

# CONFERENCE ON EUROPEAN RESTRUCTURING AND INSOLVENCY LAW



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Date: 15 April 2021

Re: **CERIL Statement 2021-1**

Reporters: Prof. Stephan Madaus  
and Prof. em. Bob Wessels<sup>1</sup>

## CERIL Statement 2021-1 on identifying annex actions under Article 6(1) of the European Insolvency Regulation 2015

Initiated and chaired by Prof. Stephan Madaus (Martin Luther University, Germany) and Prof. em. Bob Wessels (Leiden University, the Netherlands), a CERIL Working Party conducted a survey on issues of international jurisdiction for individual legal cross-border actions that 'derive directly from public collective insolvency proceedings and are closely linked with them'. To resolve uncertainty on these actions, conveniently called 'annex actions', CERIL proposes a framework to classify and distinguish between annex actions and non-annex actions.<sup>2</sup>

### Inconsistent and uncertain classification of (non-)annex actions

The Working Party has experienced that the existing case law is held to be inconsistent and difficult to apply to new cases. Related literature also offers different ways to construe a definition of annex actions consistently. The necessary qualification of civil litigation as an annex action needs to reflect provisions in two EU Regulations: Article 6(1) European Insolvency Regulation 2015 (EIR 2015) and Article 1(2) lit. b Brussels Ibis Regulation (or: Judgment Regulation).

<sup>1</sup> This Statement and Report are prepared by CERIL Working Party (WP) 11 on Matters regarding the European Insolvency Regulation 2015 (EIR 2015). The WP that discussed and contributed to this Report consisted, in addition to Stephan Madaus (co-chair) and Bob Wessels (co-chair), of the conferees participating in this WP, see [www.ceril.eu/working-parties/wp-11-matters-regarding-the-european-insolvency-regulation-2015](http://www.ceril.eu/working-parties/wp-11-matters-regarding-the-european-insolvency-regulation-2015). The reporters would like to express their gratitude for their extensive contributions to Zoltan Fabok (Hungary), Nathalie Leboucher (France), Francisco Garcimartín (Spain), Jessica Schmidt (Germany) and Reinout Vriesendorp (The Netherlands). We would also like to express our sincere gratitude to the Research Associate Dr. Chiara Lunetti, PhD in private international law, Università degli Studi di Milano and Université Paris I Panthéon-Sorbonne, for the preparation of a preliminary study and her assistance with drafting the text of this report.

<sup>2</sup> The study was developed between March 2020 and February 2021.

The existing level of uncertainty leads to time-consuming and costly disputes in civil proceedings regarding international jurisdiction, regularly also involving the Court of Justice of the European Union (CJEU). This is hindering the effective and efficient operation of the EIR 2015. The interpretation of Article 6(1) EIR 2015 has gained further relevance due to 'Brexit'. For new insolvency proceedings commenced since 1 January 2021, the UK is considered a 'third country' by the remaining EU Member States.

### Findings and recommendations

In summary, the study found three types of annex action: (a) clear annex actions, (b) clear non-annex actions and (c) actions with relevant uncertainty about their classification. The Report sets out in detail the categorisation in (a) and (b). The last category, under (c), has been given ample thought. Interpreting the context of the involved legal rules, weighing the involved interests and mindful of assessing the facts of any individual claim, CERIL proposes the following classification of such uncertain actions:

- (i) An action brought by the insolvency practitioner in relation to the assumption or the termination of executory contracts is to be regarded as a general civil claim (i.e. a non-annex action);
- (ii) An action brought by an unsecured creditor against the debtor, also referred to as 'action seeking a declaratory relief', is a non-annex action;
- (iii) For an action brought by a secured creditor a differentiation has to be made. In a case where the assets encumbered by a right *in rem* are located in an EU Member State other than the one where the main insolvency proceedings are opened, such an action is not an annex action. In a case where a security right is not protected by Article 8 EIR 2015 (either due to the fact that the creditor holds a right *in personam* (e.g. a guarantee) or a right *in rem* on an asset located in the EU Member State in which the insolvency proceedings are opened, an assessment is to be made of the legal basis of the security right and how it is affected by insolvency law;
- (iv) As to an action concerning the return of property held by the debtor, again a distinction has to be made. A dispute between the insolvency practitioner and the debtor concerning the extent of the debtor's divestment is solely governed by the *lex fori concursus*. This culminates in an annex action. In contrast, if an action is filed by a single creditor or a third-party claiming ownership of assets in possession of the debtor at the time of commencement of the insolvency proceedings (or, conversely, brought by the insolvency practitioner against the creditor or third party for the restitution of some of the debtor's assets), such a claim

- of a creditor or a third party is an ordinary civil and commercial action, and consequently a non-annex action;
- (v) An action brought by the reinstated debtor after the termination of insolvency proceedings is an ordinary civil and commercial action. It is suggested that the CJEU (that held that such an action is an annex action and should be filed in the Member State of former insolvency proceedings) should reconsider its view.

As a consequence, to overcome the existing level of uncertainty with time-consuming and costly disputes in civil proceedings, especially their characterisation as ‘annex action’, CERIL encourages litigators and courts to use the concise reference work as set out in its Report.

#### **Concluding note**

The full Report is available as Report 2021-1 on CERIL’s website [www.ceril.eu](http://www.ceril.eu). This site also informs about the organisation of CERIL and its activities.

In the meantime, co-reporter Prof. Stephan Madaus ([stephan.madaus@jura.uni-halle.de](mailto:stephan.madaus@jura.uni-halle.de)) or Conferees Prof. Francesco Garcimartín ([francisco.garcimartin@uam.es](mailto:francisco.garcimartin@uam.es)) and Zoltan Fabok ([zoltan.fabok@dlapiper.com](mailto:zoltan.fabok@dlapiper.com)) welcome the opportunity to further inform about this Statement and Report.

For further information regarding CERIL, please contact Prof. Reinout Vriesendorp (Secretary; [info@ceril.eu](mailto:info@ceril.eu)).

On behalf of the CERIL Executive,

Bob Wessels  
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