ON THE APPLICABLE LAW TO DETRIMENTAL ACTS, THIRD PARTY PAYMENTS AND "ASSIGNMENT" OF CLAIMS IN CROSS BORDER INSOLVENCY PROCEEDINGS: COMMENTS ON CJEU JUDGEMENT C-73/20 FRERICHS "NEMO DATUR QUOD NON HABET"

SOBRE LA LEY APLICABLE A LOS ACTOS PERJUDICIALES Y SUBROGACIÓN DE PAGOS DE TERCEROS EN PROCEDIMIENTOS DE INSOLVENCIA TRANSFRONTERIZOS: COMENTARIOS A LA STJUE C-73/20 FRERICHS "NEMO DATUR QUOD NON HABET"

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Abstract: In this preliminary ruling (C-73/20), the Court of Justice of the European Union (CJEU) faces again (as did in former case law), the issue of what law is applicable to detrimental acts within the course of a cross border insolvency proceeding. On this occasion, the CJEU analyses how and when, –according to the EU Private International Law (EU PIL) at hand for those proceedings, i.e.: the *lex specialis* (articles 4 and 13 Insolvency Regulation) and the *lex generalis* (article 12 para 1 lit a Rome I Regulation)–, which one is of application to determine the law applicable to acts which can be considered as "detrimental" to all the creditors. With other words, whether it would be applicable to the detrimental act, the *lex concursus* which governs the insolvency proceedings as a whole or the *lex contractus* which governs the law to the contract which led in these detrimental acts. However, the particularity of this case which is highly significant is grounded in the different relationships of the parties as a consequence of an "alleged" assignment between the insolvent company, the original debtor and an outsider creditor to this cross-border insolvency proceeding. Something that the CJEU did not pore it over as expected.

Key words: insolvency, applicable law, contractual obligation, assignment, Rome I Regulation, Regulation 1346/2000, payment, *lex concursus*, *lex contractus, lex causae*, detrimental, *actio pauliana* (claw-back), creditors, performance, fraud.

Resumen: En esta cuestión prejudicial (C-73/20), el Tribunal de Justicia de la Unión Europea (TJUE) se enfrenta de nuevo (como ya lo hizo en jurisprudencia anterior), a dirimir la pregunta sobre cual es la ley que se tiene que aplicar para actos o contratos perjudiciales para los acreedores en un procedimiento de insolvencia transfronterizo. De esta forma, el TJUE analiza cómo y cuándo, -de acuerdo con las normas del Derecho Internacional privado europeo (DIPr europeo) que existen para estos procedimientos, esto es, la *lex specialis* (artículos 4 y 13 del Reglamento europeo de insolvencia) o la *lex generalis* (artículo 12 párrafo 1 letra a del Reglamento Roma I)-, uno u otro son de aplicación para determinar la correcta ley aplicable a ciertos actos emanados de obligaciones contractuales que se pueden considerar perjudiciales para todos los acreedores. Con otras palabras, si se debe aplicar la ley que rige

todo el concurso en el Estado donde se comenzó el procedimiento de insolvencia *(lex concursus)* o la ley del país donde se celebró dicho acto-s / contracto-s perjudicial-es *(lex contratus)*. Sin embargo, la particularidad de este caso se basa en que la compañía insolvente realizó el pago tardío cuando se había iniciado el procedimiento de insolvencia, de parte de una compañía que debía dinero a otra compañía que no era uno de los acreedores del concurso, mediante una "presunta" subrogación y cesión de créditos que el TJUE no entra a analizar.

Keywords: insolvencia, derecho aplicable, obligación contractual, subrogación, Reglamento Roma I, Reglamento 1346/2000, pago, *lex contractus, lex fori concursus,* acción pauliana, acreedores, cumplimiento, fraude.

Summary: I. Preliminary remarks on the CJEU Judgement C-73/20: untangling the case; 1. Overview of the preliminary ruling; 2. Facts and merits of the case; II. Analysis of the *vexata quaestio* of the preliminary ruling: payment, performance, and the assignment of claims as a creditor's fraud: 1. Detrimental Acts to all Creditors in the Insolvency proceeding; 2. Interplay between the Insolvency Regulation and Rome I Regulation when the *lex causae* governs an act or contract; 2.1. Coherence of the EU PIL instruments applied to cross border insolvency proceedings; 2.2. The principle of "collective satisfaction" as an overriding principle in Insolvency law; 3. Assignments of claims, third party effects and creditor´s. IV. Final Remarks.

I. Preliminary remarks on the CJEU Judgment C-73/20: untangling the case

1. Overview of the preliminary ruling

1. It is usual that in cross-border insolvency proceedings, insolvent companies must face debts with third parties' (creditors) which have entered contracts with the insolvent company. Parties who are located in different countries and contracts governed by a different law than the law which governs the insolvency proceedings. Consequently, when the insolvency proceedings begin, sometimes doubts will arise concerning the scope of the *lex concursus* to govern the whole proceeding or whether for certain acts and contracts, it should be of application a different law, such as the *lex contractus* to determine the efficacy and validity of these acts and obligations and to challenge them.

2. The preliminary ruling C-73/20 *Frerichs* navigates the above mentioned, nonetheless from a very general approach[1]. It takes as a core issue the interpretation of two specific conflict of law rules at hand for the cross-border insolvency proceedings.

The one considered as the *lex specialis* to rule the insolvency proceedings for detrimental acts, i.e.: Article 13 Regulation 1346/2000 (hereafter, Insolvency regulation[2]) when Article 4 para 2 lit m might be displaced to determine the voidability, voidness and unenforceability of legal acts detrimental to all the creditors); and the one given by the *lex generalis* to all kind of contracts, i.e.: Article 12 para 1 lit b Regulation 593/2008 (hereafter, Rome I Regulation[3]). Article 13 of the Insolvency Regulation

[1] CJEU Judgment (First Chamber), of 22 April 2021, C- 73/20, *ZM v Frerichs* (ECLI:EU:2021:315). There was no Opinion rendered by the AG for this preliminary ruling; ; K. Pacula, "CJEU on the law applicable to detrimental acts under the Insolvency Regulation in Oeltrans Befrachtungssgesellschaft, C-73/20", *Conflict of laws,5t* 22 april 2021, available at: https://conflictoflaws.net/2021/cjeu-on-the-law-applicable-to-detrimental-acts-under-the-insolvency-regulation-in-oeltrans-befrachtungsgesellschaft-c-73-20/ ; G. Cuniberti, "CJEU rules on Law Governing Avoidance of Third Party Payment of Contract", *EAPIL Blog,* 28 april 2021, available at: https://eapil.org/2021/04/28/cjeu-rules-on-law-governing-avoidance-of-third-party-payment-of-contract/ ; A. Espiniella Menéndez, "Pagos transfronterizos por subrogación y posteriores a la insolvencia. Sentencia del Tribunal de Justicia de 22 de abril de 2021, asunto C-73/20", *La Ley Unión Europea,* Nº 95, 2021, pp. 1-9.

[2] Council Regulation (EC) No 1346/2000 of 29 May 2000 of Insolvency proceedings, *OJ* L160, 30 June 2000, repealed by article 91 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, *OJ* L 141, 5 June 2015.

[3] Regulation (EC) No 593/2008 of European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* L 177, 4 July 2007.

(Detrimental acts ruled by the *lex causae*) contains an exception to the general conflict of law rule of the Article 4 para 2, *viz.* to the lit m (*lex concursus*)[4]. The interaction among these provisions is likewise controversial, as the silence of the Article 13 to apply a different law which also led in the application of a different Regulation to solve the question of what law rules the performance and payment of a contractual obligation, such as the Rome I Regulation[5].

3. Thus, the moot question which arose for the German Court was "when" the application of this different applicable law rule must take place and under what requirements, to challenge a payment made it by the insolvent company on behalf of the debtor (second company) to a third party. Also, when a repayment action (*actio pauliana*) was brought to the Courts where the insolvency proceedings commenced by the liquidators. Payments which can be spotted as detrimental acts for having been made after the insolvency proceeding are lodged and by the insolvent company that was not responsible of this debt from the outset (i.e.: as a creditors *fraus*)[6].

This preliminary ruling only spins around the law applicable to the performance and payment of this act (the payment) as detrimental. Nonetheless, it has to be mentioned that the case may be considered as "thorny", insofar the parties at stake had among them a different relationships and legal nexus to examine. A legal nexus based in different grounds which led in a different conflict of law rule to solve the applicable law problems of the merits and what is more important, the outcome. In Insolvency proceedings the good outcome has to be oriented to protect the creditors interests, regardless of the applicable law to be applied. Albeit this ideal situation is not always given, such as this case demonstrates.

4. Because of the above, assuming the existence of two well-defined legal relations, being the creditor and original debtor outsiders to the insolvency proceedings, it would have also been convenient, having asked to the CJEU what applicable law is the proper one to govern an alleged assignment of the company (insolvent company) who paid to the creditor on behalf of the debtor (the one who entered the contract with the creditor and "by chance" one of the companies of the group of the insolvent, as explained below. Whether *the lex concursus* could also have appropriated or not to confirm the *efficacy* of this assignment and consequently the third-party payment made it in an apparent fraud.

The CJEU has not considered this relevant issue to clarify what should be the law applicable to cross border assignments involved in the insolvency proceeding. Especially if the liquidator could bring to this creditor to the insolvency proceeding when this creditor was not an initial creditor, but an outsider[7]. Apart from it, from these lines, it is considered that the CJEU in this preliminary ruling, did neither distinguish between the procedural and substantive aspects which mainly rely on the *lex concursus,* nor explained the scope of the *lex concursus* to regulate the substantive and procedural aspects of the controversial *actio pauliana.*

2. Facts and merits of the case

5. The contractual relationship between the parties: Two relationships to consider and a detrimental act.- *Oeltrans Group* a German company incorporated in Hamburg (Germany) had two

[4] Article 16 Regulation 2015/848 (aka, Insolvency Reg., Recast).

[5] Article 13 of the Insolvency Regulation allows to apply a different law of the State where the insolvency proceeding is in due course.

[6] G. Van Calster, "Oeltrans Befrachtungsgesellschaft v Frerichs: the CJEU on the reach of *lex contractus* as a shield against the *lex concursus´* pauliana (avoidance action)", *GAVC Law*, 23 april 2021, available at: https://gavclaw.com/tag/oeltrans-befrachtungsgesellschaft/: "The core question is whether the impact of the *lex contractus* extends to payments made by third parties In technical terms: whether effective contractual performance by third parties, is part of A12(1)b Rome I´s concept of "performance" of the contract being within the scope of the *lex contractus*".

[7] European Commission, "Report from the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person", COM (2016) 626 final, in connection with insolvency proceedings, *viz*. p. 8.

companies: *Oeltrans Befrachtngsgessellchaft* and *Tankfracht GmbH*. In the judgment is only mentioned that the company is a German company located in Hamburg. In 2010, *Tankfracht GmbH* signed /entered a contract with a Dutch company, *E.A.Frerichs* (based in the Netherlands) to be performed in the Netherlands. This is considered the first and original relationship or the first contract. The object of this contract was relating to an inland waterway vessel in which *Tankfracht GmbH* had the remuneration obligation to pay 8.259,30 euros for the performance thereof. At the end of this year, when the insolvency proceeding was goint to be opened, *Oeltrans Befrachtngsgessellchaft* (the insolvent company and "assignee") paid this amount to *Frerichs* on behalf of *Tankfracht GmbH.* The second relationship to take into consideration and of interest for the case which led in the contested act for the insolvent estate.

6. The insolvency proceeding before German courts. – The insolvency proceedings were opened against *Oeltrans Befrachtngsgessellchaft* before the *Amtsgericht Hamburg* (Local Court of Hamburg-Germany). The *lex fori concursus* as the applicable law to these proceedings was the German Insolvency law, Article 4 of the Insolvency Regulation (Recital 23)[8], in accordance with the law of the court where the proceedings have been opened ("the State of the opening of proceedings"). It was considered that Hamburg was the place of its incorporation. However, this nuance has been also argued in the Academia, due to the different theories on the companies domicile of the EU PIL[9].

In 2014, the first liquidator brought an action for repayment of this sum paid (an *actio pauliana/ restitutio action/claw back*) to the Dutch company (*Frerichs).* The liquidator challenged the voidability of the company´s legal acts. However, this action was not served to *Frerichs* until 2016. The Hamburg Court of Appeal granted the action to the liquidator, but considering the action prescribed under the German law (*lex fori concursus)*.

7. The new liquidator (ZM) filed a revision action before the *Bundesgeritchshof* (Federal Supreme Court) requesting a reinstatement order over this ruling. This Court, –despite of having recognised that the contract between both parties (original creditor and debtor), was governed by the *lex contractus* (Dutch law)[10]–, found that the action brought by the liquidator was not prescribed and the problems concerning the voidability of the payment were governed under the *lex concursus*. Or if both needed further assessment under the *lex concursus*. Although, this Court found that the problem in this case laid down in the correct interpretation of the Article 4 para 2 lit m[11], the Article 13 of the Insolvency

[8] Article 4 reads as follows (now Article 7 Regulation 2015/848); "1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened hereafter referred to as the "State of the opening of proceedings"; Recital 23: "The Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus) (...)";* on the role of the *lex concursus* from a general approach, A.L. Calvo Caravaca & J. Carrascosa González, *Derecho concursal internacional,* Colex, 2004, pp. 120-143, esp. pp.138-141; M. Virgós Soriano & F. J. Garcimartín Alférez, *Comentario al Reglamento Europeo de Insolvencia*, Thomson Civitas, 2003; G. Van Calster, *European Private International Law*, 2nd. Ed, Hart, 2016, pp. 274-324, esp. pp. 315-316; R. Arenas García, "Capítulo 8. Procedimientos concursales", J. C. Fernández Rozas, P. A. De Miguel Asensio & R. Arenas García, *Derecho de los negocios internacionales,* 4th.ed., Iustel, 2013, pp. 569-637, pp. 594-609; on the German Insolvency Law and its interplay with the EU Insolvency law, S. Braun, "Panorama del Derecho Concursal Alemán y Europeo", *ICADE Revista de la Facultad de Derecho*, Nº 61, 2004, pp.313-332,

[9] A. Espiniella Menéndez, "Pagos transfronterizos por subrogación y posteriores a la insolvencia. Sentencia del Tribunal de Justicia de 22 de abril de 2021…", *loc.cit.,*at 2: "(…) Quizás deba matizarse que la Sentencia se refiere de forma no muy precisa a que la sociedad concursada está "establecida" en Alemania, término inexacto porque no es equivalente ni al centro de intereses ni al domicilio".

[10] Such as in CJEU Judgement *Vynils*, C-54/16, wherein was also invoked the *lex contractus* as the adequate law to be applied when was proven by the defendant (one of the creditors beneficed for the act); G. Van Calster, "*Vinyls* Italia. A boon for conflict of laws (with a *fraus* component) and important findings on the insolvency Pauliana*", GAVC Law,* 21 July 2017, available at: https://gavclaw.com/tag/vinyls-italia/; see *infra*, Section III.

[11] Article 4 para 2 lit m Insolvency Regulation (1346/2000) read as follows: "(2) The law of the State of the opening of proceedings shall determine the conditions for the opening of the proceedings, their conduct and their closure. It shall determine in particular: m. the rules relating to the voidness, voidability or enforceability of legal acts detrimental to all the creditors" (currently, Article 7 para 2 lit m Regulation 2015/848).

Regulation and its interplay with the Article 12 para 1 lit b of the Rome I Regulation which regulates the applicable law to the performance and payment of the contract, under the *lex contractus* (creditor´s /defendant argument).

Moreover, it is important to bear in mind for this case that, while Dutch law does not grant under any circumstance the challenging of the payment made it by the German insolvent and "assignee" to the creditor, under German law is possible to challenge this payment. That was essentially the core issue of the controversy and the issue which raises the question of how to protect the interests of all the creditors without detriment[12]. That is, under the *lex contractus* the act is vested with "immunity" (shielded), while under the *lex concursus* does not.

II. Analysis of the *vexata quaestio* of the preliminary ruling: payment, performance, and the assignment of claims as a creditor's fraud

1. Detrimental Acts to all Creditors in the Insolvency proceeding

8. Repairment actions (*actio pauliana*) in insolvency proceedings have been subject of a lively controversy from the very beginning of the enactment of the Insolvency Regulation, precisely for these applicable law problems, and the broad diversity of the treatment of its legal nature under the law of the Member States[13].

Still, despite these differences, the purpose is the same under these laws: the protection of the credit[14]. Then, problems normally arise because in cross border proceedings where these differences are displayed, the outcome is quite different whether the *lex concursus* or the *lex contractus* applies to determine the *efficacy* of the act as part of the obligation of a contract, as explained under Section I.2, *in fine.* Likewise, because the freedom of choice in these cases, it can be sometimes regarded as a fraudulent performance (a strategy), that jeopardize the assests of the insolvent company.

9. To understand why the repairment action was included in a different rule under the scope of the Insolvency Regulation, it is required to depart from the proper understanding of what the intention of the European lawmaker was when Article 13 (lex causae) was included in the Insolvency Regulation (*lex causae*), as an exception to the Article 4 para 2 lit m (*lex concursus to acts relating the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors*).

In doing so, it is needed to go back to the First preliminary works of the Insolvency Regulation, the Virgos-Schmidt Report[15]. According to this report, this Article was included to be applied in

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[12] G. Cuniberti, "CJEU rules on Law Governing Avoidance of Third-Party Payment of …", *loc.cit.;* German Involvency Statute of 1994 amended in 2002 (*Insolvenzordnung InsO vom 5. Oktober 1994 (BGBI.I S. 2866))* is available in English (official translation of the *Bundesministerium der Justiz und für Verbraucherschutz*) at: https://www.gesetze-im-internet.de/englisch_inso/index.html

[13] *Ibid* (Cuniberti); L. Carballo Piñeiro, "Acción Pauliana e integración europea", *REDI,* vol. LXIV, Nº1, 2012, pp. 43-72; CJEU Judgment (5th Chamber), of 26 March 1992, *Reichert II* (C-261/90)(ECLI:EU:1992:149) para 19: "the purpose of such action is not to have the debtor ordered to make good the damage he has caused to his creditor by his fraudulent conduct, but to render ineffective, as against his creditor, the disposition which the debtor has made. It is directed not only against the debtor but also against the person who benefits from the act, who is not a party to the obligation binding the creditor to his debtor, even in cases where there is no consideration for the transaction where that third party has not committed any wrongful act"; P. A. De Miguel Asensio, "Impugnación de actos perjudicials en procedimientos de insolvencia: cuestiones de Derecho aplicable", *La Ley Unión Europea,* Nº26, 2015, pp. 39-40; *Id.,* "Las acciones de reintegración en el Reglamento Europeo de Insolvencia: Precisiones sobre la Ley aplicable", *La Ley Unión Europea*, Nº50, 2017, pp. 1-8.

[14] *Ibid* (Carballo Piñeiro).

[15] M.Virgos Soriano & E. Schmit, "Report on the Convention on Insolvency Proceedings*", European Union Council* 6500/96, Brussels 3 May 1996, pp. 87-89, para 135-139; also, F.J. Garcimartín Alférez, *Derecho internacional privado,* Thomson Reuters, 5th ed., 2019, pp.445-447, at p. 445: "(…) La mayoría de estas excepciones suponen que los efectos concursales no queden sujetos a la *lex fori concursus* sino a la misma ley que rige la constitución pre-concursal del derecho o relación jurídica en cuestión"; *Id.,* "Las normas de Derecho internacional privado de la ley concursal: algunas pautas para un correcto entendimiento", *Revista jurídica de Cataluña*, vol. 104, 2004, p. 1269-1292; R. Arenas García, "Capítulo 8. Procedimientos…", J. C.

conjunction to Article 4 para 2, as an exception to protect all the creditors´ interests when the acts or contracts performed with some creditors are proven as detrimental. To add legal certainty and protect the creditors interest (as these interests must be treated as equal rights)[16]. Article 13 which serves this very special purpose of legal certainty in insolvency proceedings, it is increasingly relevant within the cross-border insolvency proceedings[17].

10. Article 13 of the Insolvency Regulation states that Article 4 para 2 lit m, will be applied when there is enough proof that certain acts considered as detrimental to all the creditors are governed under a different law than the *lex concursus*. The *actio pauliana* and its requirements thus will be governed by the *lex causae*.

The creditor who was benefited from this act, –usually the defendant in the insolvency proceeding–, is the one that must invoke the exception to apply a different law to this act when the act is being challenged and it has been a target of a reintegration and objection. Hence, Article 13 is assumed as a "corrective" to protect creditors interests from acts which damage the assets (insolvent estate)[18]. Article 13 will only be of application to these detrimental acts when the requirements provided by the provision are satisfied and having regard of the specific circumstances of the cases (*case by case approach)*. These requirements are as follows:

i) the said act is subject to the law of a Member State other than that of the State of the opening of proceedings;
ii) that law does not allow any means of challenging that act in the relevant case (that was the case in this preliminary ruling).

11. However, Article 13 can be only invoked provided that the act or contract was performed *before* the opening of the insolvency proceedings[19]. In this case, the defendant (the outsider creditor) was the one who invoked Article 13, but the act (payment) was performed after the insolvency proceedings were lodged, despite the first contract (between the original debtor and creditor) were done before. With its interpretation in this preliminary ruling, one is able to note that the CJEU has broaden the scope of Article 13, while in former case law, –such as in *Lutz* case–, the interpretation was further restrictive, considering the application of Article 13 only when the act was performed before the insolvency proceedings have been opened.

Fernández Rozas, P. A. De Miguel Asensio & R. Arenas García, *Derecho de los…, op.cit.,* p. 607-609; CJEU Judgment, of 16 April 2015, C-557/13, *Lutz* (ECLI:EU:C:2015:227); CJEU Judgment (First Chamber), of 22 April 2021, C- 73/20, *ZM v Frerichs* (ECLI:EU:2021:315.

[16] G. Van Calster*, European Private International…, op. cit.,* at. 318.

[17] G. Van Calster, "Just prove it! CJEU on *lex causae* and detrimental acts (pauliana) in Nike*", GAVC Law,* 10 October 2015, available at: https://gavclaw.com/2015/10/19/just-prove-it-cjeu-on-lex-causae-and-detrimental-acts-pauliana-in-nike/; B. Wessels, "Which insolvency law applies to a cross border payment transaction?", *Leyden Law Blog,* May 2015, https://www.leidenlawblog.nl/articles/which-insolvency-law-applies-to-a-cross-border-payment-transaction

[18] *Ibid.*

[19] CJEU Judgment, of 16 April 2015, C-557/13, *Lutz* (ECLI:EU:C:2015:227), para 42; P. A. De Miguel Asensio, "Ley aplicable a la impugnación de actos perjudiciales en procedimientos de insolvencia", *Pedro Alberto de Miguel Blog,* 2015, avalaible at: https://pedrodemiguelasensio.blogspot.com/2015/04/ley-aplicable-la-impugnacion-de-actos.html ; R. Arenas García, "Capítulo 8. Procedimientos…", J. C. Fernández Rozas, P. A. De Miguel Asensio & R. Arenas García, *Derecho de los…, op.cit.,* at p. 609: "El art. 13 RI habilita a quien ha contratado con el deudor *con anterioridad* a la apertura del procedimiento de insolvencia a defenderse de la impugnación del acto celebrado basada en la aplicación de la ley del Estado de apertura del concurso mediante la alegación de que dicho acto no puede ser impugnado de acuerdo con lo que establece su ley rectora (la *lex causae*)".

2. The interplay between the Insolvency Regulation and Rome I Regulation when the *lex causae* governs an act or contract

2.1. Coherence of the EU PIL instruments applied to cross border insolvency proceedings

12. Both cited instruments must be jointly analysed, in the light of the principle of coherence of the EU PIL. This coherence is stated in the EU legal instruments, enshrined in the legal certainty principle at the same time. The relationship between all these instruments is related to the well-known idea that the uniformization of the EU PIL, –namely in civil and commercial matters–, pursues a "coherence" among all their rules of PIL but also with the substantive harmonization of the EU Secondary law[20].

Therefore, the operators must interpret the system "as a whole", pondering all the exceptions given by the conflict of law rules in this mentioned *case-by-case approach*, to achieve a correct solution paying attention to all the interests at stake[21].

13. For this case and analogous cases, where the *lex concursus* cannot be applied to certain acts, this coherence shall stem from Recital 23 and 24 of the Insolvency Regulation with the Recital 16 of Rome I Regulation[22].

The CJEU has already held in former case law that the Insolvency Regulation is doing an implied *renvoi* to the other Regulations which regulate the applicable law from a general approach when its conflict of law rules cannot be applied as a means of exception, and among the Member States (*ad intra* conflict of law rules-mitigated universalism/*gemässigtes Universalitätsprinzip*)[23].

14. In addition, the Insolvency Regulation does not state how to differentiate when the l*ex causae* should be of application, in cases as the one given in the preliminary ruling. In cases where the detrimental act was a payment formalized by means of a contract and a later assignment of claims[24], Rome I Regulation is the right Regulation to determine the applicable law to the payment and performance (or

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[20] On the coherence of the EU PIL as a "legal system" and as a part of the EU Secondary law; S. Sánchez Lorenzo, "El principio de coherencia en el Derecho internacional privado europeo", *REDI,* Sección ESTUDIOS, vol. 70, Nº2, 2018, pp. 17-47: "el principio de coherencia apunta a la idea de "sistema jurídico""; J. Von Hein & G. Rühl (eds.), *Kohärenz in Internationalen Privat-und Verfahrensrecht der Eruopäischen Union*, vol., 53, Möhr Siebeck, 2016; J. L. Iglesias Buigues, "General Appraisal and Genesis of Regulatory instruments in the Field of Civil and Commercial Law". In J. J. Forner i Delaigua & A. Santos (eds.), *Coherence of scope of application: EU Private international legal instruments,* Schulthess Ed., Romandes 2020, pp.13-26; A. Espiniella Menéndez, "Ley aplicable a las acciones concursales de reintegración (Comentario a la STJUE de 8 de junio de 2017…", loc.*cit. infra*, at p. 743.

[21] S. Sánchez Lorenzo, "El principio de coherencia en el Derecho internacional privado…", *loc.cit.,* p. 29; CJEU Judgment (Grand Chamber), of 6 March 2018, C-284/16*, Achmea;* CJEU Judgment, of 16 April 2015, C-557/13, *Lutz* (ECLI:EU:C:2015:227)

[22] Recital 16 Rome I Regulation states that "the conflict of law rules laid down in that regulation should be highly foreseeable in order to contribute to the achievement of the general objective of that regulation, namely the legal certainty in the European judicial area".

[23] CJEU Judgment *Frerichs,* C-73/20, par 24 and 30; Recital 24 Insolvency Regulation reads as follows: "Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for several exceptions to the general rule"; M. Virgós Soriano & F. J. Garcimartín Alférez, "El Derecho concursal europeo: un ensayo sobre su racionalidad interna", *REDE. Revista española de Derecho Europeo,* Nº1, 2002, pp. 67-100, esp. p. 96; I. Kokorin & B. Wessels, *Cross border Protocols in Insolvencies of Multinational Enterprise Groups,* Edward Elgar Publishing Limited, 2021, at p. 7.23: "For those subjects that are not governed by the EIR Recast, specifically it rules on applicable law, another EU regulation becomes relevant, namely the Roma I Regulation (Rome I)."; J. Rodríguez Rodrigo, "Bienes sujetos a un procedimiento secundario de insolvencia. Comentario a la Sentencia del Tribunal de Justicia de la Unión Europea de 11 de junio 2015, Nortel, C-649/13", *CDT,* vol. 9, Nº2M 2017, pp. 692-701, esp. at p. 697; A.L. Calvo Caravaca & J. Carrascosa González, "Armas legales contra la crisis económica. algunas respuestas…" *loc.cit,* at pp. 47-48.

[24] R. Arenas García, "Capítulo 8. Procedimientos…", J. C. Fernández Rozas, P. A. De Miguel Asensio & R. Arenas García, *Derecho de los…, op.cit.,* at p. 609.

even the "assignment of claims"), because under the EU PIL and the CJEU case law these obligations have been characterized as a contractual obligation[25].

15. Even if this idea was stressed by the CJEU in this preliminary ruling, in our view, what has been disregarded is the requirement that, Article 13 can be only invoked if the act was performed *before* the insolvency proceeding. Otherwise, if the act is done *after* the proceedings, it has to be of application Article 4 para 2 lit m to challenge this act under the *lex concursus.* In this preliminary ruling, surprisingly, the act (payment) is not well distinguished with the contract between the parties that was done before. What is actually contested then, is the act as detrimental and the effects for third parties (all the creditors of the insolvency proceeding).

No one refuted the validity of the contract and of the "alleged" assignment of claims under the *lex contractus* (Dutch law)[26]. It is clear that a contract, a contractual obligation follows the conflict of law rules of the Rome I Regulation, because the scope of the Insolvency Regulation was not designed to contain general conflict of law rules on contractual obligations.

2.2. The principle of "collective satisfaction" as an overriding principle in Insolvency law

16. Consequently, the CJEU has a special role to preserve and interpret the coherence sought by the EU legislator. The efforts of the CJEU to do so are always noteworthy, chiefly if one notes the still lack of harmonization in certain substantive rules the CJEU faces when interpret the whole EU Law and principles[27].

17. Substantive Insolvency law is not harmonized at all in the internal market (i.e.: in the Member States), as other subjects like assignments and third-party effects[28]. Although, there is a common principle in the Insolvency law of the Member States, enshrined in the Regulation, the "collective satisfaction principle" (*gemeinschaftliche Befriedigung)*.

As some Scholars have analysed (Van Castler), the creditor who has been satisfied individually *after* the insolvency proceeding has started, it is not complying with this principle[29]. This principle

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[25] I. Kokorin & B. Wessels, *Cross border Protocols in Insolvencies of Multinational…, op.cit.,* at p. 7.23-7.24.

[26] G. Cuniberti, "CJEU rules on Law Governing Avoidance of Third Party Payment of Contract", *EAPIL Blog,* 28 april 2021, available at: https://eapil.org/2021/04/28/cjeu-rules-on-law-governing-avoidance-of-third-party-payment-of-contract/, Basically, it was the detriment act (payment) instead of the contract (including in this view, the assignment). The author considers that is highly suspicious the fact that a company of the same group requested to the one that is going to be declared as insolvent, to pay a debt on your behalf; A. Espiniella Menéndez, "Ley aplicable a las acciones concursales de reintegración (Comentario a la STJUE de 8 de junio de 2017, *Vinyls Italia)", CDT,* vol. 11, Nº1, 2019, pp. 739-750, at pp.741-743.

[27] A comprehensive work on the coherence of the EU Insolvency Law with the EU Law in general and EU PIL in particular, B. Wessels, "On the future of European Insolvency Law", INSOL Europe Academic Forum´s 5th. Edwin Coe lecture, 2012, available at: https://www.iiiglobal.org/sites/default/files/futureofeuropeaninsolvencylaw.pdf ; C. Heinze & C. Warmuth "The law applicable to third-party effects of assignment and the conflict rules for insolvency according to EU Law", *Uniform Law Review*, vol. 24, Nº 4, pp. 664-684.

For instance, in EU PIL Consumer law and contracts of carriage of passengers once can find these problems, CJEU Judgement (First Chamber) of 18 November 2020, C-591/19, *Delayfix* (ECLI:EU:C:2020:933).

[28] See *infra*, Section 3 on the law applicable to assignments; i*nfra* footnote 30.

[29] G. Van Calster*, European Private International…, op. cit.,* at p. 321: "The Regulation harmonizes jurisdiction and choice of laws rules on insolvency proceedings. It does not harmonize insolvency law. One important common principle of insolvency law is however promoted by the Regulation, namely the principle of collective satisfaction"; *Id.,* "Vinyls italia….", *loc.cit.,* concerning the lack of harmonization of the actio pauliana in the law of the Member States, CJEU Judgment (5th. Chamber), of 8 June 2017, C-56/16, *Vinyls Italy* (ECLI:EU:C:2017:433); A.L. Calvo Caravaca & J. Carrascosa González, "Armas legales contra la crisis económica. algunas respuestas…" *loc.cit.,* at p. 46: "(…) No existe, por tanto, un "Derecho procesal y material europeo de involvencia". Existe, eso sí, un "DIPr. Europeo en materia de insolvencia". Este DIPr europeo en materia de insolvencia transfronteriza contiene normas uniformes de DIPr que resuelven el problema de la competencia internacional para abrir el procedimiento de insolvencia, de la Ley aplicable al procedimiento de insolvencia y de los efectos de las decisiones nacionales en materia de insolvencia de los demás Estados que participan en el Reglamento 1346/2000".

means that the creditors will be compensated in proportion to their respective claims (*par conditio creditorum*) and it is, without a doubt, the leading principle of the Insolvency law.

18. Hence, this is summarized in the idea that there is an obligation to bring back to the debtor´ assets what was paid upfront within the course of the insolvency proceedings. Yet, in accordance with the *lex concursus.* An action that must be brought by the liquidator, who is the one in charge to request said payments and reintegrate them to the assets[30].

3. Assignments of claims and creditor´s fraud

19. Does the *lex contractus* applied to the performance of the act covers the issue of the efficacy of the assignment? Furthermore, was there a real assignment? If yes, does this fact entail the allowance of a fraud to all the creditors in the insolvency proceeding? That is, the circumvention of the obligations. Perhaps, this might be also a different question that the German Court should have submitted to the CJEU to estimate if the *lex contractus* have been the proper one or not.

20. As Espiniella highlights, the CJEU has missed an opportunity to explain what law might be of application to an assignment of claims made by the insolvent companies to fulfil the payment of one of the companies of the group. If the first contract was entered by the outsiders to the insolvency proceedings in advance, it had to be analysed under the *lex concursus* (*effect utile* of the general rule and the exception given by the Insolvency Regulation). Besides, the author finds significant that, it also exists the possibility that it could have not been a real assignment of claims, since both companies were part of the same group (alleged assignor and assignee) and there was no need to perform this subrogation as such[31]. This is true. In the preliminary ruling, there is no consideration of a cross border "assignment of claims" regarding how is observed under the EU PIL.

21. In the event this second relationship had been created as an "assignment of claims", the law applicable would have also determined by the same Regulation that the CJEU has clarified to be applied to estimate the efficacy of the performance and payment. That is, the Rome I Regulation, as the assignment of claims are characterized as a contractual obligation. And if the National Court needs to assess its validity prior to the efficacy of the detrimental act under the *lex contractus* through this exception of the Article 13 (*lex causae).*

22. The provisions of the Rome I Regulation concerning the law applicable to assignments are 14 and 15[32]. Both articles, at the same time, make a distinction on the different kind of assignments and aspects of the applicable law to the assignment which are of relevance in cross border contractual obligations. Nevertheless, as in the preliminary ruling is not mentioned which kind of assignment is, neither was discussed the *efficacy* of the same to refute it and clarify if the payment could have been finally declared as voidable under the *lex concursus,* this is an assumption to understand why the CJEU did not bring to the fore this concern with a very close relation to the "nitty-gritty" of this case.

[30] In compliance with Article 20 Insolvency Regulation; on this concern, A. Espiniella Menéndez, "Pagos transfronterizos por subrogación*... ", loc.cit.,* at p. 9; A.L. Calvo Caravaca & J. Carrascosa González, "Armas legales contra la crisis económica. algunas respuestas…" *loc.cit,* at p. 48.

[31] *Ibid,* the author considers that this was actually a consequence of a bad procedural strategy of the liquidator.

[32] J. Carrascosa González, "Cesión de créditos. Ley aplicable". In A.L. Calvo Caravaca & J. Carrascosa González, *Derecho internacional privado*, Vol., 2, 16th. ed., Comares, 2016, pp. 1047-1048.

III. Contribution to the former CJEU case law on the Insolvency Regulation

23. The merits of this case are quite close to the ones analysed by the CJEU in the case *Vinyls Italy* (C-54/16)[33], especially on the concept of performance of the act, to the *Luzt* case (C-577/13[34]), *Nike European Operations Netherlands* (C-310/14[35]) and the case *Kornhass* (C-594/14[36]).

As a matter of fact, the CJEU has mentioned *Luzt* and *Nike* cases to connect this preliminary ruling with these former case law. Though, with some differences, regarding the merits of these former cases and how the CJEU has oriented the answer for this case, less restrictive than in those cases. For instance, in *Nike* C-310/14, the CJEU held and shield the *effect utile* of Article 13 considering the idea that freedom of choice in contractual obligations can be observed sometimes as a strategy to avoid the insolvency rules and precluding the broad interpretation of Article 13 for the sake of its function within the same conflict of law rules.[37]

24. It can be added that, at the time those preliminary rulings were handled down by the CJEU, the contested contracts considered as detrimental acts, laid down not under the scope of the Rome I Regulation but its precedent, the Rome I Regulation[38]. Furthermore, the proceedings had to be solved under a less satisfactory outcome than in this preliminary ruling as was previously analyzed by the Academia[39]. Perhaps, this fact and the particularities of this case are the consequences that have made to turn the CJEU into a different direction.

25. In a nutshell: the contribution of this judgment to former case law on the interpretation of the application of Article 13 of the Insolvency Regulation as the law applicable to the *actio pauliana* for detrimental acts has not embraced the problematic of the application of this Article, from a restrictive interpretation. This interpretation has been non-respectful with the nature and goal of the same provision in connection with the Article 4 para 2 lit m in these cases or the *lex concursus*. Even if the law which regulates the contract and later contractual obligations among the parties is the *lex contractus*. This was not, in the light of this assessment, the contested issue.

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[33] CJEU Judgment (5th. Chamber), of 8 June 2017, C-56/16, *Vinyls Italy* (ECLI:EU:C:2017:433); A. Espiniella Menéndez, "Ley aplicable a las acciones concursales de reintegración (Comentario a la STJUE de 8 de junio de 2017…", *loc.cit*.; G. Van Calster, "*Vinyls* Italia. A boon for conflict of laws (with a *fraus* component) and important findings on the insolvency Pauliana*", GAVC Law,* 21 July 2017, available at: https://gavclaw.com/tag/vinyls-italia/ ; M. McParland, "Insolvency "claw-back" provisions and the "safe harbor" defense in the EU Insolvency Regulation: *Oeltrans Befrachtngfgesellschaft* (C-73/20)", *Essex Chambers,* 23 April 2021, available at: https://www.39essex.com/insolvency-claw-back-provisions-and-the-safe-harbour-defence-in-the-eu-insolvency-regulation-oeltrans-befrachtungsgesellschaft-c-73-20-in-the-cjeu/

[34] CJEU Judgment, of 16 April 2015, C-557/13, *Lutz* (ECLI:EU:C:2015:227); G. Van Calster, "*Lex causae,* securitization and insulating agreements from the lex concursus. The ECJ in Lutz*", GAVC Law,* 24 July 2015, available at: https://gavclaw.com/?s=lutz

[35] CJEU Judgment, of 15 October 2015, C-317/14, *Nike Operations Netherlands* (ECLI:EU:C:2017:433); G. Van Calster, "Just prove it! CJEU on lex causae and detrimental acts (pauliana) in Nike*", GAVC Law,* 10 October 2015, available at: https://gavclaw.com/2015/10/19/just-prove-it-cjeu-on-lex-causae-and-detrimental-acts-pauliana-in-nike/

[36] CJEU Judgment, of 10 December 2015, C-594/14, *Kornhaas* (ECLI:EU:C:2015:806)

[37] CJEU Judgment, of 15 October 2015, C-310/14, *Nike Operations Netherlands* (ECLI:EU:C:2017:433), para 21: "Moreover, the obligation to interpret strictly the exception laid down in Article 13 of the regulation precludes a broad interpretation of the scope of that article which would allow a person who has benefited from an act detrimental to all creditors to avoid the application of the *lex fori concursus* by relying solely, in a purely abstract manner, on the unchallengeable character of the act at issue on the basis of a provision of the *lex causae";* In *Vynils,* Van Calster, "*Vinyls* Italia. A boon for conflict of laws (with a *fraus* component) and important findings on the insolvency Pauliana*", GAVC Law,* 21 July 2017, available at: https://gavclaw.com/tag/vinyls-italia/: "However, the CJEU logic I suppose lies in what it sees firmly as the object and purpose of Article 16: it protects the legitimate expectations of the party who has benefited from an act detrimental to all the creditors. In some way it prevents contractual sclerosis for parties suspected of being close to payment issues".

[38] Convention on the Law Applicable to Contractual Obligations (Rome I Convention), *OJ* 266, 9 of October 1980; M. McParland, "Insolvency "claw-back" provisions and the "safe harbor" defense in the EU Insolvency Regulation: *Oeltrans Befrachtngfgesellschaft* (C-73/20)", *Essex Chambers,* 23 April 2021, available at: https://www.39essex.com/insolvency-claw-back-provisions-and-the-safe-harbour-defence-in-the-eu-insolvency-regulation-oeltrans-befrachtungsgesellschaft-c-73-20-in-the-cjeu/; A. Espiniella Menéndez, "Ley aplicable a las acciones concursales de reintegración…", *loc.cit.,* p. 741.

[39] *Ibidem.*

IV. Final Remarks

26. To sum up this CJEU judgment that is already integrated in the bulk of the Insolvency Regulation CJEU case law:

— On the one hand, the positive aspect of this CJEU judgment is the contribution to give further explanation on the interplay between Article 13 of the Insolvency Regulation as an exception to Article 4 para 2, lit m. Besides, with other EU PIL rules that will come to be applied to determine the law of contractual obligations and its efficacy when the scope of the *lex concursus* does not extend to those matters. In these cases, there is legal certainty as the Academia has analysed, and the Rome I Regulation will be applied to determine the validity of the performance of the act (payment) as the *lex contractus* by means of the Article 13 which represents the *lex causae*.

— On the other hand, this preliminary ruling, did not take into account a relevant fact, that the act was performed after the opening of the insolvency proceedings, neither the kind of relationship among all the parties in detail. However, in cases such as the one at stake, the alleged assignment of claims was an "unavoidable" matter of the relationship between the creditor-defendant and the insolvent company to perform the detrimental act.

— All in all, what the CJEU is saying if one reads between the lines is that a *case-by-case approach* is needed to apply this exception for detrimental acts. The interpretation of Article 13 has been quite opposite and broaden than in former case law. In this sense, criticism launched are easy to understand, especially if these credits are leading in a creditor´s fraud as was the case in the light of the facts. In doing this broaden interpretation of the Article 13 is favoring this fraud and infringing the "collective satisfaction principle" and other principles, such as the legal certainty, pursued by the Insolvency Regulation and the other EU PIL Regulations as a legal system with own autonomy within the EU Secondary law.

— *Last but not least.* Once a company enters in an insolvent *status*, its assets (the insolvent estate) are not anymore its "assets", but the assets of the creditors of this company controlled by the liquidators, i.e.: this company has no rights anymore over them, neither third parties which acquire these assets on behalf of the insolvent, whether in good or bad faith. Therefore, *nemo datur quod non habet*. Otherwise, the fraud *legis* is coolly served.