer this question, it should be examined how the provisions of the other EU private international law instruments tackle the problem of temporal scope.

2. The approach of EU private international law instruments as to the temporal scope

All EU private international law instruments are based on the principle that the choice-of-law and international procedural rules are to be applied only *pro futuro*. The rules determining the applicable law can be applied only to fact patterns that occurred, while the jurisdictional rules only to proceedings that were instituted, after the instrument's entry into force. Likewise, the international procedural law provisions cover the recognition and enforcement of decisions that were rendered after the given instrument's entry into force.

The 1980 Rome Convention on the law applicable to contractual obligations[39] provides in Article 17 that the 'Convention shall apply in a Contracting State *to contracts made after the date* on which this Convention has entered into force with respect to that State.'[40] It is noteworthy that Article 17 is entitled 'No retrospective effect'. The same solution was adopted by the Rome I Regulation[41] (the 'legal successor' the Rome Convention): the 'Regulation shall apply *to contracts concluded as from* 17 December 2009.'[42] Finally, the same approach is followed in the Rome II Regulation[43] on the law applicable to non-contractual obligations, the 'Regulation shall apply *to events giving rise to damage which occur after* its entry into force.'[44]

The Brussels I Regulation's[45] jurisdictional rules have no immediate effect. Article 66(1) of the Regulation provides that the 'Regulation shall apply only *to legal proceedings instituted and to documents formally drawn up or registered* as authentic instruments *after* the entry into force thereof.'[46] Accordingly, if the proceeding was instituted before the Brussels I Regulation's entry into force, the Regulation's jurisdictional rules are not applicable and the question of jurisdiction remains under the purview of the rules that had been applicable before the Regulation's entry into force. The same approach is followed by the original Brussels II Regulation[47] and its 'legal successor', the Brussels IIa Regulation[48] in the domain of divorce, separation, annulment of marriage and parental responsibility.[49]

In the field of recognition and enforcement, the Brussels I Regulation, according to its transitional provisions, is applicable solely if the decision was rendered after the Regulation's entry into force.[50] Although due to Article 66(2) the Brussels I Regulation's scope of application also covers decisions that were rendered in

[39] 80/934/ECC [1980] OJ L 266/1. Promulgated in Hungary by Act XXVIII of 2006.
[40] Emphasis added.
[41] Regulation 593/2008 [2008] OJ L 177/6.
[42] Art 28 (emphasis added). See Corrigendum to Regulation 593/2008. [2009] OJ L 309/87.
[43] Regulation 864/2007 [2007] OJ L 199/40.
[44] Art 31 (emphasis added).
[45] Regulation 44/2001 [2001] OJ L 12/1.
[46] Emphasis added.
[47] Regulation 1347/2000 [2000] OJ L 160/19, Art 42.
[48] Regulation 2201/2003 [2003] OJ L 338/1.
[49] Art 42 of the Brussels II Regulation; art 64 of the Brussels IIa Regulation.
[50] According to art 66(1) of the Brussels I Regulation: '[t]his Regulation shall apply only *to legal proceedings instituted and to documents formally drawn up or registered* as authentic instruments *after* the entry into force thereof.' (emphasis added)

proceedings instituted before the Regulation's entry into force, it is a precondition that the decision itself was rendered after the Regulation entered into force.[51]

The same approach is followed, in the domain of recognition and enforcement in divorce, separation, marriage annulment and parental responsibility matters, by the original Brussels II Regulation[52] and the Brussels IIa Regulation. Since the latter is the 'legal successor' of the Brussels II Regulation, it contains special provisions ensuring the continuity between the Brussels II and the Brussels IIa Regulation. However, the prohibition of retrospective effects prevails as regards decisions rendered before the Brussels II regime.[53]

3. Consequences of the Insolvency Regulation's immediate application in new Member States

The immediate application of the Insolvency Regulation entails retrospective effects in the domain of both choice-of-law and international procedural law. In the field of choice-of-law, the retrospective effects are obvious: the Regulation's immediate application leads to the change of the applicable law ('*Statutwechsel*'), subjecting the insolvency procedure and the rights and obligations of the parties to a new law.

[51] According to art 66(2) of the Brussels I Regulation: 'if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments *given after that date* shall be recognised and enforced in accordance with Chapter III, (a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed; (b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.' (emphasis added)

[52] According to art 42 of the Brussels II Regulation: '1. The provisions of this Regulation shall apply *only to legal proceedings instituted*, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings *after its entry into force*. 2. *Judgments given after the date of entry into force of this Regulation* in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Chapter III if jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.' (emphasis added)

[53] According to art 64 of the Brussels IIa Regulation: '1. The provisions of this Regulation shall apply *only to legal proceedings instituted, to documents formally drawn up or registered* as authentic instruments and *to agreements concluded* between the parties *after* its date of application in accordance with art 72. 2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. 3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.' (emphasis added)

Similar problems emerge in the field of international procedural law.

The Insolvency Regulation's immediate application may lift the forum's jurisdiction in pending matters, as the Hungarian Act on Private International Law[54] and the Insolvency Regulation employ different jurisdictional bases. It is to be noted, however, that, as a matter of practice, the court may apply the principle of *perpetuatio fori* to exclude such a consequence.

For instance, Section 62/A(g) of the Hungarian Act on Private International Law provides that the Hungarian court has exclusive jurisdiction over the insolvency proceeding, if the company's registered seat is in Hungary (under Hungarian law, the 'seat' means the registered seat and not the place of the central management, though these two may coincide).[55] Before 1 May 2004, Hungarian courts had jurisdiction in matters where the company's seat was in Hungary, while the centre of the main interests in another state (Member State). Due to the Insolvency Regulation's immediate application (as interpreted by the CJEU), Hungarian courts, as from 1 May 2004, lost their jurisdiction over the insolvency proceedings; in principle, this may have occurred also in pending cases. If the centre of main interests is outside the European Union, the jurisdiction of the Hungarian courts is maintained, as the Insolvency Regulation does not apply to such cases.

In the domain of recognition and enforcement, the immediate application of the Insolvency Regulation may lead to the recognition of foreign insolvency proceedings the recognition of which had hitherto been prohibited, either statutorily or judicially. By way of example, in the absence of a mutual judicial assistance treaty, or reciprocity between the country of origin and Hungary on the recognition of the insolvency proceeding, recognition will be refused.[56] The decision (eg the decision opening the insolvency proceedings and establishing the status of being 'in liquidation') is recognized or not recognized *ex lege*.[57] From a legal perspective, it is irrelevant whether the refusal of recognition was announced by a formal decision or derived from statute.

Hungary has neither a judicial assistance treaty, nor reciprocity, with numerous Member States. Therefore, with some exceptions,[58] decisions from these countries could not be recognized and enforced. Accordingly, before Hungary's accession on 1 May 2004, these decisions (and the statuses of 'in liquidation' established in them) were not recognized. The immediate application of the Insolvency Regulation changed this settled legal situation overnight, and could lead to the recognition of decisions the recognition of which had previously been refused.

If a company's seat is in Hungary, but its centre of main interests is in another Member State, further anomalies may emerge in the domain of recognition and enforcement. According to Section 62/A(g) of the Hungarian Act on Private International Law, Hungarian courts had exclusive jurisdiction in insolvency

[54] Law-Decree 13 of 1979.

[55] Section 7(1) of Act V of 2006 on the publicity of firms, judicial registration procedure and the winding-up of firms.

[56] C Nagy: *Private International Law in Hungary* (Kluwer Law International 2012) 145–6, paras 411 and 413–414.

[57] Ibid 147, paras 416–417.

[58] See Section 73(2) of Hungarian Act on Private International Law. Reciprocity is not the pre-condition of the recognition and enforcement in the following cases: (a) foreign decisions on personal status, (b) foreign property decisions if the court's jurisdiction was based on the parties' agreement and this agreement complied with Sections 62/F-62/G of the Act.

proceedings concerning such companies. On the basis of this, decisions rendered in such insolvency proceedings were not recognized and enforced in Hungary, as they went counter to the exclusive jurisdiction of the Hungarian courts.[59] Due to the immediate application of the Insolvency Regulation, Hungarian courts lost their exclusive jurisdiction as from 1 May 2004, and this hurdle against recognition evaporated, making previously unrecognized judgments recognizable.

B. The Explicit Principal Question: The Applicability of Article 5 of the Insolvency Regulation

As noted above, the Regulation's temporal scope and the applicability of Article 5 are inter-related. The coherence of the Regulation's system can be preserved only if it is applied in its entirety or not applied at all. It may easily lead to an imbalance, if some of the constituent elements of this system are applied in isolation. According to the Virgos-Schmit Report, the Insolvency Regulation recognizes the right of all states to protect commerce in their own markets through the protection of *in rem* rights created by the law applicable before the Insolvency Regulation's entry into force.[60] At the same time, the language of Article 5(1) is clear; the protection of *in rem* rights is ensured only if the assets 'are situated within the territory of another Member State at the time of the opening of proceedings'. In other words, if the Regulation's temporal scope is engaged, there is a contradiction between the Regulation's fundamental principles and the language of Article 5.

It may be presumed that the EU legislator when drafting Article 5(1) did not consider the case where the country of the assets' location is not a member of the European Union at the time the insolvency proceeding is opened, but subsequently joins the EU. As the Regulation's choice-of-law rules (like the entirety of the Regulation) are applicable only in the Member States and countries outside the EU apply their own rules, the Regulation refers to 'another Member State' and not to 'another state'. It is worthy of note that AG Mazák, in his Opinion, submitted that 'the expression "all the debtor's assets" must of necessity be limited exclusively to those of the debtor's assets that are located in all the Member States in which the Regulation is applicable.'[61]

If the Regulation were applicable without Article 5, this would go counter to the principle of equal treatment between new and old Member States; the legal protection of the creditors in new Member States would not be ensured at the time of accession, while the creditors in old Member States would receive this legal protection automatically. If the Regulation has immediate effect in the new Member States, Article 5 must be applied too. The provision of legal protection should not be made dependent on whether the asset was in an old or a new Member State at the time of the opening of the insolvency proceedings.

[59] Section 70 of Hungarian Act on Private International Law. See Nagy (n 56) 136–7, paras 379, 144 and para 409.

[60] Para 100 ('The Convention acknowledges the interest of each State in protecting its market's trade, in the form of respect of rights in rem acquired over assets of the debtor located in that country under the law that is applicable before the opening of the insolvency proceedings.')

[61] Para 26.

VII. THE SIGNIFICANCE AND CONSEQUENCES OF THE JUDGMENT

The CJEU had to render a judgment in the light of the complex issues generated by a complicated case. Unfortunately, the preliminary ruling seems to have led to a regrettable situation. Obviously, the Court recognized the problem of retrospective effects and tried to provide legal protection in the case before the bench. However, the ruling fails to provide legal protection against the retrospective effects in the fields of jurisdiction and recognition and enforcement. The judgment distinguished between the 'original entry into force' and the 'derivative entry into force through accession' and attached divergent legal consequences to these (*pro futuro* application / immediate application). With this, the creditors of new Member States are afforded a more disadvantageous treatment at the time of accession than creditors of old Member States received during the Regulation's entry into force.

Taking into account the retrospective effects, it would have been more reasonable to apply the Regulation's provisions only for the future. The Regulation's immediate application changes overnight legal situations that were settled finally and conclusively. The courts may lose, even in pending cases, the jurisdiction they had before the Regulation's entry into force; the immediate application may require the recognition and enforcement of decisions the recognition of which was previously (*ex lege* or through a judicial decision) rejected. The Regulation's immediate application has dubious value also from the perspective of equal treatment. While the creditors of old Member States automatically received legal protection during the Regulation's entry into force, the creditors of new Member States do not obtain this, when the Regulation enters into force in respect of them. What is more, the CJEU tried to counterbalance the repercussions of the Regulation's immediate application with an interpretation that is irreconcilable with the text of Article 5; no country has ever become a Member State of the European Union so quickly, as the country in Article 5.

VIII. THE AFTERMATH OF *ERSTE/BCL*: THE HUNGARIAN SUPREME COURT'S JUDGMENT[62] IN THE PRINCIPAL PROCEEDING

The CJEU's ruling established a tight frame for the Hungarian Supreme Court's decision; however, there were some points of interpretation the latter had to address as they were not covered in the ruling.

First, the CJEU did not decide on the question whether Hungarian courts had jurisdiction. AG Mazák found that Hungarian courts had no jurisdiction, since the 'action follow[ed] directly from the insolvency proceedings opened against BCL Trading and is closely connected to those proceedings'.[63] The CJEU stepped over this issue (as the preliminary question contained no mention of it).

In its judgment, the Hungarian Supreme Court held that it had jurisdiction. It is submitted that this is a reasonable interpretation; the only connection of the Hungarian action to the Austrian insolvency proceedings was that the former concerned the assets of the debtor in liquidation, but the action was neither based on, nor derived from, those proceedings. If accepting AG Mazák's opinion, outside the framework of insolvency proceedings each and every action against a company in liquidation would

[62] Hungarian Supreme Court's judgment of 13 November 2012 in Case Gfv. VII.30.236/2012/5.

[63] Opinion of AG Mazák (n 8), para 41.

be excluded; such an interpretation would be clearly excessive in the light of the CJEU's case-law.[64]

Second, the Supreme Court examined Article 5. It could have been argued that Article 5 contains no choice-of-law rule but simply implies that the insolvency proceedings shall not change the applicable law, that is, should not affect the application of the law designated by the forum's conflicts law. However, the Supreme Court took another interpretation; it held that according to Article 5 the institution of the main insolvency proceedings did not affect the creation, validity and effects of *in rem* rights over those assets of the debtor that were located in a country other than the state where the insolvency proceedings were opened. The Supreme Court held that due to Article 5 the obligee of the *in rem* right may enforce his or her claim in a way as if the main insolvency proceedings would not have been instituted and the debtor was not in liquidation. The enforcement of the *in rem* right is not affected by the rules governing the main insolvency proceedings and the restrictions included therein. The *in rem* rights over assets located in Hungary are governed by Hungarian civil law.

Finally, the Hungarian Supreme Court established that since under Austrian law actions against the debtor had to be instituted against the liquidator, the plaintiff should have sued the liquidator of BCL and not BCL itself. According to Hungarian conflicts law a party's procedural capacity is determined by his personal law,[65] whilst in respect of companies the latter is the law of the country of incorporation.[66] Therefore BCL's procedural capacity, including its representation, was governed by Austrian law. Hence, the case was remitted with the instruction that the court of first instance call the plaintiff to name the proper defendant; if the plaintiff requested the extension of the action to the Austrian liquidator, the court had to decide upon the merits of the case.

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[64] As to the interpretation of art 1(2)(c) of the Brussels I Regulation (which excludes insolvency matters from the Regulation's scope) see Case 133/78 *Gourdain v Nadler* [1979] ECR 733, para 4 ('[I]t is necessary , if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the convention, that they *must derive directly from* the bankruptcy or winding-up *and be closely connected with* the proceedings for the "liquidation des biens" or the "reglement judiciaire".'). As to the interpretation of art 3 of the Insolvency Regulation see Case C-339/07 *Seagon* [2009] ECR I-767, para 21 ('Taking into account that intention of the legislature and the effectiveness of the regulation, art 3(1) thereof must be interpreted as meaning that it also 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.' [emphasis added]); this formula was adopted also in Case C-191/10 *Rastelli Davide*, not published yet, para 20.

[65] Section 64(1) of the Hungarian Act on Private International Law.

[66] Section 18 of the Hungarian Act on Private International Law.

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