PERSPECTIVES ON INTERNATIONAL INSOLVENCY LAW: A TRIBUTE TO BOB WESSELS

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The general concept of concurrence applied to European insolvency law

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Bob Wessels is preacher and salesman at the same time. The preacher has a preference for natural obligations, gentlemen's agreements and fair contract terms. The salesman has a fine nose for the needs of legal professionals. In combining the two he serves as an inspiring example of Dutch scholarship.

1. Bob's call of duty

The liquidator of Favini Meerssen B.V. brought an *actio Pauliana* against Favini Real Estate B.V. The Favini family allegedly divided the company to place its assets out of reach of its creditors. With no property in its estate, Favini Meerssen would be unable to fulfil its obligations. However, Favini Real Estate claimed that the *actio Pauliana* is not applicable in case of a legal division, because the protection of the interests of creditors is dealt with by Article 2:334u of the Dutch Civil Code (CC) instead. Under this exclusive regime, only the district court would be able to declare the division void, within a period of six months after the division has been made public, and only in well-defined situations.

Two concurring regimes, with different aims and levels of protection. Is the liquidator free to choose or does either the *actio Pauliana* or Article 2:334a CC apply exclusively? Dutch private law knows a convenient method of interpretation to solve such issues of concurrence. In this contribution, we would like to explore whether this method could be used in the area of European insolvency law. Thereby, we obey the call of duty to civil lawyers by Bob Wessels himself to participate in the discussion on the future of insolvency law in Europe.[1]

First, we will introduce the general concept of concurrence and its application in Dutch insolvency law (section 2). In literature, it has been questioned whether this method may be applied to solve conflicts of rules belonging to different legal systems (section 3). The Favini case demonstrates that, while harmonisation of insolvency proceedings is still at low ebb, issues of concurrence may nonetheless arise as a result of the Directive concerning the division of public limited liability companies (section 4). Regrettably, the concept of concurrence is overlooked by the Dutch Supreme Court in this case (section 5). Yet, applying the concept of concurrence in a broader European context does not go without saying. Issues of concurrence may also arise as a result of private international law, when different grounds for a claim are being judged in different jurisdictions, or under different applicable laws (section 6). Finally, Bob Wessels will receive a call of duty in return (section 7).

2. Concurrence in Dutch private law

In practice, parties and courts are often confronted with different rules and remedies, concurrently applicable to the case at hand. Their aim, nature and purpose may differ. One regime may be more advantageous for the claimant and less favourable to the position of the defendant. For example, the establishment, scope and prescription of liability may differ depending upon whether the claimant frames his action in contract or in tort. This prompts the question: what influence does one regime exert on the application of another regime? May they be applied simultaneously, or should one of the regimes be excluded in favour of the other? And if the latter is the case, who should make that choice: the claimant or the court?

In Dutch private law, a particular method of interpretation is being used to answer those questions. Its purpose is not to direct the outcome of each individual case,[2] but to guide the approach to conflicts of rules,

1 Bob Wessels issued this call on the occasion of the presentation of his Reports on 'Harmonisation of Insolvency Law in Europe' before the Netherlands Association for Civil Law; noted by H.N. Schelhaas & M.W. Scheltema, 'Een geharmoniseerd Europees Insolventierecht?', *NTBR* 2013-26, p. 232-233.

2 Snijders and Brunner already put the usability of the doctrine for this purpose in perspective, *see* W. Snijders, 'Samenloop van wetsbepalingen in het nieuwe BW', in: J.F. Glastra van Loon (Ed.), *Speculum Langemeijer*, Zwolle: W.E.J. Tjeenk Willink 1973, p. 454; C.J.H. Brunner, *Beginselen van samenloop*, Arnhem: Gouda Quint 1984, p. 16.

and to substantiate the resulting judgment. Its approach is not based on maxims such as 'lex specialis derogat legi generali', but focuses on the substantive importance of the conflicting rules.[3] The Dutch Supreme Court takes the freedom of choice of the claimant as a starting point:

'When there is concurrence of multiple but distinctly applicable legal grounds on which the claimant may base his action, the basic principle is that these are applicable cumulatively, provided that the claimant may choose as he sees fit, whenever the legal grounds lead to different legal consequences which cannot be awarded at the same time. This basic principle is set aside when this is prescribed by, or inevitably follows from, statutory law.'[4]

When multiple rules could be applied on the same legal facts, the claimant may choose which rule(s) he wishes to invoke (*free concurrence*). Only when those rules cannot be applied cumulatively – because this would go against logic, or against the wording or intention of the law – the basic principle may be abandoned. In such cases, the claimant *must* make a choice, unless the law prescribes that one rule is to be applied *exclusively*.[5] That is a tall order: exclusive application is awarded only 'when the law so prescribes or inevitably involves'.

This framework has been applied in the area of insolvency law as well. If the interests of a creditor have been violated by a legal act of the debtor, the creditor is entitled to declare this act null and void on the basis of the general *actio Pauliana* (art. 3:45 CC). But the conduct of the debtor – and possibly the third party – may equally constitute a tort. Bringing such an action in tort could be advantageous for the creditor – for example when the *actio Pauliana* is already barred by prescription, or because the creditor

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3 C.J.H. Brunner, *Beginselen van samenloop*, Arnhem: Gouda Quint 1984, p. 14-15.

4 HR 15 June 2007, *NJ* 2007/621 (*Fernhout/Essent*) at 4.2: 'Uitgangspunt bij samenloop van meer op zichzelf toepasselijke rechtsgronden voor een door eiser gesteld vorderingsrecht is dat deze cumulatief van toepassing zijn, met dien verstande dat, indien die rechtsgronden tot verschillende rechtsgevolgen leiden welke niet tegelijkertijd kunnen intreden, eiser daaruit naar eigen inzicht een keuze mag maken. Dit uitgangspunt lijdt slechts uitzondering indien de wet dat voorschrijft of onvermijdelijk meebrengt.'

5 This terminology differs from the terms 'cumulation' and 'alternativity', widely used in Dutch private law literature. These terms suggest that multiple grounds *are* to be applied simultaneously ('cumulation') and that claimants may only choose once the grounds may not be applied simultaneously ('alternativity'). Through this terminology, the principle of party autonomy seems wrongly exposed. *See* A.G. Castermans & H.B. Krans, 'Samenloop en de toegang tot de rechter', in: A.G. Castermans et. al. (Eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, p. 158.

wishes to claim additional damages.[6] Already in 1957, the Dutch Supreme Court made clear that the *actio Pauliana* does not trump the possibility to bring an action in tort.[7] Although there clearly is a *genus-species* relationship between the two rules, application of tort law is not excluded because of the special character of the *actio Pauliana*.[8] The creditor may choose to bring either one of the actions, or both.[9]

As soon as the debtor goes bankrupt, the Dutch Bankruptcy Act enters into force. In one respect, this limits the opportunities for individual creditors. Because the Act gives the liquidator the sole power[10] to obtain relief on behalf of the creditors, individual creditors may no longer bring an *actio Pauliana* under Art. 3:45 CC.[11] Here, the principle of free concurrence of actions is trumped by the exclusivity of the Bankruptcy Act.

As for the rest, the principle has been upheld.[12] For instance, the liquidator may choose to sue a third party for damages, even though the debtor – who went bankrupt – would not have had such a claim in tort himself.[13] Furthermore, creditors *themselves* may bring such actions against third parties. In all these situations, the principle of free concurrence of actions was emphasised by the Supreme Court. The argument that such

6 F.P. van Koppen, *Actio pauliana en onrechtmatige daadvordering*, Deventer: Kluwer 1998, p. 20-21.

7 HR 28 June 1957, *NJ* 1957/514 (*Erba/Amsterdamsche Bank*) m.nt. L.E.H. Rutten.

8 F.P. van Koppen, *Actio pauliana en onrechtmatige daadvordering*, Deventer: Kluwer 1998, p. 21-22; J.H. Nieuwenhuis, 'De actio Pauliana begrepen als vordering uit onrechtmatige daad', in: L. Timmerman (Ed.), *Vragen rond de faillissementspauliana* (Insolad Jaarboek 1998), Deventer: Kluwer 1998, p. 51-64.

9 See HR 13 March 1959, *NJ* 1959/579 m.nt. L.E.H. Rutten (*Van Vliet/Amsterdamsche Bank*); HR 8 November 1985, *NJ* 1987/170 m.nt. W.L. Haardt; HR 12 May 1989, *NJ* 1990/130 m.nt. W.H. Heemskerk (*AaBe/Ontvanger*). *See* J.A. Ankum, *De Pauliana buiten faillissement in het Nederlandse recht sedert de codificatie*, Zwolle: W.E.J. Tjeenk Willink 1963, p. 85 *et seq.*; C.A. Boukema, *Civielrechtelijke samenloop* (diss. Leiden), Zwolle: W.E.J. Tjeenk Willink 1966, p. 31 *et seq.*; W. Snijders, 'Samenloop van wetsbepalingen in het nieuwe BW', in: J.F. Glastra van Loon (Ed.), *Speculum Langemeijer*, Zwolle: W.E.J. Tjeenk Willink 1973, p. 456.

10 Art. 49 Faillissementswet.

11 Art. 42 Faillissementswet.

12 Even if it is clear that there has been no fraudulent transfer of assets under the Bankruptcy Act, an action in tort may still be successful, *see* HR 16 June 2000, *NJ* 2000/578 m.nt. P. van Schilfgaarde (*Cuijk/ABN AMRO*) at 3.6.

13 HR 14 January 1983, *NJ* 1983/597 (*Peeters q.q./Gatzen*), m.nt. B. Wachter. Confirmed by the Supreme Court in HR 8 November 1991, *NJ* 1992/174 and HR 23 December 1994, *NJ* 1996/628.

actions should be limited by exclusivity of the Bankruptcy Act, or by the principle of *paritas creditorum*, was rejected.[14]

3. Concurrence in European private law

So far, the doctrine of concurrence has been used to solve conflicts within Dutch private law.[15] May its criteria be used to solve conflicts of rules belonging to *different* constitutional levels, or even *different* jurisdictions?

This is a relevant question. Nowadays, various layers of public law and European law are influencing private law.[16] The same is true for the area of insolvency law. Although the efforts of the European legislator have – so far – concentrated on the coordination of the international jurisdiction, recognition and applicable laws for cross-border insolvency proceedings,[17] three developments may be mentioned here. First, the European Parliament expressed that it deems harmonisation 'worthwhile and achievable',[18] and in its response the European Commission indicated it is studying the impact

14 HR 21 December 2001, *NJ* 2005, 95 (*Lunderstädt/de Kok*) at 3.4.4 and HR 21 December 2001, *NJ* 2005, 96 (*Sobi/Hurks*) m.nt. S.C.J.J. Kortmann at 5.1.3.

15 *Cf.* A.S. Hartkamp, 'Samenloop in het Europese privaatrecht', in Th.M. de Boer et al. (Eds.), *Strikwerda's Conclusies*, Deventer: Kluwer 2011, p. 157.

16 Several textbooks have been published about the interaction between European law and private law: A.S. Hartkamp, Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. 3. Vermogensrecht algemeen. Deel I. Europees recht en Nederlands vermogensrecht, Deventer: Kluwer 2011; A.S. Hartkamp, C.H. Sieburgh & L.A.D. Keus (Eds.), De invloed van het Europese recht op het Nederlandse privaatrecht, Deel I. Algemeen Deel (Serie Onderneming en Recht, deel 42-I), Deventer: Kluwer 2007. In Belgium, the new Algemeen Deel is dedicated to 'Private and public law in a multilayered framework of regulation, judicial interpretation and rule application': W. van Gerven & S. Lierman, Beginselen van Belgisch privaatrecht (I). Algemeen Deel. Veertig jaar later, Mechelen: Kluwer 2010.

17 *See* Recital 13, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

18 European Parliament resolution of 15 November 2011 with recommendations to the Commissionon insolvency proceedings in the context of EU company law (2011/2006 (INI)) (2013/C 153 E/01). In its response, the Commission indicated it wishes to promote the modernisation of the EU Regulation on insolvency proceedings as a first step, while studying on the impact arising from differences between national insolvency laws on the functioning of the internal market. *See* Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *A new European approach to business failure and insolvency*, Strasbourg, 12.12.2012COM(2012) 742 final, par. 5. *See* http://ec.europa.eu/justice/civil/files/insolvency-comm_en.pdf (last visited on 3 February 2014).

arising from differences between national insolvency laws, with a view to a possible future harmonisation.[19] Second, harmonised European company law may have an impact on insolvency law, as the Favini case demonstrates (sections 4-5). Third, issues of concurrence may arise in the context of private international law as well (section 6).

Different layers of law require coordination. May the doctrine of concurrence be used to that effect? It is evident that in these cases the solution will not just be a matter of interpretation, but will involve constitutional principles, such as hierarchy and supremacy.[20] The influence of such principles is a reason for Bakels to argue *against* the use of this method to approach 'vertical' conflicts,[21] and a reason for Sieburgh to argue that no issues of concurrence arise once a national norm is contrary to EU law. In such a situation, EU law puts national law out of action.[22] According to these authors, the concept of concurrence may only play a marginal role once different layers of law are applicable on one single case.

But let us not jump to conclusions. For one, this would ignore that also in constitutional law, an increasing number of authors argues that the outcome of a conflict of rules should mainly be directed by the *substance* of the norms involved, and not just by arguments of *hierarchy*. This may best be illustrated by referring to De Búrca, who distinguishes 'two prevalent and broadly contrasting intellectual approaches (…) to the multiplication, overlap and conflict of normative orders in the global realm'.[23] On the one end, there is the *strong constitutionalist approach*, advocating 'some kind

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19 However, the Commission indicated that the modernisation of the EU Regulation on insolvency proceedings has its priority. *See* Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *A new European approach to business failure and insolvency*, Strasbourg, 12.12.2012 COM-(2012) 742 final, par. 5. *See* http://ec.europa.eu/justice/civil/files/insolvency-comm_en.pdf. (last visited on 3 February 2014).

20 *Cf.* A.S. Hartkamp, 'Samenloop in het Europese privaatrecht', in Th.M. de Boer et al. (Eds.), *Strikwerda's Conclusies*, Deventer: Kluwer 2011, p. 158.

21 F.B. Bakels, 'Aspecten van samenloop (I)', *WPNR* 2009-6796, par. 3.1.

22 C.H. Sieburgh, 'Ich weiß nicht was soll es bedeuten', in: A.G. Castermans *et al.* (Eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, p. 243 and p. 249-250. Sieburgh does point out that national private law may still have to solve several problems of concurrence *after* a national norm has been put out of action.

23 G. de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*', *Harvard International Law Journal* 2010-1, p. 31. *See generally* R. Barents, 'De voorrang van unierecht in het perspectief van constitutioneel pluralisme', *SEW* 2009-21; A. von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the →

of systemic unity' and proposing 'an agreed hierarchy (…) to resolve conflicts of authority between levels and sites'.[24] On the other end, there is the *strong pluralist approach*, emphasizing the plurality of diverse national and international normative systems, and favouring diversity and difference above either 'sovereigntist or universal-harmonisation schemes'.[25] Within this debate, De Búrca proposes a *soft* constitutionalist approach, which 'does not insist on a clear hierarchy of rules but rather on commonly negotiated and shared principles for addressing conflict'.[26] Such criticism resonates with private lawyers:

'A – perhaps – textbook answer is to cite the principle of supremacy and to therefore arrive at the hierarchically laced conclusion that one set of values simply trumps the other within EU law's system of conflict resolution. Such a remark is conceivably outmoded and in this context anachronistic, especially given that the principle was crafted with inter-state rather than private relationships in mind.'[27]

Although Europe's systems of private law share the same issues, for example with regard to the interaction between contract and tort law,[28] they do not seem to share a commonly negotiated method of interpretation yet. Solutions to particular issues of concurrence seem to differ greatly in theory,[29] and few countries seem to be acquainted with a general concept of concurrence, fully developed in academic discourse and legal practice.[30]

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relationship between international and domestic constitutional law', *International Journal of Constitutional Law* 2008-6, p. 397-413; N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', *Int. J. Constitutional Law* 2008, p. 397.

24 G. de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*', *Harvard International Law Journal* 2010-1, p. 36-37.

25 *Ibid.*, p. 32-33.

26 *Ibid*, p. 39.

27 G. Low & E. Muir, 'The Privatization of European law and Constitutionalization of Private Law: Two Sides of the Same Coin (Editorial)', *European Review of Private Law* 2013-5/6, p.1161. *Cf.* W. van Gerven & S. Lierman, *Beginselen van Belgisch privaatrecht (I). Algemeen Deel. Veertig jaar later*, Mechelen: Kluwer 2010, p. 170.

28 Cf. C. von Bar & U. Drobnig, The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study, München: Sellier European Law Publishers 2004.

29 For example, the (apparent) difference between the principle of *free concurrence of actions* and the principle of *non-cumul des responsabilités*. Either tort law is excluded as a matter of principle (*non-cumul*), or the least advantageous regime is excluded as a result of the claimant's choice (*free concurrence*).

30 This was already noted with remorse by C.J.H. Brunner, *Beginselen van samenloop*, Arnhem: Gouda Quint 1984, p. 3.

That is not to say that there is no need for such a method, crafted with private relationships in mind. Moreover, convergence on these issues seems possible. Some of the basic principles discussed above are recognisable in European private law as well. In the *Draft Common Frame of Reference* for example, free concurrence of actions is the basic principle – with respect to the relationship of the law on non-contractual liability to other areas of private law,[31] or with regard to the different remedies for breach of contract.[32] The principle is set aside only when remedies are not incompatible, and a demand for subsidiarity is granted only when one regime seeks to regulate the legal consequences in an exclusive way.[33] Similar provisions are to be found in the proposed *Common European Sales Law*;[34] while the European Court of Justice applies the same basic principles when dealing with concurring provisions of EU law.[35]

From a constitutional and private law perspective, it seems as if an attempt to apply this method of interpretation is not ill-fated from the outset. But will its application be helpful in practice? To answer that question, we return to the Favini case, where the liquidator attempted to unwind the division of the Favini company, regulated by an EU Directive, with an *actio Pauliana*.

31 *E.g.* Art. VI.-1:103 DCFR.

32 Art. III.-3:102 DCFR. Another example is Art. II.-1:107 (2) DCFR, which stipulates that mixed contracts are governed by all applicable rules, unless this is contrary to the nature and purpose of the contract. *See* for exceptions to this rule Art. II.-1:107 (3) DCFR.

33 *See e.g.* C. von Bar & E. Clive (Eds.), *Principles, Definitions and Model Rules of European Private Law. Vol. 4*, Munich: Sellier 2009, p. 3117. However, Art. I.-1:102 (5) DCFR does mention the *lex specialis* principle: 'Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.'

34 *E.g.* Art. 106 (6) and 131 (4) CESL: 'Remedies which are not incompatible may be cumulated'; Art. 57 CESL: 'A party who is entitled to a remedy under this Chapter ['Defects in consent', AGC/RdG] in circumstances which afford that party a remedy for non-performance may pursue either of those remedies.' *See* A.G. Castermans & R. de Graaff, 'Samenloop in een meerlagige rechtsorde. Verval en verjaring in het Europees contractenrecht', in: C.G. Breedveld-de Voogd *et al.* (Eds.), *Rechtsvinding in een meerlagige rechtsorde* (BWKJ 28), Deventer: Kluwer 2013, p. 43-65.

35 *Cf.* A.S. Hartkamp, 'Samenloop in het Europese privaatrecht', in Th.M. de Boer et al. (Eds.), *Strikwerda's Conclusies*, Deventer: Kluwer 2011, p. 157. Hartkamp refers for example to the concurrence between free movement rights and competition law – ECJ 15 December 1995, C-415/93, *ECR* 1995, p. I-4921 (*UEFA/Bosman*) – or between different applicable directives – ECJ 22 April 1999, C-423/97, *ECR* 1999, p. I-2195 (*Travel Vac SL/Sanchis*).

4. The impact of a division of a company on the rights of creditors

Favini S.p.A. (Italy) is the parent-company of Favini N.V. (hereafter: Favini Nederland), which in turn is the parent company of Favini Meerssen B.V. (hereafter: Favini Meerssen), a paper factory located in the Netherlands. Favini S.p.A. granted Favini Nederland credit, which extended this credit to Favini Meerssen.[36] The original loan had been granted by a consortium of Italian banks, which was awarded a first mortgage right on the premises of Favini Meerssen in return. After a division operation within the Favini family on 29/30 December 2005, the premises owned by Favini Meerssen (book value: € 8.530.000) were acquired by the new Favini Real Estate B.V., as well as a debt owed by Favini Meerssen to Favini Nederland as a result of the existing credit arrangements (book value: € 8.529.999).[37] Two years later, Favini Meerssen went bankrupt.

It is clear that such a division may adversely affect the interests of creditors. What safeguards does the law provide? The legal division of public and private limited liability companies is regulated by Article 2:334a CC *et seq.*[38] This regime prescribes the procedure in great detail. First of all, the boards of the companies involved must draft a detailed proposal,[39] including information on the division of assets.[40] This proposal must be

36 *See* for a description of the factual background also the Opinion of A-G Timmerman, ECLI:NL:PHR:2013:922, par. 1.

37 Although the mother company is Italian, the division of Favini Meerssen itself has been a national affair. Cross-border division is not regulated in the Dutch Civil Code. It is questionable whether such a division would succeed, because Art. 2:334b CC prescribes that the legal persons involved in the division must have the same legal status. This potentially conflicts with the right of establishment as guaranteed under Article 49 *et seq.* TFEU. Several judgments of the ECJ/CJEU are relevant in this regard: ECJ 27 September 1988, 81/87, *ECR* 1988, p. 5483 (*Daily Mail*); ECJ 5 November 2002, C-208/00, *ECR* 2002, p. I-9919 (*Überseering*); ECJ 13 December 2005, C-411/03, *ECR* 2005, p. I-10805 (*Sevic*); ECJ 16 December 2008, C-210/06, *ECR* 2008, p. I-9641 (*Cartesio*); CJEU 29 November 2011, C-371/10, *ECR* 2011, p. I-12273 (*National Grid Indus*); CJEU 12 July 2012, C-378/10, *NJ* 2012/581 (*VALE*). *See* for such a discussion on cross-border conversions, mergers and divisions: W.J.M. van Veen, 'Grensoverschrijdende omzetting, –fusie en –splitsing na het VALE-arrest', *WPNR* 2013-6981, p. 512-525.

38 For an in-depth discussion about this regime, *see* B. Wessels, 'Splitsing van het onsplitsbare? Enige vermogensrechtelijke kanttekeningen bij "splitsing" als rechtshandeling tot overgang van vermogen van een rechtspersoon onder algemene titel', *Stichting & Vereniging* 1997, p. 175-185.

39 Art. 2:334f CC.

40 Art. 2:334f (d) CC.

accompanied by an explanation in writing, including the reasons for dividing the company and the legal, economic and social consequences.[41] These documents, including annual accounts and reports, have to be submitted to the commercial register.[42] The shareholders' meeting has to be informed by the board,[43] and the proposal has to be announced in a national newspaper.[44] Creditors are granted a month to file their objection against the intended division, based on the ground that their legal relationship is not being transferred in full,[45] or that they have not been provided security at their request.[46] The division is finally decided upon by the shareholders' meeting,[47] but will only enter into force through a notarial act.[48]

Once this act has been passed, a court may declare the division void, not only because the notarial act is not authentic[49] or because other formal requirements have not been met,[50] but also because the underlying shareholders' decision is void ('nietig'), invalid ('niet van kracht) or may be avoided ('grond tot vernietiging').[51] Creditors should not expect much from

41 Art. 2:334g CC.
42 Art. 2:334h CC.
43 Art. 2:334i CC.
44 Art. 2:334h (3) CC.
45 Art. 2:334j CC.
46 Art. 2:334k CC.
47 Art. 2:334m (1) CC.
48 Art. 2:334n (1) CC. This notarial act must be passed within six months after public announcement of the proposal.
49 Art. 2:334u (1)(a) CC.
50 *See* Art. 2:334u (1)(b) CC. Apart from the situation described in Art. 2:334b (7) CC, a dissolved or bankrupt legal person cannot be involved in a division (Art. 2:334b (5) and (6) CC); the notarial act may not be passed while creditors have filed their objection (Art. 2:334l (3) CC); the notary has to declare that all the requirements have been met (Art. 2:334n (2) CC, first sentence). For foundations ("stichtingen") there is another requirement (Art. 2:334u (1)(d) CC): a court has to confirm the decision by the board of the corporation (Art. 2:334m (5) CC).
51 Art. 2:334u (1)(c) CC. This part is therefore governed by the general nullity rules under the Dutch Civil Code. *Cf.* B. Wessels, 'Splitsing van het onsplitsbare? Enige vermogensrechtelijke kanttekeningen bij "splitsing" als rechtshandeling tot overgang van vermogen van een rechtspersoon onder algemene titel', *Stichting & Vereniging* 1997, p. 179. According to Wessels, the special regime of Art. 2:334u derogates from the general nullity rules under Boek 3, Title 2 of the Dutch Civil Code.

these possibilities.[52] A shareholders' decision is void only when it is contrary to the law or the articles of association.[53] It may be avoided only in the event of non-compliance with formal requirements,[54] or if the decision is contrary to good faith.[55] The latter test focuses on the relationship between the legal person and those persons involved in its organisation, and not on the standards of good faith between creditors and debtors.[56] Moreover, the court shall *not* declare a division void if the omission is corrected,[57] or if it is problematic to reverse the legal consequences of the division.[58] When formal requirements have been met, creditors or liquidators face a brick wall.[59]

That is not to say that creditors are left without arms. Once the companies have been divided, creditors may still request amendment or termination of their contracts,[60] and claim the resulting damages.[61] After the notarial act has been submitted to the public registry, creditors have six months to bring such actions – either targeted at the division[62] or at

52 In this paragraph, invalid decisions are not being discussed separately, because this topic is beyond the scope of our contribution. For a further explanation on these subtleties, *see* A.J.M. Klein Wassink, *Toetsing van besluiten in het rechtspersonenrecht*, Deventer: Kluwer 2012, p. 85-86.

53 Art. 2:14 (1) CC.

54 Art. 2:15 (1)(a) CC concerns legal or statutory requirements ('strijd met wettelijke of statutaire bepalingen die het tot stand komen van besluiten regelen'), Art. 2:15 (1)(c) CC concerns internal rules and regulations ('strijd met een reglement').

55 Art. 2:15 (1)(b) CC, which refers to Art. 2:8 CC.

56 Art. 2:8 (1) CC. It is also questionable whether creditors would qualify as 'stakeholders' with a reasonable interest, necessary to bring such an action in the first place. *See* Art. 2:15 (3)(a) CC and A.J.M. Klein Wassink, *Toetsing van besluiten in het rechtspersonenrecht*, Deventer: Kluwer 2012, p. 70-74.

57 Art. 2:334u (4)(a) CC.

58 Art. 2:334u (4)(b) CC.

59 *Cf.* J.W. van de Horst, 'Positie van schuldeisers bij een juridische splitsing: artikel 2:334u BW onder de loep', *V&O* 2011-2, p. 24.

60 Art. 2:334r (1) CC.

61 Art. 2:334r (3) CC.

62 Art. 2:334u (3) CC. Such a cause of action may only be brought by 'a member, a shareholder, a board member or another stakeholder' (Art. 2:334u (2) CC). Some authors claim that creditors may not bring such an action, because they have not been involved directly in the division, or because their position is guaranteed by other legal safeguards. *See e.g.* M. van Olffen, F.K. de Bruijn & P.H.M. Simonis, *Splitsing van ondernemingen*, Den Haag: Boom Juridische Uitgevers 2004, p. 102; M.J.G.C. Raaijmakers, '"Belanghebbende" bij vernietiging van door de rechtbank goedgekeurde fusie van stichtingen', *Ars Aequi* 1992, p. 421-426. Other authors submit that there is no reason to assume that the legislator intended to exclude creditors from bringing →

the existing contractual obligations.[63] After expiry of this period, creditors may only obtain relief by holding the legal persons concerned liable for certain existing debts[64] or obligations.[65]

In literature, it has been questioned whether this regime offers enough protection to creditors.[66] Especially foreign creditors may not always have the awareness and knowledge to bring their actions in time.[67] In this case, the liquidator submitted that the Favini family deliberately used the division to place its property out of reach of its creditors. With no property in its estate, Favini Meerssen would be unable to fulfil its obligations to its creditors. Moreover, the actual value of the premises would have been € 25.340.000 – and not € 8.530.000 – at the time of division. In order to obtain relief on behalf of the creditors, the liquidator brought an *actio Pauliana*, claiming that the division was void on the grounds of Article 42 of the Faillissementswet (the Dutch Bankruptcy Act, hereafter: Fw). Under this regime, a court would be able to engage in an assessment of the conduct of the companies involved. Furthermore, creditors and liquidators would not be bound to go to court within six months after submission of the notarial act to the public registry, nor would a possible nullity of that act be governed by the formal requirements of Article 2:334u CC.

Two concurring regimes, with different aims and levels of protection. Is the liquidator free to choose, or does either the *actio Pauliana* or Article 2:334u CC apply exclusively?

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such actions – a position supported by us as well. *See e.g.* J.W. van de Horst, 'Positie van schuldeisers bij een juridische splitsing: artikel 2:334u BW onder de loep', *V&O* 2011-2, p. 21-25. For a similar viewpoint and further references, *see* the Opinion of A-G Timmerman in the Favini case, ECLI:NL:PHR:2013:922, par. 3.9 and endnote 16.

63 Art. 2:334r (2) CC.

64 Art. 2:334s (4) CC.

65 Art. 2:334t CC.

66 J.N. Schutte-Veenstra, 'Enkele kanttekeningen bij het vennootschappelijk verzetrecht van crediteuren', *TVVS* 1996-11, p. 293-298.

67 A-G Timmerman casted his doubts about this protection as well, *see* Opinion A-G Timmerman, ECLI:NL:PHR:2013:922, par. 3.10.

5. The concept of concurrence overlooked by the Dutch Supreme Court

The EU Directive on which this regime is based, covers only situations in which the company being divided *ceases* to exist.[68] However, the Dutch legislator extended its application to situations like the Favini case, where the company being divided *continues* to exist.[69] Furthermore, the Dutch legislator declared the regime applicable to all legal persons in Book 2 of the Dutch Civil Code.[70] Although this is therefore not a matter of application of EU law, it seems correct to take the Directive into consideration as well.[71]

While implementing this regime in the Dutch Civil Code, the legislator did not consider the possibility of bringing an *actio Pauliana* by liquidators or creditors. In fact, the state of bankruptcy was only mentioned in the context of the regime itself: could a bankrupt company be divided?[72] Although the Community legislator emphasised that the interests of creditors should be protected, it deemed legal certainty for the companies and third parties involved in the division important as well. According to the Community legislator, 'the cases in which nullity can arise must be limited by providing that defects be remedied wherever that is possible and by restricting the period within which nullification proceedings may be commenced'.[73] To this effect, the nullity rules for divisions have to meet certain boundary conditions, as we have seen above. However, the *substantive* decision to declare the decision of the shareholders' meeting

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68 Art. 17 (c), Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, *OJ L* 378, 31.12.1982, p. 47–54.

69 Art. 2:334a (1) and (3) CC. According to the Dutch legislator, these situations would involve the same interests. See MvT, TK 1995-1996, 24 702, nr. 3, p. 3, nr. 7.

70 Art. 2:334b (3) and (4) CC.

71 This technique of harmonious interpretation has been employed by the Dutch Supreme Court as well, also when the subject matter itself was linked to, but not directly governed by, EU law. *See e.g.* HR 2 November 2012, *RvdW* 2012, 1371 (*T-Mobile/Klomp*) at par. 4.1., where the Supreme Court interprets Art. 7:442 CC in accordance with the Directive 86/653/EEC on the coordination of the laws of the Member State relating to self-employed commercial agents, even though the latter only governs the trade in goods between Member States.

72 MvT, TK 1995-1996, 24 702, nr. 3, p. 6-7 and p. 20-21.

73 Preamble, Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, *OJ L* 378, 31.12.1982, p. 47–54.

null and void is left to national law.[74] Moreover, the Directive 'shall not affect the laws of the Member States on the nullity of a division pronounced following any supervision of legality'.[75] From the perspective of the general concept of concurrence, the *actio Pauliana* should therefore not be excluded.

The Court of Appeal acknowledged that the Dutch legislator did not pay attention to this specific problem. Nonetheless, it ruled that – in view of the legislator's intention to limit the cases in which nullity can arise – bringing an *actio Pauliana* was not allowed. The regime under Article 2:334u CC had to be applied strictly, and exclusively.[76] This decision was upheld by the Dutch Supreme Court. If an *actio Pauliana* would be allowed, this would devalue the legal certainty offered by Article 2:334 CC, according to the Supreme Court. The 'specific norm' of Article 2:334u CC is therefore meant to be 'exclusive',[77] leaving no room for a possible avoidance of the division under Article 42 Fw.[78]

Clearly, and understandably, the Supreme Court deemed it important to do justice to the specific conditions under Article 2:334u CC. To obtain this result, the Supreme Court followed the straight and narrow path of exclusive application. Interestingly, jurisprudence shows another possible route. On earlier occasions, the Supreme Court allowed the claimant to bring an action in tort, while allowing the defendant to invoke the special liability rules or prescription periods in contract law.[79] For example, an employer may bring an action in tort against former directors or

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74 Art. 19 (1) of the Directive: 'The laws of Member States may lay down nullity rules for divisions in accordance with the following conditions only: (…) (b) divisions which have taken effect pursuant to Article 15 may be declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, *or if it is shown that the decision of the general meeting is void or voidable under national law.*' Our italics.

75 Art. 19 (3) of the Directive.

76 Court of Appeal 's Hertogenbosch 27 March 2012, *JOR* 2012/301, at 4.16.

77 HR 20 December 2013, *RvdW* 2014/86 (*Schreurs/Favini Real Estate*) at 4.1.3. *Similarly*: HR 20 December 2013, *RvdW* 2014/134 (*Schreurs/Favini Real Estate*).

78 HR 20 December 2013, *RvdW* 2014/86 (*Schreurs/Favini Real Estate*) at 4.1.4.

79 *See* HR 15 June 2007, *NJ* 2007, 621, with a case note by K.F. Haak (in cases concerning a collision of inland navigation vessels, the claimant has the choice between bringing an action for damages under tort law, or under collision law, but both actions are governed by the short prescription period under Art. 8:1793 CC); HR 2 December 2011, *NJ* 2012, 197, with a case note by T.F.E. Tjong Tjin Tai (the long prescription period under Art. 3:310 (2) CC is applicable to an action under Art. 6:175 CC, but also when such an action is based on Art. 6:162 CC); HR 2 October 1998, *NJ* 1999, 682, with a case note by J.B.M. Vranken (the long prescription period under Art. 3:310 (2) CC is also applicable when the action is based on tort law).

employees, but the establishment and scope of liability are governed by special rules, rooted in company and labour law.[80] And a buyer may bring an action in tort, but this action is governed by the (shorter) prescription periods under Article 7:23 CC to the extent that it concerns the nonconformity of the delivered goods.[81] Thus, the heart of the problem is removed: the claimant preserves his right to choose the most advantageous action, while possible pleas by the defendant are taken into account – even when they belong to a different regime.

Admittedly, this approach is more difficult where two applicable regimes prescribe recourse to *different* courts. Such questions have been raised in the context of labour proceedings, where an employer may choose to bring an action in contract before the "cantonal court" and an action in tort before the district court. Legal representation is compulsory before the district court, but not before the "cantonal court". Although there are no indications that recourse to the district court should be excluded, the petitioned court could examine whether a referral would be appropriate.[82]

Reflecting on the Favini case, it is surprising that the Supreme Court shows the firm intention to exclude recourse to the *actio Pauliana*.[83] In our opinion, the Supreme Court could perfectly have allowed liquidators to bring an action under Article 42 Fw. After all, Article 2:334u CC does not seek to regulate *all* legal consequences in an exclusive way. If such an *actio Pauliana* would be targeted at the division itself,[84] it should be subject to the formal requirements under Article 2:334u CC, which deems recourse to a court within six months necessary.[85] However, this should not exclude the possibility to assess the conduct of the companies involved in

80 HR 2 March 2007, *NJ* 2007, 240 (*Holding Nuts-bedrijf Westland/S c.s.*), par. 3.4.4. Here, it concerned the Articles 2:9 BW (director, not employee) and 7:661 BW (employees).

81 HR 21 April 2006, *NJ* 2006, 272 (*Inno/Sluis*); HR 29 June 2007, *NJ* 2008, 606 (*Pouw/Visser*).

82 A.G. Castermans & H.B. Krans, 'Samenloop en de toegang tot de rechter', in: A.G. Castermans *et al.* (Eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, p. 166-169.

83 The Supreme Court does so without referring to the doctrine of concurrence, as opposed to the Advocate-General. *See* Opinion A-G Timmerman, ECLI:NL:PHR:2013:922, par. 3.5 *et seq.*

84 Although authors agree that the division is a legal act (which would mean it satisfies the conditions under Art. 42 Fw), there has been some debate on the exact characterisation. *See* B. Wessels, 'Splitsing van het onsplitsbare? Enige vermogensrechtelijke kanttekeningen bij "splitsing" als rechtshandeling tot overgang van vermogen van een rechtspersoon onder algemene titel', *Stichting & Vereniging* 1997, p. 178-179.

85 Where one regime prescribes recourse to a court (Art. 2:334u CC) and the other regime does not (Art. 42 Fw), it would be appropriate to prescribe recourse to the court.

the division.[86] If such an *actio Pauliana* is not targeted at the division, but at the shareholders' decision, there is no reason at all to subject it to these special rules. If such an action succeeds, this will bring about the nullity of the decision, but not (yet) of the division – for which recourse to the court remains necessary.[87]

We acknowledge that it may be problematic to reverse the legal consequences of a division in some cases, which is exactly why the legislator intended to afford the court a certain discretion under Article 2:334u (4)(b) CC. But the mere fact that reversing the legal consequences of a division may sometimes be too complicated should not be a reason to exclude recourse to the *actio Pauliana* in general. Some cases – such as the Favini case – may turn out to be quite workable after all.[88] Such a case-by-case approach is more nuanced than the straight and narrow path of exclusive application. In line with the general concept of concurrence, it seeks to do justice to all the interests involved, including those of creditors and liquidators.

6. Private International Law

Thus far, the concurrence between the *actio Pauliana* and the rules of the tort and division regimes has been analysed in the context of Dutch and European law. Yet, applying the concept of concurrence in a broader European context does not go without saying. It is not certain that the same court will be competent to assess the various actions. It is neither certain that the *actio Pauliana* will be governed by the same national law as the tort or division, nor is it certain which national rule of concurrence applies. In private international law, the general concept of concurrence has not been the subject of much academic attention.[89] The existing

86 *Cf.* Art. 19 (3) Sixth Council Directive 82/891/EEC of 17 December 1982 based on Art. 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, *OJ L* 378, 31.12.1982, p. 47–54.

87 This outcome differs somewhat from the Opinion of A-G Timmerman, who deemed a total exclusion far-fetched as well, but still confines the applicability of Art. 42 Fw to the shareholders' decision only. *See* ECLI:NL:PHR:2013:922, par. 3.13.

88 This was noted by A-G Timmerman as well, who calls it a 'quite simple case with a single transfer of property and debt', *see* Opinion A-G Timmerman, ECLI:NL: PHR:2013:922, endnote 27.

89 This has been noted by Th.M. de Boer, 'Samenloop van verdragen en verordeningen op het terrein van het internationaal familierecht', *FJR* 2010/117, nr. 12, p. 308-315.

contributions largely concern specific issues of concurrence between the instruments of private international law itself.[90]

The basic principle under the Brussels I Regulation is that persons domiciled in a EU Member State shall be sued in the courts of that state, irrespective of their nationality.[91] To decide whether such a person may be sued in another Member State, the classification of the creditor's or liquidator's claim will serve as a starting point. That is by no means an easy task when the claim falls within the scope of different rules on jurisdiction. A claim may relate to the contractual relationship – leading to jurisdiction for the courts for the place of performance of the obligation in question[92] – or it may relate to tort law – leading to jurisdiction for the courts for the place where the harmful event occurred or may occur.[93]

The Brussels I Regulation does not apply to bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.[94] As a consequence, the jurisdiction with respect to a claim based on tort law, brought by the liquidator, will not be determined by the Brussels I Regulation, but by the Insolvency Regulation.[95] It is said that the liability of directors for mismanagement falls within the scope of the Insolvency Regulation.[96]

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90 De Boer refers to the limited scala of (Dutch) books on specific issues of concurrence in private international law: J.B. Mus, *Verdragsconflicten voor de Nederlandse rechter* (diss. RUU), Zwolle: W.E.J. Tjeenk Willink 1996; H. Stein, 'Samenloop van executieverdragen', in: D.H. Beukenhorst *et al.*, *Offerhauskring 25 jaar*, Deventer: Kluwer 1987, p. 185 *et seq.*; L. Strikwerda, 'Samenloopperikelen in het internationaal procesrecht: art. 57 EEX', in: T. Hartlief *et al.* (Eds.), *CJHB* (Brunnerbundel), Deventer: Kluwer 1994, p. 389 *et seq.*; P. de Meij, *Samenloop van CMR-verdrag en EEX-verordening* (diss. RUG), Deventer: Kluwer 2003. A notable exception is M.V. Polak, 'Contract, delict en IPR', in I.S.J. Houben et al. (red.), *Samenloop*, Deventer: Kluwer 2007, p. 129-147.

91 Art. 2 Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter: Brussels I Regulation).

92 Art. 5 (1)(a) Brussels I Regulation.

93 Art. 5 (3) Brussels I Regulation. Recently, the CJEU decided that liability for mismanagement falls within the scope of Art. 5 (3) Brussels I, deciding that in those situations, the 'harmful event' is situated in the place to which the activities carried out by that company and the financial situation related to those activities are connected. *See* CJEU 18 July 2013, C-147/12, not yet published (*ÖFAB, Östergötlands Fastigheter AB*).

94 Art. 1 (2)(b) Brussels I Regulation.

95 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (hereafter: Insolvency Regulation).

96 P. Vlas, *Rechtspersonen*, Apeldoorn/Antwerpen: Maklu 2009, p. 198–199. Referred to by A.A.H. van Hoek, 'Doorbraak van aansprakelijkheid in het IPR', *Ars Aequi* 2013, p. 951, footnote 6.

The same counts for the *actio Pauliana* initiated by the liquidator,[97] even if it is brought against a person whose place of residence is not within the territory of a Member State.[98]

Yet, actions initiated by individual creditors seem to fall outside the scope of the Insolvency Regulation. The European Court of Justice has decided that an *actio Pauliana* initiated by an individual creditor is to be governed by the Brussels I Regulation.[99] This Regulation does not contain a special provision on the jurisdiction for an *actio Pauliana* brought by a creditor, nor is this matter considered to fall within the scope of tort law.[100] Following the basic principle, such an action should therefore be brought before the court of the State in which the defendant is domiciled.[101]

As a consequence, different bases for a claim may be judged by different courts. It does not go without saying that one court is competent to assess the various grounds in the same proceedings.[102] For example, the European Court of Justice decided that a court having jurisdiction to assess a tort claim under Article 5 (3) of the Brussels I Regulation, does not have jurisdiction in so far as it is *not based* on tort law, because:

'the "special jurisdictions" enumerated in Articles 5 and 6 of the Convention (the predecessor of the Regulation, AGC/RdG) constitute derogations from the

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97 ECJ 12 February 2009, C-339/07, *ECR* 2009, p. I-767 (*Seagon/Deko Marty Belgium*).

98 CJEU 16 January 2014, C-328/12, not yet published (*Schmid/Hertel*).

99 CJEU 12 April 2012, C-213/10, not yet published (*F-tex*).

100 This has been decided for in the context of article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (EEX Treaty); ECJ Justice 26 March 1992, C-261/90, *ECR* 1992, p. I-2149, (*Reichert/Dresdner Bank II*) concerning the *actio Pauliana* in French law, whereby a creditor seeks to obtain the revocation of a transfer of rights in rem in immovable property by his debtor in a way which the creditor regards as being in fraud of his rights. This decision is considered to be applicable under the Brussels I Regulation, *see Groene Serie Burgerlijke Rechtsvordering* (Vlas), Verordening (EG) nr. 44/2001 betreffende de rechterlijke bevoegdheid, de erkenning en de tenuitvoerlegging van beslissingen in burgerlijke en handelszaken, Art. 5, comment 19.

101 The Italian Corte di Cassazione used Art. 5 (1) of the Brussels I Convention (the *forum contractus*); referred to by Ilaria Pretelli, 'Cross-border credit protection against fraudulent transfers of assets. *Actio Pauliana* in the conflict of law', *Yearbook of Private International Law* 2011-13, p. 603.

102 Recently, the Dutch Supreme Court referred such a case to the CJEU, concerning the jurisdiction to decide whether a board member should be held liable on a ground which may be characterized as contractual, tortious and as a matter of labor law. *See* HR 24 January 2014, ECLI:NL:HR:2014:164.

principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively.'[103]

In several other judgments, the European Court of Justice reiterates that the rules of special jurisdiction 'cannot give rise to an interpretation going beyond the cases envisaged by the regulation'.[104]

Does this imply that the competent court cannot coordinate the various claims? The European Court of Justice, well aware of the disadvantages of having different courts adjudicating different aspects of the same dispute, pointed out that a plaintiff is always entitled to bring his action in its entirety before the courts of the State of the defendant.[105] Moreover, the first court seized is – under certain circumstances – allowed to hear the case in its entirety, provided that there is a connection between the actions brought before the different courts.[106]

Still, a court with jurisdiction to assess an *actio Pauliana* may have to deal with a defence based on the regime governing a division – as the Favini case demonstrates. This, however, is not a matter of jurisdiction, but of *applicable law*. According to Polak, in principle the applicable law

103 ECJ 27 September 1988, 189/87, *ECR* 1988, p. 5565 (*Kalfelis/Schröder*), par. 19; ECJ 27 October 1998, C-51/97, *ECR* 1998, p. I-6511 (*Réunion européenne/Spliethoff's Bevrachtingskantoor*), par. 49.

104 CJEU 18 July 2013, C-147/12, not yet published (*ÖFAB, Östergötlands Fastigheter AB*), par. 31. *See e.g.* ECJ 19 January 1993, C-89/91, *ECR* 1993, p. I-00139 (*Shearson Lehmann Hutton*), par. 16; ECJ 15 January 2004, C-433/01 (*Blijdenstein*), par. 25; ECJ 10 June 2004, *ECR* 2004, p. I-6009 (*Kronhofer*), par. 14; ECJ 16 July 2009, C-189/08, *ECR* 2009, p. I-06917 (*Zuid-Chemie/Philippo's Mineralenfabriek*), par. 22.

105 ECJ 27 September 1988, 189/87, *ECR* 1988, p. 5565 (*Kalfelis/Schröder*), par. 20; ECJ 27 October 1998, C-51/97, *ECR* 1998, p. I-6511 (*Réunion européenne/Spliethoff's Bevrachtingskantoor*), par. 51.

106 ECJ 27 September 1988, 189/87, *ECR* 1988, p. 5565 (*Kalfelis/Schröder*), par. 20; ECJ 27 October 1998, C-51/97, *ECR* 1998, p. I-6511 (*Réunion européenne/Spliethoff's Bevrachtingskantoor*), par. 51. Polak questions this possibility, because, according to the Court's own case law, Art. 28 Brussels I Regulation does not in itself confer jurisdiction to a court. *See* ECJ 24 June 1981, 150/80, *ECR* 1981, p. 1671 (*Elefanten Schuh/Jacqmain*), par. 19; ECJ 27 October 1998, C-51/97, *ECR* 1998, p. I-6511 (*Réunion européenne/Spliethoff's Bevrachtingskantoor*), par. 39; ECJ 5 October 1999, C-420/97, *ECR* 1999, p. I-6747 (*Leathertex/Bodetex*), par. 38. According to Polak, it is also at odds with the basic principle that a court is vested with jurisdiction only to the extent that this follows directly from the specific rules under the Brussels I Regulation. *See* M.V. Polak, 'Contract, delict en IPR', in I.S.J. Houben *et al.* (Eds.), *Samenloop*, Deventer: Kluwer 2007, p. 136.

should be found with respect to each claim separately.[107] The issue of concurrence is not considered a connecting factor. It does not influence the application of (at least: Dutch) private international law. Each claim must be judged on its own merits.[108] The court is bound to award the claim, irrespective the assessment of the other claim according to the law of another state.[109]

At first sight, this consequence of Private International Law seems to be perfectly in line with the first principle of the Dutch doctrine of concurrence as described in section 2: a free concurrence of actions, which fully respects the autonomy of the claimant. Yet, from the perspective of the defendant, this does not hold true in case the line of defence touches upon another ground that is to be assessed by the law of another state. Take for example the Favini-case, in which the claim was based on the *actio Pauliana*, while the defence was based on the division regime. A comparative analysis learns that the conditions for bringing an *actio Pauliana* differ from state to state,[110] while the Division Directive leaves some room for differentiation as to the conditions to be applied. How should be decided whether the *actio Pauliana* fully governs the case at

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107 M.V. Polak, 'Contract, delict en IPR', in I.S.J. Houben et al. (red.), *Samenloop*, Deventer: Kluwer 2007, p. 138. He refers to a specific Dutch conflict-rule that was supposed to be an exception to this principle: if a claimant based his claim on tort, while claimant and defendant have a contractual relationship, a court is free to choose the law that governs the contract, even with respect to the claim based on tort (Art. 5 Wet Conflictenrecht Onrechtmatige Daad). As per 1 July 2011, Dutch Private International Law has been embedded in the Civil Code (Book 10), since then this exception no longer applies.

108 C. von Bar & U. Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, München: Sellier European Law Publishers 2004, p. 310-314, show some exceptions to the *lex loci delicti* with regard to tort claims, once a contractual relationship exists. They refer to responses that 'uniformly stressed that the diversity of conflict laws leads to substantial costs of obtaining information and entails extra expense' (p. 312).

109 M.V. Polak, 'Contract, delict en IPR', in I.S.J. Houben et al. (red.), *Samenloop*, Deventer: Kluwer 2007, p. 141.

110 P.M. Veder, 'Party Autonomy and Insolvency Law', in: R. Westrik and J.A. van der Weide (Eds.), *Party Autonomy in International Property Law*, Munich: Sellier 2011, p. 264 and 265, mentioning requirements of proof of collusion or awareness of the prejudice to other creditors or fraudulent intent by the debtor, or the limitation to legal acts that have been performed in a particular period prior to the opening of insolvency proceedings. With references to J.J. Forner Delaygua (ed.), *La protection del crédito en Europea: La acción pauliana*, Barcelona: Bosch 2000; P.R. Wood, *Principles of International Insolvency*, London: Sweet & Maxwell, 2007, p. 458 *et seq.*; and the UNCITRAL Legislative Guide on Insolvency Law, part II, par. 1481-203.

hand, or whether the specific guarantees of the division Directive are to be respected?

The usual rules for finding the applicable law do not respond to this question. Specific rules with regard to the applicable law on the *actio Pauliana* are lacking, at least in the period before bankruptcy. Courts are said to be guided by their perception of the substantial interests involved.[111] Once bankruptcy-proceedings have been opened, the law applicable to insolvency proceedings and their effects shall be that of the State within the territory of which such proceedings are opened, which is called the 'State of the opening of proceedings'.[112] This law shall also determine the nullity rules with regard to legal acts detrimental to all the creditors.[113] But it shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that the said act is subject to the law of another Member State, and that this law does not allow any means of challenging that act in the relevant case.[114]

In theory, a court may be confronted with a claim which needs to be assessed according to national law with a tradition of allowing a *free concurrence of actions*, while the defence is to be assessed under a national law which does not allow such a concurrence, but applies the principle of *non-cumul des responsabilités*. Some insight might be gained from the way actions based on tort and contract have been coordinated in the Rome II Regulation. Even if the law of one state applies to a tort, because that is the country in which the damage occurs,[115] the law of another state will apply nonetheless if it is clear that the tort has a manifestly closer connection with that country. Such a connection may be based in particular on the pre-existing relationship between the parties, such as a contract, which is closely connected with the tort in question.[116] This escape is to be understood in the light of Recital 14 of the Rome II Regulation:

111 I. Pretelli, 'Cross-border credit protection against fraudulent transfers of assets. *Actio Pauliana* in the conflict of law', *Yearbook of Private International Law* 2011-13, p. 629-640.

112 Art. 4 (1) Insolvency Regulation.

113 Art. (2)(m) Insolvency Regulation. According to Vonken, these rules have an accumulative character. *See* Asser/Vonken 10-I, Algemeen deel IPR, nr. 213, with reference to HR 24 October 1997, *NJ* 1999/316 (*Gustafsen/Mosk*) and HR 7 March 2003, *NJ* 2003/128 (*Cikam/Siemon*).

114 Art. 13 Insolvency Regulation.

115 Art. 4 (1) Rome II Regulation.

116 Art. 4 (3) Rome II Regulation.

'The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an "escape clause" which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.'

When we turn to insolvency cases like Favini's, it is clear that the requirements of legal certainty and justice in individual cases stress the need for a coordinated approach. The various interests at stake before or during bankruptcy need to be weighed and balanced, as is shown at least in the Dutch context, with various outcomes: the general *actio Pauliana* should be outweighed by the specific *actio Pauliana* brought by the liquidator on behalf of all creditors, while the interests of existing creditors should be weighed against the right of creditors of a newly founded company to rely on the rationale of its existence.

Clearly, a court should be granted some flexibility to find the appropriate law to apply. This is what could be learned from civil lawyers, that the possibility of concurrence of claims and defences needs to be addressed in any attempt to harmonise the insolvency law in Europe, including its private international law aspects. Rather than formulating specific escape clauses for every possible problem, private law shows another possible route: the acceptance and development of a general concept of concurrence, to be used to coordinate between different applicable claims and defences.

7. Call of Duty 2.0

To concur or not, that's the question. In the context of Bob Wessels' field of expertise, European Insolvency Law, the multiplication, overlap and conflict of different legal levels and sites is sharply demonstrated. The division of the Favini company sparks different actions and defences – rooted in European law, insolvency law and private law. Those who aim for one harmonised system of European private law or of European insolvency law, but also private international law, should take the interaction between those regimes into account. Although Europe's systems of private law share the same issues of concurrence, they do not seem to share a commonly negotiated method of interpretation to solve those issues – yet. That is not to say that there is no need for such a method, developed with private relationships in mind. After Bob Wessels' call of duty, which brought about this insight, a second call of duty is appropriate now: to design a European framework to assess issues of concurrence. The Dutch framework might serve as an inspiring starting point.